



The University of the State of New York
The State Education Department
State Review Officer
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No. 25-097

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

Appearances:

Cuddy Law Firm, PLLC., attorney for petitioner, by Joseph Sulpizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Fiona M. Dutta, 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. Petitioner (the parent) appeals from the portion of an impartial hearing officer (IHO) decision which found that respondent (the district) offered her son an appropriate educational program and denied her request to be reimbursed for her son's tuition costs at Gersh Academy (Gersh) 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

The parties' familiarity with this matter is presumed, and therefore the facts and procedural history of this case and the IHO decision will not be recited in detail. Briefly, the student has received diagnoses of autism spectrum disorder with accompanying intellectual and language impairments-level 3, attention-deficit/hyperactivity disorder combined presentation, and unspecified disruptive, impulse-control, and conduct disorder (Parent Ex. U ¶ 4). Pursuant to prior

IHO orders the district funded the student's placement at Gersh for the 2021-22, 2022-23, and 2023-24 school years (*id.* ¶ 10).¹

On March 8, 2024, the district conducted a psychoeducational reevaluation of the student at Gersh (Dist. Ex. 3 at p. 1). The evaluator was unable to complete the administration of some academic achievement subtests due to the student's agitation (*id.* at p. 4).

A CSE convened on April 12, 2024, found the student eligible for special education as a student with autism, and developed an IEP with a projected implementation date of May 1, 2024 (Dist. Ex. 1 at pp. 1, 26).^{2, 3} The CSE recommended the student attend an 8:1+1 special class for 10 periods per week in math and English language arts (ELA), three periods per week for sciences, and two periods per week for social studies (Dist. Exs. 1 at pp. 19-20; 2 at p. 1). Further, the CSE recommended the student receive two 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual speech language therapy, one 30-minute session per week of group speech-language therapy, and full-time 1:1 paraprofessional services for behavior support (Dist. Ex. 1 at p. 20). The CSE also recommended one 60-minute session per month of parent counseling and training; assistive technology devices including a static display, speech generating device (SGD) for daily, full-time use; and special transportation that included adult supervision provided by a 1:1 paraprofessional (*id.* at p. 21). Finally, the CSE recommend the student receive the above services on a 12-month basis (*id.* at pp. 20-21).

By letter to the district dated April 15, 2024, the parent asserted that the district had failed to comprehensively evaluate the student in all areas of disability in accordance with a prior IHO decision, that he had not received a copy of the district psychoeducational reevaluation that had been conducted, and that the district had not conducted a PT evaluation of the student despite its awareness that the student had PT needs (Parent Ex. C at pp. 2-3). The parent requested an independent educational evaluation (IEE) at public expense to include a neuropsychological evaluation, a speech-language therapy evaluation, an assistive technology evaluation, OT and PT evaluations, and an applied behavior analysis (ABA) skills assessment (*id.*).

In a prior written notice and a school location letter, both dated May 24, 2024, the district summarized the recommendations of the April 2024 CSE and identified the particular public school location to which it assigned the student to receive the programming set forth in the April 2024 IEP (Dist. Ex. 2 at pp. 1-5, 7).

¹ Gersh has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

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 The recommended special education program and services page of the IEP reflected a projected beginning/service date of May 1, 2024 for related services, individual paraprofessional behavior support, and assistive technology devices and a May 10, 2024 projected beginning/service date for the student's special class (Dist. Ex. 1 at pp. 19-21).

In a letter dated June 21, 2024, the parent advised the district of her concerns with the IEP developed by the April 2024 CSE as well as with the district's assigned school and stated that he was rejecting the district's "inappropriate recommended program and placement for the 2024-25 school year" (Parent Ex. D at p. 3). The parent further stated that, in the absence of an appropriate program and placement, she intended to place the student at Gersh for the 2024-25 school year and seek tuition reimbursement from the district (*id.*).

A. Due Process Complaint Notice

In a due process complaint notice dated July 24, 2024, the parent alleged that the district failed to provide the student with a FAPE for the 2024-25 school year on various substantive and procedural grounds (IHO Decision at pp. 7-9). In particular, the parent alleged that the district failed to comprehensively reevaluate the student as ordered in a prior IHO decision and that the only assessment conducted as part of the reevaluation was a psychoeducational evaluation by a district school psychologist (*id.* at pp. 5, 7-8). The parent also alleged that the district impeded her right to meaningfully participate in the CSE process, that the April 2024 CSE's recommendation for an 8:1+1 special class in a district specialized school with no provision for ABA or transitional support services was not appropriate for the student, and that the assigned public school site was not appropriate (*id.* at pp. 7-9). The parent also indicated that, in the event the district failed to "timely and appropriately implement" special transportation for the student during the 2024-25 school year, similar to issues that occurred during the 2023-24 school year, she intended to utilize other means to transport the student and would seek district funding therefor (*id.* at p. 9). The parent also alleged that Gersh was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of an award of tuition reimbursement (*id.* at pp. 9-10).

The parent requested that the IHO order the district to directly fund the cost of the student's attendance at Gersh, including transportation costs, and fund an IEE with various assessments by providers of the parent's choosing (Parent Ex. A at pp. 11-12). In the event the IHO declined to award tuition reimbursement, the parent requested that the IHO order the district to fund an award of compensatory education (*id.* at p. 12).

