The University of the State of New York

The State Education Department
State Review Officer
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No. 24-484

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:
Law Offices of Adam Dayan, PLLC, attorneys for petitioners, by Amled Perez, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition at the Manhattan Star Academy School (MSA) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that the unilateral placement of MSA was appropriate and requests all relief be denied. 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]). 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 student has received a diagnosis of an autism spectrum disorder and received preschool special education services consisting of instruction in a special class, speech-language therapy, and occupational therapy (OT), as well as applied behavior analysis (ABA) services through the parents' insurance (Parent Exs. C at pp. 1-2; E; F). During the 2022-23 school year, the student also received one 45-minute session per week of private, individual speech-language therapy using

the PROMPT approach (Parent Ex. D).[1] In fall 2022 when the student was four years old, the parents obtained a private neuropsychological evaluation of the student, at which time the evaluator recommended a full time "nonpublic or private specialized school" placement together with speech-language therapy, OT, and "an individualized 1:1 home-based [applied behavior analysis] ABA program" (id. at pp. 1-10).

A CSE convened on May 19, 2023, found the student eligible for school-age special education services as a student with autism, and developed an IEP with an implementation date of September 5, 2023 (see Parent Ex. I).[2, 3] The CSE recommended 12-month programming for the student consisting of a 12:1+1 special class placement for English language arts (ELA), math, social studies and sciences in a specialized school together with three 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of group speech-language therapy (id. at pp. 16, 17, 20).[4] The CSE also recommended that the student use a dynamic display speech generating device (SGD) on an individual, daily basis as needed at school and home (id. at p. 17).[5] The CSE recommended special transportation services consisting of an air conditioned vehicle, route with fewer students, and curb to curb transportation (id. at p. 19).

A May 26, 2023 prior written notice memorialized the May 2023 CSE's recommendations (see Parent Ex. J). A June 5, 2023 letter from the parents to the district indicated that the parents did not agree with the May 2023 CSE's recommendations, including the size of the special class, the annual goals, and the lack speech-language therapy that specified use of the PROMPT approach and 1:1 paraprofessional services (see Parent Ex. K).

The parents signed the MSA enrollment contract on June 7, 2023, for the student's attendance during the 10-month portion of the 2023-24 school year from September 7, 2023 to

[1] According to the private speech-language pathologist, "PROMPT is a holistic, language based, tactile kinesthetic approach to improve motor speech productions and the development of language for interaction" (Parent Ex. D).

[2] The hearing record contains duplicative exhibits, including the student's May 2023 IEP (compare Parent Ex. I, with Dist. Ex. 1). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that is determined to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[4] The May 2023 also recommended four 60-minute sessions per year of individual/group parent counseling and training (Parent Ex. I at p. 16).

[5] The CSE recommended that the student receive services on a 12-month basis (Parent Ex. I at p. 17). State law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend" school as a school-aged student (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). The student turned five years of age between the May 2023 CSE meeting and September 2023 (see Parent Ex. A). Thus, for July and August 2023, the student was entitled to receive extended school year services under the CPSE, and at the start of the 2023-24 10-month school year in September 2023, the student was no longer eligible for special education as a preschool student with a disability (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]).

June 30, 2024 (see Parent Ex. P).[6, 7] The MSA base tuition included academic instruction and related services but noted that costs could increase if services recommendations change after enrollment (id. at p. 1).

A June 15, 2023 prior written notice and school location letter notified the parents of the particular public school site the district assigned the student to attend for the 2023-24 school year and provided contact information for the parents to coordinate a visit (see Parent Ex. L).[8]

In a "10-day notice" letter dated August 23, 2023 the parents notified the district of their disagreement with the IEP and their intent to unilaterally place the student at MSA for the 2023-24 school year and seek public reimbursement/funding for that placement (see Parent Ex. B). The parents also requested appropriate transportation services for the student to MSA (id. at p. 2).

In an email sent on September 15, 2023, the parents requested specialized transportation services pursuant to the student's IEP for the 2023-24 school year to MSA, where the student started on September 7, 2023 (Parent Ex. N at pp. 1-2). The district responded to the parent on October 2, 2023 (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated October 13, 2023, the parents, through their attorneys, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parents asserted that the CSE failed to consider the recommendations of the private neuropsychologist (id. at pp. 5-7). The parents argued that the May 2023 recommendations were not appropriate as the recommended 12:1+1 special class was too large for the student, who required a smaller educational setting with more individualized support (id. at p. 5). The parents also faulted the CSE's rationale for not recommending a smaller class because it did not account for the student's "challenges and learning needs" (id.). Additionally, the parents argued that the student required a 1:1 paraprofessional to address the student's communication and behavioral/emotional challenges and to ensure the student received sufficient individualized support (id. at p. 6).

The parents contended that the student required PROMPT speech-language therapy services as the progress reports demonstrated that the student was making progress with that service; however, they alleged that the CSE refused to consider the service (Parent Ex. A at p. 6). Moreover, the parents alleged that the CSE refused to include 1:1 home-based ABA services with supervision from a BCBA on the IEP (id. at p. 7). The parents argued that the annual goals in the IEP were not appropriate as they were "extremely broad" (id.). Regarding the assigned public school site, the parents alleged that classroom was too loud and that the student would be

[6] The representative from MSA signed the contract on June 8, 2023 (Parent Ex. P at p. 6).

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

[8] A letter from the parents dated August 1, 2023 indicated that they had contacted the proposed assigned school and did not agree with the placement (see Parent Ex. M).

overlooked amongst peers there (id. at pp. 7-8). The parents also asserted that the proposed classroom at the assigned public school site would not allow the student to receive sufficient individualized instruction (id. at p. 8).

The parents asserted that they provided the district with notice of their intent to unilaterally enroll the student at MSA for the 2023-24 school year and requested transportation services (Parent Ex. A at pp. 8-9).[9] As relief the parents sought funding/reimbursement for the student's placement at MSA, home-based ABA program, and transportation (id. at pp. 9-10).[10]

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 14, 2023 and concluded on July 31, 2024 after 12 days of proceedings (see Tr. pp. 1-241). In a decision dated September 19, 2024, the IHO found that the district established that it offered the student a FAPE (IHO Decision at pp. 13, 16). The IHO found that the parent's testimony explained what had transpired during the May 2023 meeting and that her testimony supported the district's recommendations (id. at pp. 12-13).

In alternative findings, the IHO also held that the parents met their burden that MSA was an appropriate unilateral placement (IHO Decision at p. 14). However, the IHO found that equitable considerations did not favor the parents (id. at pp. 14-15). Specifically, the IHO noted that the evidence showed that the parents, in part, cooperated but that the timeline of events did not favor the parents' request for relief (id.). The IHO held that, based on the timeline, the parents did not intend to send the student to a public school and only considered the private school (id. at p. 15).

The IHO denied the parents request for reimbursement/funding for the 2023-24 school year at MSA (IHO Decision at pp. 15-16). The IHO also denied the parents' request for transportation costs (id. at p. 16).

