The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-077

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

**Appearances:**
MSR Legal & Consulting Services, PLLC, attorneys for petitioners, by Oroma Mpi-Reynolds, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Carey Cummings, Esq.

**DECISION**

## I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied in part their request to be reimbursed for their daughter's tuition costs at the Manhattan Star Academy (MSA) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that the district failed to demonstrate that it had offered to provide an appropriate educational program to the student. The appeal must be dismissed. The cross-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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but

is not limited to, parents, teachers, an individual who can interpret theinstructional implications of evaluation results, and a chairperson that falls within statutory cri teria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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 the case and the IHO's decision will not be recited here in detail.

The student received services through the Early Intervention Program, which included applied behavioral analysis (ABA) services, speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Dist. Ex. 7 at p. 11).

In anticipation of the student's transition to the Committee on Preschool Special Education (CPSE), the student underwent a psychological evaluation in May 2023, as well as an educational evaluation, classroom observation, speech-language evaluation, PT evaluation and OT evaluation in June 2023 (Dist. Ex. 7 at pp. 12-24, 26-40). The student's mother also served as the informant for a social history (id. at pp. 7-11).

The CPSE convened on July 12, 2023 and determined that the student was eligible for special education as preschool student with a disability (Dist. Ex. 10 at pp. 1, 3). In the resulting IEP, which had a projected implementation date in September 2023, the CPSE recommended that the student attend a 12:1+2 full day special class in an early childhood program and receive two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of group speech-language therapy per week, three 30-minute sessions of individual OT per week, and three 30-minute sessions of individual PT per week, all on a 12-month basis (id. at pp. 21-22). The CPSE also recommended special transportation services for the student and noted that the recommended 12:1+2 full day special class would be part of an "Approved Special Education Program" (id. at p. 24).

A Final Notice of Recommendation dated July 12, 2023 was sent to the parent (Dist. Ex. 12; see Parent Ex. N). The notice listed the program recommended by the CPSE but did not include a site/school where the services would be delivered (Dist. Ex. 12).

Also on July 12, 2023, the CPSE administrator emailed the parent to request permission to communicate with her via email; upon receiving that permission, the administrator sent three proposed school sites to the parent (see Parent Ex. N).

The parent signed an enrollment contract with MSA on July 19, 2023 for the 2023-24 10-month school year, as enrollment was set to begin on September 7, 2023 (Parent Ex. G at pp. 1, 6).[1] The total tuition for MSA was $102, 900 for the 2023-24 school year.

On August 11, 2023, the parents, through their attorney,[2] sent the district a ten-day notice of their intention to unilaterally place the student at MSA for the 2023-24 school year and seek

[1] MSA's representative did not sign the contract until August 3, 2023 (Parent Ex. G at p. 6).

[2] While the parents both appear on the student's behalf in this State-level review, references to "the parent" in the singular are to the student's mother, who was identified by herself in numerous communications between the parties, testified at the impartial hearing, and was listed by herself as the parent on the due process complaint notice (see Tr. pp. 65-94; Parent Exs. A; O; see also Req. for Rev.).

funding for the costs from the district (see Parent Ex. B). In this letter, the parents asserted that the student required additional 1:1 support and that the July 2023 IEP did not include "an appropriate level of academic, behavioral, and motor support" for the student (id. at p. 2).

The CPSE reconvened on August 24, 2023 to modify the student's IEP by adding special transportation with limited travel time on the bus to and from school (compare Dist. Ex. 3 at p. 24, with Dist. Ex. 10 at p. 24).[3]

A Final Notice of Recommendation dated August 24, 2023 was sent to the parents (see Dist. Ex. 4). The notice listed the recommended CPSE services, but not the site/school where the services would be delivered (id.).[4]

In a due process complaint notice, dated September 7, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A).[5] Specifically, the parent asserted that the district failed to assess the student in all areas of suspected disability; failed to recommend sufficient support, such as 1:1 support; recommended a class that was too large; and failed to offer an appropriate placement for the student (id. at p. 2). The parent contended that she was left with no other recourse but to unilaterally place the student at MSA for the 2023-24 school year (id.). The parent requested prospective funding of tuition, related services and fees for the entire 2023-24 school year; reimbursement for all monies paid; and for implementation of transportation services (id. at p. 3).[6]

An impartial hearing convened on October 12, 2023 and concluded on January 3, 2024, after four days of proceedings (see Tr. pp. 1-99). In a decision dated January 27, 2024, the IHO determined that he was "constrained to find that the District failed to meet its burden to demonstrate that it conducted an appropriate review, that it conducted relevant evaluations, developed an appropriate IEP, and/or offered the Student an appropriate placement for the 2023-24 school year" (IHO Decision at pp. 10, 17-18). More specifically, the IHO found that the district failed to offer the student a FAPE, holding that there was a lack of explanation regarding the district's failure to recommend ABA services and parent counseling and training despite evaluations indicating that these services were necessary (id. at pp. 8-10, 17-18). The IHO also faulted the district for a lack of recommendations in its evaluations (id. at p. 18). Next, the IHO

[3] As the substantive program was recommended in July 2023, for purposes of clarity throughout this decision, the initial July 2023 IEP will be referred to for the remainder of the decision.

