



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-117

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

Appearances:

Isaacs Bernstein, P.C., attorneys for petitioners, by Lisa Isaacs, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Michael P. Heitz, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which found that respondent (the district) offered their son a free appropriate public education (FAPE) and denied the parents' request for tuition funding at the Brooklyn Autism Center (BAC) for the 2023-24 school year. The appeal must be sustained in part and remanded for further proceedings.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the hearing record reflects that the student is nonverbal and has received a diagnosis of autism spectrum disorder (ASD) (Parent Exs. B at pp. 4, 6; C at p. 1).¹ On February 15, 2023, the CSE convened to conduct the student's reevaluation and develop an IEP (Parent Ex. B). At the time of the

¹ The hearing record contains multiple exhibits that appear to be nearly identical (compare Parent Ex. B, with Dist. Ex. 1; Parent Ex. C, with Dist. Ex. 2; and Parent Ex. E, with Dist. Ex. 3). I remind the impartial hearing officer 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]).

February 2023 CSE meeting, the student was attending a 6:1+1 special education class at Seton Foundation's Mother Franciska Elementary School (Mother Franciska), which is a nonpublic school (see Parent Exs. B; C).

At the February 2023 CSE meeting, the CSE considered a psychoeducational evaluation of the student conducted in January 2023 and memorialized in writing in February 2023, teacher reports, and a counseling report (Parent Ex. B at pp. 2-5). Finding the student remained eligible for special education as a student with autism, the February 2023 CSE recommended a 12-month program consisting of placement in a 6:1+1 special class in a specialized school within the district with the provision of a speech generating device (SGD) and adapted physical education three periods per week (id. at pp. 1, 29-31). In addition, the February 2023 CSE recommended weekly related services including one 30-minute session of individual counseling, one 30-minute session of group counseling, five 30-minute sessions of individual occupational therapy (OT), three 30-minute sessions of individual physical therapy (PT), four 30-minute sessions of individual speech-language therapy, and one 30-minute session of group speech-language therapy (id. at p. 30). The February 2023 CSE also recommended that the parents receive two 60-minute sessions per year of group parent counseling and training (id.). The February 2023 CSE further recommended compensatory services that included special education teacher support services (SETSS) and speech-language therapy due to the student's loss of skills during a period of remote learning (id. at p. 32).

The district sent the parents a prior written notice and a school location letter both dated May 8, 2023 that advised the parents of the February 2023 CSE's recommendations and the public school to which the district assigned the student to attend for the 2023-24 school year (Parent Exs. E; F).

In an email to the district dated June 19, 2023, the parents advised that they would not be sending the student to the district's recommended placement for summer 2023 (Parent Exs. G at p. 2; S ¶¶ 34, 35, 38). The parents expressed concern that the district's psychoeducational evaluation was deficient, and therefore, of limited value because the evaluating psychologist used an instrument to assess the student that was inappropriate to use on a nonverbal student like their son (Parent Exs. G at p. 2; S ¶ 36). According to the parents, the deficient psychoeducational evaluation led to an inappropriate February 2023 IEP that lacked 1:1 teaching and discrete trial teaching, contained inadequate goals, and failed to include a 1:1 paraprofessional for the student (Parent Exs. G; S ¶¶ 36, 37). The parents further advised that after visiting the district's assigned public school they did not believe that the district's programming would serve the student's needs without additional individual SETSS for core academics (Parent Exs. G at p. 2; S ¶ 44).

On July 18, 2023, the parents executed a contract with the Brooklyn Autism Center (BAC) for the student's attendance for the 2023-24 school year (Parent Ex. H).² The parents sent the district an email on August 16, 2023, wherein they repeated their dissatisfaction with the district's psychoeducational evaluation and advised that they had a private neuropsychological evaluation of the student conducted (Parent Ex. J). The parents shared a copy of the July 2023 private neuropsychological evaluation report with the district and requested that the district "reopen the

² The Commissioner of Education has not approved BAC as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

IEP for the team to discuss and consider the recommendations made in the neuropsychological evaluation as soon as possible" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated November 9, 2023, the parents requested an impartial hearing and alleged that the district denied the student a FAPE in the least restrictive environment (LRE) for the 2023-24 school year (Parent Ex. A). Factually, the parents alleged that the February 2023 CSE improperly relied on an inadequate psychoeducational evaluation to develop the student's IEP because the district evaluator used an inappropriate instrument for testing and did not accommodate the student's use of assistive technology (id. at pp. 2-3). The parents further alleged that the February 2023 CSE's reevaluation of the student was inadequate because the CSE was not composed of a multidisciplinary team and did not consider a "variety of assessment tools and strategies" (id. at p. 3). The parents also alleged the February 2023 CSE failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) (id. at pp. 3-4). In addition, the parents alleged that the February 2023 IEP contained inadequate goals, as they were generic and not measurable (id. at p. 4). According to the parents, although the IEP indicates that the student "requires [applied behavior analysis] ABA and 1:1 discrete trial instruction" the "placement recommendation and goals do not include provisions for [the student] to be educated in this manner" (id. at pp. 4-5). The parents also allege that the public school site to which the district assigned the student was inappropriate because "the therapies were not in compliance with [the student's mandates]" and the school site did not offer ABA, which "which is the methodology recommended for [the student]" (id. at p. 5). After contending that the unilateral placement of the student at BAC was appropriate and that equitable considerations favored them, the parents sought direct funding or reimbursement for the costs of the student's program at BAC for the 2023-24 school year, including the costs for transportation and assistive technology (id. at pp. 5-7).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). The IHO conducted a prehearing conference on December 19, 2023 and thereafter issued a "Prehearing Conference Summary and Order" (prehearing order) to the parties that summarized the prehearing conference, notified the parties of the next scheduled hearing date, and set forth the IHO's rules governing the hearing, including the IHO's directives related to disclosure of exhibits and witness lists, and general requirement for direct witness testimony via affidavit unless exceptions apply (IHO Ex. I).