IV. Appeal for State-Level Review

The parents appeal. The parents contend that the IHO erred in finding that the district offered the student a FAPE for the 2023-24 school year. The parents note that the district did not present any testimonial evidence and that the IHO had stated in her decision that such a scenario would be insufficient to establish FAPE. Accordingly, the parent argues that the IHO erred in finding a FAPE without testimony from district witnesses because it was contrary to the IHO's "correct statement of law" with regard to the need for witness testimony. The parents further argue that the testimony and documentary evidence cited to by the IHO does not establish that the district offered the student a FAPE. The parents contend that the CSE failed to recommend a 1:1 paraprofessional and the recommended 12:1+1 special class was too large. The parents assert that

[9] The parents noted that, as of the filing of the due process complaint notice, the district had not provided the student with transportation and that they had been transporting the student to school through taxis and ride sharing since September 7, 2023 (Parent Ex. A at p. 9).

[10] The parents also requested that the district provide the student with appropriate transportation services (Parent Ex. A at p. 10).

the district evidence demonstrates that the student required a small class with 1:1 instruction throughout the day and that the CSE's recommendations were inappropriate and not reasonably calculated to enable the student to make appropriate progress. The parents request a finding that the district failed to offer the student a FAPE. The parents also contend that the IHO failed to address several of their allegations from the due process complaint notice. Specifically, the parents allege the district failed to comprehensively evaluate the student, failed to perform a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP), and failed to recommend PROMPT speech-language therapy and that the CSE failed to develop appropriate IEP goals with the parents' input.

The parents also argue that the IHO erred in finding that equitable considerations did not favor their request for reimbursement. The parents contend that they were cooperative as they attended and participated in the CSE meeting. They argue that they did not sign the contract with MSA until after the CSE meeting and did not make any payments until July 2023. The parents also assert that they sent multiple letters expressing their concerns, to which the district did not respond.

The parents further contend that the IHO violated their due process rights and made erroneous evidentiary rulings. The parents assert that the IHO did not require the district to make an opening statement and then allowed them to raise new arguments in its closing brief. The parents argue that the district should have only been allowed to defend issues raised in the due process response. Further, the parents assert that the IHO impermissibly raised issues sua sponte; such as the parents' disinterest in a public-school placement, which violated their due process rights. Lastly, the parents allege that their due process rights were violated by the IHO "delaying this proceeding" by "limiting all hearings to one hour," repeatedly requesting that the parties seek extensions to the compliance date, and failing to provide the parents with written responses to extension requests.

The parents argue that the IHO erred in denying their request for tuition and transportation funding. The parents contend that the IHO failed to address the issue of transportation and should have awarded reimbursement of $1,333.85 for the transportation they had to provide until the district began providing the service in October 2023. The parents request that the SRO find that the district failed to offer a FAPE for the 2023-24 school year, order reimbursement/funding for the cost of MSA for the 2023-24 school year, and order reimbursement for the cost of transportation services.

In an answer with cross-appeal, the district contends that the IHO correctly found that it had offered the student a FAPE for the 2023-24 school year. The district asserts that the undersigned should not permit any arguments raised solely in the parents' memorandum of law that were not properly raised in their request for review. The district argues that it developed a procedurally and substantively appropriate IEP. The district argues that, while it may be ideal to have witnesses, a lack of district witnesses did not necessitate a finding that the district did not prove its case, and any statement by the IHO to the contrary was incorrect. The district asserts that the parent's testimony bolstered the district's case, and that this is not a basis to reverse the IHO. The district contends that the recommended 12:1+1 special class was appropriate and that the CSE considered the recommendations of the private neuropsychologist but was not required to adopt the exact program as envisioned by him. The district alleges that parents' arguments that the

assigned public school site would not adhere to the IEP were abandoned on appeal and would otherwise be impermissibly speculative.

In its cross-appeal the district argues that the IHO erred in her alternative finding that the unilateral placement was appropriate because it was not specifically designed to meet the student's needs. As for equitable considerations, the district argues that they do not favor the parents. The district asserts that the 10-day notice was sent more than two months after the parent signed the contract with MSA and more than a month after the parents started tuition payments and that therefore the request for tuition costs should be denied. The district also contends that the parents failed to present adequate proof for transportation reimbursement and that an award of reimbursement would be inappropriate without evidence of payment.

The district also asserts that the parents' arguments that their due process rights were violated are without merit and should be rejected because the IHO had broad discretion in conducting the impartial hearing and afforded the parties a meaningful opportunity to exercise their rights. The district argues that the IHO conducted the hearing properly.

In an answer to the district's cross-appeal, the parents reiterate their arguments that the IHO erred in finding that the district offered the student a FAPE for the 2023-24 school year. The parents again assert that the IEP was procedurally and substantively inappropriate and argue that they did not abandon their arguments regarding the assigned public school site in their request for review. Further, the parents argue that the unilateral placement at MSA was appropriate. The parents also contend that the IHO erred regarding equitable considerations and argue that they favor their request for reimbursement. Regarding the request for transportation, the parents argue that the IHO should have awarded reimbursement.

V. Applicable Standards

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

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

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[11]

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. Preliminary Matters

1. Scope of the Impartial Hearing and of Review

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]).

[11] 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).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. 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]).

In this case, the parents in the request for review argued that the district failed to fully evaluate the student in all areas of suspected disability and failed to perform an FBA or BIP (Req. for Rev. at ¶ 12). However, the parents did not raise these issues in their due process complaint notice (see Parent Ex. A). The district did not open the door to either of these issues during the impartial hearing as it did not call witnesses and, instead, relied solely on documentary evidence (see Tr. pp. 1-241). As such, these issues were outside the scope of the impartial hearing, and will not be addressed for the first time on appeal.[12]

With respect to the scope of review on appeal, State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

The case has a peculiar procedural twist in two issues that the parties treat as postscripts to the last round pleadings on appeal and which the IHO did not address. In response to the district's argument that they abandoned arguments in there due process complaint notice, the parents contend in response that the record contains no evidence regarding the public school site's ability to implement the student's IEP and that they did not abandon any arguments.[13] In the due process complaint notice, the parents requested home-based ABA services and argued that the proposed assigned public school was not appropriate (Parent Ex. A at pp. 8, 9-10). The IHO did not grant

[12] I do note that the parents have continuously argued throughout the proceedings that the CSE failed to consider the recommendations of the private neuropsychologist. This allegation is not the same as an allegation that the CSE failed to fully evaluate the student and will be addressed below.

[13] The district requested that only the arguments made in the request for review should be addressed by the SRO and that the SRO should not consider any additional arguments from the parents' memorandum of law (Answer & Cr.-Appeal at ¶ 7). The parents, in their reply, accepted that assertion by the district (Reply at ¶ 5).

that relief or address either issue in the decision (see IHO Decision).[14] While the parent's response to the district's answer with cross appeal mentions the district's capacity to implement the IEP, the parents make no reference to home-based ABA services in either their request for review or the response to the district's cross appeal.