[4] The district submitted into the hearing record excerpts from its special education student information system (SESIS) events log, which contained several entries throughout the CPSE process (Dist. Ex. 13). The final notice of recommendation was referred to as a C-7P form (id., see Dist. Ex. 4).

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

[6] The parent requested an order that the district "prospectively pay or satisfy the Parent's debt by direct payment" for transportation services, until such time that the district adequately implemented the student's transportation (Parent Ex. A at p. 3).

held that the district failed to present testimonial evidence regarding the proposed placements as to whether there was availability for the student or whether they were capable of implementing the IEP (id. at p. 9). The IHO found that MSA was an appropriate placement for the student for the 2023-24 school year (id. at pp. 11-12, 19-20).[7] However, he was "constrained to find that the Parent did not make a good faith effort to explore the District's proposed placements and that the Parent never had any intention of actually placing the Student in a public school" and that the parent, at best, made a "perfunctory effort" to tour the proposed schools (id. at pp. 11-12, 22-23). The IHO noted that a parent could not make a student and themselves unavailable to tour schools and then claim the district did not offer an appropriate program (id. at p. 22). Based on the findings that the equities did not favor the parent, the IHO held that it was appropriate to limit the parent's entitlement to tuition reimbursement and/or direct funding to $25,000.00 (id. at p. 24).

## IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's cross appeal thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The gravamen of the parties' dispute on appeal is whether the IHO erred in concluding that the district failed to offer the student a FAPE for the 2023-24 school year due to inadequate support in the IEP and a lack of a witness to testify about the availability of the proposed placement and whether the IHO erred in reducing the award of tuition costs at MSA due to equitable considerations.

## 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

[7] The IHO noted that the district did not contest the appropriateness of the unilateral placement (IHO Decision at pp. 11, 19).

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]).[8]

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. 2023-24 IEP

Turning first to the district's cross-appeal, the district contends that the issues of whether the student was properly evaluated or whether the IEP lacked a specific recommendation were not raised in the due process complaint notice and that the IHO therefore erred. The district argues that ABA services were not necessary for the program to meet the student's needs and asserts that some ABA principles were written into the IEP to address the student's needs. Further, the district contends that the CSE properly reviewed the information before it to recommend an appropriate program and placement for the student. Lastly, the district asserts the IHO erred by faulting it for not presenting a witness from the recommended placement because the implementation claims did not go to the district's ability to implement the IEP.

As to the issues raised in the due process complaint notice, the district is incorrect that the parent failed to raise a claim regarding the sufficiency of evaluative information in the due process complaint, as the parent raised the adequacy of the assessments of the student (see Parent Ex. A at ¶ 7). The parent also alleged that the proposed placements were inappropriate and unsafe due to the class size being too large for the student to be able to function safely and receive adequate attention for learning purposes (id. at ¶ 12), thus the district's argument regarding a lack of

[8] 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).

allegations in the due process complaint notice regarding a deficient IEP programming recommendation is also without merit.

However, the parent's allegation is nevertheless unavailing. While the parent mentioned the sufficiency of the evaluative information in her due process complaint notice, she at no point identified any particular area of need or concern that was not evaluated by the district. The parent only made a bare statement that the district failed to assess all areas of suspected disability (Parent Ex. A at ¶ 7). The parent did not elaborate during the impartial hearing as to whether there was any area of need not evaluated and the parent did not argue that the present levels of performance as listed in the IEP were improper or inappropriate. Therefore, I will discuss the evaluations as needed to render a decision on the merits of the parent's other claims, specifically, class size and need for ABA services. Moreover, as discussed below, the description of the student's needs in the IEP aligned with the evaluative information and the parent does not otherwise point to any specific needs, abilities, strengths or weaknesses of particular importance that the student exhibited, and the July 2023 IEP failed to include. As such, even if the parent had alleged some defect in the evaluation of the student with greater particularity, I nevertheless find it would not result in a denial of a FAPE and, as further described below, that the CPSE relied on sufficient evaluative information available to it to develop the student's IEP for the 2023-24 school year.

