



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-103

**Application of the [REDACTED]  
[REDACTED] for review of a determination of a hearing  
officer relating to the provision of educational services to a  
student with a disability**

### **Appearances:**

Michael Best, Corporation Counsel, and Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Maria C. McGinley, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse them for their son's tuition costs at the McCarton School (McCarton) for the 2010-11 school year. The parents cross-appeal the IHO's decision to the extent that she did not direct the district to reimburse them for the cost of home-based services. The appeal must be sustained. 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 been the subject of a prior administrative appeal related to the 2009-10 school year, and as a result, the parties' familiarity with the student's educational history and prior due process proceedings is assumed and will not be repeated here in detail (Application of a Student with a Disability, Appeal No. 11-032).<sup>1</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (Tr. pp. 186-87, 668; Dist. Ex. 3 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

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<sup>1</sup> On October 16, 2012, the U.S. District Court for the Southern District found in favor of the district, upon judicial review of Application of a Student with a Disability, Appeal No. 11-032 (F.L. v. NYC Dep't. of Educ., 2012 WL 4891748 [Oct. 16, 2012, S.D.N.Y.]).

At the time of the impartial hearing, the student was enrolled in the upper school at McCarton (Tr. p. 609).<sup>2</sup> On April 12, 2010, the CSE met for the student's annual review and to develop his IEP for the 2010-11 school year (Dist. Ex. 3). For the 2010-11 school year, the April 2010 CSE recommended a 12-month placement for the student in a 6:1+1 special class in a specialized school with related services comprised of four 60-minute sessions of individual speech-language therapy per week, one weekly 60-minute session of speech-language therapy in a dyad, as well as five 45-minute sessions of individual occupational therapy (OT) per week (Dist Exs. 3 at pp. 1-2, 25; 4). In addition, the April 2010 CSE developed 16 annual goals and 83 corresponding short-term objectives that addressed the student's primary areas of deficit (id. at pp. 7-22). The April 2010 CSE also proposed that the student receive 1:1 behavior management paraprofessional services, and upon a determination that the student's behavior seriously interfered with instruction, the CSE also developed a behavioral intervention plan (BIP) for him (Dist. Exs. 3 at pp. 4-5, 25-26; 4 at p. 2).

By letter to the district dated June 14, 2010, the student's mother indicated that the district had yet to provide her with a written copy of the IEP created at the April 2010 CSE meeting, and that she had not received a final notice of recommendation (FNR) from the district identifying the particular public school site to which the student had been assigned for the upcoming school year (Parent Ex. G at p. 1). As a result, the student's mother indicated that she planned to enroll the student in McCarton for the 2010-11 school year and that she intended to seek reimbursement of the student's tuition and costs related to his home-based program and related services to be paid at public expense (id.).

In an FNR to the parents dated June 22, 2010, the district summarized the April 2010 IEP and notified them of the particular school site to which the student was assigned for the 2010-11 school year (Dist. Ex. 7 at p. 1). On July 19, 2010, the parents visited the assigned public school site (Tr. p. 700; Parent Ex. E at p. 1).<sup>3</sup> By letter to the district dated June 27, 2010, the parents indicated that following their visit, they had deemed the assigned public school site to be inappropriate for the student and outlined their reasons for rejection (Parent Ex. E at p. 1).<sup>4</sup> Additionally, the parents reiterated their request for reimbursement of the costs of the student's tuition, home-based program and related services to be provided at public expense (id. at pp. 1-2).

On August 10, 2010, the student's mother entered into an enrollment contract with McCarton in which she agreed to be responsible for the costs of the student's tuition for the 2010-11 school year (Tr. p. 677; Dist. Ex. 18).

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<sup>2</sup> The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (Tr. p. 646; see 8 NYCRR 200.1[d], 200.7).

<sup>3</sup> Although the parents' June 27, 2010 letter indicated that on July 19, 2010, they visited the assigned school and proposed class; the student's mother testified that she visited the assigned school sometime in early July 2010 (Parent Ex. E at p. 1; Tr. pp. 700-01).

<sup>4</sup> Within the context of the hearing record, the date of this letter appears to be incorrect (Tr. pp. 700-01; Parent Ex. E at p. 1).

## **A. Due Process Complaint Notice**

By due process complaint notice dated May 2, 2011, the parents requested an impartial hearing (Dist. Ex. 1).<sup>5</sup> Additionally, the parents invoked their rights pursuant to pendency (stay put) in accordance with an unappealed 2008 IHO decision, which included, among other things, the costs of tuition at McCarton (*id.* at p. 2). The parents enumerated more than 60 allegations of defects related to the provision of a free appropriate public education (FAPE) during the 2010-11 school year and with regard to the appropriateness of the April 2010 IEP and the assigned public school site (*id.* at pp. 2-7). The alleged defects set forth claims that the district denied the student a FAPE because: (1) the 6:1+1 special class with 1:1 paraprofessional services in the April 2010 IEP and assigned public school site were not reasonably calculated to provide the student with meaningful educational benefits; (2) the district failed to offer the student consistent 1:1 support throughout the school day; (3) the district failed to address the student's need for 1:1 teaching; (4) the district failed to memorialize parent counseling and training on the April 2010 IEP; (5) the district failed to conduct an appropriate functional behavioral assessment (FBA) of the student; (6) the district failed to develop an appropriate BIP for the student, despite his interfering behaviors; (7) the district failed to develop a transition plan for the student; (8) the district failed to offer the student any home-based or extended-day services; (9) the students in the proposed classroom were grouped primarily by age and not by functioning level and/or classification; and (10) the assigned public school site could not satisfy the student's related services mandates (*id.* at pp. 2-5).