Application of the practice regulations would preclude such belated statements in the parent's response to the district's cross-appeal from being addressed because they should have raised in in the request for review, which in turn, permits the district to respond in its answer (8 NYCRR 279.8 [c][2] [requiring parties in their request for review challenging an IHO decision to "identify[] the precise rulings, failures to rule, or refusals to rule"]), and that issues not identified are deemed abandoned (8 NYCRR 279.8 [c][4] [noting that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]). The case law interpreting these provisions, especially those issues in which the IHO responded with silence, have indicated that if a party is unsuccessful before the IHO, as in this case where the parents' claims were dismissed when the IHO concluded broadly that the district offered a FAPE, the parents must appeal all of the issues because they fell within the definition of "aggrieved" as interpreted by the courts (Phillips v. Banks, 656 F. Supp. 3d 469, 482–83 [S.D.N.Y. 2023] [noting that "[h]ere, plaintiffs received no relief from the IHO, who found no denial of FAPE for any of the challenged years, and they failed to articulate any argument on their administrative appeal as to prostheses despite the IHO's determination leaving them aggrieved"], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]). It would seem that the courts are indicating that if the parents were successful before the IHO and the district was challenging the IHO's adverse determinations in a request for review, the parents would not be required to specifically challenge or carry forward their arguments or claims on an issue that the IHO failed to decide. Application of that interpretation would lead to the conclusion that the district is correct in this case and that, because the parents were ultimately unsuccessful before the IHO and received no relief, they were required to identify all of the issues on which they could be potentially successful or which could change the outcome in their request for review, including those on which the IHO was silent and which were one of the "failures to rule" described in 8 NYCRR 279.8(c)(2). It would also seem that, "[b]ecause the SRO was not alerted to the need to review this issue, the issue must be deemed to have been abandoned" (Phillips, 656 F. Supp. 3d at 483), meaning that the parents silence in their request for review on the two issues, home-based ABA and alleged defects in the assigned public school site, cannot be overlooked and that it is impermissible to remain silent until a later pleading such as the parents' response to the district's cross-appeal, which is if nothing else effectively sandbagging the district late in the appeals process. In the end, it appears that the case law on this topic thus far would preclude the parents, who were aggrieved overall by the IHO's decision, from ignoring issues in their request for review and then waiting until the end of the pleading process in the State-level review, to raise issues from their due process complaint notice that the IHO failed to rule on raised (Phillips, 656 F. Supp. 3d at 483; see also FB v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 586-87 [S.D.N.Y. 2013]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 [S.D.N.Y. Nov. 27, 2012]; C.H. v. Goshen Cent. Sch. Dist., , 2013 WL 1285387, at *10-*11 [S.D.N.Y. Mar. 28, 2013]).

[14] The IHO did note that the student received the services at the parent expense and noted some of the parent's arguments regarding ABA (IHO Decision at pp. 4-5).

Alternative findings below are provided below, solely for the sake of avoiding remand, which are necessarily brief due to the IHO's and the parties' refusal to take up these issues earlier in the process.

2. Burden of Proof

As the parent's point out the IHO initially stated in the decision that "[d]ocumentary evidence, unsupported by any testimony, is not sufficient to establish that a school district offered a student a FAPE" (IHO Decision at p. 12). The parents argue that the IHO correctly stated the law with this statement, but erred by allowing the parent's own testimony to be used as support a finding of FAPE. The district argues that while the IHO came to the correct conclusion, that it had offered a FAPE, the IHO was incorrect to initially state that the district could not meet its burden without testimonial evidence.

As noted above, the burden of production and persuasion has been shifted under State law to a district to show that it offered a student a FAPE (Educ. Law § 4404[1][c]).[15] In Endrew F., the Supreme Court held that the "reviewing court may fairly expect [school] authorities . . . to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"(580 U.S. at 404). However, neither the IDEA, State Law, nor case law provides that a district fails to meet its burden of proof simply because the evidence produced does not consist of witness testimony and instead, each party has the right to "[p]resent evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512 [a][2]). Because there is a right to present documentary evidence, the documentary evidence must be discussed as it relates to the disputed issues because a district could prevail on some or all of the disputed issues related to a FAPE for a student by producing evidence consisting of documentary evidence. An IHO is required to conduct a fact-specific analysis in order to determine whether a district offered the student a FAPE and a district must ensure that the hearing record includes evidence addressing the particular issues raised by the parents in their due process complaint notice. The sufficiency of the evidence presented should be determined after weighing the relative strengths and weakness of the parties' evidence in light of the allegations and the relevant legal standards. To be clear, there is no procedural requirement that a district call witnesses at the impartial hearing in order to address the parent's due process complaint notice, especially if the district submits the extensive documentation that is required under the procedures of the IDEA itself.[16] Thus, the parents'

[15] Ordinarily, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

[16] If the parents believed that there were particular facts or events during the CSE process that were relevant that should have come to light and were not captured by or, more importantly, contradicted the documentary evidence offered by the district, the parents, as participants in the impartial hearing process, were free to try to establish a different version of the facts, offer contrary documentation, or "compel the attendance of witnesses and . . . confront and question all witnesses at the hearing" including but not limited to the district personnel that participated in the May 2023 CSE meeting (8 NYCRR 200.5[j][3][xii]). The IHO was authorized to issue

argument suggesting a bright line rule requiring witness testimony is rejected and, as discussed further below, I will address whether the district's documentary evidence alone in this case is sufficient to establish the appropriateness of the May 2023 IEP.[17]

3. Conduct of the Impartial Hearing

Turning to the parent's next procedural challenge, the parents allege that the IHO's conduct during the impartial hearing denied them due process. Specifically, the parents take issue with the IHO's process regarding extensions of the compliance date, the IHO's limiting of the hearings to one hour each, the IHO's denial to expand the hearing record to include additional exhibits presented by the parents, and the IHO allowing the district to make arguments not raised in the due process response. The district argues that the IHO had broad discretion to conduct the hearing and did not abuse that discretion.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights and as noted above, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

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 (Letter to Anonymous, 23 IDELR 1073). 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.

With respect to extensions of the hearing timelines, federal and State regulations require an IHO to render a decision not later than 45 days after the expiration of the 30-day resolution

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subpoenas for this purpose if necessary (8 NYCRR 200.5[j][3][iv]).

[17] If a district intends to rest its case on documentary evidence alone, the district it is prudent offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]).

period or the applicable adjusted time periods (34 CFR 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 CFR 300.515[a]; 8 NYCRR 200.5[j][5][i]). However, extensions may be granted consistent with regulatory constraints, and the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). An IHO is explicitly prohibited from "solicit[ing] extension requests or grant[ing] extensions on his or her own behalf or unilaterally issue extensions for any reason" (8 NYCRR 200.5[j][5][i]).

In this case, the IHO asked the parties if there were applications to extend the compliance date based on their efforts to conduct an orderly proceeding (Tr. pp. 2, 9-10, 16, 48, 99, 145, 189-90, 196, 201, 223, 239). On most occasions when the IHO asked whether there was an application for an extension, the parents' attorney requested an extension of the compliance date, which was often joined by the district (Tr. pp. 3, 10, 16, 48, 99, 145, 190, 196, 201, 223).[18] At no point, did the parents' attorney object and in several instances indicated the need for flexibility to ensure the availability of the parents' witnesses. While the IHO may have prompted the parties by inquiring whether they had any applications regarding the compliance date, this was hardly a violation of due process as the parents allege on appeal.[19]

With respect to scheduling impartial hearings, State regulation requires that the hearing "be conducted at a time and place which is reasonably convenient to the parent and student involved" (8 NYCRR 200.5[j][3][x]). Furthermore, as noted above, each party "shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable" (8 NYCRR 200.5[j][3][xiii]).

The parents argue that the IHO erred by not scheduling longer blocks of time for the hearing dates; however, the hearing record reflects various discussions regarding the parties' and the IHO's availability, there is no indication that the parents objected to the times scheduled, and the parents do not allege that, due to the manner in which the hearings were scheduled, they were denied the opportunity to present evidence. Thus, the parents' allegation in this regard does not support a finding that they were denied due process.