**1. Student's Needs**

The hearing record indicates that the July 2023 IEP was based upon the student's initial evaluation completed by First Step Evaluations which included a May 2023 social history report and psychological evaluation; and an educational evaluation, classroom observation, speech-language evaluation, PT evaluation and OT evaluation all completed in June 2023 (compare Dist. Ex. 10 at pp. 3-5, with Dist. Ex. 7 at pp. 3-4; 10-40; see Dist. Ex. 14 ¶¶ 6, 10).[9]

The district's CPSE administrator testified via affidavit that she participated in the student's July 2023 CPSE meeting, along with a regular education teacher; a special education teacher who was also the representative for the agency that conducted the student's initial evaluations; and the parent (Dist. Exs. 10 at p. 2; 14 ¶ 7). She further testified that in creating the student's IEP, the CPSE reviewed the student's initial evaluations that included cognitive, social/emotional, motor development and language evaluations (Dist. Ex. 14 ¶ 6). The CPSE administrator testified that the CPSE's 12:1+2 full day special class recommendation was for a class that was smaller than the student's previous class and would provide the student significant individualized support and enable her to make progress (id. at ¶¶ 8-9).

With respect to the student's cognitive abilities, the July 2023 IEP reflected the results of a May 2023 administration of the Stanford-Binet Intelligence Scales, Fifth Edition (SB-5), which yielded a full scale intelligence quotient (FSIQ) of 66 and "classified" the student in the mildly

[9] For preschool students with disabilities, the parent selects an SED approved evaluator and in this case First Step Evaluations was selected. The parent must thereafter provide written consent for the proposed evaluation pursuant to section 200.5(b)(1) and section 200.16(c) (see "Evaluations of Three- and Four-Year-Old Children Suspected of Having Disabilities Pursuant to Section 4410 of the Education Law" VESID Mem. [Aug. 2003], available at https://www.nysed.gov/sites/default/files/programs/special-education/evaluation-of-three-and-four-year-old-children-suspected-of-having-disabilities_0.pdf).

impaired range of intelligence (compare Dist. Ex. 7 at pp. 3, 13, with Dist. Ex. 10 at p. 3).[10] As related to daily living skills, the July 2023 IEP indicated that the student's skill level fell in the "[l]ow" range; the student was not toilet trained, used a spoon and fork, took off her socks, sometimes cleaned up, and did not demonstrate safety awareness (Dist. Ex. 10 at p. 3; see Dist. Ex. 7 at p. 15).

As related to the student's communication, the July 2023 IEP included information from the June 2023 speech-language evaluation (compare Dist. Ex. 7 at pp. 4, 27-28, with Dist. Ex. 10 at p. 3). Administration of the Preschool Language Scales – Fifth Edition (PLS-5) yielded a standard score of 73 and percentile rank of four indicating that the student's receptive and expressive language skills were significantly delayed (compare Dist. Ex. 7 at pp. 4, 27-28, with Dist. Ex. 10 at p. 3). The IEP stated that the student demonstrated delayed speech intelligibility and delayed oral-motor sensory and feeding skills that included immature chewing, cup drinking and swallow patterns (Dist. Ex. 10 at p. 3). In the area of receptive language, the IEP noted that the student had difficulties with grammatical development, critical thinking, vocabulary, auditory directives, and linguistic concepts (id.). As related to expressive language, the student demonstrated difficulty with syntax, questions, and vocabulary (id.). The IEP stated that the student's strengths included her ability to act out clapping, waving and knocking on a door; point to her mouth, nose, fingers and hair; name a ball and duck; rote count to three; place a half-shape in a form board; and find a few hidden objects (id.). As related to the student's needs, the IEP indicated that the student did not match like objects, describe pictures, name actions, identify "more" or "larger" by pointing, count items one by one, follow directions containing positional concepts such as "on," or repeat back any short sentences spoken by the evaluator (id. at pp. 3-4).

In the area of social/emotional development, the July 2023 IEP included scores from the Developmental Assessment of Young Children, Second Edition (DAYC-2), administered during the June 2023 educational evaluation, which yielded a standard score of 76 on overall social/emotional skills and indicated the student performed at or better than five percent of children her age (compare Dist. Ex. 7 at pp. 3, 19, with Dist. Ex 10 at pp. 3, 4). The IEP stated that the student was a sweet girl that demonstrated pride in her accomplishments, frequently applauded when she accomplished a task, enjoyed music and dance activities and noted she swayed, clapped and tapped along to music (Dist. Ex. 10 at p. 4). The IEP noted that the student sat for short periods at circle time, did not sing but followed repeated and routine motions, and played functionally with select toys (id.). The student did not interact or share with peers and could aggressively push and grab items possessively from them (id.). The IEP reported the student had a limited attention span, was self-directed, did not make requests, whined and had tantrums when she did not get her way, and could act out and be disruptive if routines changed (id.).