The parents also alleged that the student's unilateral placement comprised of McCarton and his home-based program was appropriate to address his special education needs (Dist. Ex. 1 at p. 7). They further maintained that they cooperated with the district in good faith, and therefore, no equitable considerations existed that would preclude or diminish an award of relief (*id.*). As a remedy, the parents sought, among other things, tuition reimbursement for McCarton for the 2010-11 school year, in addition to reimbursement for the costs of home-based services based on applied behavioral analysis (ABA) instruction techniques and after-school OT (*id.* at p. 7).

On May 5, 2011, the district responded to the parents' due process complaint notice, in which it alleged, among other things, that the assigned public school site was reasonably calculated to enable the student to receive educational benefits (Dist. Ex. 2).

## **B. Impartial Hearing Officer Decision**

On July 26, 2011, an impartial hearing convened, and after seven days of testimony, concluded on February 13, 2012 (Tr. pp. 1-719). On September 19, 2011, the then-appointed IHO rendered an interim decision in which he determined that McCarton, in conjunction with the student's home-based services comprised of ten hours per week of ABA instruction and two hours per week of OT, constituted the student's pendency placement (Interim IHO Decision at p. 2).<sup>6</sup>

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<sup>5</sup> On September 9, 2011, the parents amended their due process complaint notice to include claims related to the provision of a FAPE during the 2011-12 school year; however, during the course of the impartial hearing, the parties reached a settlement with regard to the claims arising from the 2011-12 school year (IHO Decision at p. 5; Tr. pp. 145-46, 388-89; Parent Ex. GG).

<sup>6</sup> On September 21, 2011, the IHO who issued the pendency order recused himself (IHO Decision at p. 3). On October 12, 2011, a second IHO, who later issued the final decision on the merits, was appointed to preside over the impartial hearing (Tr. p. 74).

In a decision dated April 4, 2012, upon a finding that the district failed to offer the student a FAPE during the 2010-11 school year, the subsequently appointed IHO directed the district to reimburse the parents for the cost of the student's tuition at McCarton for the 2010-11 school year (IHO Decision at pp. 21-22, 24). In pertinent part, the IHO concluded that the student did not receive a FAPE during the 2010-11 school year (id.). Specifically, the IHO found that the district failed to demonstrate that a 6:1+1 special class was appropriate and that the student would receive sufficient 1:1 instruction at the assigned public school site (id. at p. 20). Furthermore, the IHO determined that the district's omission of parent counseling and training from the April 2010 IEP contributed to a denial of a FAPE to the student (id. at p. 20). The IHO also concluded that the district failed to conduct a written FBA for the student, and further noted that the hearing record was unclear regarding whether the parents had any meaningful input in the formulation of the FBA or the BIP (id.). With respect to the BIP, the IHO also found that it was deficient because it lacked information concerning the frequency or duration of the student's behaviors (id.). The IHO further noted that the teacher who would have implemented the BIP would not have had any information concerning the student's behaviors without having first reviewed the student's file (id.).

Moreover, the IHO was not persuaded by the district's contention during the impartial hearing that it was only required to establish that it was prepared to offer the student a FAPE on the first day of school (IHO Decision at pp. 18-19). Rather, the IHO determined that in light of the material changes to students' summer program and placement in September, the district was required to establish that the assigned public school site remained appropriate in September following the summer months (id.). Next, the IHO concluded that the assigned public school site did not constitute an appropriate educational setting for the student, in part, because the evidence showed that it could not have fulfilled the student's related services mandate on the first day of school (id. at p. 19). Lastly, the IHO found that the student would not have been appropriately grouped at the assigned public school site, based on similarity of needs (id. at p. 21).

Regarding the parents' unilateral placement, the IHO concluded that the student had made meaningful progress at McCarton and that it was reasonably calculated to provide the student with educational benefits (IHO Decision at pp. 22-23). Next, despite her conclusion that McCarton was appropriate, she found that the student's home-based program was not necessary to enable the student to make meaningful educational progress (id.). Having determined that the student's program at McCarton was "complete," the IHO indicated that the district was not responsible for the costs of additional programming for him, such as extended-day or home-based services (id.). Lastly, the IHO found that equitable considerations favored the parents' request for relief (id. at p. 23). Specifically, the IHO determined that the parents cooperated with the district, and noted testimony from the student's mother that she would have accepted a district program for the student, if the district had offered her an appropriate program (id.).

