



The University of the State of New York

The State Education Department

State Review Officer

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No. 25-232

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:

Law Offices of Neal H. Rosenberg, attorneys for petitioner, by Michael Mastrangelo, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the cost of her son's enrollment at the Manhattan Behavioral Center (MBC) 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

At all relevant times, the student was eligible for special education as a student with autism (see Dist. Ex. 1 at p. 1).^{1, 2} For the 2022-23 school year, the student attended Manhattan Star Academy (MSA), a nonpublic special education school, in a 6:1+1 special class and received related services (see Dist. Ex. 5 at p. 1). For the 2023-24 school year, the student continued to

¹ 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]).

² The student has received a diagnosis of autism spectrum disorder with accompanying intellectual and language impairment (Parent Exs. J ¶ 20; K ¶ 2).

attend MSA in an 8:1+2 special class with related services and support from a paraprofessional (see Dist. Ex. 6 at p. 1).

On April 4, 2024, a CSE convened and developed an IEP with a projected implementation date of April 19, 2024 (Dist. Ex. 1 at pp. 1, 38).³ The April 2024 CSE recommended that the student receive 12-month services in a district specialized school and attend an 8:1+1 special class for 10 periods per week for each of English language arts (ELA) and math instruction; three periods per week of social studies instruction; and two periods per week of science instruction (Dist. Exs. 1 at pp. 29-31, 35). For related services, the CSE recommended two 30-minute sessions per week of individual occupational therapy (OT); one 30-minute session per week of group OT; and four 30-minute sessions per week of individual speech-language therapy (id. at pp. 29-30). In addition, the CSE recommended one 60-minute session per month of parent counseling and training; daily, full-time, individual behavior support from a paraprofessional; and access to a dynamic display speech generating device with a communication application, specifically, an iPad with Touch Chat with Word Power (id.).

On June 25, 2024, the district issued a prior written notice and a school location letter (Dist. Exs. 3 at p. 1; 4 at p. 1).⁴ The prior written notice memorialized the recommendations of the April 2024 CSE, as well as the other placement options considered (compare Dist. Ex. 1 at pp. 29-31, 37-38, with Dist. Ex. 3 at pp. 1-3, 11). The school location letter identified the public school site to which the student was assigned to receive the recommended special education programming (see Dist. Ex. 4 at p. 1).

On August 1, 2024, the parent signed a contract with MBC, a private educational agency that provides "support [for] individuals with autism spectrum disorders and other special needs" "through center-based services, home[-]based services, and consultation" (Parent Exs. B at pp. 1, 3; C at p. 2). Under the contract's terms, MBC agreed to provide the student with instruction using applied behavior analysis (ABA) and related services beginning in July 2024 and ending in June 2025; and the parent was financially responsible for the cost of any services not funded by the district (Parent Ex. B at p. 1). The contract anticipated that MBC would provide the student's services, in accordance with an attached weekly service list, as follows: 26 hours of ABA services with BCBA supervision for 10 percent of the service hours; three 30-minute sessions of speech-language therapy; three 30-minute sessions of OT; two 30-minute sessions of physical therapy (PT); one 30-minute session of augmentative and alternative communication (AAC) training; and

³ Participants in the April 2024 CSE meeting included the student's parents, a school psychologist who also served as the district representative, a related service provider/special education teacher from the district, and the special education coordinator from MSA, who was also referred to in the IEP as the IEP coordinator (Dist. Ex. 1 at pp. 1, 38). For consistency in the decision, this CSE participant will be referred to as the special education coordinator.

⁴ The April 2024 IEP and the corresponding prior written notice divided the student's speech-language therapy services into three individual sessions per week and one individual session per week; however, there did not appear to be any differences in the duration or location of the services and accordingly, they are grouped together as a frequency of four sessions per week of individual speech-language therapy services when referred to herein (see Dist. Exs. 1 at pp. 29-30; 3 at pp. 2-3).

one 30-minute session of family training (*id.* at pp. 1, 5). The contract also provided that "the parties may modify the frequency or duration of services on the Weekly Service List" (*id.* at p. 1).

In a letter dated August 20, 2024, the parent informed the district of her disagreement with the program and placement recommended by the April 2024 CSE (*see* Parent Ex. A at pp. 1-2).⁵ The August 2024 letter further indicated that the parent was unilaterally placing the student at MBC for the 2024-25 school year and "seek[ing] reimbursement/direct funding of tuition and all associated costs" (*id.* at p. 2).

The student began attending MBC for the above-described services program in September 2024 (*see* Parent Exs. E; F at p. 1; G; at p. 1; H at p. 1; I at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice filed on December 11, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year as a result of procedural flaws in the development of the student's April 2024 IEP and substantive deficiencies in the IEP itself (*see* IHO Ex. I at pp. 1-3, 5).⁶ Among other procedural concerns, the parent alleged that the district failed to "conduct evaluations or a functional behavior[al] assessment and therefore did not satisfy its obligation to obtain updated evaluative material from which it could make an appropriate recommendation" (*see id.* at p. 2). According to the parent, the resulting IEP was substantively deficient in that it lacked "appropriate management strategies to address the [s]tudent's emotional, behavioral[,] and [educational] needs"; it set goals that were unrealistic in the recommended setting, did not accurately reflect the student's needs, and were not tailored to the student's greatest deficit areas; and it included a recommendation for 1:1 behavioral support from a paraprofessional but lacked a recommendation for ABA instruction (*see id.* at pp. 2-3). The parent also contested the recommended 8:1+1 special class placement, which the parent described as "too large," and the assigned school, which, according to the parent, was "unable to appropriately implement the IEP" and would "not group the [s]tudent with similarly functioning peers" (*id.*). The parent invoked pendency based on a prior, unappealed IHO's decision (*id.* at p. 3). As relief, the parent requested "direct payment/reimbursement for tuition, related services[,] [] transportation to and from MBC . . . and all associated costs" for the 2024-25 school year (*id.*).

B. Impartial Hearing Officer Decision

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH) (*see* Tr. pp. 1, 3). Following a prehearing conference on January 15, 2025, an impartial hearing convened on February 19, 2025, and concluded the same day (*see* Tr. pp. 1-89). During the proceedings, the parent's attorney indicated that the parent was withdrawing the request for transportation-related relief and seeking "the full cost of services . . . at [MBC] to be paid directly to the school" (Tr. p. 12). The parent offered various exhibits, each of which the IHO admitted

⁵ The subject line of the parent's August 2024 letter stated, "24-25 School Year Ten Day Notice of Unilateral Placement" (Parent Ex. A at p. 1).