B. Impartial Hearing Officer Decision

The parties agreed that the student was entitled to pendency based on an unappealed IHO decision dated November 8, 2023, consisting of the student's attendance at Gersh and district provision of special transportation (see Pend. Implementation Form; see also IHO Ex. I at p. 1; Parent Ex. F). After a prehearing conference on August 28, 2024, an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on October 16, 2024, and November 12, 2024 (Aug. 28, 2024 Tr. pp. 1-22; Tr. pp. 1-269).⁴

In a finding of fact and decision, dated January 5, 2025, the IHO found that the district met its burden at the impartial hearing to establish that it provided the student a FAPE for the 2024-25 school year (IHO Decision at p. 9). The IHO determined that the district persuasively defended

⁴ The transcript for the August 28, 2024 prehearing conference is not paginated sequentially with the remaining transcripts. Thus, the August 28, 2024 transcript will be cited as "August 28, 2024 Tr." and the three remaining, sequentially paginated transcripts will be cited as "Tr.".

and supported the IEP that the CSE created for the student, finding that the CSE reviewed sufficient evaluative data, that the parent was provided a meaningful opportunity to participate, that there was not a consensus at the CSE meeting that the student required instruction using ABA methodology, that the assigned school had the capacity to implement the IEP, and overall that the IEP was appropriate and reasonably calculated to enable the student to receive educational benefit (see *id.* at pp. 9-12).

Because the IHO found that the district offered the student a FAPE, she denied the parent's request for tuition reimbursement (see IHO Decision at p. 18). In addition, the IHO found that compensatory education was not warranted as an alternative form of relief in this matter (see *id.* at pp. 15-17).

Regarding the parent's request for an IEE at public expense, the IHO found that the student had not been evaluated in all the suspected areas of disability as a part of the student's triennial review (IHO Decision at pp. 13-14). The IHO found that the district failed to respond to the parent's April 16, 2024 letter or take appropriate actions to defend its reevaluation (*id.* at p. 14). The IHO noted that, during the hearing, the district requested that it be provided an opportunity to perform the evaluations, but the IHO stated that that the district had ample opportunity to address the parent's request, but failed to do so in a timely manner; thus, the IHO found that the student was entitled to an IEE at public expense to include a neuropsychological evaluation, a speech-language evaluation, an OT evaluation, a PT evaluation, an assistive technology evaluation, and an ABA skills assessment to be conducted by evaluators of the parent's choosing (*id.* at pp. 14-15, 18).

IV. Appeal for State-Level Review

The parent appeals the portion of the IHO decision that found that the district provided the student with a FAPE for the 2024-25 school year. The parent alleges that the IHO erred in finding that the April 2024 IEP was appropriate when the IHO also found the district did not conduct a sufficiently comprehensive reevaluation of the student. In addition, the parent asserts that the IHO erred in finding the parent was afforded an opportunity to participate in the CSE process and that the April 2024 IEP was appropriate despite the lack of a recommendation for ABA. The parent also argues that the IHO erred in relying on the district's witnesses' retrospective testimony to assess the April 2024 IEP. Finally, the parent argues that the IHO erred in not ordering the other relief the parent requested, including the district's provision of transportation, and alleges that the district failed to comply with the pendency agreement for this matter.

The parent requests findings that Gersh was an appropriate unilateral placement for the student and that the equitable considerations weigh in favor of the parent's requested relief. The parent seeks an order directing the district to fund the student's cost of attendance at Gersh, including the cost for 1:1 paraprofessional services; to provide the student with transportation services, including a 1:1 paraprofessional during transportation and limited travel time; and an order for the district to reimburse the parent for any expenses incurred.

In its answer to the parent's appeal, the district argues that the IHO correctly found that it offered the student a FAPE for the 2024-25 school year. The district also argues that it complied

with the pendency agreement in this matter. The district requests that the IHO's decision be affirmed and the parent's request for review be dismissed.

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" (Andrew 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]).⁵

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).

⁵ 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. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, a request for review must provide a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2] [emphasis added]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]).

Here, under the heading "Issues Presented for Review," several numbered paragraphs include underlined text with statements that identify the parent's allegations with respect to the IHO's decision (see Req. for Rev. ¶¶ 18, 19, 20, 21, 23, 26, 33). Review of the issues identified reveals that the parent has not pursued several specific claims on appeal. For example, although the parent alleged in the due process complaint notice that the April 2024 IEP was deficient because it recommended an 8:1+1 special class in a district specialized school similar to recommendations made in prior school years and failed to include transitional support services and that the assigned public school site was not appropriate (see Parent Ex. A at pp. 8-9)—issues which the IHO did not directly address—the parent has not pursued those claims on appeal.⁶ Therefore, they are deemed abandoned.