#### **IV. Appeal for State-Level Review**

The district appeals, and argues, among other things, that it offered the student a FAPE during the 2010-11 school year, McCarton was not an appropriate unilateral placement for the student and that equitable considerations would preclude relief in this matter. In support of its position that the district offered the student a FAPE during the 2010-11 school year, the district makes the following allegations: (1) the omission of parent counseling and training from the April 2010 IEP did not rise to the level of a denial of a FAPE to the student; (2) the April 2010 CSE relied on the FBA prepared by McCarton personnel to develop the student's BIP; (3)

regardless of whether the district was required to conduct an FBA, the failure to do so did not necessarily rise to the level of a denial of a FAPE; (4) the April 2010 CSE also considered evaluative data and reports from McCarton in addition to a classroom observation in order to develop the BIP and program recommendations for the student; (5) the BIP adequately described the student's behaviors and offered strategies directed at his interfering behaviors; (6) the assigned public school site was prepared to implement the student's behavior plan; (7) the hearing record revealed that the assigned public school site could have fulfilled the student's related services mandate; (8) there was evidence in the hearing record to demonstrate that personnel employed by the assigned public school site could facilitate the student's transition from McCarton to the district school; (9) the evidence showed that placement in a 6:1+1 special class with a 1:1 behavior management paraprofessional was appropriate for the student's educational needs; and (10) the assigned public school site could suitably group the student based on his special education needs within the proposed classroom.

Although the district does not appeal the IHO's finding that the student was not entitled to an award of home-based services, the district argues that the IHO erred in finding that McCarton was appropriate. The district contends that testimony from McCarton personnel that indicated that the student could not make meaningful educational progress without a home-based program supports a finding that McCarton did not constitute an appropriate placement for the student. Lastly, the district claims that equitable considerations weigh against the parents' request for relief, in part because the evidence shows that the parents never seriously considered enrolling the student in a district school. As a remedy, the district requests an order reversing the IHO's decision to the extent that directed it to reimburse the parents for reimbursement of the student's tuition at McCarton in the alternative, a finding that it provided the student with a FAPE, that McCarton was an appropriate unilateral placement and that equitable considerations preclude relief in this instance.

The parents submitted an answer, admitting and denying the allegations raised in the petition. The parents cross-appeal the decision on the basis that additional matters, raised in their due process complaint notice and undecided by the IHO, support a finding of a denial of a FAPE as well as to the extent that the IHO did not award reimbursement for the student's home-based program.

In pertinent part, the parents maintain that the district denied the student a FAPE during the 2010-11 school year, McCarton was an appropriate placement for the student, the student required a home-based program, and equitable considerations support their request for relief. The parents specifically allege that the hearing record does not demonstrate that the proposed 6:1+1 special class combined with 1:1 paraprofessional services was appropriate for the student. Furthermore, the parents claim that the April 2010 IEP was developed without meaningful parent participation, and that the outcome of the April 2010 CSE meeting was predetermined. The parents also assert that the evidence shows that the student requires a 1:1 teaching program. The parents contend that the district's failure to assess the student for his amenability to any teaching methodology denied the student of a FAPE. They further maintain that the student required an extended-day program, and that the April 2010 CSE failed to discuss the student's need for such services. Next, the parents allege that the district failed to conduct an FBA for the student, and the resultant BIP was inadequate to address his behavioral needs. Additionally, the parents submit that the district's failure to include the provision of parent counseling and training and a transition plan in the April 2010 IEP contributed to the denial of a FAPE to the student. Regarding the assigned public school site, the parents contend that there is no showing in the hearing record that the assigned public school site could have implemented the student's IEP

beyond the summer months. In addition, the parents maintain that the assigned public school site could not implement the student's IEP, because it would not have provided the student with his related services in accordance with his IEP. Also, the parents allege that the student would not have been suitably grouped for instruction within the proposed classroom.

Additionally, the parents maintain that McCarton, coupled with his home-based program, formed an appropriate unilateral placement for the student. In pertinent part, the parents submit that McCarton is appropriate to address the student's educational needs, because the student requires a 1:1 setting, and without a 1:1 program, he could not effectively acquire new skills. The parents claim that the student exhibits behavioral needs, which McCarton addresses through the student's written behavior plan. The parents further assert that the hearing record reflects that the student made progress across a variety of domains at McCarton. Further, contrary to the district's assertions, they allege that the student's need for additional after-school services did not render McCarton inappropriate. Lastly, the parents submit that equitable considerations support their request for relief, in part, because the student's mother was amenable to the possibility of placement of the student in a district program, and she fully cooperated with the district.