⁶ The due process complaint notice was undated but was delivered to the district in an email dated December 11, 2024 (IHO Ex. I at p. 1).

into evidence (see Tr. pp. 14-15, 22, 51; Parent Exs. A-K). The parent's exhibits included testimony by affidavit from MBC's director of education and the parent herself, each of whom appeared for cross-examination during the hearing (see Tr. pp. 14-15, 21-48, 50-71; Parent Exs. J; K).⁷ The district presented no testimony but offered several exhibits, all but one of which the IHO admitted into evidence (see Tr. at pp. 13-14; District Exs. 1-6).⁸

In a decision dated March 10, 2025, the IHO found that the district's recommended program, including related services, "directly correspond[ed] to [the] [s]tudent's management needs" and was reasonably calculated to enable the student to make appropriate progress (IHO Decision at pp. 7, 10). According to the IHO "review of the subject IEP reveal[ed] a comprehensive list of reasonable, measurable goals[,] designed to meet the [s]tudent's individual needs, in addition to illustrative methods by which each goal may be achieved" (*id.* at p. 7). "Regarding the alleged lack of ABA programming," the IHO found "the record [] devoid of any credible or convincing evidence to establish that the [s]tudent required ABA programming," "particularly at the duration and frequency provided at [MBC]," to receive a FAPE (*id.*). In that regard, the IHO further reasoned that "the IDEA does not require a school district to provide a specific program or methodology for the education of [students] with disabilities" (*id.*). As for the recommended placement and assigned school, the IHO found the parent's concerns to be "based on impermissible speculation," as the student never attended the proposed public school placement (*id.* at p. 9).

Additionally, the IHO found that the district did not err in failing to conduct a functional behavioral assessment (FBA) because, according to the IHO, "the record [wa]s devoid of evidence that the [s]tudent's behavior was of the nature that it actually impeded his learning and the learning of others" (IHO Decision at p. 8).⁹ The IHO further reasoned "that the subject IEP appropriately addressed [the] [s]tudent's maladaptive behaviors with management needs, suitable goals," and individual behavior paraprofessional services, noting that, according to the director's testimony, MBC had "not crafted a [behavioral intervention plan] BIP for the [s]tudent" (*id.*).

Finally, the IHO found that the district's failure to conduct a triennial evaluation of the student, which the district did not dispute, constituted a violation of the district's procedural obligations but did not amount to a substantive denial of a FAPE (IHO Decision at pp. 6, 10, 14 & n.89). In that regard, the IHO reasoned that, although the April 2024 IEP referenced a 2020

⁷ The affidavits, which were not notarized, were admitted into evidence only after the affiants affirmed their content (see Tr. pp. 15, 21-22, 50-51; Parent Exs. J; K).

⁸ The district withdrew proposed District Exhibit 7 as duplicative of Parent Exhibit A (Tr. pp. 13-14).

⁹ The IHO noted that, "although the [MBC] [d]irector described the [s]tudent's behavior as 'aggressive,' including references to flopping, tantrums[,] and material swiping, no specific detail regarding the severity and frequency of such behaviors was provided, including the circumstances and how such behaviors impeded [the] [s]tudent's learning and the learning of his peers" (IHO Decision at p. 8).

evaluation, the bulk of the information presented throughout the IEP was derived from the parent, MSA staff, and the student's progress reports (*id.* at p. 6).^{10, 11}

Although the IHO had already determined that private school funding was not an appropriate remedy for the procedural violation in this case, the IHO addressed the appropriateness of MBC as a unilateral placement, as well as equitable considerations (IHO Decision at pp. 10-14). Within the context of the appropriateness of the unilateral placement, the IHO first addressed the validity of the parent's contract with MBC or, in other words, the parent's financial obligation to MBC (see *id.* at pp. 11-12). The IHO found that, although the parent incurred an obligation to pay MBC, the contract was invalid, as it "failed to clearly articulate vital terms," namely, the cost of the student's enrollment for the 2024-25 school year (*id.* at pp. 12, 14).¹² The IHO also found that the parent failed to submit credible or convincing evidence establishing that MBC provided an educationally appropriate program for the student (*id.* at p. 13). In that regard, the IHO reasoned that review of the student's weekly schedule revealed an absence of any academic instruction and that the evidence failed to support the student's need for all-day 1:1 ABA instruction (*id.*).¹³ The IHO further noted that, although the contract "state[d] that the [s]tudent [wa]s enrolled 'beginning in July of 2024 and ending in June of 2025,'" and despite the recommendation for a 12-month program, the student did not attend MBC in July and August 2024 (*id.* at pp. 12, 14). However, the IHO found "no evidence that [the] [p]arent refused to cooperate with the [district]" and, therefore, rejected the district's "argument that the equities d[id] not favor the [p]arent" (*id.* at p. 14).

Ultimately, the IHO denied the requested relief but ordered that the district "facilitate and fund a comprehensive triennial evaluation/assessment[] in all areas of the [s]tudent's documented

¹⁰ Citing *C.M. v. New York City Department of Education*, 2017 WL 607579 (S.D.N.Y. Feb. 14, 2017), the IHO noted, "[i]t has been held that it is reasonable for a CSE to rely on descriptions of a student's present level[s] of performance provided through progress reports because they are created by staff that interact with students regularly" (IHO Decision at p. 6 & n.28 [internal quotation marks omitted]).

¹¹ In an apparent typographical error, page six of the IHO's decision describes the subject IEP, developed in April 2024, as "the April 2023 IEP" (IHO Decision at p. 6; see Dist. Ex. 1 at p. 35).

¹² According to the IHO, there was no way to tell the amount of services that MBC would provide to the student or the cost thereof from the face of the contract, which set forth no monetary amount (IHO Decision at pp. 11-12). The IHO acknowledged that the MBC program description, entered into evidence as Parent Exhibit C, set forth rates for services, but found the program description insufficient "to fully inform[] the parent regarding the full and[/]or potential costs associated with attending [MBC]" (*id.* at p. 12). The IHO reasoned that "[t]he final cost of enrollment [wa]s [] contingent upon the amount of related services [the] [s]tudent receiv[ed];" that the school year had not yet concluded; and that MBC "may reduce or add to the duration and frequency of related service[s]" or "add related services not originally recommended in the [s]tudent's IEP" (*id.* at p. 12 & n.74). The IHO noted that MBC did, in fact, increase the amount of the student's speech-language therapy and that, according to the parent's testimony, she did not know the annual cost of the student's enrollment at MBC (*id.*).

¹³ The IHO noted that the "[p]arent submitted no formal assessments or reports to justify the roughly [six] hours per day/35 hours per week of ABA instruction [that] [the] [s]tudent receiv[ed] at [MBC]" (IHO Decision at p. 13).

and suspected need" and, thereafter, convene a CSE meeting to review the evaluation results and create an appropriate IEP for the student (IHO Decision at pp. 14-15).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the issues raised in the parent's request for review and the district's answer is presumed and, therefore, the allegations and arguments will not be recited here in detail.