To the extent the underlined statements in the request for review under the heading "Issues Presented for Review" include statements such as "[t]he IHO erred in finding the [district] provided the Student with FAPE for the 2024-2025 school year," or "[t]he IHO erred in finding that the [April 2024] IEP was appropriate," these statements on their own are too broad to meaningfully challenge any of the specific findings rendered by the IHO or to resurrect claims in the due process complaint notice that the IHO did not address (see Bd. of Educ. of Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *13 [S.D.N.Y. Sept. 20, 2024] [finding that "[m]erely asserting that the IHO" erred in finding that the district did not offer the student a FAPE "does not raise the precise rulings presented for review"]]; W.R. v. Katonah Lewisboro Union Free Sch. Dist., 2022 WL 17539699, at *9 [S.D.N.Y. Dec. 7, 2022] [same]; M.C., 2018 WL 4997516, at *23 [finding

⁶ The parent includes some factual allegations in her request for review regarding the assigned public school but does not identify the IHO's ruling or failure to rule regarding the assigned school as an issue on appeal.

that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"").

In addition, the IHO specifically declined to award compensatory education in this matter (see IHO Decision at pp. 15-17), and the parent does not challenge that portion of the IHO's decision on appeal. Finally, neither party challenges the IHO's order that the district fund an IEE with various assessments by evaluators of the parent's choosing (see IHO Decision at pp. 13-15, 18). Accordingly, the IHO's denial of compensatory education and award of an IEE at public expense have 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]).

I now turn to the issues specifically within the scope of review.

B. April 2024 CSE Process

1. Parental Participation

With respect to the parent's participation in the CSE process, 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"]).

The parent contends that her ability to participate in the April 2024 CSE was hindered by not having access to the March 2024 psychoeducational evaluation prior to the CSE meeting.⁷ The

⁷ The parent also argues that the IHO should have considered the district's failure to respond to her 10-day notice. However, the parent's 10 day notice arises from a statutory provision in the IDEA that permits an award of reimbursement to be reduced or denied if no notice is provided (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). While the district's lack of response to such a notice could plausibly be an equitable factor weighed in considering appropriate relief, it would be not be deemed a violation that denied the student a FAPE or the parent meaningful participation. Accordingly, as the IHO found that the district offered the student a FAPE and, therefore, did not reach an analysis of equitable considerations effecting relief, the IHO did not err in not considering the district's lack of response to the parent's 10-day notice.

IDEA and its implementing regulations require that a copy of an evaluation report and documentation of eligibility must be provided at no cost to parents (see 20 U.S.C. § 1414[b][4][B]; 34 CFR 300.306[a][2]; 8 NYCRR 200.4[b][6][xii]). However, a failure to provide a copy of an evaluation to the parent is a procedural violation that does not necessarily rise to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *10 n.7 [S.D.N.Y. July 30, 2015] [finding that, even if the parent did not receive a copy of a draft IEP and evaluations, the draft was changed during the meeting and the parent meaningfully participated]).

Here, the district psychoeducational evaluation was conducted on March 8, 2024 and the report was dated March 11, 2024 (Dist. Ex. 3 at pp. 1, 5). According to the parent, the district did not provide her with a copy of the psychoeducational evaluation report (Tr. pp. 185-86; Parent Exs. C at p. 2; U ¶ 11). However, both the school psychologist and the parent testified and the May 2024 prior written notice documented, that the April 2024 CSE reviewed the psychoeducational evaluation at the CSE meeting and included information from the evaluation in the April 2024 IEP (Tr. pp. 79, 186; Dist. Exs. 1 at p. 1; 2 at p. 4; 4 ¶ 10).⁸ The parent testified that, during the April 2024 CSE meeting, she raised the fact that the student did not cooperate during the evaluation because he was agitated, crying, and throwing himself on the floor (Tr. pp. 171-72), demonstrating she had some knowledge of the evaluation.

Moreover, review of the IEP demonstrates that, even if the parent did not receive a copy of the psychoeducational evaluation prior to the CSE meeting, she meaningfully participated by contributing information about the student and expressing concerns with the CSE's recommendations. The section of the April 2024 IEP present levels of performance related to academic achievement and functional performance included the parent's remarks that the student was "doing very well" and "was improving" (Dist. Ex. 1 at p. 4). With regard to the student's social development, the IEP indicated that the parent "expressed no social concerns" (id. at p. 4, 5). In terms of physical development, the IEP reflected that, as reported by the parent, the student was overall healthy, took medication to manage his behavior, and had a history of asthma (id. at p. 6). Further, the April 2024 IEP indicated that the private school was providing physical therapy (PT) services, and the parent was advised to submit a request to the CSE requesting a PT evaluation (id.). Finally, at the April 2024 CSE meeting, the parent expressed a preference for a school with ABA programming with the nonpublic school representative also expressing his disagreement with the CSE program recommendation of an 8:1+1 special class, stating the student needed a smaller classroom, ABA instruction, and the support of an on-site Board Certified Behavior Analyst (BCBA) (Dist. Exs. 1 at p. 28; 4 ¶¶ 19-20; Parent Ex. U ¶ 12).