The July 2023 IEP indicated that, according to the parent, at home the student was a sweet, calm girl who played nicely by herself; the student looked at books, played with kitchen toys, blurted out words, hummed, read and sang to herself (Dist. Ex. 10 at p. 4; see Dist. Ex. 7 at p. 16). In the area of social development, the IEP included additional information from the May 2023 psychological evaluation report that indicated the student was self-directed, strong willed, had a

[10] The testing also yielded a nonverbal IQ of 70 (borderline impaired) and a verbal IQ of 64 (mildly impaired) (Dist. Ex. 7 at p. 13; see Dist. Ex. 10 at p. 3).

hard time functioning in school, needed constant 1:1 assistance in school and "only participate[d] in classroom activities when she [wa]s given 1:1 support" (compare Dist. Ex. 10 at p. 4, with Dist. Ex. 7 at p. 16). The IEP included further information that the student did not maintain eye contact, demonstrate interest in other children, like changes in routine, or use functional language; the student had frequent tantrums in school, screamed, kicked, grabbed, cried and was aggressive with others (id.).

With respect to the student's physical development, the July 2023 IEP included scores from the administration of the Peabody Developmental Motor Scales – Second Edition (PDMS-2) in June 2023, that yielded a gross motor quotient of 68 and a fine motor quotient of 67, with delays of greater than two standard deviations in both areas (compare Dist. Ex. 10 at p. 3, with Dist. Ex. 7 at pp. 4, 34, 39). The IEP noted that the student demonstrated deficits in muscle tone, muscle strength, and balance and coordination (Dist. Ex. 10 at p. 4). In addition, it noted that the student was beginning to negotiate stairs; however, relied on adult support for safety as she tended to drop to her hands and knees to crawl (id.). The IEP stated that the student did not jump, had limited ball play skills, did not pedal a tricycle, ride a scooter or balance on one foot (id.). As related to fine motor skills, the IEP indicated that the student completed simple puzzles, did not always turn pages one by one, or open doors by turning and pulling a doorknob; the student presented with delays in sensory processing skills (id.).

**2. 12:1+2 Full Day Special Class**

With regard to the parties' dispute over the adequacy of the 12:1+2 full day special class setting, State regulation provides that:

> [i]f the [CPSE] determines that the preschool child has a disability, the [CPSE] shall recommend approved appropriate services and/or special programs and the frequency, duration, location and intensity of such services including, but not limited to, the appropriateness of single services or half-day programs based on the individual needs of the preschool child. The committee shall first consider the appropriateness of providing (i) related services only; or (ii) special education itinerant services only; or (iii) related services in combination with special education itinerant services; or (iv) a half-day preschool program as defined in section 200.1(u) of [Part 200]; or (v) a full-day preschool program as defined in section 200.1(p) of [Part 200]

(8 NYCRR 200.16[e][3]). A full-day preschool program means an approved special education program that provides instruction for a full-day session, which shall not be less than five hours per day of instruction for preschool students with disabilities (8 NYCRR 200.1[p]-[q]). The maximum special class size for a full day or half day program shall not exceed 12 preschool students with at least one teacher and one or more supplementary school personnel assigned to each class (8 NYCRR 200.16[i][3][iii][b]).

Based on the student's identified needs as indicated above, the July 2023 CPSE recommended the student attend a 12-month 12:1+2 full day special class setting and receive related services of two 30 minute sessions of individual speech-language therapy per week, one

30 minute session of speech-language therapy in a group per week, three 30-minute sessions of individual OT per week, and two 30-minute sessions of individual PT per week (Dist. Ex. 10 at pp. 1, 21-22). To further support the student within a 12:1+2 full day special class, the July 2023 CPSE identified management strategies that included: repetition; visual/verbal cues/prompts; positive reinforcement; praise/encouragement; use of a reward system; sensory breaks; first/then statements; modeling; choices in a field of two; small group instruction; and simplified directions (id. at p. 5).

The parent, in her direct testimony by affidavit, stated that a "12-student classroom would be too large, since it's similar to the nursery school that [the student] attended where she struggled" (Parent Ex. O ¶ 14). In contrast, the CPSE administrator stated the 12:1+2 full day special class was smaller than the student's previous class size of 15 students and the staffing ratio would provide the student with "significant individualized support" (Dist. Ex. 14 ¶ 8). The CPSE administrator further testified that when making a recommendation the CPSE took into consideration the fact that the student previously attended a class with a general education teacher and 15 students, and that she did not have a special education teacher who worked with her all day long (Tr. p. 39).[11]

According to the July 2023 IEP, the CPSE considered the student for general education services with support services and a special class in an integrated setting (SCIS) but did not recommended either of these placements (Dist. Ex. 10 at p.1). Rather, the CPSE recommended that the student attend a 12:1+2 full day special class, noting that she needed the structure and support of this setting to address her delays in cognitive, speech/language, fine-motor, sensory, gross-motor, adaptive and social/emotional development (Dist. Exs. 10 at p. 1; 14 at ¶ 16).