Generally, the parent contends that the IHO erred in determining that neither the district's failure to conduct a triennial evaluation nor the district's failure to conduct an FBA and develop a BIP for the student amounted to a denial of a FAPE for the 2024-25 school year. The parent further contends that the district's failure to recommend PT, despite the student's documented PT needs, deprived the student of a FAPE and that the IHO erred in failing to address the issue. Finally, the parent contends that the IHO erred in considering the validity of the parent's contract with MBC within the context of MBC's appropriateness as a unilateral placement; in determining that the contract was unenforceable; and in further determining that the student's program at MBC was not educationally appropriate. The parent seeks an award of funding for the full cost of the student's program at MBC for the 2024-25 school year.

The district contends that the IHO's decision, denying the requested relief, should be upheld. The district argues that, despite its failure to reevaluate the student, conduct an FBA, or recommend PT, the IHO correctly determined that the April 2024 IEP was appropriate and sufficient to provide the student with a FAPE. According to the district, the hearing record also supports the IHO's determination that the parent failed to establish either her financial obligation to MBC or the educational appropriateness of the student's program at MBC.¹⁴

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.

¹⁴ In its answer, the district argues that the hearing record supports the IHO's finding that equitable considerations did not favor the parent; but the IHO did not make such a finding. Rather, the IHO rejected the district's "argument that the [equities] do not favor the [p]arent" (IHO Decision at p. 14). Aside from the parent's financial obligation to MBC, which the IHO did not characterize as an equitable consideration, equitable considerations are not disputed on appeal and will not be addressed.

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]).¹⁵

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. Scope of the Impartial Hearing and Review

Initially, I note that neither party has appealed from the IHO's determination that the district violated its procedural obligation to conduct a triennial evaluation of the student. Nor has either party appealed from the IHO's order directing the district to facilitate and fund a comprehensive triennial evaluation/assessment in all areas of the student's documented and suspected need and, thereafter, convene a CSE to develop an updated IEP for the student. Accordingly, those portions of the IHO's decision 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]).

Before addressing the merits of the parent's appeal, I must address the parent's contention that the IHO erred in failing to review whether the district's failure to recommend PT in the April 2024 IEP, despite the student's documented need for PT, denied the student a FAPE. To that end,

¹⁵ 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).

I must determine whether the underlying claim regarding PT, a claim which did not appear in the due process complaint notice, was sufficiently raised before the IHO.¹⁶

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

In this case, the due process complaint notice, which contained no mention of PT, afforded the district no notice of the parent's claim that the omission of a PT recommendation from the April 2024 IEP denied the student a FAPE (see IHO Ex. I at pp. 1-3).¹⁷ Upon review of the hearing record, the parent did not seek an agreement from the district to include that issue within the scope of the impartial hearing. Nor did the parent seek to amend the due process complaint notice.

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M., 2017 WL 607579, at *14; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

Review of the hearing record reveals that the student's need for PT was first raised by the parent in an apparent effort to establish the appropriateness of MBC's program (see Tr. pp. 22, 24; Parent

¹⁶ The district argues that, as indicated in the April 2024 IEP, the CSE discussed PT services, "but the [p]arent expressed that she required 'additional time' to consider PT services" (Answer ¶ 7). The district further argues that, to the extent the parent relies on a December 2024 PT progress report and/or testimony from MBC's director, that information was not before the April 2024 CSE and may not be relied upon retrospectively to assess the CSE's recommendations.

¹⁷ Like the due process complaint notice, the parent's 10-day notice to the district contained no mention of the student's need for PT (see Parent Ex. A at pp. 1-2). Thus, the district had no opportunity to address the omission of a PT recommendation prior to the student's unilateral placement at MBC.

Ex. K ¶¶ 26, 39-41). The district's counsel questioned the parent regarding the omission of a PT recommendation from the April 2024 IEP in an apparent effort to show that MBC was not following the student's IEP; but such questioning occurred on cross-examination related to the appropriateness of the parent's unilateral placement, after the parent had already presented direct testimony from MBC's director regarding the student's receipt of PT at MBC and the student's need for the services provided by MBC during the 2024-25 school year (see Tr. pp. 22, 24, 54-55; Parent Ex. J ¶¶ 26, 39-41). Therefore, I cannot conclude that the district "opened the door" to the claim that omission of a PT recommendation from the April 2024 IEP denied the student a FAPE (cf. M.H., 685 F.3d at 250-51 [holding that the district opened the door to the parent's claim that the recommended program failed to provide a teaching methodology that would be effective for the student where the district "introduced the issue of methodology – first in its opening statement, and then in the questioning of its first witness"]; A.D., 739 Fed. App'x at 80 [holding that the district opened the door to the parent's "claim for lack of counseling services in the IEP" where the district "addressed the counseling issue in its opening statement" and "elicited testimony from its witnesses" "regarding the types of counseling support that" the recommended program would have provided]). I further note that the parent did not argue before the IHO that the district denied the student a FAPE by its failure to recommend PT and, instead, advanced that particular argument for the first time on appeal (see Tr. pp. 80-87; Req. for Rev. ¶ 20).

Accordingly, the IHO did not err in failing to review the issue, and I decline to do so (see, e.g., Application of the Dep't of Educ., Appeal No. 21-082 [finding that the parent's claims related to the district's failure to recommend a 1:1 nurse or nursing services and assistive technology were outside the scope of the impartial hearing where the "the subject of a 1:1 nurse or nursing services and assistive technology was first addressed" during the parent's cross-examination of the district's witnesses]; Application of a Student with a Disability, Appeal No. 18-079 [finding that the IHO went beyond the scope of the impartial hearing in addressing the parent's claim regarding functional grouping at the recommended placement where the parent raised the issue during her case in chief]). To hold otherwise would inhibit the development of the hearing record for the impartial hearing officer's consideration and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dept. of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]).¹⁸

¹⁸ "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. and R.D v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review because it was not raised in the party's due process complaint notice]).

B. FAPE

Turning to the merits of the parent's appeal, the parties dispute whether the IHO erred in determining that neither the district's failure to conduct a triennial evaluation, an undisputed procedural violation, nor the district's failure to conduct an FBA and/or develop a BIP, amounted to a substantive denial of a FAPE to the student for the 2024-25 school year.

1. The Student's Needs

First, a review of the student's needs and then-current functioning, as known to the CSE at the time of the April 2024 IEP, will provide the context necessary to evaluate whether the district substantively offered the student a FAPE for the 2024-25 school year.