While the district did not provide the parent with a copy of the March 2024 psychoeducational evaluation prior to the April 2024 CSE meeting, constituting a procedural violation, the evidence in the hearing record indicates that the parent was able to meaningfully

⁸ The district representative testified that the April 2024 CSE reviewed the March 2024 psychoeducational evaluation, teacher and related services provider reports, academic and cognitive assessments including a functional behavioral assessment (FBA), a behavior intervention plan (BIP), and the results of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), Wechsler Individual Achievement Test, Third Edition (WIAT-III), Assessment of Basic Language and Learning Skills (ABLLS), and Edmark Level 2 (Dist. Ex. 4 ¶ 10).

participate in the April 2024 CSE meeting. Therefore, the procedural violation did not result in a denial of FAPE for the 2024-25 school year.

2. Sufficiency of Evaluative Information

The parent contends the CSE had insufficient information about the student to develop the IEP because the psychoeducational evaluation was not comprehensive enough to assess the student's needs in all areas.

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]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The March 2023 psychoeducational reevaluation was completed by a contracted evaluator hired by the district (Tr. pp. 74-75; Dist. Ex. 3 at p. 5). The student was assessed at the nonpublic special education school he attended (Dist. Ex. 3 at p. 1). The evaluation consisted of a teacher and student interview, and administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) and Wechsler Individual Achievement Test-Fourth Edition (WIAT-4) (id.).⁹ The psychologist noted that during her first attempt at evaluating the student several weeks earlier,

⁹ Under "Assessment Methods", the March 2024 psychoeducational reevaluation stated the WIAT-4 was administered to the student but under test scores it references the Wechsler Individual Achievement Test-3rd Edition (WIAT-III) (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 3 at p. 4). Only three subtests were administered (word reading, reading comprehension, and math problem solving) (Dist. Ex. 3 at pp. 3-4). The narrative portion of the reevaluation describing the student's performance on the WIAT does not state which version of the assessment tool was used (id. at p. 3).

the student was unable to regulate his behavior in order to participate in the assessments (id.). The psychologist reported that the parent attributed the student's behavior to not feeling well (id.).

The psychologist noted that on the second day of testing the student's individual paraprofessional accompanied and remained with the student during the evaluation and provided him with prompting and calming strategies (Dist. Ex. 3 at p. 1). According to the psychologist, during testing the student exhibited weaknesses in receptive and expressive language and his verbal responses did not always correspond to the questions or the student's responses consisted of repeating part of what he heard (id.). The student did not socially engage with the evaluator, was inattentive and distracted, and became agitated requiring intervention by the paraprofessional to calm him (id.). The psychologist reported that testing was discontinued prior to the administration of all academic achievement subtests because the student attempted to bite the paraprofessional, which required two adults to "subdue" the student (id.).

The student's cognitive abilities were assessed as falling within the "[e]xtremely [l]ow" range (Dist. Ex. 3 at pp. 2-4). On the WISC-V the student obtained a full-scale IQ of 54, with his performance in fluid reasoning, verbal comprehension, working memory and processing speed all falling at or below the first percentile (id.). The student's score on the visual spatial index of the WISC-V fell in the "[l]ow [a]verage" range with the evaluator describing the "variability" between the student's performance on the block design subtest (scaled score 10) and visual puzzles subtest (scaled score 5) as "unusually large" (id. at p. 2). The psychologist opined that procedural learning, trial and error problem solving and/or concrete visual feedback facilitated his performance on tasks involving visual perceptual and spatial reasoning skills (id.).

Academically, the psychologist reported the student demonstrated below average performance on the word reading (standard score of 76, "[v]ery [l]ow"), reading comprehension (standard score of 55, "[e]xtremely [l]ow"), and math problem solving (standard score of 40, "[e]xtremely [l]ow") subtests of the WIAT (Dist. Ex. 3 at pp. 3-4). The student was able to read some words and match some words to pictures, but did not demonstrate understanding of sentences and was unable to answer "who" and "where" questions (id. at p. 3). The student identified numbers, did not always count with one-to-one correspondence, and did not understand concepts such as empty, longest, same, and second (id.).

The parents contend the psychoeducational evaluation did not include teacher and parent interviews or behavior rating scales to assess the student's needs. The psychologist recorded her behavioral observations of the student in her psychoeducational report specifically noting that he was a sweet child, but during testing was easily agitated and had difficulty self-regulating his behavior (Dist. Ex. 3 at p. 3). She further stated in the summary of her evaluation report that the student exhibited weaknesses in attention, receptive and expressive language, relating to others, socialization, visual responsiveness, emotional responses, and self-regulation (id. at p. 4). The psychologist stated the student continued to require a small structured educational setting to address his educational and behavioral needs, with final decisions made by the CSE upon reviewing all pertinent information (id. at p. 5). While the student's social/emotional skills were not assessed through behavior rating scales, the psychologist's observations during testing indicated his continued need in this area.

Moreover, in addition to the March 2024 psychoeducational evaluation, the CSE reviewed and considered teacher and related service provider reports, academic and cognitive assessments, a functional behavioral assessment (FBA), a behavioral intervention plan (BIP), assessment of basic language learning skills (ABLLS) and Edmark Level 2 when determining the student's present levels of performance and individual needs and when making program recommendations to meet the student's needs (Dist. Exs. 1 at pp. 1-6; 2 at p. 4; 4 ¶¶ 10-12).