Next, the parents argue that the IHO's decision to exclude additional exhibits offered as evidence violated their due process rights. Federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the

[18] I note that at the last hearing date held on July 31, 2024, the parents' attorney did not attend the hearing and that the district made the request to extend compliance date (Tr. p. 239-40).

[19] Extension order reports issued by the IHO are included in the hearing record which show each extension of the timeline that was granted (see Extension Orders).

conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

Here, I disagree with the parents' contention and find that the IHO acted with the scope of her broad authority. The parents' attorney made a motion to enter these exhibits during the February 29, 2024 hearing and the district objected to them (Tr. pp. 55).[20] The parties made arguments before the IHO regarding the proposed exhibits and, after hearing both sides, the IHO declined to allow the exhibits to be entered, finding that they were not timely disclosed (Tr. pp. 55-58). The parents' attorney then filed a brief and the parties dedicated an entire hearing date to the issue (see Tr. pp. 102-51; Parent Br. Regarding Evidentiary Exclusion). The IHO again denied the parents' request; however, the IHO did note that the parents could attempt to lay a foundation for the documents during witness testimony (Tr. p. 145). Here, the IHO was authorized under State regulations to exclude the evidence as untimely and acted within her broad discretion to do so. The IHO allowed the parents substantial time to make their argument; the fact that the IHO did not agree with the parents does not equate to a violation of their due process rights.[21]

Regarding the district's response to the due process complaint, I note that an impartial hearing is not limited to issues described in a district's due process response as argued by the parents, and the IHO did not violate the parents' due process rights by allowing the district to argue that its IEP was appropriate. It was clear from the response that the district intended to defend the IEP (see Due Process Response). In accordance with 20 U.S.C. § 1415(c)(2)(B), when a local educational agency (LEA) receives a due process complaint notice from a parent, it is mandated to respond within 10 days if it has not previously sent a written notice regarding the subject matter

[20] I note the IHO did allow two exhibits into the hearing record to which the parents' attorney objected (Tr. p. 31, 37; see Dist. Exs. 8; 11). However, the IHO admitted those exhibits subject to further arguments on relevance (Tr. p. 38). The parents conceded that the district's exbibits were timely disclosed to the parents (Tr. pp. 35-36). The parents did not make subsequent arguments related to the relevance of those exhibits during the impartial hearing, other than to note the IHO's finding in their brief to support their request for the IHO to include their own exhibits that were untimely disclosed (see Parent Br. Regarding Evidentiary Exclusion).

[21] Further, the allegation from the parents that the IHO limited the hearing sessions to one hour does is not a violation of their due process rights. As noted before, an IHO has broad discretion to conduct the hearing as the IHO deems necessary, so long as the IHO accords each party a meaningful opportunity to exercise their rights. The IHO clearly provided both parties with meaningful opportunities throughout the course of the impartial hearing. Notably, the IHO took umbrage with the district's attorney during the hearing and defended the parents' attorney when the IHO interpreted the district as making argument against the character of the parent's attorney (Tr. p. 144). Additionally, the IHO stated that the parents' attorney had time to be heard and that the IHO would not cut her off (Tr. pp. 142-43). The parents had ample time during to the impartial hearing to be heard and make their arguments in full.

of the complaint (see also 34 CFR 300.508[e]; 8 NYCRR 200.5[i][4][i]). The statutory language specifies that the district's response must include:

> (aa) an explanation of why the agency proposed or refused to take the action raised in the complaint; (bb) a description of other options that the IEP Team considered and the reasons why those options were rejected; (cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (dd) a description of the factors that are relevant to the agency's proposal or refusal.

(20 U.S.C. § 1415[c][2][B]). Importantly, the statute does not confine the district at an impartial hearing to referencing only those matters specifically identified in the district's response to the due process complaint notice (see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011] [finding that the district was not required to state its defenses in a response to the due process complaint notice]).. Instead, the statute delineates that the impartial hearing is restricted to the issues raised in the due process complaint notice itself, rather than by the district's response. This is underscored by the statutory provision at 20 U.S.C. § 1415(f)(3)(B) that states: "The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise." The parents' argument that their due process rights were violated is based upon a misreading of the statute and is rejected.[22]

B. May 2023 CSE and IEP

The parents assert on appeal that the IHO erred in finding that the May 2023 IEP offered the student a FAPE. In particular, the parents claim that the student's May 2023 IEP did not offer appropriate special education programming.

In order to determine whether the May 2023 CSE's recommendations were appropriate, a discussion of the student's needs is required. According to the May 2023 prior written notice, the May 2023 CSE "reviewed and discussed" a January 2022 medical genetic report, February 2023 teacher, speech-language, and OT progress reports, an April 2023 classroom observation report, and an April 2023 neuropsychological evaluation report (Parent Ex. J at p. 2; see Parent Exs. C; E; F; G; H; Dist. Ex. 7). As discussed below, review of the student's May 2023 IEP shows that it incorporated information from the evaluation and progress reports, and the resulting IEP present levels of performance are not in dispute on appeal (see Parent Ex. I at pp. 1-6).

Review of the student's May 2023 IEP and the April 2023 private neuropsychological evaluation report shows that the CSE incorporated detailed information and test results regarding the student's overall cognitive, language, academic, and behavioral functioning into the IEP (compare Parent Ex. C at pp. 3-6, with Parent Ex. I at pp. 1-4). Regarding the student's cognitive skills, the IEP reflected results of an administration of the Wechsler Preschool and Primary Scale

[22] Also, while it would have been helpful for the district to have made an opening statement, it was clear that the district was not conceded the issue of FAPE (Tr. p. 27). The lack of an opening statement by the district, might not be best practices, but it is not a violation of parents' due process rights.

of Intelligence - Fourth Edition (WPPSI-IV) to the student that yielded a full scale IQ of 69, which was in the extremely low range of intellectual functioning in comparison to same-aged peers (Parent Exs. C at p. 3; I at p. 1). More specifically, the student's composite scores included a verbal comprehension index of 73 (4th percentile) falling in the borderline range, a visual spatial index of 100 (50th percentile) falling in the average range, and a fluid reasoning index of 62 (1st percentile) falling in the extremely low range (Parent Exs. C at p. 3; I at p. 1). The student's performance on the working memory index was underdeveloped and fell at the 5th percentile, with a standard score of 76 (Parent Exs. C at p. 3; I at p. 1). His score on the processing speed index was unable to be calculated due to his inability to engage in the tasks in a standardized manner (Parent Exs. C at p. 3; I at p. 1). Due to the variability amongst his scores, a general abilities index was assessed in order to determine the student's intellectual reasoning abilities in the absence of working memory and processing speed demands (Parent Exs. C at p. 3; I at p. 1). The student's general abilities index was assessed to be 70 (2nd percentile, borderline range) (Parent Exs. C at p. 3; I at p. 1).