The parents further submit that the "unprecedented number and accelerated pace of appeals" taken by the district reflects its "general lack of respect for adverse IHO findings," as well as its perception that the SRO is "decidedly biased in its favor and will likely accept, excuse and overlook" FAPE violations for which the district should be held accountable (Answer ¶ 47).<sup>7</sup>

The parents also contend that in light of the district's failure to challenge the appropriateness of McCarton or raise any equitable considerations in its response to their due process complaint notice, the district should be precluded from raising such claims on appeal. Next the parents assert that despite notice of the defects surrounding the April 2010 IEP, the district failed to cure those defects.<sup>8</sup> The parents argue that the district should not be permitted to remedy a defective IEP through "revisionist testimony" adduced at the impartial hearing (Answer ¶ 51). Finally, the parents claim that by unilaterally selecting the assigned public school site for the student, the district violated a stipulation reached in a class action suit.<sup>9</sup>

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<sup>7</sup> To the extent that the parents request a recusal based on allegations of bias, I have considered the parents' request and find that I am able to impartially render a decision and that there is no basis for recusal in this instance (see 20 U.S.C. § 1415[g][2]; 8 NYCRR 279.1[c]).

<sup>8</sup> The student's mother testified that she participated in the resolution process (Tr. p. 679). State regulation provides that within 15 days of the receipt of the due process complaint notice, the district shall convene with the parent and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, which shall include a representative of the school district who has decision-making authority on behalf of the school district and may not include an attorney of the school district unless the parents are accompanied by an attorney, where the parents discuss their complaint, and the school district has an opportunity to resolve that complaint (8 NYCRR 200.5[j][2][i]). Where the parties are unable to reach agreement during the resolution period, the impartial due process hearing may occur, which was the case in the instant matter (8 NYCRR 200.5[j][2][v]). Notwithstanding the parents' complaint that the district failed to cure the alleged defects of which they had received notice during the ten-day notice period or during the resolution session, there is no indication in the hearing record that the district's failure to remedy the alleged defects was a procedural violation that impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

<sup>9</sup> See Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]. The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see also Application of the Bd. of Educ., Appeal No.

Finally, the parents have attached the following documents to their answer for consideration on appeal as additional evidence: (1) a page from the Office of State Review website; (2) the IHO's decision in the instant case; and (3) a January 2012 New York State Education Department guidance document entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide." With regard to the additional evidence that was submitted with the parents' answer, generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the IHO's decision is already included in the hearing record and a State Review Officer will take notice of official administrative guidance documents published by the New York State Education Department.<sup>10</sup> Accordingly, their contents are duly considered when relevant and there is no need to formally admit these documents in to evidence. The additional documentary evidence either could have been submitted at the time of the impartial hearing or is not necessary in order to render a decision. Accordingly, I will not consider this additional evidence.

As a remedy, the parents request an order dismissing the district's appeal and modifying the IHO's decision to find in their favor on additional claims supporting a denial of a FAPE. The parents also seek reversal of the IHO's determination regarding extended day services and an award of reimbursement for the student's home-based program.

The district submitted an answer to the cross-appeal and denied each of the allegations set forth in the cross-appeal. Regarding the parents' request for additional findings that the district did not offer the student a FAPE, the district submits that although the parents seek review of all of the claims raised in the due process complaint notice not considered by the IHO, the parents failed to specify which allegations should be considered on appeal, and as a result, their request for review of such matters should not be entertained. Next, the district argues that the IHO properly denied the parents' request for the provision of a home-based program for the student,

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03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]). Therefore, I lack the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., determine the extent to which the district may be bound or may have violated the consent order issued by a district court, or establish the appropriate remedy for the alleged violation of a Court's order (see R.K., 2011 WL 1131492, \*17 n.29 [E.D.N.Y. Jan. 21, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. Apr. 15, 2010]; see also F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*11-\*12 [S.D.N.Y. Oct. 16, 2012]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. Aug. 25, 2010] [addressing the applicability and parents' rights to enforce the Jose P. consent order]).

<sup>10</sup> "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide" is available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>

because, in part, it was not a necessary element of an appropriate educational program for him. The district further maintains that it was not required to offer the student a home-based or extended-day program to address the student's generalization needs, particularly, because the hearing record demonstrated that the student did not require such a program in order to make meaningful educational progress.

The district also responded to the remaining issues raised by the parents in their answer, and argued that they were not properly preserved for review, because the parents raised them for the first time on appeal. Moreover, the district asserts that the parents' answer and cross-appeal violates State regulations, in part, because they failed to include citations to the hearing record. In the alternative, with respect to the parents' "four corners" argument, the district maintains that it should be permitted to provide testimony describing the program it could provide, as implemented by the assigned public school site, had the student attended there. Next, despite the parents' claim that the district has commenced over 100 appeals, the district maintains that their assertion is unsupported and unrelated to the merits of the instant case. In any event, the district alleges that the number of appeals that it has initiated over the past year is irrelevant to the instant case. Additionally, the district asserts that it was not required to raise arguments challenging the appropriateness of McCarton or whether equitable considerations favored the parents' claim in its due process response, and there is no indication in the hearing record that the district's failure to include such defenses in its due process responses resulted in a denial of a FAPE to the student or any prejudice to the parents. The district also contends that the parents cannot argue on appeal that the district failed to remedy any alleged defects in the IEP, because the parties jointly conducted a resolution session but were unable to reach an agreement during the resolution meeting. Lastly, the district asserts that the matters addressed in Jose P. have no bearing on the instant case, because the student is not a member of the Jose P. class. As relief, the district requests an order directing that the petition be sustained and that the parents' cross-appeal be dismissed.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No.