The summary of the student's present levels of performance in the April 2024 IEP incorporated the student's needs as identified in the March 2024 psychoeducational evaluation and annual review documents created by the nonpublic special education school related to the student's academic achievement, functional performance and learning characteristics, social development, physical development, and management needs, and included information about the student's performance in speech-language therapy, and OT (compare Dist. Ex. 1 pp. 1-6, with Parent Exs. K at pp. 1-4; L at pp. 2-4; M at pp. 2-3; Dist. Ex. 3 at pp. 3-5).

The April 2024 IEP indicated, based on teacher report, that the student's reading and writing were assessed using the ABLLS and Edmark Level 2 (Dist. Ex. 1 at p. 2). According to the teacher report, in reading, the student filled in the missing word when given an incomplete sentence in an array of three, read a short story on the first-grade level and answered "wh" questions using visuals, independently spelled second-grade Dolch sight words, and wrote a four-to-six-word sentence with partial verbal prompting (id.). The IEP reflected that the student was working on identifying the character and setting of a story using visual and partial verbal prompting and had difficulty making inferences to determine what happened next in a story (id.). The student also had difficulty writing more than one sentence and was working on correcting sentences using proper capitalization for nouns and dates with gestural prompting (id.). The IEP further reflected that the student used proper punctuation at the end of a sentence when provided partial verbal prompting (id.).

In the area of math, the April 2024 IEP indicated, based on teacher report, that when using TouchMath and visuals, the student independently added two-digit numbers without regrouping, subtracted single digits, and skip counted by 2s and 5s to 50 (Dist. Ex. 1 at p. 3). In addition, the IEP noted the student had difficulty adding two-digit numbers with regrouping and answering one step addition and subtraction word problems (id.). According to the teacher report as recorded in the IEP, the student was working on identifying examples of same and different, and although he could identify examples of same, he required partial physical prompting to identify examples of different (id.). In terms of daily living skills, the IEP indicated the student told time to the hour, half hour, and 15-minute mark on an analog and digital clock, identified the name of common coins (penny, nickel, dime, quarter) and their values, and added pennies to 25 cents (id.). With full verbal and physical prompting, the student was working on telling time to the minute and adding nickels and dimes to 25 cents (id.). The IEP noted the student had difficulty with adding coins and dollars to five dollars (id.).

Regarding the student's speech-language development, the April 2024 IEP included information from an April 2024 Gersh speech-language therapy annual review report regarding the student's functioning (compare Parent Ex. L at p. 2, with Dist. Ex. 1 at pp. 3-4). The IEP indicated the student benefited from minimal to moderate support (visual and verbal) to respond to both preferential and concrete "yes/no" questions (Dist. Ex. 1 at p. 3). The student benefited

from answer choices and verbal support to label categories/associations when given 3-4 items and needed visual and verbal support to formulate grammatically correct sentences to communicate wants and needs (id.). He also needed minimal to moderate support using a field of three answer choices to label object functions in response to "what do you do with" questions (id.).

In the area of receptive language, the IEP reflected the Gersh speech-language therapy report that indicated student identified age-appropriate vocabulary within varying categories (e.g., colors, shapes, animals, vehicles, food, community helpers, etc.), followed one-step and two-step directives when regulated, identified actions and object functions when given choices and visuals, and demonstrated comprehension of all "wh" question types (compare Parent Ex. L at p. 2, with Dist. Ex. 1 at p. 3). The IEP noted that the student also demonstrated comprehension of basic linguistic concepts including qualitative, quantitative, spatial, and negation concepts (Dist. Ex. 1 at p. 3). In addition, the student sequenced two-to-three pictures in correct order but required moderate support to retell what happened using complete sentences (id.).

In the area of expressive language, the IEP indicated, based on the Gersh speech-language therapy report, that the student communicated his wants and needs in short phrases and fragmented sentences (e.g., Ball, yes), but used complete sentences when given verbal and visual cues and modeling (compare Parent Ex. L at p. 2, with Dist. Ex. 1 at pp. 3-4). The student benefitted from sentence starters and sentence strips to formulate sentences with appropriate syntax but was not able to utilize subjective pronouns appropriately (id.). According to the April 2024 IEP, the student had significant difficulty formulating questions and made statements rather than questions (id. at p. 4). The student independently labeled age-appropriate vocabulary within various categories and responded to questions regarding object functions (id.). The IEP stated that the student benefited from moderate to minimal verbal support to name/label the category when presented with a set of items in a given category and made and labeled associations with a field of four pictures (id.). Difficulty was noted in the student's ability to label prepositions which resulted in the need for modeling and visual cues, and he was unable to recall/retell events from his day or personal events (e.g., weekend activities, trips, etc.) (id.).

In terms of pragmatic language, the Gersh speech-language therapy report stated, and the IEP reflected, that when given minimal prompts, the student independently initiated and responded to greetings and farewells with staff members, established and maintained eye contact, responded to his name, and used appropriate joint attention during structured language tasks (compare Parent Ex. L at p. 3, with Dist. Ex. 1 at p. 4). Additional support was needed when he was distracted or dysregulated (Dist. Ex. 1 at p. 4). Furthermore, the IEP noted the student independently employed appropriate turn-taking skills when engaging in cooperative play activities with peers, although he did not typically initiate play with peers (id.). According to the IEP, the student identified and labeled emotions in pictures with minimal to no support but had difficulty identifying his emotions and self-advocating for and identifying/utilizing coping strategies to aid in self-regulation (id.). When engaging with staff members, the student engaged in two reciprocal conversation exchanges given moderate verbal support but required more support when initiating and maintaining interactions with peers (id.).