The May 2023 IEP reflected that the student's overall performance within the verbal domain was measured to be in the borderline range, with difficulties in conceptualizing, articulating, and understanding social norms and conventions (Parent Exs. C at p. 3; I at p. 1). Specifically, the student exhibited difficulty in conceptualizing and articulating the underlying commonality between two seemingly dissimilar words (Similarities, 1st percentile) (Parent Exs. C at p. 3; I at p. 1). He was better able to access and express his general knowledge of information (Information, 9th percentile) (Parent Exs. C at p. 3; I at p. 1). The student's ability to utilize complex and concise language to describe the meaning of words was below expected for his age (Vocabulary, 1st percentile) (Parent Exs. C at p. 3; I at p. 1). Additionally, the student's ability to articulate understanding of social norms was assessed to be in the low average range (Comprehension, 9th percentile) (Parent Exs. C at pp. 3-4; I at p. 1). Select subtests of the Clinical Evaluation of Language Fundamentals-Preschool Third Edition administered indicated that the student's semantic knowledge, complex language expression, and processing indicated areas requiring significant and specific interventions and remediation (Parent Exs. C at p. 4; I at p. 2).

According to the May 2023 IEP, the student's nonverbal abilities were variable, his fluid reasoning skills were extremely low, and his abstract reasoning skills were in the borderline range, but his visual spatial skills were average, with notable strength in object assembly (Parent Exs. C at p. 4; I at p. 2). Attention, memory, and processing assessments revealed the student's working memory was in the borderline range, with difficulties in maintaining attention, especially when multitasking (Parent Exs. C at p. 4; I at p. 2). Processing speed was a significant weakness, with extremely low scores in tasks requiring quick visual discrimination and scanning (Parent Exs. C at p. 5; I at p. 2). Taken together, mental efficiency was determined to be an area of vulnerability for the student, and he required accommodations such as individualized support, structure, repetition and rephrasing of instructions, complex material broken down into smaller units, verbal and visual cues, repeated prompts, redirection, and breaks (Parent Exs. C at p. 5; I at pp. 2-3).

Regarding the student's communication skills, the May 2023 IEP reflected specific information from the February 2023 speech-language report including results of the Rossetti Infant Toddler Scale, which showed that the student's receptive language skills fell at 24-27 month age range and his expressive language skills fell at the 21-24 month age range (Parent Exs. E at p. 2; I at p. 3). Teacher report included in the IEP indicated that the student used an iPad with

Proloquo2Go, pointing, gesturing, and using 1-2 word utterances to communicate wants and needs (Parent Ex. I at pp. 3, 4; Dist. Ex. 7 at p. 4). Receptively, the student identified items in various categories, followed directions within contexts, and comprehended some pronouns (Parent Exs. E at p. 2; I at p. 3). He exhibited difficulty with identifying objects based on function, understanding quantity, yes/no and wh questions, and following two step directions (Parent Exs. E at p. 2; I at p. 3). The student's expressive language skills included the student's ability to label actions, colors, and body parts, with ongoing work to expand sentence structure and use of pronouns (Parent Exs. E at pp. 2-3; I at p. 3). The student attempted to communicate disagreement by pointing or looking away and was prompted to use phrases like "no" or "help me" with visual aids (Parent Exs. E at pp. 2-3; I at pp. 2-3). According to the IEP, the student required verbal models to expand sentence structures, including using prepositions and pronouns (Parent Exs. E at p. 3; I at p. 3).

The May 2023 IEP reflected neuropsychological evaluation results of the student's pre-academic skills assessment using the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), which showed variable performance, including at the 88th percentile in letter and word recognition, 7th percentile in reading comprehension, 21st percentile in written expression, and 37th percentile in math concepts and applications (Parent Exs. C at p. 5; I at p. 3). Teacher report included in the May 2023 IEP reflected that the student was "established in many preacademic skills," such as reciting the ABC song, identifying letters, primary colors and basic shapes, sorting, and demonstrating one to one correspondence to five (Parent Ex. I at p. 3; see Dist. Ex. 7 at p. 5). The IEP also indicated that the student recognized his own picture, matched it to his individualized schedule, and made progress toward following simple one and two-step directions (Parent Ex. I at p. 3; see Dist. Ex. 7 at p. 5). Further, the student was able to point to objects when named in a number of categories, labeled animals and various objects, counted by rote to 20, and labeled numerals to 20 (Parent Ex. I at p. 4; see Dist. Ex. 7 at p. 5). The teacher report indicated that the student benefitted from small group instruction in a structured learning environment, consistent and clear expectations, visual supports, verbal prompting, modeling, redirection, and assistive technology (Parent Ex. I at p. 4; see Dist. Ex. 7 at p. 5).

The neuropsychologist conducted assessment of the student's social/emotional and behavioral functioning through clinical observations and the Behavior Assessment System for Children-Third Edition (BASC-3), parent report form, the results of which were reflected in the May 2023 IEP (Parent Ex. C at p. 6; I at p. 4). According to parent reports, the student presented with significant difficulties in his functional communication and social skills, and difficulties in the areas of social withdrawal, and odd or idiosyncratic behaviors were noted (Parent Exs. C at p. 6; I at p. 4). Further, administration of the Childhood Autism Rating Scale, Second Edition, reflected in the IEP indicated that the student was exhibiting severe symptoms of autism spectrum disorder, with weaknesses in verbal communication, adaptation to change, relating to people, and listening responses (Parent Exs. C at p. 6; I at p. 4). Review of the May 2023 IEP showed that it included information from the February 2023 speech-language report regarding the student's social-pragmatic skills, including that he needed prompts to increase independent and spontaneous requests (Parent Exs. E at p. 3; I at p. 5). The student identified certain emotions but had difficulty imitating them, and he needed to improve his ability to collaborate with peers, increase tolerance to wait his turn, and respond to/ask simple turn taking questions (Parent Exs. E at p. 3; I at p. 5). Additionally, teacher report reflected in the IEP indicated that the student was affectionate, separated from his parents without distress, and engaged in structured play, though he was still learning turn-taking and sharing skills (Parent Ex. I at p. 5; Dist. Ex. 7 at p. 6). The IEP described

the student's social development needs including positive peer models and a classroom environment that minimized exposure to aggressive behaviors to prevent regression (Parent Exs. C at p. 7; I at p. 5; Dist. Ex. 7 at p. 6). His IEP indicated that a BIP was not required at that time (Parent Ex. I at p. 7).

Teacher assessment of the student included in the May 2023 IEP indicated that he presented with physical development skills at a 36-42 month old range (Parent Ex. 1 at p. 5; Dist. Ex. 7 at p. 7). The student moved around his classroom independently, walked up and down stairs holding the rail, and was able to run, climb, ride a tricycle, and play catch (Parent Ex. I at p. 5; Dist. Ex. 7 at p. 7). He was working on sensory processing, fine motor skills, attention, regulation, visual motor integration, and prewriting skills (Parent Ex. I at p. 5; Dist. Ex. 7 at p. 7). Information from the February 2023 OT progress report reflected in the May 2023 IEP indicated that, in the area of fine motor skills, the student used a four-finger grasp with a marker, was working towards a tripod grasp, and exhibited inconsistent pre-writing skills (Parent Exs. F at p. 2; I at p. 6). He was able to copy and draw lines and some basic shapes but struggled with more complex tasks like cutting large paper and manipulating buttons (Parent Exs. F at p. 2; I at p. 6). The student's adaptive behavior was assessed at the 30-36 month range (Parent Ex. I at p. 5; Dist. Ex. 7 at p. 7). The student was working on increasing his independence in adaptive skills, such as toileting and dressing (id. at p. 6).