According to the June 2024 prior written notice, in addition to a March 2020 psychoeducational evaluation, the April 2024 CSE considered progress reports dated March 11, 2024, from the student's classroom teacher at MSA, as well as the student's OT and speech-language therapy providers, in developing the student's IEP (see Dist. Ex. 3 at pp. 4-11). Additionally, the April 2024 IEP indicated that the CSE considered "[s]chool and [p]arent narratives," that included estimated grade level skill information provided by the special education coordinator at MSA at the time of the meeting (Dist. Ex. 1 at p. 1). Neither the 2020 psychoeducational evaluation report nor the March 2024 progress reports are included in the hearing record; but the prior written notice included text from the March 2024 progress reports (see Dist. Ex. 3 at pp. 4-11). The hearing record includes progress reports from the student's teacher and related services providers prepared in January 2023 which, upon review, appear to contain substantively the same information as the information taken from the March 2024 progress reports (compare Dist. Ex. 3 at pp. 4-11, with Dist. Ex. 5 at pp. 2-3, 6-10).¹⁹

The April 2024 IEP included assessment results from the student's 2020 psychoeducational evaluation (Dist. Ex. 1 at pp. 2-3). The IEP reflected that the student scored in the borderline range in fluid reasoning abilities on the Stanford-Binet Intelligence Scales, Fifth Edition (SB-5) (Dist. Ex. 1 at p. 2).²⁰ The IEP included standard scores from the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), which reflected "[m]oderately [l]ow" adaptive skills at school with domain standard scores of 71 overall, 73 in communication, 78 in daily living skills, and 66 in socialization ("[l]ow") (id. at pp. 2-3). In addition, the parent's ratings on the Vineland-3 reflected an overall "[l]ow" performance with a composite score of 60, 42 in communication, 71 in daily living skills, and 58 in socialization (id. at p. 3). The April 2024 IEP also included the Gilliam Autism Rating Scale, Third Edition (GARS-3) teacher and parent rating scales, which indicated a "[v]ery [l]ikely" probability of the student having autism (id. at p. 2).

¹⁹ The hearing record included no explanation as to why the student's teacher and related services providers apparently reported the same information in January 2023 and again in March 2024.

²⁰ The April 2024 IEP provided no further standardized scores regarding the student's cognitive and academic skills (Dist. Ex. 1 at p. 1).

a. Academic Functioning

According to the April 2024 IEP, the MSA special education coordinator informed the CSE that the student was working at a "kindergarten level with instructional supports" in reading decoding, fluency, and comprehension, and in letter formation, math computation, math fluency, and word problem solving (Dist. Ex. 1 at pp. 1-2). The IEP reported the following information, derived from the teacher progress reports, regarding the student's academic functioning (compare Dist. Ex. 1 at pp. 3-4, with Dist. Ex. 3 at p. 5, and Dist. Ex. 5 at p. 2).

In the area of reading, the student "identifie[d] the upper and lowercase letter in multiple fields and throughout different words" (Dist. Exs. 1 at p. 3; 3 at p. 5; 5 at p. 2). The student was "exposed to the letter sound associated with the specific letter" with "songs, games, and worksheets" supplementing the lessons to help the student "review the letter and letter sound across different modalities" (id.). The student "participat[ed] in a shared reading curriculum" "to increase [his] engagement and interest in books" (id.). During such readings, the student "was asked to respond to questions about how he would react in situations, how he could make connections between the characters and himself[,] and what he predicted would happen next in the book" by pairing the questions with visual answer choices, including a choice "that said 'something different' in case he wanted to answer something not otherwise listed" (id.). The student "require[d] minimal verbal and physical prompting during both letter sound and shared reading instruction . . . to maintain attention, stay in his seat, follow directions, and make choices" (id.). The student "benefit[ed] from seeing a timer with a designated amount of time to maintain attention and [from] positive reinforcement" (id.). The student "ha[d] demonstrated some progress in his ability to identify letter sounds and participate in shared reading [but] still showed deficits in his reading skills" (id.).

In the area of writing, the student was "working on writing upper and lowercase letters in a [two-inch] box" (Dist. Exs. 1 at p. 4; 3 at p. 5; 5 at p. 2). The student "benefit[ed] from minimal verbal and physical prompting when writing to follow the dot cues, apply pressure, and stay within the box" (id.). "During writing lessons, [the student] [wa]s presented with a letter he c[ould] trace over" and "a staff member w[ould] model writing the letter" before the student tried "to write the letter independently" (id.). The student "demonstrated some progress in his ability to trace upper and lowercase letters" but "still show[ed] deficits in his writing skills" (id.).

In math, the student was "given explicit instruction on each numeral up to ten" and "used the numbers to count movable and non[-]movable objects" (Dist. Exs. 1 at p. 4; 3 at p. 6; 5 at p. 3). "To supplement each lesson, [the student] complete[d] number identification worksheets, set coloring activities, set matching file folder games, and [] listen[ed] to songs about numbers" (id.). The student "require[d] some verbal and physical prompting to make choices, stay seated, and maintain attention during math lessons;" and he benefited from the use of a visual timer for a designated amount of time and positive reinforcement (id.). The student "demonstrate[d] some progress in his ability to make and count sets up to 10" but "still show[ed] deficits in his math skills" (id.).

b. Speech and Language Skills

The April 2024 IEP reported the following information, derived from the speech-language therapy progress reports, regarding the student's receptive, expressive, and pragmatic language skills (compare Dist. Ex. 1 at pp. 5-6, with Dist. Ex. 3 at pp. 6-8, and 5 at pp. 6-8).

In the area of receptive language, the student "followed one-step familiar directions with independence when he [wa]s engaged with a task" . . . [h]owever, as directives bec[a]me more complex or novel in nature, [he] benefit[ed] from support to follow directions appropriately" (Dist. Exs. 1 at p. 5; 3 at p. 6; 5 at p. 6). The student "identifie[d] common objects that [we]re highly motivating" but had "difficulty identifying functions of items," requiring visual supports, such as pointing, "to appropriately identify how items are used" (Dist. Exs. 1 at pp. 4-5; 3 at pp. 6-7; 5 at p. 6).

In the area of expressive language, the student "present[ed] with limited functional communication," using single word productions and grunts and "communicat[ing] largely with vocalizations (e.g., vocal stereotypy, vocal play, shouting), whining/crying, laughing, or gestures" (Dist. Exs. 1 at p. 5; 3 at p. 7; 5 at p. 7). When motivated, the student spontaneously communicated two-to-three-word combinations to make requests (id.). The student did "not spontaneously communicate . . . for other communicative functions, such as commenting, describing, protesting, expressing affirmation or negation, [or] expressing emotions" (Dist. Exs. 1 at pp. 5-6; 3 at p. 7; 5 at p. 7). The student used an AAC device consisting of an iPad with the TouchChat with Wordpower application to express varied single words and word combinations and expand his utterances "through play-based tasks . . . and requesting [] highly preferred items" (Dist. Exs. 1 at p. 5; 3 at p. 7; 5 at p. 7).²¹ The student "benefit[ed] from verbal and visual modeling on his AAC device to learn new motor plans to vary his language" (id.). The student required "ample clinician scaffolding including aided language stimulation, models, indirect and direct verbal cues, and gestural cues to produce functional language throughout all contexts" (id.).