07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Impartial Hearing**

Before reaching the merits of the instant appeal, I must determine which claims are properly preserved for review. In their answer, the parents allege that the district failed to develop any general goals at the CSE meeting. As set forth in detail below, the parents failed to include this claim in their due process complaint notice, and therefore, it will not be considered on appeal.

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). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[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]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law

(Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parents did not argue that the district failed to develop any general goals nor can their due process complaint notice be reasonably read to include such an allegation (see Dist. Ex. 1). In addition, these issues were not properly before the IHO for resolution at the impartial hearing, and the parents cannot, now, raise these issues for the first time on appeal (Dirocco v Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*23 [S.D.N.Y. Jan. 2, 2013] [Parents' failure to identify claim related to spelling goals in their due process complaint precluded consideration on appeal]). Furthermore, upon review of the hearing record I find no agreement by the district to an expansion of the issues in this case (see Dist. Ex. 1; Tr. pp. 1-719).

Where, as here, the parents did not seek or secure the district's agreement to expand the scope of the impartial hearing to include these issues or include these issues in an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at \*4-\*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Moreover, because it was raised for the first time on appeal, it is not surprising that the IHO properly did not address this issue in her decision; accordingly, I find that the parents' allegation that the CSE failed to develop any general goals during the April 2010 CSE meeting is, therefore, outside the scope of my review and I decline to consider the matter (see M.P.G., 2010 WL 3398256, at \*8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; see also IHO Decision at pp. 18-24; Application of the Dep't of Educ., Appeal No. 12-091; Application of a Student with a Disability, Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a

Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

Next, regarding the parents' claim that the district is precluded from raising any claims or defenses that were not asserted in its response to the parents' due process complaint notice, there is no legal authority to support the parents' position. Here, the district submitted a response to the due process complaint notice that comported with federal and State regulations, and there is no indication in the hearing record that its failure to include a defense below resulted in a denial of a FAPE to the student (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]; see also Application of the Dep't of Educ., Appeal No. 11-118; Application of a Student with a Disability, Appeal No. 08-151). Moreover, federal or State regulation does not require the insertion of affirmative defenses in the response to the due process complaint notice, nor does it suggest that unasserted defenses will be waived (R.B. v. Dep't of Educ., 2011 WL 4375694, at \*5 [S.D.N.Y. Sept. 16, 2011]; Application of the Bd. of Educ., Appeal No. 11-119). Under the circumstances, the district is not precluded from challenging the appropriateness of the student's unilateral placement and home-based program and whether the equities support an award of relief.

## **B. Scope of Review**

As a cross-appeal, the parents "preserve all of their additional claims as additional ... FAPE deprivations that the IHO could and should have adjudicated in [their] favor" (Answer ¶ 53). However, neither the answer nor the accompanying memorandum of law specifies which of the issues that remain that the IHO did not decide in reaching a determination that the district did not offer the student a FAPE, nor does either submission describe how such issues should lead to a different result than the one reached by the IHO (see IHO Decision; Dist. Ex. 1; Answer; Parent Mem. of Law). Despite characterizing the IHO's findings as "amply sufficient" to establish that the district denied the student of a FAPE, the parents generally allege such issues should be adjudicated in their favor, without specification or further development (Answer ¶ 53; Parent Mem. of Law at p. 1). Under the circumstances presented, I decline to do so.

A party appealing must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" and this includes clearly identifying which particular issues that the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments] Fera v. Baldwin Borough, 2009 WL 3634098, at \*3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at \*4 n.3 [S.D.Ala. Aug. 23, 2007]).

State regulations governing appeals also require pleadings to set forth citations to the record on appeal, and shall identify the relevant page number(s) in the transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (see 8 NYCRR 279.18 [b]), however, with respect to the issues that the parents claim the IHO could and should have addressed, neither the answer or memorandum of law include any references to the

evidence in the hearing record at all. As the answer lacks any guidance from the parents' counsel indicating the significance of these "forgotten" issues or at least citation to relevant portions of the hearing record, I will not sift through their due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on their behalf and I find the cross-appeal insufficient with respect to those issues (8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 12-032); Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

I have, however, carefully reviewed the entire hearing record to consider those claims that the parents have taken the care to identify in their answer and cross-appeal (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). When an IHO has not addressed claims but the issues are sufficiently identified on appeal, another option to consider is whether the case should be remanded to the IHO for a determination of claims that the IHO purportedly did not address.<sup>11</sup> In this case, due to the amount of time that has passed since the challenged IEP in this case was developed, I have exercised my discretion to address these matters rather than remand the matter to the IHO, where, as here, the hearing record is adequate to render a determination. However, under similar circumstances in future cases involving the appropriateness of an IEP or the provision of a FAPE, I may consider exercising my discretion to remand a matter to an IHO with directives to render determinations on FAPE issues that were properly raised by a party, but went undecided by an IHO.