The May 2023 IEP reflected information from the student's January 2022 medical genetic report, which detailed the results of genetic testing (Parent Exs. G at p. 1; I at p. 6). The specific diagnosis the student received was "reported in association with a syndromic intellectual disability disorder characterized by global developmental delay, intellectual disability, infantile hypotonia, and dysmorphic facial features which may include a flat facial profile, round face," and other features (Parent Exs. G at p. 1; I at p. 6). Additional variable features included central nervous system and spinal abnormalities, feeding issues, and epilepsy (Parent Exs. G at p. 1; I at p. 6).

1. Annual Goals

On appeal, the parents allege that the IHO did not consider the May 2023 CSE's failure to "discuss and develop appropriate IEP [annual] goals" with input from the parents.[23]

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and

[23] In the due process complaint notice the parents argued that the May 2023 CSE informed the parents that it would "transplant" the student's annual goals from his March 2023 CPSE IEP to the May 2023 IEP; however, the March 2023 IEP was not included in the hearing record (Parent Ex. A at p. 6; see Parent Exs. B-BB; Dist. Exs. 1-11). Regardless of whether or not the annual goals were copied from the student's March 2023 IEP, review of the May 2023 IEP present levels of performance indicates that the annual goals contained in that IEP remained appropriate for the student to work on during the 2023-24 school year (see Parent Ex. I at pp. 1-15).

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The student's May 2023 IEP featured 15 measurable annual goals to improve the student's academic skills, visual motor integration, fine motor skills, sensory processing, and communication skills (Parent Ex. I at pp. 7-15). Specifically, the IEP included an annual goal for the student to identify basic colors and shapes during group activities using a total communication approach (id. at pp. 7-8). In addition, his academic needs were addressed with annual goals to attend to a story during group read aloud, identify all letters of the alphabet and their sounds, read 50 learned sight words, properly form all 26 letters, label pictures with beginning, middle, and ending sounds, rote count to 100, and solve addition and subtraction story problems within 10 (id. at pp. 8-11). The May 2023 IEP also contained annual goals to improve the student's visual motor integration, prewriting, scissor, and fine motor grasping skills (id. at p. 12). Another annual goal addressed the student's need to improve his sensory processing skills, attention, and self-regulation (id. at p. 13). In the area of communication, the IEP included an annual goal for the student to request a preferred item using a Picture Exchange Communication System (PECS) or augmentative device, and other annual goals to improve his ability to follow one step directives, imitate actions, and demonstrate comprehension by answering "wh" questions (id. at pp. 13-15). Each goal reflected criteria to determine if the goal had been achieved (e.g. 80 percent), the methods of how progress would be measured (e.g. teacher made materials, checklists), and a schedule for when progress would be measured (e.g. one time per quarter) (id. at pp. 7-15).

Review of the student's May 2023 IEP annual goals shows that they addressed his identified needs and does not provide a basis to overturn the IHO's finding that the IEP was appropriate.

2. 12:1+1 Special Class and 1:1 Support

The parents allege on appeal that the IHO erred in finding the May 2023 CSE's recommended placement was appropriate. Specifically, the parents argue that, despite the private neuropsychologist's input, the CSE "wrongfully refused to consider a smaller class setting" for the student and failed to offer a "cogent" explanation for its recommendations. Further, the parents claim that although the CSE recommended 1:1 paraprofessional services during the CSE meeting, subsequently, the district did not include those services in the student's IEP.

The evidence shows that the private neuropsychologist did not participate in May 2023 CSE meeting, but the CSE had his written evaluation report (Parent Ex. I at p. 22). Regarding the May 2023 CSE's consideration of the private neuropsychologist's recommendations, review of the evaluation report reflects recommendations including placement of the student in a small, highly supportive special education classroom with a low student/teacher ratio in a nonpublic or private specialized school (Parent Ex. C at p. 7). It was recommended that the student not be placed with other students who exhibited aggressive or externalizing behaviors to prevent increased anxiety and dysregulation (id.). In addition, the private neuropsychologist recommended that the student receive related services such as speech-language therapy and OT integrated within his educational program, to prevent regression (id.). According to the private neuropsychologist, the student required daily direct instruction and small group instruction, with full time specialized support to address his needs in social pragmatics, language expression, processing, and reciprocal interactions (id.). The private neuropsychologist also recommended an individualized 1:1 home-

based ABA program to help the student avoid regression, and generalize skills in communication, reciprocity, and behavioral control, with weekly parent counseling and training by a BCBA (id.). The neuropsychologist recommended that the student participate in structured group activities for peer modeling, socialization, and adult facilitation (id.). Specific strategies recommended to aid the student's attention included cues, prompts, altered presentation rates for new material, one to one direct instruction, additional processing time, rehearsal strategies, and breaks throughout the day (id.).

Review of the student's May 2023 IEP shows that the CSE incorporated many of the neuropsychologist's recommendations (compare Parent Ex. C at p. 7, with Parent Ex. I at pp. 6, 16). For instance, the private neuropsychologist recommended placement of the student in a small, highly supportive special education classroom in a small school, with a low student-teacher ratio (Parent Ex. C at p. 7). During the 2022-23 school year while in preschool, the student attended a 12:1+2 special class (Dist. Ex. 7 at p. 1). As reflected in the May 2023 IEP, the parents expressed that the student had made "significant growth in a small setting," and that he had benefitted from a smaller classroom size, which they opined was "essential to his continued progress" (Parent Ex. I at p. 4). According to the IEP, the student was continuing to build his social skills and benefitted from positive peer models (id. at p. 5). In the classroom environment, the student had begun to find ways to successfully express his needs and wants and had decreased instances of expressing frustration through screaming or crying (id.).

Accordingly, and similar in student to teacher ratio as his preschool classroom, the May 2023 CSE recommended a 12:1+1 special class placement in a specialized school (Parent Ex. I at p. 16, 20).[24] State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]).

The May 2023 IEP also relayed the private neuropsychologist's recommendation and the parents' concerns that the student should not be placed in a classroom environment where other students exhibited aggressive behaviors and other behavioral issues because the student would mirror and imitate those behaviors and regress, and that it would be distracting and dysregulating for the student (Parent Ex. I at pp. 5, 21; see Parent Ex. C at p. 7). The private neuropsychologist, who observed the student in a 12:1+2 setting, did not express any criticism of a 12-student preschool classroom in his evaluation report that was before the CSE (Parent Ex. C). It was only later, during the impartial hearing that the parents elicited an opinion from the private neuropsychologist testimony critical of a 12:1+1 special class in a nonspecialized school (Parent Ex. Z at ¶¶ 13-14). However, the CSE recommended a specialized school (i.e., a public school for students with disabilities), not a "nonspecialized school" (see Parent Ex. I at p. 20). Further, the neuropsychologist's after-the-fact opinion may not be relied upon to find the CSE's recommendations to be inappropriate (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at

[24] According to the May 2023 IEP, the CSE considered "[a]n ICT class setting," which it determined was "too big to meet" the student's needs; special classes in a community school, which the CSE rejected after determining that the student needed "a more restrictive environment"; and an 8:1+1 special class in a specialized school, which the CSE determined was "too restrictive" for the student (Parent Ex. I at p. 21).

*13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]; L.S. v. Union Free Sch. Dist. of the Tarrytowns, 2024 WL 1859970, at *17 [S.D.N.Y. Apr. 29, 2024]). The parents' preference for "smaller class size" versus their perception of how instruction is delivered in the 12:1+1 special class illustrates a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], aff'd, 725 F.3d 131 [2d Cir. 2013]), but a parents' decision to provide a smaller classroom ratio is not in and of itself conclusive evidence of the question of whether a public placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]).