The student's speech-language pathologist targeted pragmatic language skills "through a variety of structured and unstructured language activities" (Dist. Exs. 1 at p. 6; 3 at p. 8; 5 at p. 8). The student did not independently initiate greetings, and he benefited from "verbal and visual modeling on his device," tactile cues, visual cues, or verbal cues "to respond to greeting and farewells . . . on his AAC device or verbally" (id.). The student's "play skills during language tasks [we]re emerging," and he showed progress with "waiting his turn during a game" (id.). The student "benefit[ed] from support to appropriately use the items in a game," as he would often "throw [items] on the floor or put them all into his hand at once" (id.). "Although [the student]

²¹ According to the progress reports and the April 2024 IEP, the student received AAC services as a component of his related services program at MSA (see Dist. Exs. 1 at p. 6; 3 at p. 8; 5 at p. 8). Sessions consisted of "programming and modification of [the student's] AAC system[,] as well as support provided to family, caregivers, and his educational team" (id.). Push-in services were provided "at times to model words on [the] AAC device that [we]re relevant to class content," and such modeling prompted the student "to use his device for a variety of communicative functions" (id.). The student "benefit[ed] from models to form 3+ word utterances; however, he navigate[d] with minimal assistance to pages within his system that contain[ed] preferred items such as toys, snacks, and shows" (id.).

demonstrate[d] emerging pragmatic language skills, [his] pragmatic language [wa]s not age appropriate" (id.).

The student's language performance was highly dependent on "his attention, mood, or interest in an activity" (Dist. Exs. 1 at pp. 5-6; 3 at pp. 7-8; 5 at pp. 6-7). "When upset . . . or disengaged in a task, he present[ed] with behaviors that interfere[ed] with progress" such as "flopping to the floor, laughing, crying, [or] vocal stereotypy" (id.). The student did "not always comply with instruction[,] and more assistance . . . from other instructors, such as his classroom teachers and the school BCBA, [was needed] to support reorientation during therapeutic tasks" (id.).

c. Social/Emotional Development

As for the student's social/emotional development, the April 2024 IEP relayed information obtained from the MSA progress reports, as well as information obtained from the parent and MSA's special education coordinator during the CSE meeting (see Dist. Exs. 1 at pp. 5-8; 2; 3 at pp. 7-8; 5 at pp. 3-4, 6-7). The IEP noted maladaptive behaviors of tantrums, aggression, and defiance; potential antecedents for the behaviors; and strategies to support the student during those times (Dist. Ex. 1 at pp. 7-8).²² According to the IEP, when the student was upset, he "engage[d] in tantrums of crying, screaming, throwing himself to the ground, attempting to hide under furniture[,] and kicking adults" (Dist. Exs. 1 at p. 7; 5 at p. 4). "The antecedent of these behaviors" was identified as primarily transitions or denial of access to a preferred activity or object (Dist. Exs. 1 at pp. 7-8, 9; 3 at p. 10; 5 at pp. 4, 9-10). When on the floor, the student "occasionally require[d] full physical prompting to stand up and pick up his device" (Dist. Exs. 1 at p. 7; 5 at p. 4). "Other times, [he] benefit[ed] from the cue 'stand up' with a 30 second wait time" (id.). When upset, the student "benefit[ed] from completing [one]-step directions or identifying mastered items to earn his tokens quickly" (id.). Once tokens were earned, he "receive[d] a less-preferred reinforcer" and returned to his seat (id.).

According to the IEP, MSA staff felt that a "task that provide[d] demands or an unpreferred activity would trigger targeted behaviors, which include[d] tantruming (screaming, throwing his body to the floor), aggression (hitting, throwing his talker), [and] defiance (shutting down and refusing to engage)" with aggression being "the most concerning behavior at school" (Dist. Ex. 1 at p. 8). Additionally, MSA staff reported that the student took about five to 15 minutes to recover (id.). The IEP reflected a parent report "that tantrums or aggression [were] triggered by aggression and defiance" (id.). The parent further reported that the student "would stomp his feet, scream, and throw his body to the floor" but would comply when the parent gave a directive firmly (id.). According to the parent, the student was "not very social to his peers" but "would engage [i]n activity involving peers" "[d]epending on his mood" (id.).

²² Although much of the social/emotional present levels of performance in the April 2024 IEP was the same as that contained in the January 2023 progress report from MSA, the IEP included information, which was not included in the January 2023 progress report, regarding the student's maladaptive behaviors (i.e., tantruming, aggression, defiance), the possible triggers, and time it took for the student to recover (compare Dist. Ex. 1 at pp. 7-8, with Dist. Ex. 5 at p. 4).

The IEP further reported that the student needed "consistent prompting to remain focus[ed]" because he "like[d] to be in his world" (Dist. Ex. 1 at p. 8). The use of a token board helped the student to stay "motivated and engaged for increased lengths of time for all academic instruction" (Dist. Exs. 1 at p. 7; 5 at p. 4). The student was reportedly "working on requesting preferred items, sensory/movement breaks, staying seated for longer periods of time[,] and transitioning to therapies and specials" (*id.*). The student had shown improvement transitioning from period to period using "a visual schedule, reminders of transitions, timers, highly preferred items[,] and teacher support to help transition calmly" (Dist. Exs. 1 at pp. 4, 7, 8; 5 at p. 4). The supports of a token board, breaks, and the visual schedule assisted the student with regulating his behavior and reduced tantrums (Dist. Exs. 1 at pp. 4-5, 8; 5 at p. 4).

The April 2024 IEP also discussed teaching the student to identify emotions (Dist. Ex. 1 at pp. 7-8). The student "continue[d] to work on identifying his current emotions from a list of picture-supported options," for example, asking, "[h]ow are you feeling today," and providing a sentence starter of, "[t]oday I feel ___" (Dist. Exs. 1 at pp. 7-8; 5 at p. 4). With teacher modeling and moderate support to identify his emotions, the student "typically respond[ed] with happy and tired" (Dist. Exs. 1 at p. 8; 5 at p. 4).