### **C. April 2010 IEP**

Next, I will consider the adequacy of the April 2010 IEP. The parents argue that the IEP is deficient and urge that review of the IEP must be limited to the "four corners" of the document, contending that the district cannot be permitted to present testimony at a due process hearing in an attempt to subsequently cure deficiencies in the IEP. As the Second Circuit recently articulated, the determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis and includes the consideration of only the information known at the time the IEP was developed (R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). However, the Second Circuit rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 185-89). As set forth below upon application of a prospective analysis, an independent review of the entire hearing record supports the district's contention that the recommended 6:1+1 special class with the related services set forth in the April 2010 IEP was reasonably calculated to provide the student with educational benefits and sufficient 1:1 support in the least restrictive setting.

#### **1. CSE Process - Parent Participation/Predetermination**

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<sup>11</sup> As a number of the enumerated allegations in the due process complaint notice were overlapping and even duplicative in some instances (see Dist. Ex. 1), I remind the IHO that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]) in order to determine which issues need to be addressed in the IHO's decision. In light of parents' concerns about the district's defenses to their claims, a prehearing conference would also have been an appropriate time and place for the parents and the IHO to seek clarification from the district regarding the extent to which it would contest the appropriateness of the unilateral placement at McCarton or extended day services, and to gain clarification from both parties on what equitable considerations may have been at issue.

Turning to the procedural challenges, I will first consider the parties' dispute regarding whether the April 2010 CSE engaged in impermissible predetermination when formulating the student's IEP and whether the district failed to afford the parents a meaningful opportunity to participate in the development of the student's IEP. As set forth in greater detail below, I find that the hearing record does not include sufficient evidence to find in favor of the parents' claims. The consideration by district personnel of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at \*7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at \*6-\*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at \*30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Attendees at the April 2010 CSE meeting included a district school psychologist who also served in the capacity as district representative, a district special education teacher, an additional parent member and the parent (Tr. pp. 169, 176-77; Dist. Exs. 3 at p. 2; 4 at p. 1).<sup>12</sup> McCarton personnel also participated by telephone included the following individuals: the educational supervisor, the student's speech-language pathologist, and the student's occupational therapist (Tr. p. 177; Dist. Exs. 3 at p. 2; 4 at p. 1).<sup>13, 14</sup> According to the hearing record, the April 2010 CSE meeting lasted for 2.5 hours (Tr. p. 179). Additionally, as explained below, there is also no evidence to suggest that anyone on the April 2010 CSE precluded the student's mother from participating fully in the meeting (M.W. v. New York City Dep't. of Educ., 2012 WL 2149549 at \* 11 [E.D.N.Y., 2012]). On the contrary, the evidence favors a finding that the district took appropriate measures to obtain input from McCarton personnel who took part in the CSE meeting.<sup>15</sup> In this case, although the district requested that all participants remain for the

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<sup>12</sup> Although the district school psychologist served in a dual capacity during the April 2010 CSE meeting, to avoid confusion in this decision, she will hereinafter be referred to as the school psychologist.

<sup>13</sup> The hearing record reflects that a duly constituted CSE developed the student's IEP (Tr. p. 222; 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]). In addition, to the extent that the parents alleged in their due process complaint notice that the April 2010 CSE was not properly composed, because a regular education teacher did not attend the meeting, a regular education teacher was not a mandatory participant, because the April 2010 CSE did not consider placing the student in the general education environment (Dist. Ex. 3 at p. 24).

<sup>14</sup> The April 2010 IEP refers to the participation at the meeting of the student's McCarton "Head teacher" (Dist. Ex. 3 at p. 2). The hearing record reflects this person's title is actually "educational supervisor" and she performs a different role than that of the student's McCarton classroom teacher (compare Tr. pp. 466-68, with Tr. pp. 472-73, 488, 614; Dist. Ex. 11 at p. 4). For the sake of clarity in this decision, the participant at the April 2010 meeting from McCarton will be referred to as the educational supervisor.

<sup>15</sup> I further note that in light of her testimony that she has been attending CSE meetings on the student's behalf since he was two years old, the hearing record suggests that the student's mother is a seasoned veteran of the CSE process (Tr. p. 692; see also Application of a Student with a Disability, Appeal No. 11-032).

duration of the April 2010 CSE meeting, the hearing record indicates that McCarton could not ensure everyone's participation for the entire meeting (Tr. p. 178). As a result, as per the school psychologist's practice, the April 2010 CSE asked the parent at the beginning of the meeting if she objected to participants departing the meeting as needed in order to resume their duties at McCarton (Tr. p. 178). No one raised any objections to the departures of the student's providers during the April 2010 CSE meeting (Tr. p. 179). However, the school psychologist testified that she secured the attendance of each of the student's providers for a discussion of their respective specialties (Tr. pp.178-79). The hearing record further suggests that each of the student's providers from McCarton had an opportunity to participate in the creation of the student's IEP (Tr. p. 208). More specifically, the school psychologist testified that the CSE "spent a lot of time" with the student's providers and asked them questions in order to properly assess the student's functioning levels and goals (*id.*). In addition, the hearing record suggests that each of the participants, including the student's mother, had copies of the documentation reviewed by the April 2010 CSE to enable each individual to follow along during the discussion (Tr. p. 186).