According to her direct testimony by affidavit, the CPSE administrator stated that the list of management resources was created to address the student's deficit areas that manifested in the classroom and included sensory breaks, simplified directions, and repetition (Dist. Ex. 14 at ¶14). Further, the CPSE administrator testified that the July 2023 IEP contained "[22] specific and measurable annual goals", and opined that the 12:1+2 special class, with recommended related services of PT, OT, and speech-language therapy, and management strategies were appropriate and reasonably calculated to "meet [the student's] goals and [allow her to] make measurable progress during the 2023-[]24 school year" (id. at ¶¶ 16, 19).

[11] State law requires that programming for preschool students with disabilities be provided in the least restrictive environment (LRE) (Educ. Law § 4410). During cross-examination, the CPSE administrator testified that in relation to class sizes of 8:1+2, 6:1+2, or 12:1+2, the 12:1+2 was appropriate for the student in consideration of "the least restrictive environment" and in consideration of "the number of students in the classroom environment" (Tr. p. 39). The administrator properly took the student's then-current, less supportive environment into account; however, the variation in special class student-to-staff ratios discussed by the CPSE administrator in terms of restrictiveness was irrelevant with regard to the student's LRE because a full day special class program would not provide greater or less access to nondisabled peers regardless of the ratio of how many disabled students attended a particular special class. It would only make a difference in terms of LRE if a special class in an integrated setting (SCIS) program had been proposed as a realistic option for the student at the time of the CPSE meeting. However, it is of little consequence in this case as neither party is asserting that the student should have been educated with non-disabled peers.

Based on the above, while the parents may have preferred a smaller special class setting such as the 8:1+2 special class ratio that the student was in at MSA, the hearing record reflects that the 12:1+2 special class recommended by the July 2023 CPSE was an appropriate full day special class setting to address the student's needs.

**3. 1:1 Support/ABA Methodology**

In its cross-appeal the district argues that the IHO erred in finding that the district did not offer the student a FAPE due to the CPSE's lack of recommendation for ABA services and parent counseling and training because the parent did not raise the issues of a lack of ABA services or parent counseling and training in the due process complaint notice and the IHO should not have reached that issue. The parents "refute" that the issues were not in their due process complaint notice and cite to page 2 of their due process complaint notice, which, upon review, notably did not contain any reference to a lack of ABA services or parent counseling and training (Parent Ex. A). The parents also assert that there was evidence of a clear consensus regarding the student's need to be instructed using ABA methodology.

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]). 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], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; 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]).

Here, the parent did not raise the issue of a lack of parent counseling and training in the IEP in the due process complaint nor did the parent make such a request during the impartial hearing (see Tr. pp. 1-99; Parent Ex. A). Therefore, the IHO improperly expanded the scope of the impartial hearing to include the related service of parent counseling and training. Accordingly, this issue was outside the scope of the impartial hearing and is outside the scope of review in this

appeal. [12] However, the claims regarding a lack of more intensive services in the IEP, such as 1:1 support, was raised in the due process complaint and will be addressed (see Parent Ex. A at ¶ 9).

The evidence shows that in May 2022, at the age of 20 months, the student received an Early Intervention psychological evaluation in which the student received a diagnosis of autism spectrum disorder (ASD), and the evaluator recommended a comprehensive program of interventions that included ABA services (Parent Ex. D at p. 12). The hearing record shows that the student received 20 hours of ABA services per week through early intervention services (Tr. pp. 79-80; Parent Ex. O at ¶¶ 5, 7; Dist. Ex. 7 at p. 35). The May 2023 psychological evaluation, conducted prior to the student's transition to CPSE, included a recommendation that the student undergo a speech-language evaluation, as well as OT and PT evaluations, and stated that the results of such evaluations would be discussed with the parents upon completion (Dist. Ex. 7 at p. 16). The psychological evaluation further indicated that the parents would "participate in the review meeting at the district to determine how best to address [the student's] needs" (id. at p 17). It also noted that the final determination of services would be the responsibility of the CPSE (id. at p. 16).