Socially, the April 2024 IEP reflected the teacher's description of the student as a sweet and friendly child who enjoyed attending school (Dist. Ex. 1 at p. 5). However, the IEP also reflected the teacher's report that the student exhibited maladaptive behaviors which included

screaming, crying, throwing himself on the floor, biting his arms, scratching, and mouthing his shirt (*id.* at p. 2). The IEP noted the student greeted staff and peers every morning and independently followed the morning classroom routine (*id.*). When provided partial verbal prompting, the student worked on waiting his turn throughout the day and exhibiting socially appropriate behaviors during nonpreferred activities (*id.*). The IEP indicated that according to his teacher, the student used a 5-token board, visual schedule, and sensory breaks throughout the day (*id.*). He enjoyed earning slime, putty, kinetic sand, drawing, and YouTube as reinforcers (*id.*). Based on teacher report, the IEP stated the student benefited from a quiet environment, limited distractions, visuals, positive praise, small groups, and skills broken into smaller components (*id.*). It further stated the student required an individual paraprofessional to "keep him safe when exhibiting maladaptive behaviors" (*id.*).

Turning to physical development, the April 2024 IEP adopted the description of the student's sensory processing, gross motor, motor planning, bilateral integration, fine motor, visual motor/perceptual, and self-help skills found in the Gersh April 2024 OT annual review report (compare Parent Ex. M, with Dist. Ex. 1 at pp. 5-6). According to the IEP, the student displayed interest in gross motor activities and his gross motor movement was within normal limits (Dist. Ex. 1 at p. 5). The student had fair postural control, as evidenced by frequently leaning on his desk or anyone sitting next to him; displayed fair endurance while completing a three-step obstacle course and was able to complete five trials of the course with moderate to maximal tactile and verbal assistance; and bore weight on all limbs as he crawled through tunnels (*id.*).

Consistent with the Gersh OT report, the April 2024 IEP indicated the student was right hand dominant, used a mature tripod grasp independently when writing, but occasionally used a quadruped grasp when drawing using markers and crayons (compare Parent Ex. M at p. 2, with Dist. Ex. 1 at p. 5). He used his non-dominant hand for stabilization purposes, manipulated many classroom tools (caps of water bottles, staplers, tape, etc.) and rotated a pencil to use the eraser appropriately (Dist. Ex. 1 at p. 5). Turning to visual motor/perceptual skills, the IEP indicated the student used standard scissors to cut out basic and complex shapes staying within a 1/4-inch border, had good writing legibility requiring minimal verbal prompts for letter and word spacing, and used a pincer grasp to take out puzzle pieces (*id.* at pp. 5-6). The student completed a 25-piece interlocking puzzle with minimal verbal cues to problem solve when a piece did not fit (*id.* at p. 6). According to the IEP, the student colored within the lines with good coverage (*id.*). In terms of self-help skills, the student independently snapped and zippered his coat when given extended time due to frustration and difficulty attending (*id.*). He required moderate to minimal verbal and tactile cues to don and doff his coat (*id.*). The IEP noted that given a button board and minimal verbal cues to motor plan, the student buttoned small and large buttons (*id.*). Based on the Gersh OT report, the IEP indicated the student independently used the bathroom but benefited from minimal verbal cues to wash his hands (*id.*). He was able to pack and unpack his bag with minimal verbal cues to initiate the task (*id.*). The IEP stated the student independently brushed his teeth with visuals (*id.* at p. 3). It indicated the student enjoyed tactile input like slime, Thera putty, shaving cream and glue and had fair body and spatial awareness (*id.* at p. 6).

Although the parent argues that the information before the CSE was insufficient, she does not identify an area of need that the IEP omitted or inaccurately described. Based on the foregoing, although the district did not conduct formal evaluations in the related service areas, the CSE had

sufficient information from a variety of sources that informed the CSE's identification of the student's current needs and development of the student's IEP.¹⁰

C. ABA Methodology

The parent contends on appeal that the IHO erred in finding the April 2024 IEP was appropriate and provided a FAPE, despite its failure to recommend ABA instruction. 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 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]).

¹⁰ The parent refers to the IHO's analysis related to the parent's entitlement to an IEE at district expense—which is not challenged on appeal—to argue that the same finding must also support the conclusion that the CSE did not have sufficient evaluative information about the student upon which to base the student's IEP. That is, although the IHO found that the CSE had enough information before it to develop an appropriate IEP and thereby did not deny the student a FAPE, the IHO also found that the district had "not evaluated [the student] in all the suspected areas of disability as a part of the triennial review," thereby warranting an IEE at district expense (compare IHO Decision at pp. 9-10, with IHO Decision at pp. 13-14). The IHO's conclusions may be reconciled in that, even if the evaluative information before the CSE had been lacking, the IHO may have deemed it a procedural violation that did not rise to the level of a denial of a FAPE. Further, with respect to the IEE, the IHO also based her determination on the district's failure to respond to the parent's April 2024 letter requesting an IEE at district expense (IHO Decision at pp. 13-14). Accordingly, I do not find that the IHO's decision regarding the IEE is determinative of the issue relating to the sufficiency of the evaluative information before the CSE.