On February 12, 2024, the parties proceeded to an impartial hearing on the merits, which concluded on February 15, 2024 (Tr. pp. 1-218). In a decision dated March 6, 2024, the IHO found that the district offered the student a FAPE in the LRE for the 2023-24 school year (IHO Decision at p. 5). In reaching his conclusion that the district provided the student a FAPE, the IHO found the testimony of the district's school psychologist who participated at the February 2023 CSE meeting credible (id. at pp. 7, 8, 12-13, 16-17, 18). The IHO reasoned that greater weight should be accorded to the CSE's recommendations and the testimony of the school psychologist than the opinion of the parent's private neuropsychologist who testified and conducted the July 2023 private neuropsychological evaluation (id. at pp. 12-13, 16-17).

Regarding the February 2023 IEP, the IHO found that the CSE considered "numerous evaluation results" including the student's teacher reports, the psychoeducational evaluation, the Vineland-3 Domain Parent/Caregiver Form, and counseling reports (IHO Decision at p. 9). With respect to the parents' challenges to the district's psychoeducational evaluation, the IHO cited the school psychologist's testimony that "she did not have any issues with the assessment methods utilized by the [p]sychoeducational [e]valuator" and that the district's evaluator used an appropriate instrument for testing nonverbal students (*id.* at p. 12). The IHO further referred to the school psychologist's testimony that the student did not have behavioral needs that warranted an FBA or BIP and the student was "perfectly contained in his classroom when classroom management tools were used" (*id.* at p. 14). The IHO further noted the parent's testimony that the student's behaviors had improved (*id.* at p. 15). Accordingly, the IHO found that the hearing record did not reflect that the student exhibited persistent behaviors that would impede his learning or that of others which would have necessitated the development of a BIP (*id.*).

In addressing the parents' allegation that the February 2023 IEP contained inadequate goals, the IHO found that the IEP contained an "exhaustive list of specific measurable annual goals designed to meet the student's needs" and enable him to make progress (IHO Decision at pp. 9, 15). The IHO further discounted the private neuropsychologist's testimony that the student required a small class setting which provided ABA instruction "in a 1:1 discrete trial learning setting" (*id.* at pp. 15-17). Finally, the IHO noted that the student never attended the district's assigned public-school site, but the IHO nevertheless determined that the district was capable of implementing the student's IEP at the assigned school based upon the testimony of the district's school psychologist (*id.* at p. 18). Upon concluding that the district offered the student a FAPE, the IHO found it was unnecessary to proceed further to make findings of fact or conclusions of law on the issues of whether the parents' unilateral placement of the student at BAC was appropriate or whether equitable considerations supported the parents' requested relief and dismissed the parents' due process complaint notice (*id.* at p. 19).

IV. Appeal for State-Level Review

The parents appeal. Initially, the parents argue that the IHO abused his discretion and displayed bias against the parents and student through his "words and directives" and by giving the district's witness, the school psychologist, a "high level of deference" (Req. for Rev. ¶ 18). In addition, the parents argue that the IHO "rigorously enforced" or relaxed his procedural rules set forth in his prehearing order when doing so served to benefit the district. Further, the parents argue that the IHO's credibility determinations were "arbitrary and capricious" and that the IHO unjustly gave less weight to the testimony of the parents' witness, the private neuropsychologist (*id.* ¶¶ 22-25.). The parents submit additional evidence for an SRO to consider in support of their contentions that the IHO exhibited bias.

The parents also contend that the IHO's determination that the district offered the student a FAPE is contraindicated by the hearing record; alleging that the IHO ignored defects by the CSE in conducting the three-year reevaluation and developing an appropriate IEP. In addition, the parents argue that the hearing record did not support the IHO's finding that a BIP or FBA was not required or that the February 2023 IEP contained appropriate goals that were measurable. According to the parents, the IHO prevented the development of a full record with regard to the student's need for ABA and 1:1 discrete trial teaching and improperly shifted the burden to the parents to demonstrate that no other method besides ABA would benefit the student. Further, the

parents contend that although the February 2023 IEP contained language that the student requires ABA and 1:1 discrete trial teaching, the district's school psychologist testified that such portion of the IEP would not necessarily be implemented as "ABA is just one of the methodologies. It doesn't have to be used" (*id.* ¶ 37). Lastly, the parents allege that the school psychologist indicated that the assigned school would not implement the ABA and 1:1 discrete trial teaching in the IEP and the district failed to demonstrate that the assigned school was appropriate and capable of implementing the student's IEP. The parents request that an SRO overturn the IHO's decision; find that the district failed to offer the student a FAPE for the 2023-24 school year, that the unilateral placement was appropriate, and that equities favor the parents; and award the parents funding for the costs of the student's tuition at BAC for the 2023-24 school year.

In an answer, the district denies the parents' material allegations and requests that the appeal be dismissed in its entirety. Among other arguments, the district contends that the challenges to the findings by the IHO are mere disagreements with the IHO's reasoning that are being misframed as bias and that the IHO had a responsibility to develop an adequate and complete hearing record. The district further contends that the IHO correctly determined that it offered the student a FAPE because, among other things, the evidence shows that district evaluator conducting the psychoeducational evaluation used an appropriate assessment tool to evaluate a nonverbal student like the parents' son, the hearing record contradicts the parents' claim that the student requires 1:1 ABA instruction to progress, the IEP is not deficient because it lacks a BIP, and the IEP contains adequate, measurable goals.

V. Applicable Standards

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

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew 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 Andrew 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]).³

³ 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

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. Preliminary Matters—IHO Qualifications and Bias

I turn first to the parents' allegation that the IHO exhibited bias against the parents and improperly favored the district. According to the parents, the IHO permitted the district to present live, in-person testimony which was inconsistent with the IHO's directive in his prehearing order that all direct testimony shall be by affidavit. The parents also allege that the IHO inappropriately shared "notes" via email of the district's questioning of the parents' witness.

It is well-settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence. Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal

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" (Andrew F., 580 U.S. at 402).