The April 2010 CSE advised the student's mother of her due process rights and the hearing record further indicates that she was already represented by counsel at the time of the CSE meeting (Dist. Ex. 4 at p. 1). At the beginning of the meeting, the student's mother advised the April 2010 CSE that she intended to continue the student's enrollment at McCarton for the upcoming school year (Tr. pp. 180-81, 283, 300).<sup>16</sup> The hearing record reflects that the student's mother further advised the committee she wanted the student to remain in McCarton, because she had not seen any public school that she deemed appropriate to meet the student's needs (*see* Tr. p. 674; Dist. Ex. 4 at p. 1). Although the district's obligation to permit parental participation in the development of the student's IEP should not be trivialized, the IDEA does not require districts to accede to the parents' program demands (*Blackmon v. Springfield Bd. of Educ.*, 198 F.3d 648 at 657-58 [8th Cir. 1999]; *citing Rowley*, 458 U.S. at 205-06). The April 2010 CSE subsequently asked the student's mother if she wanted a public school placement, which she refused (Tr. pp. 180, 284, 286). As a result, the April 2010 CSE asked the student's mother if she preferred that the committee develop an individualized education services program (IESP) for the student and the school psychologist explained the differences between an IEP and an IESP (Tr. p. 286; Dist. Ex. 4 at p. 1).<sup>17</sup> The April 2010 CSE suggested that the student's mother have a discussion with "someone" else regarding what type of educational plan she was seeking prior to making her decision and following a phone call to her attorney at the time of the meeting, the student's mother requested that the district create an IEP for the student (Tr. p. 180; Dist. Ex. 4 at p. 1).

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<sup>16</sup> The student's mother testified that she advised the CSE that she planned to continue the student's placement at McCarton, because the district could not offer her a "placement" option at the time of the April 2010 meeting (Tr. p. 694). The school psychologist testified that it is not the role of the CSE to determine which public school site to which the student would be assigned; rather, the district placement officer makes that recommendation (Tr. pp. 225-26).

<sup>17</sup> Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts, upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs (Educ. Law §§ 3602-c[2][a], [2][b][1]). A school district of location recovers from the school district of residence the evaluation costs, CSE administrative costs, and special education services costs incurred (8 NYCRR 177.2; *see also* "Guidance on Reimbursement Claims for the Cost of Providing Special Education Services to Parentally-Placed Nonresident Students Pursuant to Education Law Section 3602-c" located at <http://www.p12.nysed.gov/specialed/publications/policy/reimbursement608.htm>).

Notwithstanding the parents' claim that the outcome of the April 2010 CSE meeting was predetermined, the school psychologist testified that the April 2010 IEP was formulated at the time of the CSE meeting (Tr. p. 209). Although the April 2010 CSE reviewed the student's IEP from the previous school year, the school psychologist testified that the CSE did not have a draft copy of the student's IEP at the time of the meeting, nor did the April 2010 CSE utilize "draft goals" to create the student's goals (Tr. pp. 279-80). Rather, the hearing record indicates that the April 2010 CSE reviewed each annual goal and short-term objective with McCarton personnel at the time of the meeting to ensure that the CSE "got the wording right and the percentages right," while making sure that all participants felt that the April 2010 IEP was appropriate for the student's needs (Tr. pp. 195, 198, 204-05, 210; Dist. Ex. 4 at p. 2).<sup>18</sup> The hearing record further indicates that the April 2010 developed the student's related services mandates based on input from the student's providers from McCarton, to which none of the participants voiced any objections at the time of the April 2010 meeting (Tr. pp. 188-89, 212). Additionally, the April 2010 discussed the student's need for 1:1 support (Tr. pp. 214, 290-92; see Dist. Ex. 3 at pp. 4-5, 25). The hearing record also reflects that the CSE considered other programs before it recommended placement in a 6:1+1 special class (Tr. p. 225). For example, the April 2010 CSE opted against placing the student in a 12:1+1 special class, because it determined that the student required additional support at that time (Tr. p. 225; Dist. Ex. 3 at p. 24). In addition, the April 2010 CSE also considered placement of the student in a 6:1+1 special class without the provision of a behavior management paraprofessional; however, the CSE decided against this program option, because it believed that the student would benefit from 1:1 paraprofessional support (id.). Based on the foregoing, I find that the evidence does not support the conclusion that the district predetermined the student's program for the 2010-11 school year, but instead shows that the student's mother meaningfully participated and contributed to the development of the student's IEP during the April 2010 CSE meeting.

## 2. Sufficiency of Evaluative Data

Turning next to the parties' dispute whether the evaluative information upon which the April 2010 CSE relied formed a sufficient basis for its program recommendation, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C.