Regarding the IHO's determination that the district denied the student a FAPE due to the "absence of recommendations in the evaluations conducted by the CPSE" (IHO Decision at p. 10), it is the CPSE under State law, not the evaluator, who is tasked with considering evaluative and other relevant information and then making a recommendation for appropriate special education programming and placement for a preschool student with a disability (see Educ. Law § 4410[4][c], [5][b]). Under state regulation, a CPSE is tasked with making recommendations for a student based on evaluations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]); the evaluations need not make specific recommendations in order to be deemed sufficient. Indeed, the IHO erred on this point insofar as the holding was premised upon a finding in direct conflict with State regulation. With respect to an initial evaluation of a preschool student to determine whether the student is eligible for special education, State regulation specifically provides that "The summary report shall not include a recommendation as to the general type, frequency, location and duration of special education services and programs that should be provided; shall not address the manner in which the preschool student can be provided with instruction or related services in the least restrictive environment; and shall not make reference to any specific provider of special services or programs" (8 NYCRR 200.16[c][2] [emphasis added]). The IEP recommendation for a preschool student with a disability shall be developed in accordance with 8 NYCRR 200.4(d)(2)-(4), which are provisions that also address the procedures for the development of IEPs for school-aged students (8 NYCRR 200.16[e][3]). In developing such recommendations, the CPSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulation (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

[12] Even if it had been raised, it was also substantive error for the IHO to premise a denial of a FAPE on the lack of parent counseling and training on the student's IEP because the services are required for students who have autism in any event, a point which the Second Circuit has ruled on and made repeatedly (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 122 [2d Cir. 2016]).

As related to the need for 1:1 support and ABA services in the student's IEP, during the impartial hearing the parent, in direct testimony by affidavit, asserted that the student's "nursery school/day care center" stated the student needed an adult next to her all day, either another teacher or her 1:1 ABA therapist, and the student did not pay attention to lessons without her 1:1 ABA therapist present (Parent Ex. O at ¶¶ 7-9). The parent testified that in December 2022, the student's nursery school informed her that it "couldn't handle [the student] the following year" and recommended that the parent look for a specialized preschool through the CPSE (id. at ¶ 10). According to the parent, the student benefitted from ABA and the student's nursery-school teacher reported "the ABA therapist provided [the student] with more structure, more supervision during the school day. And they suggested a full-time specialized program for [the student] that included ABA" (Tr. pp. 80-81). However, it does not appear that the parent's concern, raised at the impartial hearing, was brought to the CPSE's attention and it is unclear from the parent's testimony if she even verbally agreed or disagreed with the CPSE's recommendations at the July 2023 CPSE meeting. Of the CPSE meeting, the parent testified, "[w]ell, I thought [] in my mind, I thought that the class of 12 was a little large, and I thought that [the student] might need an ABA or a BCBA" (Tr. p. 82). Upon further questioning, the parent testified that she indicated to the CPSE that it was important for the student to continue ABA services and that she thought some public schools had a BCBA on staff (Tr. pp. 88-89). However, she did not recall whether ABA was listed as a service on the student's IEP, although she believed that she requested ABA services be included on the student's IEP (Tr. pp. 89-90).

The CPSE administrator testified she had knowledge through the CPSE evaluations and discussion that the student had previously received ABA services; however, she was not aware of the basis for the student receiving ABA services (Tr. pp. 27-28). As described above, the CPSE had several sources of evaluative information available to it to develop the student's IEP, including the May 2023 social history report, May 2023 psychological evaluation, and the educational evaluation, speech-language therapy evaluation and OT and PT evaluations all conducted in June 2023 (Tr. p. 27; Dist. Exs. 7; 14 at ¶ 6). Aside from noting the student received ABA services during early intervention, the CPSE evaluative information did not report, nor were there progress reports describing how the student was benefitting from ABA services.

During the impartial hearing, the CPSE administrator testified that ABA was not required to address the student's "severely delayed receptive and expressive language skills" and the CPSE did not recommend a 1:1 paraprofessional for the student (Tr. pp. 30, 31-32). She indicated that she was aware that the student was aggressive and opined that "those types of behaviors" were usually due to communication difficulties or an inability to appropriately interact with others (Tr. p. 31). The CPSE administrator explained that the methodologies used in the special class addressed "those types of skills" (Tr. p. 32). More specifically, the CPSE administrator explained that to address a student's "ability to be able to communicate with others effectively, appropriately interact with peers, whether it's to say hello or even if they're upset, [the special class] use[d] different types of strategies such as an emotions chart or repetition, [and] modeling" in addition to other management strategies (id.). Regarding the student's need for 1:1 support to participate in classroom activities as reported in the May 2023 psychological evaluation, the CPSE administrator testified that the skills with which the student had difficulty and need for 1:1 attention could be addressed with a special education teacher and two "teachers" in the full time special class setting