Regarding the student's needs relative to special factors, the April 2024 IEP indicated that the student did not need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded the student's learning or that of others; but it also indicated that the student needed a BIP and stated, "[p]lease see the functional behavioral assessment and behavior intervention plan" (Dist. Ex. 1 at p. 12). The management needs section of the IEP did not indicate the need for a behavior plan; however, the IEP indicated the student needed the following management strategies to support behavior: token board; visual schedule; collaboration and coordination across the transdisciplinary team; additional wait time to process instructions; modeling of task analysis; sitting in close proximity to the teacher; access to school counselor or trusted adult as needed; check-ins with teacher to reduce frustration or anxiety; reminders to implement relaxation or coping strategies; explicit strategy instruction to support executive functioning skills; checklists for task/routine completion; encouragement to ask for help and self-advocate academically; and verbal and nonverbal redirections, cues, and prompts (*id.* at pp. 10-12).²³

d. Daily Living Skills

The April 2024 IEP reported the following information, derived from the teacher progress reports, regarding the student's daily living skills (compare Dist. Ex. 1 at pp. 4-5, with Dist. Ex. 3 at p. 6, and Dist. Ex. 5 at p. 3). The student "show[ed] independence in his morning and afternoon routines, following his visual schedule, requesting [] preferred items, requesting [] the bathroom, and handwashing;" and he "show[ed] increased independence with taking off his outerwear" (Dist. Exs. 1 at p. 4; 3 at p. 6; 5 at p. 3). The student "require[d] a gestural prompt to walk to his desk," unzip his backpack, "and unpack his belongings before getting a toy," but he "independently t[ook]

²³ Throughout the present levels of performance section, the April 2024 IEP indicated that the student required verbal, gestural, tactile, and physical prompts; the use of visual timers to support engagement and attention in learning activities; positive reinforcement (i.e., praise); token boards; visual schedules; and first-then charts (Dist. Ex. 1 at pp. 3-10).

out his lunchbox, folder, and AAC device and plac[ed] them in the correct spots" (id.). According to the IEP, "[a]fter unpacking, [the student] wait[ed] at the door to be taken to the bathroom" (id.). The student would occasionally request to use the bathroom throughout the day; and, through teacher modeling, he was learning to use his AAC device to make such requests (Dist. Exs. 1 at p. 5; 3 at p. 6; 5 at p. 3). The student needed "hand over hand prompting to button and zip up his pants" (id.).

The OT progress reports and the April 2024 IEP reported the following additional information regarding the student's activities of daily living skills (see Dist. Exs. 1 at p. 9; 3 at pp. 10-11; 5 at p. 10). The student independently doffed his socks and shoes; but, to don his socks, he required assistance to orient the socks and "minimum to moderate verbal cueing to incorporate his non-dominant hand [] for visual attention" (Dist. Exs. 1 at p. 9; 3 at pp. 10-11; 5 at p. 10). To don his shoes, the student needed "maximum tactile prompting to cross one leg over the other in order to more easily access the opposite foot"; and he "benefit[ed] from assistance to loosen shoelaces," as well as "verbal and tactile prompting to stabilize at the back of the shoe as he insert[ed] his foot" (Dist. Exs. 1 at p. 9; 3 at p. 11; 5 at p. 10). The student could unfasten a zipper on a dressing board and don clothing but, at times, needed "tactile prompting to completely free the zipper from the latch" (id.). The student needed "moderate to maximum verbal and tactile prompting for digital placement in order to engage the zipper and grade force to push the pin fully into the latch," as well as "continued prompts to stabilize the board material as he fasten[ed] the zipper" (Dist. Exs. 1 at pp. 9-10; 3 at p. 11; 5 at p. 10). The student "benefit[ed] from faded tactile prompting for digit placement on a button board[] and moderate verbal cueing to sequence unfastening and fastening buttons" (Dist. Exs. 1 at p. 10; 3 at p. 11; 5 at p. 10).

e. Physical Development

The April 2024 IEP reported the following information, derived from the OT progress reports, regarding the student's sensory processing skills (compare Dist. Ex. 1 at pp. 8-9, with Dist. Ex. 3 at pp. 9-10, and Dist. Ex. 5 at pp. 9-10). The student "demonstrate[d] somewhat inconsistent attention and engagement during [occupational] therapy sessions" with "[h]is level of participation [often] depend[ent] on his motivation to complete the task at hand" (Dist. Exs. 1 at p. 8; 3 at p. 9; 5 at p. 9). The student "respond[ed] positively to vestibular and proprioceptive input provided via . . . movement-based activities"; however, due to noncompliant behaviors, such as whining or throwing his body to the floor, the student was "often unable to participate in sensorimotor activities" (id.). Instead, sessions "focus[ed] on his engagement during tabletop activities" (id.).

The April 2024 IEP reported the following information, also derived from the OT progress reports, regarding the student's fine and graphomotor skills (compare Dist. Ex. 1 at p. 9, with Dist. Exs. 3 at p. 10, and Dist. Ex. 5 at p. 10). The student "alternate[d] between using a static tripod and digital pronate grasp to manipulate writing tools" (Dist. Exs. 1 at p. 9; 3 at p. 10; 5 at p. 10). During writing and coloring tasks, the student needed "intermittent verbal and tactile cueing to incorporate his non-dominant hand to stabilize the paper" (id.). The student could "trace uppercase letters within one-inch boxes, often benefiting from moderate to maximum tactile prompting for increased precision" (id.). During coloring tasks, the student "typically scribble[d] across areas rather than confining movements within indicated areas," but he showed "improvement filling white space" with modeling and "moderate verbal and visual cueing" (id.). During cutting tasks, the student "benefit[ed] from initial assistance to properly grasp the scissors" and align them with

designated lines, but he "demonstrate[d] fair coordination with scissors and c[ould] navigate straight, curved, and jagged lines[,] as well as basic shapes . . . within [1/4 to 1/2] inch with . . . supports provided" (*id.*).²⁴ For keyboarding, the student "benefit[ed] from a model to identify the letters in his first name" (*id.*). "[G]iven faded verbal and visual prompting, the student would "scan[]" the keyboard to identify corresponding letters" and use his index fingers to access letter keys (*id.*).

According to the April 2024 IEP, the student was receiving PT at MSA, the school he was attending at the time of the CSE meeting (see Dist. Ex. 1 at p. 10). The IEP further reported that, during the CSE meeting, the parent stated that she wanted "additional time to think about a physical therapy evaluation for" the student, that the student was "on medication to calm his behaviors," that his hearing and vision were within the normal range, and that he had no allergies or asthma (*id.*).

2. Sufficiency and Consideration of Evaluative Information and Annual Goals

On appeal, the parties dispute whether the IHO erred in determining that the district's failure to reevaluate the student prior to the April 2024 CSE meeting did not deprive the student of a FAPE for the 2024-25 school year. According to the parent, the district relied on outdated information from progress reports prepared in January 2023, over a year prior to the April 2024 CSE meeting, in developing the subject IEP; the district failed to explain why updated progress reports were not used; and the district failed to establish how such outdated information resulted in an appropriate IEP for the student.²⁵ The parent further argues that the annual goals included in the April 2024 IEP, which were copied from MSA's October 2023 "areas of instructional and therapeutic focus," were no longer appropriate for the student for the 2024-25 school year.