The parent testified that the student had received ABA as a young child until he reached "the age of three" and again, after approximately five months during which time he experienced "regression," the student enrolled in a preschool program that used ABA and made "a huge improvement" (Tr. pp. 173-74). According to the parent, when the student attended a district public school for kindergarten that did not use ABA, she "saw his regression" (Tr. p. 174). The parent indicated that she was seeking a program that used ABA at that time because the student "reacts and cooperate[s] with the ABA method [more] than anything else" (*id.*). She confirmed that the main reason she rejected the April 2024 IEP was because it did not offer ABA (Tr. p. 177).

The April 2024 IEP reflects that, at the meeting, the parent and committee members from Gersh shared their view that the student would benefit from a program that used ABA methodology (Dist. Ex. 1 at p. 28). The district school psychologist who attended the April 2024 CSE meeting testified that the CSE did not include a methodology on the IEP because "that decision is best left to the schools" (Dist. Ex. 4 ¶ 16; see Tr. pp. 80-82). Further she opined that "[t]here was no consensus during the IEP meeting that ABA was the only method that the student respond[ed] to" (Dist. Ex. 4 ¶ 16). The school psychologist further testified that there was not clinical data to support a need for ABA (Tr. p. 127). On the other hand, she also indicated that the CSE recommended supports based on information before them regarding what was working for the student at Gersh (see Tr. p. 89).

As described above, the April 2024 CSE relied on the March 2024 psychoeducational evaluation, as well as reports from Gersh (Dist. Exs. 1 at pp. 1-6; 2 at p. 4; see Parent Exs. K; L; M; Dist. Ex. 3). The reports from Gersh before the CSE noted the school's use of ABA; for example, the January 2024 Gersh academic annual review report stated that the student "require[d] ABA methodologies throughout the day in all settings to be successful in achieving his goals" (Parent Ex. K at pp. 1, 3).

In addition, through affidavit and live testimony at the impartial hearing, the educational coordinator of Gersh described the instructional methodologies used at Gersh and with the student (Tr. pp. 148-49; Parent Ex. T ¶¶ 14-15, 20[b]).¹¹ She stated the student attended the Behavioral, Academic & Social Enrichment (BASE) program which was for students with intellectual impairments and focused on functional academics and life skills (Parent Ex. T ¶¶ 13-14, 16). The program utilized a "very specific ABA program," but also utilized a variety of other methodologies and programs including a picture exchange communication system, discrete trial teaching, collaborative problem solving, and sensory integration (*id.* ¶ 14). ABA was used as a reinforcement for positive behaviors, as well as to facilitate the development of language, self-help skills, appropriate play, and social behavior (*id.* ¶ 15). ABA was also used to reduce self-injurious behavior, tantrums related to transition communication problems, and self-stimulatory behavior that impeded the learning process (*id.*).

¹¹ The educational coordinator's affidavit includes two paragraphs numbered "19" and two paragraphs numbered "20" (see Parent Ex. T at pp. 3-4). For purposes of this decision, the first paragraphs 19 and 20, appearing on pages 3 to 4 of the affidavit will be cited as "19(a)" and "20(a)" and the second paragraphs 19 and 20, appearing on pages 4 to 5 of the affidavit will be cited as "19(b)" and "20(b)."

The educational coordinator at Gersh stated the school used other teaching methods with the student including collaborative problem solving and the social thinking curriculum, which were "distinct from ABA" and used in conjunction with ABA methodology (Tr. p. 148). In her affidavit, she stated the collaborative problem solving method taught students how to self-regulate by understanding how they feel, why they feel that way, and how to cope with those feelings (Parent Ex. T ¶ 20[b]; see Tr. p. 148). She further stated the social thinking curriculum taught the student to identify his emotions and how to regulate himself (Tr. p. 148).

Similar to the combination of approaches utilized at Gersh, while the April 2024 IEP did not specifically include ABA methodology, it included many strategies that are aligned with the principles of ABA. Specifically, the April 2024 IEP indicated the student required minimal distractions, hands-on multisensory instruction, a visual schedule to be reviewed daily, sensory breaks, consistent praise for positive social behaviors/on-task behaviors/task completion, monitoring for signs of frustration, and a BIP (Dist. Ex. 1 at p. 6). In addition, a visual of classroom rules needed to be reviewed daily, and collaboration with related services providers and support staff to review behavior management and coping strategies needed to occur (*id.*). Furthermore, the April 2024 IEP identified the student's preferred reinforcers and the student's needs to have a 5-token board, visuals, small group instruction, breaking skills into smaller components, and need for an individual paraprofessional (*id.* at pp. 2, 4, 21). Finally, the IEP stated the student had a FBA and BIP to address tantrum, self-injury, and self-stimulatory behavior (*id.* at p. 7). While no FBA or BIP documents were submitted into evidence, the April 2024 IEP reflected the student's behavioral needs, strategies to address those needs, and goals to measure progress toward improving his behavior (*id.* at pp. 2, 4, 6-7, 8, 14).