Further, as recommended by the private neuropsychologist, the May 2023 CSE recommended that the student receive OT and both individual and group speech-language therapy, and identified strategies to address his classroom management needs including cues and prompts, visual aids, verbal cues, individual direct instruction, a visual schedule, material broken down, additional processing time, rehearsal strategies, breaks as needed, assistive technology, and communication prompts (compare Parent Ex. C at p. 7, with Parent Ex. I at pp. 6, 16-17).

To the extent the parents argue that the May 2023 CSE failed to incorporate all of the private neuropsychologist's recommendations, in developing the recommendations for a student's IEP, the CSE 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 regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Here, a review of the private neuropsychological evaluation report and the student's May 2023 IEP demonstrates that the CSE considered and adopted some of the evaluative information

and recommendations; however, the CSE was not required to wholesale adopt the private report (compare Parent Ex. C, with Parent Ex. I at pp. 1-6, 16).

Turning to the parents' assertion that IHO erred when determining that the 12:1+1 special class was sufficiently supportive for the student without a recommendation for 1:1 paraprofessional services, while not set forth among the special factors in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disabilitys-need-for-a-one-to-one-aide.pdf).

According to the parent's direct testimony by affidavit, in response to their concern that the student would not receive enough individual attention and academic support in a class of 12 students, the CSE discussed recommending "a 1:1 paraprofessional" but concluded that "none of the available types (health, behavioral, or toileting) were appropriate for him based on his profile" (Parent Ex. BB ¶ 8). The May 2023 IEP indicated that the CSE determined that the student did "not exhibit physical aggression or other similar behavior concerns" and that, therefore, paraprofessional services were not recommended (Parent Ex. I at p. 21). Review of the evaluative information available to the May 2023 CSE, including the private neuropsychological evaluation report, did not indicate that the student required 1:1 paraprofessional services to address his needs (Parent Ex. J at p. 2; see Parent Exs. C; E; F; G; H; Dist. Ex. 7). Nor did the observation conducted by the district in the student's 12-student preschool special class indicate that the student was struggling in the absence of a 1:1 paraprofessional (Dist. Ex. 3).

Although the parents may have preferred that the student receive individualized paraprofessional support in the special class setting, overall, review of the evidence in the hearing

record supports the IHO's finding that the 12:1+1 special class recommendation could address the student's educational needs and there is no reason to disturb the IHO's conclusion on this basis.

3. PROMPT Speech-Language Therapy

The parents argue that the IHO failed to address their claim that the CSE failed "to recommend PROMPT-based" speech-language therapy for the student.

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

The parent testified that she discussed the student's need for PROMPT based speech-language therapy with the May 2023 CSE, and shared a May 17, 2023 progress report with the district from the student's PROMPT based speech-language pathologist, which stated that the student had made progress with this type of therapy and continued to require it due to his delays (Parent Exs. D; K at p. 1; BB ¶ 10). Although according to the parent the related service provider/special education teacher serving on the CSE "seemed to agree that the student required PROMPT-based" speech-language therapy, the CSE member stated that the CSE could "not write specific types of therapy on an IEP" (Parent Exs. K at p. 1; BB ¶ 10). The parent stated that she could not agree to an IEP that did not include a specific service that the student needed and informed the CSE that the student must receive speech-language therapy from a PROMPT trained speech-language pathologist due to his weaknesses in motor speech coordination, and receptive and expressive language (id.).

According to the May 17, 2023 private speech-language therapy progress note, the student had been receiving one 45-minute session per week of private, home-based speech-language therapy since December 2021 using PROMPT methodology (Parent Ex. D). The private speech-language pathologist reported that the student presented with significant delays in motor speech abilities and expressive and receptive language skills, and that sessions had focused on improving those skills (id.). In his PROMPT sessions, the student continued to demonstrate consistent and steady improvement, having responded well to the tactile input of PROMPT therapy (id.). The student's current motor speech goals included focusing on increased lip activation and contraction, specifically lip rounding and production of (sh, /u/, /o/) in words and phrases (id.). The student's speech production goals also included addressing coarticulation in multisyllabic words and phrases (id.). According to the speech-language pathologist, the multimodality of PROMPT therapy was "pivotal" for the student as a tactile and visual learner (id.). PROMPT was used to target the student's concept formation, increase his mean length of utterance, and expand and vary the language structures he was using (id.). Language goals for the student included responding to simple yes/no and choice questions, expanding his vocabulary and understanding of concepts, and expanding and varying his language structures and functions (id.). The student had reportedly made meaningful and functional progress with 1:1 individualized speech-language therapy, and it was "strongly recommended" that the student continue to receive PROMPT therapy, as he benefitted from PROMPT in all settings that speech-language therapy was provided, including

school (id.). Finally, the speech-language therapist opined that changes to the type of therapy that the student was receiving could potentially be detrimental to his continued progress (id.).

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

The student was receiving one 45-minute session per week of private PROMPT speech-language therapy at the time of the May 2023 CSE meeting (Parent Exs. AA at p. 5; BB at p. 7). At that time the student was also receiving three 30-minute individual sessions of speech-language therapy at his preschool program, which was not based on PROMPT methodology (see Parent Ex. E). Although the parent and the PROMPT therapist opined that the student required services using the PROMPT methodology, the preschool speech-language therapy progress report indicated, as of February 2023, that the student was making progress toward his speech-language therapy goals without this particular methodology (id. at pp. 3-5). Given that the student was receiving benefit from speech-language therapy without the PROMPT methodology, the information available to the CSE did not amount to a "clear consensus" that the student required PROMPT-based speech-language therapy to receive a FAPE (Parent Ex. J at p. 2; see Parent Exs. C; E; F; G; H; Dist. Ex. 7).

4. Assigned Public School Site and Home-Based ABA

The IHO did not address the parents' claim in the due process complaint notice regarding the grouping of the student with other students, and the parents did not mention the same in their

request for review. Accordingly, I find, as described above that the parents' abandoned these claims and they are not permissible at this level. As noted however, I have made the following determinations in the alternative. Only after the district argued in its answer and cross-appeal that the issue had been abandoned did the parents then respond, with little more than a statement that the claim is not being abandoned, and arguments that the record included "no evidence or testimony regarding the public school's ability to implement the May 2023 IEP, or its appropriateness to meet [the student]'s individualized needs." The parents allege that they did not speculate about the school because they visited it, and that the district had "an ample opportunity to provide a cogent and responsive explanation of the program or the public placement recommendations."

First, contrary to their belated statements on appeal, the parents did not allege in their due process complaint notice that the public school site was incapable of implementing the May 2023 IEP. Instead, they alleged that the student would not have been appropriately grouped with peers, would have been overlooked, and that the student would have become dysregulated due to loud noises (Parent Ex. A at pp. 7-8). Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (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. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir 2014]). 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 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 respect to functional grouping of the proposed class at the assigned public school, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]).[25] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

Here, the student did not attend the recommended 12:1+1 special class for the 2023-24 school year because he was unilaterally placed at MSA. Indeed, deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be speculative in nature (J.C. , 643 Fed. App'x at 33 [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent post M.O. (G.S., 2016 WL 5107039, at *15 [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"], citing M.O., 793 F.3d at 245).