No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

Further, the IDEA and its implementing regulations provide that an IHO must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

Regarding the parents' allegation that the IHO impermissibly allowed the district to present live, direct testimony in contravention of the directives in his prehearing order, it is well established that an IHO has a responsibility to ensure that there is a complete and accurate hearing record (8 NYCRR 200.5[j][3][vii]), and the IHO identified that concern during the impartial hearing (Tr. 7). Therefore, it is well within an IHO's discretion to allow testimony at the impartial hearing, particularly, when that testimony is relevant and an IHO must accord each party the right to be heard, present evidence timely disclosed, and question all witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). Upon an independent review of the hearing record, I find that the IHO conducted himself with professionalism and properly balanced competing notions of fairness to ensure the development of a complete record. The IHO allowed parents' counsel to cross-examine the district's direct witness, just as they would have been allowed had the direct testimony of the district's witness been provided by affidavit rather than live (Tr. pp. 60-79). Furthermore, the IHO took steps to mitigate any potential prejudice to the parents by affording the parents' counsel the opportunity to adjourn to further prepare cross-examination, rebuttal, or substitute other testimony at the conclusion of the district's witness's testimony and the district's case-in-chief, which the parents' counsel opted to not avail herself of (see Tr. pp. 9, 80). Accordingly, I decline to find under the circumstances of this case that the IHO abused his discretion in permitting the district to present live direct testimony.

As further support of their allegations of bias, the parents submit two proposed exhibits as additional evidence on appeal which are emails from the IHO to the parties (see Parent Exs. AA; AB). The parents allege that these emails represent examples of the "disparate treatment" received by the parents. Parents proposed exhibit AA is an email chain between the IHO and parties discussing scheduling and disclosure of evidence. Parents proposed exhibit AB is a separate email chain wherein the IHO provided to the parties his "notes" regarding the last moments of testimony that he believed may have occurred without the presence of the parents' attorney due to the participants being disconnected from the virtual hearing, but the transcript reflects that the virtual hearing was timing out and shutting down for all parties at 1:00PM (Tr. p. 167). Moreover, I am unpersuaded by the parents' allegation that the IHO acted impermissibly by sharing with both parties his notes due to concern that they were disconnected from the virtual hearing. The IHO was correct to disclose to both parties what he believed occurred. Review of such notes indicate that

the IHO candidly highlighted that they were a "rough outline" and "not an official transcript" (Parent Ex. AB). In addition, the parents' counsel was provided an opportunity to redirect the witness and she availed herself of that opportunity when the impartial hearing resumed on the next day (Tr. pp. 190-91).

Overall, a review of the IHO's decision and the hearing record supports a finding that the IHO's decision was not biased against the parents and, additionally, the IHO offered to remedy any potential prejudice to the parents. The IHO conducted the hearing within the bounds of standard legal practice and the hearing record does not support a finding of bias. Moreover, an independent review of the hearing record demonstrates that the parent had a full and fair opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514 [b][2][i], [ii]; 8 NYCRR 200.5 [j]).

B. Sufficiency of Evaluative Information

Next, I turn to the parents' assertion that the IHO erroneously excused the February 2023 CSE's failure to adequately assess the student, specifically with respect to the district not using a standardized assessment for nonverbal students, use of an assessment that only provided informal testing information related to the student's cognitive and academic needs, not including a classroom observation, and not using the student's assistive technology (AT) device during psychoeducational testing.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

According to the CSE meeting attendance sheet, the participants at the February 2023 CSE meeting included the district school psychologist who reviewed the student's recent psychoeducational evaluation and who also served as the district representative (district school psychologist), as well as a district special education teacher, the parent, and the student's then-current teacher from Mother Franciska (Tr. p. 30; Dist. Ex. 1 at p. 40).⁴ As noted above, in developing the student's February 2023 IEP, the CSE relied on the results of the February 2023 psychoeducational evaluation, related service progress reports, and a teacher report from the student's then-current school, as well as input from the parent and the student's teacher (Tr. p. 34; Dist. Ex. 3 at p. 2; see Parent Exs. B at pp. 1-7; C; D). The February 2023 psychoeducational evaluation report included behavioral observations and testing results obtained during the January 2023 testing session and, in addition, summarized information from a January 2022 speech-language therapy report, a January 2022 OT report, a November 2022 PT report, and an undated teacher report from Mother Franciska (Parent Ex. C).

The February 15, 2023 psychoeducational evaluation report stated that the evaluation was conducted as part of a "[three] year re-evaluation, in order to determine [the student's] current level of functioning and to assist in his educational planning" (Parent Ex. C at p. 1). The initial section of the report included background information that indicated the student was diagnosed with autism spectrum disorder (ASD) and was enrolled in a 12-month, 6:1+1 special class setting at Mother Franciska where he received adapted physical education, counseling, OT, PT, and speech-language therapy, and used an augmentative and alternative communication (AAC) device (id.).⁵ The background information further indicated that the student was happy and enjoyed participating in group activities with peers but also that he needed a structured routine throughout the day and redirection, as he was easily distracted and had behaviors that consisted of scratching, biting and kicking (id.). Although the student's behaviors had decreased in class they could, at times, occur when he became frustrated (id.). As noted in the background information, the student's teacher reported that he "could follow an overall classroom behavior management plan," showed interest with peers, shared and took turns when provided with a verbal prompt, and enjoyed social games; however, at times he needed prompting to focus when he became too excited (id.). The background information indicated that based on previous reports the student receptively identified coins/bills and their values; sequenced numbers one to 100; identified time by hour and half hour; counted and matched numbers to pictures; identified sight words; unscramble letters to make words; and could type numbers and punctuation on an iPad given cues (id. at p. 2).⁶

As noted above, the February 2023 psychoeducational evaluation report included summaries of related services reports conducted in 2022 (Parent Ex. C at pp. 2-3). First, the evaluation report summarized a January 2022 speech-language report, that indicated the student communicated through gestures, facial expressions, and use of his AAC device, which he

⁴ District Exhibit 1 and Parent Exhibit B are both copies of the February 2023 IEP, wherein District Exhibit 1 contains an attendance page of the February 2023 CSE participants that is not included in Parent Ex. B (compare Parent Ex. B, with Dist. Ex. 1).

⁵ The student's parents also received parent counseling and training (Parent Ex. C at p. 1).