In arguing that the IHO erred in finding that April 2024 IEP appropriate despite the lack of ABA, the parent principally argues that the testimony from the district witness from the assigned school was retrospective. A district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP"; however, testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (see R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [indicating that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). The prohibition against retrospective testimony is intended to reflect the fact that "[a]t the time the parents . . . choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on" (R.E., 694 F.3d at 186). Therefore, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and . . . reasonably known to the parties at the time of the placement decision" (*id.* at 187).

The parent asserts that the district witnesses "gave retrospective testimony that it would have provided additional services, i.e., an ABA program beyond those listed in the April 2024 IEP"; however, the parent does not include any citation to the testimony in question (Parent Mem.

of Law at p. 9).¹² The special education coordinator from the assigned public school site testified that, although the assigned school did not have a BCBA provider on site, much of the staff was trained "in ABA and behavior support/modification techniques which are used in our classrooms throughout the day" (Dist. Ex. 5 ¶¶ 1, 10; see also Dist. Ex. 2 at p. 7). She elaborated during the impartial hearing that the assigned school did not "have specific ABA classes or subjects at the school" but used "various curriculums [that] do have ABA methodologies intertwined into it" (Tr. p. 52). Reference to the use of techniques in the classroom is consistent with the IEP, which as noted above lists several techniques to provide behavioral support and modification (see Dist. Ex. 1 at pp. 2, 4, 6-7, 8, 14).

In any event, putting aside the testimony of the special education coordinator, the hearing record shows that Gersh was an eclectic program that borrowed from diverse methodologies rather than strictly adhering to ABA methodology to the exclusions of others, which tends to undermine the parent's view that the April 2024 CSE should have recommended ABA methodology for the student, to the exclusion of other approaches, based on the reports from Gersh. Despite the district's decision not to include a specific methodology on the student's IEP, in this case, the April 2024 IEP was reasonably calculated to address the student's needs and support the student's progress. The April 2024 IEP described the student's needs, had goals to address those needs and outlined the accommodations, strategies, and support services for the student to make reasonable progress given the recommended programs and related services. Accordingly, I find insufficient grounds to disturb the IHO's determination that there was no clear evaluative consensus that the student required ABA.

D. Pendency

On appeal, the parent argues that the district failed to fulfill the transportation mandate of the pendency agreement made between the parties.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).¹³ Pendency has the effect of an automatic injunction, and

¹² The parent also argues that the district should have called as a witness the individual who gave the parent a tour of the assigned public school; however, there is no indication in the hearing record that the parent was prevented from calling that individual as a witness to rebut the district's evidence.

¹³ In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Here, there is no dispute that an unappealed November 8, 2023 IHO decision forms the basis of the student's pendency placement in this matter (see Pend. Implementation Form; Parent Ex F). The November 2023 IHO decision found that "[t]he [s]tudent [wa]s entitled to special education transportation for the 2023-2024 school year" and the parties agreed that the district would provide the student's "specialized transportation" as part of pendency (Parent Ex. F at p. 16). The hearing record is not developed regarding what the student's specialized transportation consisted of at the time of the November 2023 IHO decision.

Notwithstanding the parties' agreement regarding the basis for pendency, the parent alleges that the student is entitled to special transportation accommodations as outlined in the student's April 2024 IEP during the pendency period. The student's April 2024 IEP provided that the student should receive a 1:1 paraprofessional during transportation, limited travel time, a route with fewer students, and door to door services (Dist. Ex. 1 at p. 25). However, the parent rejected the April 2024 IEP and unilaterally placed the student at Gersh.

It appears that the student is being transported to and from Gersh by the district during the pendency period (Parent Ex. U at p. 5).¹⁴ However, according to the parent, beginning in September 2024, the transportation provided by the district was not limited in time (Parent Ex. U ¶¶ 25-26). As it does not appear that limited travel time is a special transportation accommodation that is specifically required as part of the student's pendency placement, the district is not in violation of its obligation to the student under pendency, and there is no basis for an order of relief.

¹⁴ The parent testified that she had called the district's office of pupil transportation on multiple occasions since September 4, 2024 because according to the parent, the district was not providing the student with limited travel time, as mandated in the student's April 2024 IEP (Parent Ex. U ¶ 27).

However, the parties are encouraged to discuss the student's transportation and consider alternative arrangements for the student, if necessary.¹⁵

VII. Conclusion

Having found no basis to disturb the IHO's determination that the district offered the student a FAPE for the 2024-25 school year and that the district fulfilled its pendency obligations, the necessary inquiry is at an end, and there is no need to reach the issue of whether Gersh was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition funding by the district (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**
August 14, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER

¹⁵ While pendency is reviewed separate from appropriateness, Education Law § 4402(4)(d) states that school districts in New York State are mandated to provide special education students with "suitable transportation" to and from a nonpublic school within fifty miles if the student attends such school for the purpose of receiving services or programs similar to those recommended for the student by the CSE.