(id.).[13] Within direct testimony by affidavit, the CPSE administrator reported the CPSE did not recommend a 1:1 paraprofessional, as a crisis or a health paraprofessional would not be appropriate given the student's needs (Dist. Ex. 14 at ¶18).[14] The CPSE administrator specified the management strategies employed in the special class that included use of "a lot of prompting, visual cues, support, hand-over-hand assistance" as well as use of a visual schedule and songs, and noted the "expectations [we]re lower" so the teachers took their time with the children (Tr. pp. 32-33). With regard to the student's head banging, the CPSE administrator reiterated that the special education teacher and two teacher assistants would use management techniques in the classroom such as use of visual cue cards, repetition, modeling, providing small group instruction, use of breaks to alleviate behaviors, and providing chew tools in the classroom to provide sensory supports (Tr. pp. 34, 35, 37). The CPSE administrator reported that the student's present levels within the IEP were developed by reviewing the results of the SB-5, PLS-5, DAYC-2, and PDMS-2 and the present levels of performance were an accurate and up to date representation of the student's "present level of functioning and academic achievements" (Dist. Ex. 14 at ¶ 10). The CPSE administrator testified that the IEP "clearly memorialized" the student's academic, social/emotional, and physical strengths and deficits and developed management strategies "to address [the student's] deficit areas that would manifest in the classroom" (id. at ¶¶ 11-14).

In addition, 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

[13] The CPSE administrator later indicated that there was a special education teacher and two teacher assistants in the classroom (Tr. p. 34).

[14] The CPSE administrator further reported that if the student needed 1:1 support that could be considered in the future, and the special education teacher would report concerns in conjunction with the parent, if 1:1 support was needed (Tr. pp. 33-34).

IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194). In this case, there was no evidence available to the CPSE that ABA instruction had been used because other methodologies or approaches had been tried with the student and that the student had failed to make progress in the absence of 1:1 ABA instruction.[15] In fact, the evidence tends to show, as described above, that the student had previously been placed in a less supportive setting and that the CPSE was contemplating far more supportive programming as the student transitioned to initial CPSE programming than had been attempted in the past.

Here, the early intervention evaluators' suggestions that the student would benefit from ABA and their preferred approach did not create a clear consensus that the student could only receive educational benefit with ABA methodology that the CPSE was mandated to adopt. The recommendations made by the July 2023 CPSE and the totality of the program offered in the July 2023 IEP appropriately addressed the student's special education needs; therefore, the addition of ABA instruction and a 1:1 paraprofessional were not required on the student's IEP in order to offer the student a FAPE.

**4. Approved Preschool Program**

Turning to the IHO's conclusion that the district denied the student a FAPE because it failed to show it was capable of implementing the student's IEP, the district asserts that the issue was not raised in the due process complaint notice, and this is its only argument in defense. However, the parent specifically accused the district of failing to identify a "seat" for the student and alleged that in September 2023 the district still had not provided the parent with a program for the student (Parent Ex. A at p. 2). It was permissible for the IHO to reach the issue,[16] and the district's defense to the contrary is without merit.

Although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks-and-mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school

[15] Although the CPSE evaluations indicated that the student received ABA services during early intervention, the June 2023 speech-language evaluation was the only evaluation that provided information reported by the student's ABA therapist (see Dist. Ex. 7 at p. 26; see generally Dist. Ex. 7 pp. 1-25, 27-40). The June 2023 speech-language evaluation included specific concerns reported by the student's then-current ABA provider that the student had a "tendency to be self-directed;" "'want[ed] to do her own thing;'" had "tantrums and ha[d] a 'melt down' if someone t[ook] something away from her;" "d[idn]'t share with her peers and d[id] not engage in turn-taking;" and "pushe[d] other children if they [we]re in her way" (Dist. Ex. 7 at p. 26).

[16] There may have been other permissible ways aside from witness testimony for the district to establish such facts, but they were not presented in this case, and thus there is no basis to overturn the IHO's ultimate conclusion on this point.

placement by the start of the school year"]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented. This analysis also fits with the competing notions that, while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Here, although the July 2023 IEP, as designed, was reasonably calculated to enable the student to receive educational benefits, the district nevertheless failed to offer the student a FAPE for the 2023-24 school year due to the fact that it never identified a brick-and-mortar location for the IEP to be implemented, which was among the issues that the parent raised in the due process complaint notice.[17] The district did not present any evidence showing that it notified the parents that it had selected a school location for the student.

**B. Unilateral Placement**

The IHO found that the unilateral placement was appropriate for the 2023-24 school year (IHO Decision at pp. 11-12, 19-20). The district did not appeal this finding so it has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

**C. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ.,

[17] Notably, there were two "Final Notice of Recommendation" in the hearing record, but neither listed a "site/school" (see Dist. Exs. 4; 12). No school location letter was entered into the hearing record and the student was not accepted to any CPSE program (Tr. pp. 43-44).

226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO held that equitable considerations did not favor the parents' request for full tuition reimbursement because the parents did not make a good faith effort to explore the proposed placements and that the parents never actually intended to place the student in a public school (IHO Decision at pp. 12-14, 22-24). Based on these findings, the IHO reduced the tuition reimbursement to $25,000 (id. at pp. 24-25).