⁶ The psychologist who conducted the evaluation indicated that she requested a current teacher report on several occasions but that none was received (Parent Ex. C at p. 1).

employed to express his wants/needs using three symbol combinations "(I + want + ..., I + need + ...)" (*id.* at p. 2). In addition, he was able to answer simple who, what, and where questions via picture identification and his AAC device (*id.*). However, the student had difficulty answering when, why, and complex where questions, and categorizing or labeling objects by their attributes or functions (*id.*). Next the psychoeducational evaluation report indicated that based on a January 2022 OT report, the student had delays related to sensory processing skills, self-care/activities of daily living (ADL) skills, graphomotor skills, visual perceptual/visual motor integration skills, and work behaviors (*id.*). The student had the ability to button/unbutton medium-sized buttons; needed occasional cues to don/doff his shoes; needed moderate to maximum assistance to tie shoelaces; used a modified tripod grasp holding a writing utensil; and traced letters of his name when provided with tactile cues and verbal cues to attend, although he continued to demonstrate difficulty with sizing, letter formation, and alignment (*id.*). The student required assistance with orienting scissors correctly on his hand but required minimal cues to cut lines, and minimal to moderate cues to complete a 24-piece interlocking puzzle (*id.*). Further, the student exhibited self-stimulatory behaviors and required "multisensory cues to initiate tasks," and "s[ought] vestibular, proprioceptive, and tactile input during the sessions" (*id.* at pp. 2-3). As memorialized in the psychoeducational evaluation report, the OT report noted that the student benefited "greatly" from activities that included weight bearing, playing catch with a weighted ball, and propelling himself on a scooter (*id.* at p. 3). The OT report stated that following "sensory input [the student] [wa]s better self-regulated and c[ould] focus for longer periods of time on tabletop tasks " (*id.*). The psychoeducational evaluation report also reflected components of a November 2022 PT report, that indicated the student presented with delayed gross motor skills, balance, and endurance; required maximum cues to self-redirect, could exhibit poor safety awareness; and needed supervision to follow peers during transitions within the hallway (*id.*). The student could ambulate and negotiate stairs independently, inconsistently throw and catch a ball, and navigate a balance beam with physical prompts (*id.*). The report noted that the student tended to become aggressive when demands were placed on him and needed activities to be shortened in order for him to continue to participate (*id.*). The student responded well to timers to stay on track, and a token board to motivate him during PT sessions (*id.*).

As part of her behavioral observations of the student, the evaluator who conducted the February 2023 psychoeducational evaluation noted that he made eye contact upon meeting her (Parent Ex. C at p. 3). The student took his AAC device from his parents when offered and the evaluator noted that during testing the student reached for his device and needed prompting to put it down (*id.* at pp. 3-4). The evaluator assessed the student's intellectual ability using the Wechsler Intelligence Scales for Children, Fifth Edition (WISC-V) (*id.* at p. 4). She reported that during subtests requiring the student to respond "non-verbally and verbally, with and without visual stimuli, [the student] did not respond" (*id.* at p. 4). As such, the evaluator reported subtests were administered informally and provided qualitative information rather than domain scores and a full-scale IQ (*id.*). Informally, on cognitive and academic tests, the student demonstrated the ability to replicate block designs, and "identif[ied] shapes, colors, and animals"; numbers and quantities, including pictures with the "same" number of items; and demonstrated understanding of concepts such as "empty," "tired," and "party" by pointing to pictures (*id.* at pp. 4, 5-6). The evaluator advised that overall test results might not be representative of the student's full cognitive and academic potential due to his distractibility and lack of verbal responses to items presented (*id.* at p. 4). On the Vineland Adaptive Behavior Scales-Third Edition (Vineland-3) Domain Parent/Caregiver Form, an adaptive functioning standardized measure completed by the parent,

the student presented with delays in communication, daily living skills and socialization with standard scores of 37, 55, and 61, respectively, and all with a corresponding percentile rank below the first percentile (id. at pp. 6, 7). The parent responses on the Pervasive Developmental Disorder Behavior Inventory (PDDBI) indicated that the student presented with ritualistic behaviors, social pragmatic problems, and social approach behaviors on this scale (id. at p. 7). The evaluator indicated that based on the PDDBI the student presented with behaviors in line with children his own age diagnosed with ASD and recommended the CSE review the current information to assist in educational planning for the student (id.).

In addition to the information provided by the psychoeducational evaluation report, the February 2023 CSE had before it and included in the IEP information from a counseling report that stated the student was generally happy throughout therapy sessions, easily transitioned to and from therapy sessions, but was minimally able to follow directions and "required much prompting and redirection to provider tasks and materials" (Dist. Ex. 1 at p. 5).

The February 2023 IEP reflects that the CSE also considered information provided by the student's then-current teacher (Parent Ex. B at pp. 3-7). According to the IEP, the student's teacher reported that the student used an independent task schedule, followed a picture schedule to determine the next task and those he completed, followed two to three step directions throughout the day, and, during cooking groups followed simple recipes with his teacher and peers, and counted to add ingredients (id. at p. 6).⁷ Further, the February 2023 CSE had before it information from the student's teacher that the student participated in weekly grocery shopping trips, independently exited the school bus to the store, grabbed a shopping cart when asked, took turns following a grocery list of picture items needed for the week's cooking lesson, and independently placed items in the grocery cart, waited in line, scanned items, and bagged items with minimal prompting (id. at pp. 6-7).

The parents assert that the IHO should have found that the reevaluation of the student was inadequate because it was conducted using informal measures, the evaluator chose to test the student using an assessment that was not designed for nonverbal students, and the student's AAC device was not used during test administration.

During the impartial hearing, the district school psychologist testified that it was difficult to test nonverbal students but explained that the WISC-V could be used, noted that district evaluators had to use what was available for testing, and stated that informal findings were permissible and provided qualitative descriptions of the student's abilities (Tr. pp. 47-48, 50, 70-72). The district school psychologist further testified that she and her supervisor found the psychoeducational evaluation report to be thorough (Tr. p. 70).

⁷ As reflected in the IEP, the CSE also had information from the teacher that in math the student counted and matched numbers to pictures up to 15, and worked on simple addition and subtraction problems and in ELA worked on listening to a story and answering questions about characters and setting, looked at pictures and labeled pronouns and actions to create sentences such as "he is running;" (Parent Ex. D). The student also worked on handwriting and typing (id. at p. 4). The February 2023 IEP indicated that the student typed his first name independently, and his handwriting had improved with highlighted prompting and use of a box for appropriate sizing of letters (id.).