The district argues that the present levels of performance section of the student's IEP included information from a March 2024 teacher progress report, a March 2024 speech-language therapy progress report, and a March 2024 OT report, as well as input from the parent and MSA's special education coordinator, each of whom attended the CSE meeting. Thus, according to the district, the April 2024 CSE had up-to-date information regarding the student's then present levels of performance, which was reflected in the April 2024 IEP.

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

²⁴ The student was "able to sustain his grasp on scissors and appropriately grade force to create cuts in construction paper, benefiting from minimum to moderate tactile prompting at the wrist to smoothly sequence the 'squeeze, release' movement pattern" (Dist. Exs. 1 at p. 9; 3 at p. 10; 5 at p. 10). He needed "moderate verbal and tactile prompting to incorporate his non-dominant hand, as well as assistance to stabilize and turn the paper" (*id.*).

²⁵ According to the parent, information from the 2022-23 school year was not reflective of the student's present levels of functioning.

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. v. New York City Dep't of Educ.*, 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).

A CSE is not required to only use evaluative information from its own sources in the preparation of an IEP and is not precluded from relying on privately obtained evaluative information in lieu of conducting its own evaluation (*M.H. v. New York City Dept. of Educ.*, 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; *Mackey v. Board of Educ.*, 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80).

Moreover, a district may rely on information obtained from a student's private school personnel, including sufficiently comprehensive progress reports, in formulating a student's IEP (see *C.M.*, 2017 WL 607579, at *15-*17; *D.B.*, 966 F. Supp. 2d at 329-31; *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at *23 [S.D.N.Y. Mar. 29, 2013]; *S.F.*, 2011 WL 5419847, at *10).

In this case, the district's prior written notice shows that the April 2024 CSE considered March 2024 progress reports from the student's teacher and related services providers, which, as discussed in detail above, provided a comprehensive description of the student's needs and then-current functioning across the following domains: reading, writing, and math; receptive, expressive, and pragmatic language; social/emotional and behavior; daily living; sensory processing; and motor (see Dist. Ex. 3 at pp. 4-11). Review of the subject IEP reveals that the CSE incorporated information from those reports, which the prior written notice indicated were compiled within one month prior to the CSE meeting, along with additional information provided by the parent and MSA's special education coordinator during the meeting (see Dist. Exs. 1 at pp. 3-10; 2; 3 at pp. 4-11). Although, as noted above, the information attributed in the prior written notice to progress reports from March 2024 was substantially the same as the information contained in the January 2023 progress reports, the parent does not point to any specific

information within the April 2024 IEP that was inaccurate. Additionally, while the parent asserts that the present levels of performance were solely based on outdated information, the parent does not account for the participation of the parent and the MSA special education coordinator at the April 2024 CSE meeting. Thus, the evidence in the hearing record belies the parent's contention that the April 2024 CSE relied only on outdated information in developing the student's IEP.

I now turn to the parent's claim that the annual goals included in the April 2024 IEP failed to appropriately address the student's needs for the 2024-25 school year.

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 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]). The IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M., 2017 WL 607579, at *20-*21).

Here, the April 2024 CSE developed approximately 17 annual goals to assist the student with reading, writing, and math and to improve his speech-language skills, social/emotional, daily living, and motor skills (see Dist. Ex. 1 at pp. 14-28). Review of the annual goals shows that they were measurable, with defined criteria, methods, and schedules for monitoring progress; and all goals related to the needs identified in the student's present levels of performance (see *id.* at pp. 3-10, 14-28).²⁶ In the request for review, the parent argues that the annual goals in the April 2024 IEP were from the student's October 2023 MSA "Areas of Instructional and Therapeutic Focus" document and asserts that, therefore, the goals were "no longer appropriate for the 2024-25 school year" (compare Dist. Ex. 1 at pp. 14-28, with Dist. Ex. 6). However, the parent does not provide any specific dispute as to the accuracy of the student's present levels of performance as described in detail in the April 2024 IEP, drafted six months after the October 2023 goals were developed and which included information about the student provided by the MSA special education coordinator at the meeting (see Dist. Ex. 1 at pp. 3-10, 38). Additionally, there is no indication that the October 2023 goals were met by the time of the April 2024 CSE meeting, and as discussed above, the annual goals in the April 2024 IEP addressed the student's needs as described (see *id.* at pp. 3-28).

²⁶ The April 2024 IEP included two specific music therapy goals even though music therapy was not a recommended service (see Dist. Ex. 1 at pp. 19-20, 29-30). Although the student's present levels of performance lacked detail regarding music therapy, the music therapy goals aimed to improve the student's communication skills and the student's length of engagement in an activity, needs which were discussed in the student's present levels of performance (see *id.* at pp. 3-12, 19-20).

Aside from the assertion that the annual goals were inappropriate for the 2024-25 school year, the parent's request for review identifies no other substantive deficiency in the April 2024 IEP or educational benefit denied to the student as a result of the district's failure to conduct a reevaluation of the student (see Req. for Rev. ¶¶ 4-11).

Based on the foregoing, I decline to disturb the IHO's determination that the procedural violation of failing to conduct a reevaluation of the student within three years after the student's prior evaluation, did not constitute a substantive denial of a FAPE in the development of the April 2024 IEP for the 2024-25 school year (see, e.g., Application of the Dep't of Educ., Appeal No. 14-083 [finding that the district's failure to conduct a triennial evaluation did not amount to a denial of a FAPE where the CSE incorporated information regarding the student's needs and functioning from a December 2011 private school progress report into the student's May 2012 IEP]; Application of the Dep't of Educ., Appeal No. 13-062 [finding that the annual goals included in the subject IEP were not so "inaccurate as to constitute the denial of a FAPE," notwithstanding differences from the goals proposed by the student's private school, where the IEP annual goals "were aligned with the student's needs to the extent described in the present levels of performance"]); Application of the Dep't of Educ., Appeal No. 12-170 [overturning the IHO's determination that the annual goals included in the subject IEP were inappropriate because, "when read in conjunction with the short-term objectives," they "targeted the student's identified areas of need and provided sufficient information to guide a teacher in instructing the student and measuring her progress"]).

3. Interfering Behaviors (FBA/BIP)

The next disputed issue is whether the IHO erred in determining that the district's failure to conduct an FBA and develop a BIP for the student did not deprive the student of a FAPE for the 2024-25 school year. The parent argues that, while the IHO found the hearing record "devoid of evidence that the [s]tudent's behavior was of the nature that it actually impeded his learning and the learning of others," the April 2024 IEP stated that the student "present[ed] with behaviors that interfere[d] with progress" (Req. for Rev. ¶¶ 12-16 [internal quotation marks omitted]).²⁷ The parent further argues that the IHO wrongly considered the lack of a formalized behavior plan at MBC, which, according to the parent, had "no bearing on whether the [district] should have conducted an FBA" (id. ¶ 15). Finally, the parent argues that the district failed to explain the discrepancies in the April 2024 IEP regarding the student's need for behavioral interventions.²⁸ The district does not dispute that it did not conduct an FBA or develop a BIP for the student but argues that the IEP appropriately addressed the student's behavioral needs. More specifically, the

²⁷ According to the parent, the CSE's failure to conduct an FBA to obtain essential information about the way in which the student's "behaviors impeded his learning is additional proof that the CSE lacked sufficient information about [the student's] educational needs at the time the IEP was developed" (Req. for Rev. ¶ 13).