The evidence indicates that the parent did not tour the same site listed in the prior written notice and it is not clear if the 12:1+1 classroom she toured was merely an example of a 12:1+1 special class or the exact class and group of students with whom the student would be eventually have been placed, and I find that the grouping argument is impermissibly speculative,

[25] To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

notwithstanding the parents' statement that it is not. Furthermore, even if it was not, the available evidence does not support the parents' argument. The parent provided direct testimony by affidavit that she was given a tour of a 12:1+1 special class in a different location in July 2023 and her opinion that the students in that particular classroom would not be appropriate because 90 percent of them were "verbal" rather than nonverbal and, further, that the principal and she were startled by yelling in the classroom during the tour (Parent Ex. BB at ¶¶ 17-18). While the parent may have been reluctant to have the student be grouped with verbal role models, it would not be inappropriate because, for example, the IEP itself indicated that he has emerging verbal skills, needed verbal models, was himself engaging in spontaneous 1 to 2 word phases to verbalize his needs, and needed to work on "expanding on his language and using it to initiate and maintain brief social interactions with peers" (Parent Ex. I at pp. 3-5).[26] Thus the evidence tends to show that the student's placement with peers having verbal skills would have run afoul of the functional grouping requirements, and the parents' claim in the due process complaint notice to the contrary lacks merit.

The parents also asserted in their due process complaint that the assigned public school site lacked 1:1 instruction, a board-certified behavior analyst (BCBA) "to develop the [student]'s special education program, and instruction that is "informed by ABA principles" (Parent Ex. A at p. 8). However, the May 2023 IEP did not require that the student be provided with 1:1 instruction, a BCBA to develop the student's educational programming, or specify that the ABA methodology must be used with the student, and these claims, while couched as claims regarding the school site in the due process complaint notice, were really a "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir 2015]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *6 [S.D.N.Y. Feb. 11, 2016] [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP; in other words, if the student ought to be placed in a school with particular characteristics, programs or services, then they should be set forth in the IEP and may not be raised as a challenge to the school placement"]). Accordingly, these claims must be rejected as without merit.

Also unaddressed by the IHO was the parents' claim in the due process complaint notice that the CSE failed to adopt the private neuropsychologist's recommendation that the student be provided with home-based ABA services, which was mentioned in the parent's opening statement (Tr. p. 44; Parent Ex. A at p. 5). The parents did not further mention home based-ABA services in their appeal to the undersigned at all,[27] instead merely making a general statement that they did not abandon any of their "prong 1" claims, which one might generously describe as a lackluster effort at best.[28] The available evidence shows that the private neuropsychologist noted that home-

[26] In other contexts, he may use three-, four- or five-word phases, but at times his teacher reported that he may demonstrate frustration by crying or screaming (see Parent Ex. I at p. 5).

[27] There was an oblique reference to home-based ABA in parents' memorandum of law accompanying the request for review regarding the IHO's improper reliance on testimony (Parent Mem. of Law at p. 9).

[28] Courts and SROs alike have disfavored "catch-all" allegations as insufficient (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 337 [S.D.N.Y. 2013] [finding "catch-all allegations" about placement in a due process

based ABA services had been acquired through the parents' insurance, and that he opined briefly in his evaluation report before the CSE that a 1:1 home-base ABA therapy was needed to "generalize [the student's] skills" and that the student was "prone to regression" in the absence of home-based ABA (Parent Ex. C at pp. 1, 7). Somewhat different than his written evaluation report that was before the CSE, in his direct testimony by affidavit during the impartial hearing, the private neuropsychologist left out his generalization reasoning and instead indicated that he had recommended "a 1:1 home-based ABA program, consisting of 15 - 20 hours of ABA per week to work on [the student's] communication, reciprocity, and behavioral control skills to avoid regression of skills previously taught in school" (Parent Ex. Z at ¶ 11). On cross examination the private neuropsychologist testified that 15 to 20 hours of home-based ABA was "not far off of the standard recommended number of hours that have been well established in the field and -- and in research and data for decades now" (Tr. pp. 217-18).

The most relevant evidence is that which was before the CSE, including the neuropsychologist's focus in his evaluation report on the need for home-based services for generalization of skills and his view that such students are "prone to" or that there was some potential for regression (Parent Ex. C at p. 7). The private neuropsychologist's opinion before the CSE was much less explicit and its primary rationale was for generalization and I do not find that rational convincing. Both SROs and courts have indicated that school districts are not required, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., C.M. v. Mount Vernon City Sch. Dist., 2020 WL 3833426, at *21, *28 [S.D.N.Y. July 8, 2020]; F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K., 2016 WL 899321, at *8-*10). While I can understand that the parents may have felt that services that he obtained outside of school while in preschool should continue while he moved into school-age programing, that that does not mean that the school district must automatically follow suit. I am also not convinced by the neuropsychologist that such an intense program such as 15-20 hours or 3 to 4 hours per day of home-based services was required beyond his daily school-based programming in order to make progress and there is no evidence that such home-based services are merely "standard in the field"; instead it appears to tend toward maximization of services which is not required under IDEA (B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 368 [E.D.N.Y. 2014]).

C. Transportation Services

The parents' request for reimbursement for transportation to and from MSA until the district provided the service in October 2024 is denied. They have not prevailed on their Burlington/Carter arguments for public funding of the costs of MSA and thus would not be entitled to it under that reimbursement theory. Education Law § 4402(4)(d) states that school districts in New York State are mandated to provide special education to students with appropriate transportation to and from a nonpublic school within fifty miles. However, it does not provide a specific time frame for which the district has to comply with such a request for transportation. In this case, the available evidence

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complaint did not preserve specific claims about placement because the broad allegation failed to inform the defendant "of a specific problem to be remedied"]; Phillips, 656 F. Supp. 3d at 482–83 [finding a general statement about related services does not provide sufficient notice regarding a specific complaint about vision services]).

shows that parents did not make a specific request for transportation to and from MSA until the 10-day notice rejecting the public programming that they sent on or about August 23, 2023 (see Parent Ex. B). Furthermore, the parent testified that the district began providing the student with transportation services in October 2023 (Tr. p. 178). The parents knew of their intention to send the student to MSA as early as June 7, 2023 (see Parent Ex. P). However, the parents did not inform the district of their need for transportation to and from MSA until August 23, 2023. Since the district began providing the transportation after the parents requested it, I find there is no further appropriate relief to be granted.[29]

VII. Conclusion

The evidence in the hearing record supports the IHO's finding that the district offered the student a FAPE for the 2023-24 school year. The parents were aggrieved by the IHO's decision but did not comply with their obligation to appeal the IHO's failure to rule on their functional grouping claim at the assigned public school site and their claim that the IEP should have included home-based ABA therapy in addition to his school programing in their request for review and, therefore, they abandoned these two claims. Accordingly, there is no need to determine whether the student's unilateral placement at MSA was appropriate or whether equitable considerations favor the parents' request for tuition reimbursement/funding. The parents' request for tuition reimbursement/funding at MSA for the 2023-24 school year is denied. The parents' request for transportation reimbursement is denied.

I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 25, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER

[29] I also note that the parent's assertion of the cost in her affidavit, without more documentation or detail as to what specially designed aspects of the transportation that was privately provided, would be insufficient evidence to warrant reimbursement even if the parent had prevailed with respect to obtaining the tuition costs for MSA (see Parent Ex. BB at ¶ 28).