The district school psychologist stated that the February 2023 psychoeducational evaluation report provided qualitative information that included how the student behaved during the assessment, and what happened during the assessment, and testified that evaluations did not have to provide numbers "in order to consider what was happening" (Tr. p. 76).⁸ Further, the district school psychologist testified that review of the psychoeducational evaluation report, the teacher report, and "based on everything that we know about him, and based on everything that was reviewed during the assessment, and based on everything that was presented by the teacher and the related service professionals" helped the CSE recommend a program for him (*id.*).⁹

With regard to the student's AAC device not being used during the February 2023 psychoeducational evaluation, based on the description of the student's use of his AAC device in the January 2022 speech-language report, it is unclear if the student would have been able to use his device to respond to test questions (*see* Parent Ex. C at p. 2).¹⁰ The district school psychologist testified that the student had his AAC device with him during the February 2023 psychoeducational evaluation but it was hard for her to report on what the evaluating psychologist "did and didn't do with the [] device;" and noted that in her experience "[i]t's very limited with what you can do with the device during the standardized assessment" (Tr. pp. 44, 73).

The parents further argue that the reevaluation was not sufficient as it did not include a classroom observation. Here, the district school psychologist testified that for the student's three-year review, the district conducted a psychoeducational evaluation and reviewed the progress reports, and teacher reports and this was adequate to develop the student's IEP (Tr. pp. 74-75). In addition, the student's teacher at the time participated in the February 2023 CSE meeting (Tr. p. 76; *see* Parent Ex. D; Dist. Ex. 1 at p. 40). The district school psychologist confirmed that a

⁸ The district school psychologist testified that the Comprehensive Test of Nonverbal Intelligence (CTONI) was a test for nonverbal students and that she made a point to request this test as the district shared one copy for evaluations; however, she opined that "even the CTONI [wa]s not so foolproof that it work[ed] with the kids on the [autism] spectrum" (Tr. pp. 71-72).

⁹ Although the July 2023 private neuropsychological evaluation was not before the CSE it would not have rendered the district evaluation inappropriate as both evaluations obtained similar results. Both the February 2023 district psychoeducational evaluation and the July 2023 private neuropsychological evaluation employed the Vineland-3 to obtain standardized measures of adaptive functioning with regard to communication, daily living skills and socialization, (*compare* Parent Ex. C at p. 6, *with* Parent Ex. J at p. 5). On both administrations of the behavior scale, the parent's responses yielded percentile ranks below the first percentile in all domains (*id.*). Additionally, the district evaluation included an assessment measure related to the student's ASD diagnosis, the PDDBI, and although the private neurological evaluation did not further assess the student in this area, the corresponding report characterized the severity of the student's social communication and restricted, inflexible patterns of behavior as being at a "[l]evel 2" as described by the DSM 5 (*compare* Parent Ex. C at p. 7, *with* Parent Ex. J at pp. 5-6). Further both evaluations included an intellectual assessment, with the district assessment providing qualitative information as it related to the severity of the student's needs, and the private neuropsychological assessment reporting the student's nonverbal IQ as measured by a test of nonverbal abilities as 61 with a corresponding percentile rank <1st percentile (*compare* Parent Ex. C at pp. 4-6, *with* Parent Ex. J at pp. 2-3).

¹⁰ The clinical director at BAC testified that prior to the student starting school at BAC in September 2023, the student participated in an intake process to get a baseline for his skills and behaviors (Parent Ex. R at ¶ 27). The clinical director testified that at the intake "[the student] had very limited vocal communication and had difficulty navigating his device outside of one-word requests for highly preferred items" (*id.* ¶ 29).

classroom observation was not completed as the information available was "deemed to be sufficient" (Tr. p. 75).

When conducting a mandatory reevaluation, a CSE is not simply required to conduct all possible evaluations of a student. Instead federal regulations explain that the CSE is charged with reviewing existing evaluation data and

[o]n the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i) (A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;

(ii) The present levels of academic achievement and related developmental needs of the child;

(iii) (A) Whether the child needs special education and related services; or

(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum

(34 CFR 300.305[a][2]). As noted above, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). Additionally, a CSE is required to convene annually to review a student's educational progress and to revise the student's program to reflect the student's progress and anticipated needs (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). While State regulations define that certain assessments must be performed as part of an initial evaluation of a student to determine initial eligibility (8 NYCRR 200.4[b][i]-[v]), a reevaluation need not contain identical assessments as a student's initial evaluation and it is left to the collaborative process of the CSE to determine what additional data is needed during a reevaluation of a student (8 NYCRR 200.4[b][5]).

Based on the foregoing, in developing the student's IEP, the February 2023 CSE had information from multiple sources including the teacher and service providers who worked with the student, and the February 2023 psychoeducational evaluation. The hearing record shows that the CSE considered these sources to fashion present levels of performance, management needs, goals, and recommendations for the student's special education program and related services. Thus, the evidence in the hearing record does not support the parents' allegation that the evaluative information available to the February 2023 CSE was insufficient for the CSE to develop the student's IEP for the 2023-24 school year. Further, there is no requirement for the district to demonstrate that it conducted the exact same assessments as an initial evaluation under State

regulations or that it had exhaustively performed every assessment that the parents or their expert could later point to in order to satisfy the procedural requirements. For these reasons, I find no reason to disturb the IHO's finding that the district conducted a sufficiently comprehensive evaluation.

C. February 2023 IEP

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

In their request for review, the parents allege that the district's failure to conduct an FBA and develop a BIP for the student led to a denial of a FAPE for the 2023-24 school year.

Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA

will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "[t]he [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]).

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

The student's teacher and therapist reported that, at times, the student could easily get distracted and needed redirection to focus on tasks and remain seated (Parent Exs. B at p. 4; C at pp. 1, 3; D at p. 1). Additionally, the student's teacher indicated that the student had behaviors that "c[ould] consist of scratching, biting, kicking" and r that the "behaviors ha[d] decreased in class but w[ould] sometimes occur when [the student] bec[a]me[] frustrated" (Parent Ex. C at p. 1 see Parent Ex. B at p. 5).