The parents assert that the IHO's findings on equitable considerations are not supported by the hearing record. The parents argue that they consented to evaluations and participated in the CSE meeting. The parents assert that the proposed placements were visited and that at no time was the parent told that she had to bring the student to visit schools. The parents contend that they should not be faulted, when it was the district's delay in holding an IEP meeting that should be weighed against the district. Moreover, the parents argue that the IHO failed to consider the student's mobility challenges when taking into account the parents' reluctance in bringing the student back and forth for placement visits.

In response, the district argues that the IHO correctly found that equities do not favor the parents and the reduction in tuition reimbursement was warranted.[18] The district asserts that the parents did not consider the proposed placements in good faith and had determined to unilaterally place the student prior to visiting any placements.

Here, the hearing record supports the IHO's decision that equitable considerations do not favor the parents' request for full relief. The IHO, in his decision, questioned the parent's conduct of regarding her participation and cooperation with the process of locating an approved school (IHO Decision at pp. 22-24). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). I decline to reverse the IHO's decision regarding the parent's testimony as there is nothing in the hearing record that compels a contrary conclusion.[19]

Although the district did not ultimately select a brick-and-mortar preschool location for the student's services, the evidence shows that the parent was largely responsible for that outcome. Notably, the documentary evidence supports the IHO's finding that the parent, at best, made only a "perfunctory effort" to tour the proposed preschools (see IHO Decision at p. 23). The district proposed three placements to the parent on the same day that the CPSE convened in July 2023 (Parent Ex. N). These approved preschool programs were HIDEC, ADAPT and StrivRight (id.). The SESIS logs demonstrates that from that list, the parent visited one of the schools, HIDEC, but that the parent only offered one date to visit ADAPT, which was not feasible (Dist. Ex. 13 at pp. 1-7). The hearing record does not show that the parent ever visited ADAPT or StrivRight (Tr. pp.

[18] The district did not assert on equitable grounds that the IHO should have denied the costs of tuition in full.

[19] The parents' contention that it was the district's delay in moving the CPSE process along is not supported by the evidence in the hearing record. The parent testified, via affidavit, that a request was made by the nursery school for CPSE services in "wintertime" of 2023, while during cross-examination, she testified that "we started the process" immediately after a discussion in the December 2022 with the nursery school (Tr. p. 81; Parent Ex. O at ¶ 10). It is unclear how, who or when that request was made. Despite this dearth of information regarding the request, the information in the hearing record demonstrates that the district began evaluations on May 23, 2023, after obtaining the parent's written consent on that same date (Dist. Ex. 7 at pp. 1, 10-17). The CPSE then convened on July 12, 2023 (see Dist. Ex. 10). Upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Specifically, once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). In addition, the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][iv][a]; see also 34 CFR 300.300[a]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]). A review of the hearing record does not support a finding that there was any delay or a significant delay on the part of the district in conducting the initial evaluation.

73-74, 77-78, 83-84; Parent Ex. O ¶¶ 18-20; Dist. Ex. 14 at ¶¶ 21, 23).[20] Upon reconvening to address the request for special transportation, the district proposed a fourth placement, HeartShare; however, the evidence demonstrates that when HeartShare tried reaching out to the parent to schedule a tour, the parent "hung up the phone twice" (Dist. Exs. 13 at pp. 2-3; 14 at ¶ 24).[21] Although, the parent did visit HeartShare, the parent failed to bring the student which required a second tour being scheduled and it is unclear whether that second tour with the student in attendance took place (Tr. pp. 76, 86; Parent Ex. O at ¶ 24; Dist. Exs. 13 at p. 1; 14 at ¶¶ 25-26), which is indicative of uncooperativeness.[22] As such, the IHO's discretionary finding that equitable considerations did not favor the parent are supported by the evidence hearing record. My independent review of the hearing record demonstrates that the parent's actions impeded the district's ability to timely complete its placement recommendation for an approved preschool when it had already fashioned an appropriate IEP. As such, the IHO correctly reduced the parent's requested relief.

## VII. Conclusion

The evidence shows that the July 2023 IEP was appropriately drafted. However, the district was nevertheless charged with the responsibility of completing the process for identifying the specific nonpublic school but did not do so. The hearing record supports the IHO's conclusion that the district failed to offer the student a FAPE for the 2023-24 school year, albeit on different grounds, as well as the determination that equitable considerations weighed against the parent's request for full tuition reimbursement. The IHO did not abuse his discretion in reducing the requested relief to $25,000.

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

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**May 20, 2024**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**

[20] The parent's testimony supports the SESIS log regarding visitation of the placements (Tr. pp. 73-74, 77-78, 90. In the end, the parent visited HIDEC and HeartShare (Tr. p. 90).

[21] The parent testified that she did not have phone service at the time (Tr. p. 79).

[22] The parent did not have the student attend any tours (Tr. pp. 76, 78, 90-91).