²⁸ The parent notes that, while the April 2024 IEP indicated that the student did not need strategies to address behaviors that impeded his learning or the learning of others, it also indicated that the student needed a BIP. The parent further notes that, although the CSE did not conduct an FBA and did not develop a BIP, the IEP stated, "[p]lease see the functional behavior assessment and behavior intervention plan" (Req. for Rev. ¶ 14 [internal quotation marks omitted]). The parent asserts that the evidence in the hearing record provided no explanation for these contradictory statements in the IEP. In its answer, the district attributes the IEP's reference to an FBA and BIP to a clerical error (Answer ¶ 6).

district argues that the April 2024 IEP recommended 1:1 paraprofessional services for the student's behaviors; various strategies to help regulate the student's behaviors; and annual goals to address the student's attentiveness and reciprocal play skills.

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). A district is also 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]).

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; see also *L.O. v. New York City Dep't of Educ.*, 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that, in such instances, particular care must be taken to determine whether the IEP addresses the student's problem behaviors (*id.*).

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 on an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]).²⁹ In that regard, the

²⁹ In *R.E.* and *L.O.*, the Second Circuit indicated that, if a student has interfering behaviors, a BIP must be developed, citing 8 NYCRR 200.22 (*R.E.*, 694 F.3d at 190; *L.O.*, 822 F.3d at 111; see *A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 535 [2d Cir. 2017]); however, the Second Circuit did not discuss the whole of the text of the regulation, which indicates that the CSE "shall consider the development of a [BIP]" in certain

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. 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).

As detailed above, the description of the student included in the present levels of performance section of the April 2024 IEP, indicates that the student demonstrated interfering behaviors, of which the district was aware (see Dist. Ex. 1 at pp. 5-8). Specifically, the IEP indicated that, when upset or disengaged, the student demonstrated maladaptive behaviors that interfered with progress including tantrums with crying, screaming, flopping to the floor, physical aggression, and/or defiance (see id.). Thus, the district violated its procedural obligations by failing to conduct an FBA to determine the factors related to the student's interfering behaviors and whether the student required a BIP to address his behaviors (20 U.S.C. § 1414 [d][3][B][i]; 34 CFR 300.324 [a][2][i]; 8 NYCRR 200.4 [d][3][i], 200.22[a], [b]).

Nevertheless, the district's failure to conduct an FBA does not automatically render the subject IEP deficient; and the April 2024 IEP must be closely examined to determine whether, in

instances, such as 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" (8 NYCRR § 200.22[b]), which language is less absolute.

the absence of an FBA and a BIP, the CSE otherwise addressed the student's interfering behaviors (C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 139-41).

Upon review, the April 2024 IEP lacked information regarding the frequency of the student's maladaptive behaviors and did not include an annual goal targeting reducing tantrums or aggression specifically; however, as discussed in greater detail above, the present levels of performance provided descriptive information regarding the student's interfering behaviors including possible antecedents and suggested interventions (see Dist. Ex. 1 at pp. 7-8). The April 2024 IEP included various management strategies to support behavioral regulation, as well as several annual goals to improve the student's social/emotional skills (see id. at pp. 10-12, 18, 22-23). Such goals included: "self-advocate . . . by producing 1-2 word phrases (e.g., need help, want break, want open) using his preferred method of communication"; "tolerat[e] wait time (e.g., keeping hands down or to self)"; and demonstrate attending behavior while participating in whole group instruction "by remaining seated in the instructional area, sitting upright, and maintaining visual focus on the activity" (id. at pp. 18, 22-23).

To further address the student's learning and behavioral needs, the April 2024 CSE recommended an 8:1+1 special class placement along with full-time, individual paraprofessional services to provide behavioral support throughout the day (Dist. Exs. 1 at pp. 12, 29-30; 3 at pp. 3, 11).³⁰ In her hearing testimony, the parent expressed concern that, because the district did not conduct an FBA or develop a BIP, the paraprofessional would not have anything specific to do and would not provide adequate behavioral support (Tr. p. 62). However, as indicated above, the April 2024 IEP provided strategies for preventing and responding to the student's maladaptive behaviors such as use of a token board, breaks, a visual schedule, physical prompts, and verbal cues (see Dist. Ex. 1 at pp. 4, 7-8).

Thus, while the district should have conducted an FBA and considered whether the student required a BIP to address his behaviors, its failure to do so in this instance "did not rise to the level of denial of a FAPE," as the student's interfering behaviors were "identified as a special education need in the IEP present levels of performance" and "addressed through the recommended [8:1+1] special class placement," the recommended 1:1 behavior paraprofessional services, IEP management strategies, "and the social/emotional/behavioral annual goals" (Dist. Ex. 1 at pp. 5-8, 10-12, 18, 22-23; Application of the Bd. of Educ., Appeal No. 21-154; see also Application of a Student with a Disability, Appeal No. 17-030 [finding that the lack of an FBA or a BIP did not "rise to the level of a denial of a FAPE" because the "CSE had sufficient information regarding the student's behaviors" and made "recommendations to address the student's behavioral needs"]; Application of a Student with a Disability, Appeal No. 12-166 [finding that the district's failure to conduct an FBA did not deprive the student of a FAPE where the subject "IEP adequately described the student's interfering behaviors" and provided "strategies and supports to address" those behaviors including "the services of a 1:1 paraprofessional, as well as annual goals . . . related to behavior"]).

³⁰ The hearing record indicates that, despite later challenging the CSE's recommendation for 1:1 behavior paraprofessional services, the parent expressed agreement with that recommendation during the April 2024 CSE meeting (see Tr. at pp. 52-53, 62; Parent Ex. A at p. 1; Dist Ex. 1 at p. 8; Due Process Compl. Not. at p. 2).

VII. Conclusion

In summary, the hearing record supports the IHO's determination that neither the district's failure to conduct a triennial evaluation nor the district's failure to conduct an FBA of the student substantively deprived the student of a FAPE for the 2024-25 school year; and I decline to review whether the district denied the student a FAPE by its failure to recommend PT, as that claim was outside the scope of the impartial hearing. Thus, the necessary inquiry is at an end, and I need not review whether MBC was an appropriate unilateral placement for the student or whether the parent presented sufficient evidence of a financial obligation to MBC (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

THE APPEAL IS DISMISSED.

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

STEVEN KROLAK
STATE REVIEW OFFICER