The February 2023 IEP described the student as generally sweet, happy, and energetic and noted the student enjoyed music, videos, movies and sensory toys (Parent Ex. B at pp. 3, 5). As noted by the student's counselor and speech-language therapist, the student transitioned easily from class to therapy sessions (id.). Therapy reports reflected in the February 2023 IEP, indicated that the student displayed self-stimulatory behaviors such as hand flapping, headshaking, biting himself, applying pressure to his face and at times "laying on the clinician" (id. at pp. 3, 7). In speech-language therapy, the clinician reported the student engaged in these behaviors during non-preferred therapist-directed activities (id. at p. 3). The IEP noted that in OT the student "benefit[ed] and enjoy[ed] various sensory input (vestibular, proprioceptive, fidget toys, etc.)" (id. at p. 5).

During OT sessions, the student participated in sensory input activities to promote regulation, attention, and engagement to tabletop activities (*id.*). In response to sensory input, the student demonstrated observed improvements in his ability to remain seated and complete tabletop tasks for up to 10-to-12-minute intervals, with one to two cues for redirection (*id.*).

The district school psychologist testified that there were no issues concerning the student's behavior raised at the February 2023 CSE meeting, as during the prior school year the student "stopped exhibiting behavioral concerns" and his paraprofessional services were removed because he no longer needed that support (Tr. p. 40, 65-66; *see* Tr. p. 164). According to the district school psychologist, at the February 2023 CSE meeting the student's then-current teacher described the student as "a pleasant and well-behaved child" and the parent did not raise any concerns regarding the student's behavior (Tr. p. 40). But she acknowledged that the IEP reflected the parent's concern that when the student became frustrated he might "demonstrate behaviors" (Tr. pp. 40-41). However, she explained that the student's classroom teacher reported these behaviors had decreased (Tr. p. 40; *see* Parent Ex. B at p. 5). The district school psychologist reported that the parent "was a little concerned" that the student's paraprofessional was being removed but "not to such an extent that she really [] voiced her objection to that" (Tr. p. 65). With regard to the student biting his wrist and kicking, the district school psychologist testified that these behaviors were being addressed by the classroom teacher (Tr. pp. 66-67). The parent reported that she was concerned at the CSE meeting when they removed the student's one to one paraprofessional as the student "had just started showing increased independence" and she "believed his behavioral gains (and, therefore his academic skills) would diminish if he did not have that close, one-to-one support, at least initially" (Parent Ex. S ¶¶ 25-27; *see* Tr. p. 164). The parent recalled that she was not asked at the CSE meeting if the student needed behavior planning and commented that even though the student's behaviors had improved, the student "required the structure and attention that a well-developed behavioral plan provide[d]" (Parent Ex. S ¶¶ 28-31).

The special factors section of the February 2023 IEP indicated that the student did not need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or that of others, nor did he need a behavioral intervention plan (Parent Ex. B at 8). However, the management needs section of the IEP indicated that the student benefitted from instruction provided using ABA and required differentiated instruction in a 1:1 discrete trial setting, especially when being introduced to new skills (*id.* at p. 7).¹¹ The IEP also indicated that the student required a structured routine throughout the day, breaks between tasks, redirection to focus when distracted, and that he worked best when he knew he would receive a high level of reinforcement at the end of a task (Dist. Ex. 1 at p. 7).

Additionally, the February 2023 CSE developed goals and objectives and recommended related services to address student's distractibility and self-stimulating behaviors (Parent Ex. B at pp. 9-30). More specifically, the CSE recommended that the student receive five 30-minute sessions per week of individual OT with goals that addressed, among other things, "improved attention and work behaviors in relation to sensory processing skills for increased participation in classroom and home settings" (*id.* at pp. 9-12). Corresponding short-term objectives focused on the student's ability to "participate in [a] tabletop task within [a] 10-12 minute interval with decreased fidgeting/self-stimulating behaviors s;" "request for [one] sensory break when needed

¹¹ The issue of ABA and 1:1 discrete trials is further discussed below.

within [a] 30 minute session without attempting to get up out of [his] chair;" and "be redirected to tabletop tasks following a sensory break with only [one] verbal cue " (id. at p. 9). The CSE also recommended two 30-minute sessions of counseling service, with one provided individually, and one in a group, with goals that addressed working cooperatively with peers in the small group setting (id. at pp. 18-19, 31).

Here, I find that although the district did not conduct an FBA or develop a BIP, the IEP otherwise addressed the student's behaviors by recommending he attend a 6:1+1 special class, and further recommending supports to address his management needs, and, recommended related services and goals to address his attending, behavior and communication needs (Dist. Ex. 1 at pp. 9, 31). There is insufficient basis to disturb the IHO's determination due to the lack of an FBA or BIP for the student.

2. 6:1+1 Special Class

Turning next to the parties' arguments over the IEP's proposed setting for the student, State regulation provides that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]).

On appeal the parents argue that the district did not show that its recommendation that the student attend a 6:1+1 special class was appropriate. In her affidavit, the parent reported that she did not agree with the district 6:1+1 special class recommendation as the student was not able to learn unless he was in an individualized setting (Parent Ex. S ¶¶ 21-22).

Based on the information before it, , the February 2023 CSE determined that the student required a structured learning environment with an emphasis on functional academics and vocational training due to exhibited deficits in the areas of ELA, math, communication skills, fine motor skills, gross motor skills, daily living skills, and vocational skills (see Parent Ex. B at pp. 3-7). With regard to the effect of the student's needs on involvement and progress in the general education environment, the student's IEP indicated that he needed "a small student to adult ratio" to provide support and supervision at all times (Parent Ex. B at p. 7). It further indicated that the student required a highly specialized educational program that facilitated the acquisition, application, and transfer of skills across natural environments (id.).

The February 2023 reflected that the CSE considered both 8:1+1 and 12:1+1 special class placements in a specialized school; however, rejected those options as it determined the student "need[ed] more intensive specialized instruction with a smaller student to teacher ratio to address his educational and social/emotional needs" (Parent Ex. B at p. 38). State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Consistent with the student's needs, the February 2023 CSE recommended the student attend a 6:1+1 special class in a specialized school on a 12-month basis (Parent Ex. B at pp. 30, 31).

In addition to the 6:1+1 special class, as noted above, the CSE recommended instructional strategies to address the student's management needs. Specifically, the IEP indicated that the

student benefited from methodologies such as applied behavior analysis (ABA) in order to learn new skills and required differentiated instruction and 1:1 discrete trial training "especially when being introduced to new skills" (Dist. Ex. 1 at p. 7). Further management needs identified that the student required a structured routine throughout the day, and the student benefitted from breaks between tasks, and worked best when "receiving high reinforcement" and redirection to focus (Dist. Ex. 7 at p. 1).

During the impartial hearing, the district school psychologist testified that the recommended 6:1+1 special class allowed for 1:1 differentiated instruction presented by either the teacher or paraprofessional to help the student learn certain skills (Tr. p. 56). She characterized a 6:1+1 special class as "a limited classroom of six children" that provided "a highly structured program (Tr. p. 59). The district school psychologist opined that the CSE recommendation for a 6:1+1 special class was calculated to enable the student to make progress and noted that the program was "exactly the same as he was attending in Mother Franciska" (Tr. p. 59). Within affidavit testimony, the parent explained that the determination not to reenroll the student at Mother Franciska was personal and "unrelated to the quality of the education" that the student received in that program and reported the student had progressed and "made strides over the past few years" at Mother Franciska (Tr. p. 163; Parent Ex. S ¶¶ 39-40).

In addition to the 6:1+1 special class, the student's February 2023 IEP, recommended related services that included one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group; five 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT; four 30-minute sessions per week of individual speech-language therapy, one 30-minute sessions per week of speech-language therapy in a group; two 60-minute per year of parent counseling and training sessions in a group, in addition to three periods per week of adapted physical education, and accommodations for daily individual use of an assistive technology device (Dist. Ex. 1 at pp. 31-32). The February 2023 CSE recommended approximately 22 annual goals to support the student's identified needs that addressed OT, PT, speech-language therapy, counseling, reading, writing, math, activities of daily living, adapted physical education, and parent training/counseling (Dist. Ex. 1 at pp. 9-31).¹²

¹² The IHO decision concluded that in contrast to the parents' argument that the February 2023 IEP goals were not appropriate, or measurable, the "CSE established an exhaustive list of specific measurable annual goals designed to meet the student's needs resulting from the [s]tudent's disability and to enable him to make progress" (IHO Decision at p. 9). The district school psychologist testified that in developing goals, they were geared toward the student's needs and at the CSE meeting "[e]ach goal had been discussed with the teacher and the parent" (Tr. pp. 34, 56). The student's February 2023 IEP included approximately 22 goals to address the student's needs with four OT goals that targeted attention, sensory processing skills, increased participation, graphomotor skills, visual motor/perceptual skills, and improved ADL/self-care skills, in addition to corresponding objectives; three PT goals that addressed improved balance, coordination, and strength for increased functional participation in school activities, in addition to corresponding objectives; two speech-language goals that addressed increased expressive and receptive and expressive language skills, with corresponding objectives that worked on answering questions via an AAC device, identification of actions, and pronouns via an AAC device, and production of targeted sounds and words; two counseling goals that addressed working cooperatively with peers and requesting items using pictures or verbal communication; two reading goals that worked on identification of key details and information from text, and reading high-frequency words on sight, in addition to corresponding objectives; one writing goal that addressed printing letters and numbers, in addition to corresponding objectives; four math goals that addressed counting money, applying operations of subtraction, solving addition problems, and identification of time on an analog clock, in addition to corresponding objectives; two ADL goals that addressed personal hygiene, and daily activities, in addition to corresponding objectives; one adapted physical education goal that

Further, the February 2023 IEP provided for compensatory services due to the loss of skills the student experienced during blended and remote learning that included 63 60-minute sessions of individual special education teacher support services (SETSS) in ELA, 42 60-minute sessions of individual SETSS in math, and 42 30-minute sessions of individual speech-language therapy (Parent Ex. B at p. 32).

Accordingly, based on the above, I find that there is insufficient evidence in the hearing record to overturn the IHO's finding that the February 2023 CSE's recommendation of a 6:1+1 special class was reasonably calculated to provide the student with educational benefits.

3. 1:1 Support/ABA Methodology (Assigned Public School Site)

Turning to the parties' dispute over whether the student would have or should have been provided specifically with ABA or, by the same token, 1:1 discrete trial teaching, the Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's

addressed participation in games and group activities, with corresponding objectives; and one parent training/counseling goal (Parent Ex. B at pp. 9-29). In contrast to the parents' argument that the goals were not measurable, the February 2023 IEP goals each included criteria for measurement using percentage of accuracy, in addition to objectives that identified a ratio of number of trials correct as a measurement (see Dist. Ex. 1 at pp. 9-29). As such, I agree with the IHO's finding that the district provided the student with specific and measurable goals to address the student's identified needs.

speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

With regard to the assigned school site, the evidence shows that the parent reported that she visited the district assigned school and it was "a nice, new school, and for that reason, I thought there might be some flexibility"; however, she did not like the school's attitude toward inclusion and recalled that she was told the school did not provide opportunities to interact with typical peers (Parent Ex. ¶¶ S 41-42). The parent testified that her June 2023 email to the CSE stated she would consider the district program with modifications to the student's IEP that would provide 1:1 support and specifically asked for individual SETSS instruction for core academic instruction (Parent Ex. S ¶ 44; Parent Ex. G at p. 2).

Although the parents accurately note that their July 2023 private neuropsychological evaluation recommended that the student continue to receive instruction using ABA methodology, this report was not before the February 2023 CSE and thus it cannot be used as a basis to challenge the determinations of the CSE (see Parent Ex. J).¹³ However, as noted above, the student's February 2023 IEP adopted language from the Mother Franciska teacher's report that was before the CSE and then indicated the student benefited from methodologies such as ABA to learn new skills and required differentiated instruction in a 1:1 discrete trial setting (Parent Ex. B at p. 7; see Parent Ex. D at p. 1). The parent reported that she discussed the student's need for 1:1 instruction using ABA with the February 2023 CSE (Parent Ex. S ¶ 20). The parent testified that she disagreed with the district recommendation of a 6:1+1 special class without ABA (Tr. p. 164).

The district psychologist testified that she read the report from the student's Mother Franciska teacher that indicated that the student required ABA in order to learn new skills (Tr. p. 62). She stated that "ABA is just one if the methodologies used and sometimes the [district] schools use[] some parts of that and sometimes they don't" (Tr. p. 62). She stated that ABA did not have to be used (Tr. p. 62). She explained that the CSE did not reject the suggestion that the student required ABA and included it in the student's IEP but noted according to the Mother

¹³ To complete a thorough examination of the available evidence in the hearing record, I note that the private neuropsychologist testified that the student required ABA instruction in a small class setting and opined that the student would not learn in a group setting without ABA instruction as he required "the kind of one on one attention that only ABA c[ould] provide" with 1:1 teaching and structure, systematic prompting, prompt fading, shaping, repetition and reinforcement (Parent Ex. Q at p. 4). During the hearing, the neuropsychological evaluator testified that "ABA instruction has [] very much to do with the fact that somebody has very specifically been trained to provide the ABA instruction in very discrete learning trials" (Tr. pp. 94-95). Further, the evaluator explained that ABA included 1:1 teaching and breaking tasks down into simpler steps (Tr. p. 95-96). However, the evaluator acknowledged that 1:1 instruction and simplifying tasks were not unique to ABA methodology and that there were other methodologies that incorporated aspects of ABA (Tr. pp. 95-96). She suggested that the other methodologies "[we]re building on the principles of behavioral training" (Tr. p. 96). The evaluator testified that she did not know if the student could learn if he was instructed with a methodology other than ABA because she did not know what other methodology had been used with the student (Tr. 98). The evaluator further testified that based on her observation of the student she was "inclined to say that the ABA methodology is the treatment of choice" (Tr. p. 95-97). However, once again, this evaluation and opinion could not have been considered by the February 2023 CSE as it postdates the CSE's determination and thus cannot be relied on to conclude that the CSE deprived the student of a FAPE.

Franciska teacher "that was in that school" (Tr. p. 62). The district school psychologist reported that the student's instruction at Mother Franciska was not delivered in a 1:1 setting all the time (Tr. p. 63). She noted that the teacher acknowledged that new skills were presented to the student in a 1:1 setting but indicated, based on her knowledge of Mother Franciska, the school also provided "whole group instruction" as well (Tr. p. 63). Although the February 2023 IEP reflected the Mother Franciska teacher's recommendation that the student required differentiated instruction in a 1:1 discrete trial setting, it also reflected the teacher's report that the student showed interest in peers, shared and took turns with peers, and engaged in group activities, for example during cooking class demonstrated the ability to follow recipes, and count/measure ingredients with his teacher and peers (Parent Ex. B at pp. 5, 6).

Of particular importance to this case, and a fact that was unfortunately overlooked by the IHO in an otherwise thorough analysis of the February 2023 IEP, the district psychologist reported that she had called the assigned public school site school to inquire about instructional offerings and found out the school "use[d] something called [A]ttainment [C]urriculum that [wa]s based on each student's individual needs and based on the IEP that [wa]s created" but that she was not familiar with it (Tr. pp. 57-58). When asked about whether the school provided ABA, the school psychologist conceded that the school site did not (Tr. p. 57). In this case, the parents' allegations were shown by the evidence to be more than mere speculation that the district would not adhere to the requirements of the IEP. The district psychologist did not adequately explain how 1:1 discrete trial teaching would be distinguishable from ABA, and the evidence tends to show that the school would not be able to provide the 1:1 discrete trial called for by the IEP.

Here, I find that although the district would be capable of providing 1:1 differentiated instruction within the 6:1+1 class, I am not convinced that the district would be able to provide the "1:1 discrete trial setting" that the student's IEP stated he required because, to the contrary, the school psychologist indicated that the assigned public school site did not provide an ABA programming (Tr. 57). As such, I find that the IHO erred in concluding that the district program would be capable of implementing the 1:1 discrete trial IEP recommendations made in the management needs by CSE, and thus erred in concluding that the district provided the student a FAPE. The parents were entitled to rely on the terms of the IEP created by the CSE and this deficiency in the assigned public school site is significant.

D. Remand to IHO

An SRO may consider whether the case should be remanded to the IHO for a determination of the issues that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

As the IHO did not reach the issue of the appropriateness of the parents' unilateral placement, I will remand the matter to the IHO to decide whether the private educational program obtained by the parents was appropriate and if so whether equitable considerations favor the parents. It is left to the sound discretion of the IHO whether to receive additional evidence or testimony to develop the record as related to the totality of the program at BAC in addition to

outside PROMPT speech-language services obtained by the parents and whether they provided specially designed instruction that addressed the student's identified needs. I note the significant differences between the district approach that recommended a 6:1+1 special class in addition to a high frequency of related services that included OT, speech-language therapy, PT, counseling, as well as adapted physical education, parent counseling/training; when compared to with the program provided by BAC consisting of a daily program with 1:1 ABA individual instruction in a class of six students; with embedded speech, fine motor, and gross motor activities. Of particular note, no related services were provided by therapists through BAC, but there is some indication that outside services were also obtained by the parents consisting of speech-language therapy PROMPT services provided by a speech-language pathologist two times weekly which may be relevant to the question of whether the private programming, viewed in totality, was appropriate (Tr. p. 110; Parent Exs. K; L; R ¶¶ 51-56, 68-75; Dist. Ex. 1 at pp. 31-33).¹⁴ These matters should be addressed by the parties and the IHO upon remand.

VII. Conclusion

Having found that the IHO conducted a thorough review of the regarding the adequacy of the February 2023 IEP itself, but erred with respect to whether the assigned school site was capable of implementing the 1: 1 discrete trials contained in the IEP, the IHO's determination that the district offered the student a FAPE must be reversed. As the IHO did not address the appropriateness of the parent's unilateral placement at BAC or equitable considerations and the hearing record may be insufficiently developed on these issues, this matter is remanded for the IHO to further develop the hearing record and then make determinations on these issues.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 6, 2024, which determined that the district offered the student a FAPE for the 2023-24 school year is reversed; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings to develop the hearing record and determine the appropriateness of the parent's unilateral placement of the student for the 2023-24 school year and equitable considerations.

Dated: **Albany, New York**
 June 13, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

¹⁴ Whether or not the parents are actually seeking reimbursement for the PROMPT is not relevant to whether the student's private programming, as a whole, is appropriate.