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<sup>18</sup> According to the hearing record, all CSE participants, including the student's mother had a copy of the student's IEP from the prior school year during the meeting (Tr. p. 281).

§ 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

According to the school psychologist, the CSE considered the following documents during the April 2010 meeting: the results of a June 17, 2008 administration of the Stanford-Binet Intelligence Scales, Fifth Edition (SB5), a January 2009 McCarton School OT progress report, the district's May 14, 2009 IEP, the results of a June 9, 2009 administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II), the results of a June 2009 administration of the Assessment of Basic Language and Learning Skills-Revised (ABLBS), January 2010 McCarton School educational progress and speech-language progress reports, and the district's March 3, 2010 classroom observation report (Tr. pp. 173-75, 183-86, 279-81; Dist. Exs. 4; 8-14; Parent Ex. K).<sup>19</sup>

The documentary information reviewed by the April 2010 CSE shows that the student's cognitive test results yielded a full scale IQ of 46, a nonverbal IQ of 51, and a verbal IQ of 47 (Dist. Ex. 9). Achievement assessment results yielded the following subtest standard scores: word reading 43, reading comprehension 40, numerical operations 43, and spelling 66 (Dist. Ex. 8 at p. 1).<sup>20</sup> The January 2010 McCarton educational progress report indicated that during the 2009-10 school year, the student received 40 hours per week of 1:1 instruction in a classroom with five other students, and daily 60-minute speech-language therapy and 45-minute OT sessions (Dist. Ex. 11 at p. 1). He exhibited delays in cognition, communication and socialization, poor attention skills, and a high rate of self-stimulatory behavior (Dist. Exs. 11 at p. 1; 12 at p. 1). Off-task behaviors included inattention, hand tapping, walking out of his way, and touching objects/his face repeatedly (Dist. Exs. 11 at pp. 1-2; 12 at p. 1). According to the January 2010 report, the student "learn[ed] best" when provided instruction using ABA principles, fast-paced instruction with frequent opportunities for repetition, specialized programming, a predictable routine, visual support, positive reinforcement and systematic prompting procedures during activities (Dist. Ex. 11 at p. 1). The January 2010 report described the student's participation in 1:1 teaching sessions, his ability to work at his desk for up to 15 minutes before receiving access to a preferred item or activity, and his academic strengths and weaknesses (id. at pp. 1-3).

Information that the April 2010 CSE considered described the student's language and social skill needs (Dist. Exs. 11 at pp. 2-3; 12). According to the reports, the student communicated verbally using utterances of one to six words in length, but required prompting to initiate interactions, increase voice volume, and use full sentences (Dist. Exs. 11 at p. 2; 12 at pp. 2-3). Receptively, the student followed multistep directions with cues and showed understanding of linguistic concepts including some pronouns, quantity, and pair associations (Dist. Ex. 12 at p. 2). According to the speech-language pathologist, the student exhibited language processing

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<sup>19</sup> I note that the school psychologist testified that the district did not conduct its own evaluations prior to the development of the April 2010 IEP, and did not have the information available to her to determine if a triennial evaluation had occurred within the past three years (Tr. pp. 272-73). Notwithstanding the parents' allegation that the district did not conduct timely assessments of the student, I note that the evidence shows that the evaluative information the April 2010 CSE considered was conducted within two years of the CSE meeting (Tr. pp. 302-03; Dist. Exs. 8-14; Parent Ex. K).

<sup>20</sup> The student's WIAT-II subtest standard scores correlated to grade equivalents ranging from K.5 to 1.8 (Dist. Ex. 8; see Dist. Ex. 11 at p. 3).

difficulties combined with a lack of motivation to answer questions, resulting in a delayed response time and inaccurate responses to known questions (*id.*). Socially, the student required adult support when socializing with peers or engaging in leisure activities, such as prompting to ask a peer to take a turn or gain a peer's attention (Dist. Exs. 11 at p. 2; 12 at pp. 2-3). During group activities, the student demonstrated the ability to attend to the group leader for up to ten minutes, and wait for three minutes with redirection and prompting (Dist. Ex. 11 at p. 2).

The McCarton progress reports the April 2010 CSE reviewed also described the student's fine and gross motor, sensory processing, community, leisure, and self-care skills (Dist. Exs. 11 at pp. 3-4; 12 at p. 3; 13). During OT sessions, the student worked on improving coordination, endurance, balance, and trunk strength through a variety of gross-motor activities (Dist. Ex. 13 at p. 2). Fine motor skills addressed by OT sessions include improving scissor skills, typing, handwriting, drawing, and copying pictures (*id.* at pp. 2-3). To address sensory processing needs, McCarton personnel provided the student with opportunities for physical activity, fine motor exercises, relaxation, and sensory input (*id.* at p. 1-2). The report also depicted the student's sensitivity to loud environments, which could result in an increase in the student's behaviors such as covering his ears, humming and whining, and his difficulty inhibiting non-purposeful body movements such as finger tapping, hand clapping, and body rocking (*id.* at p. 2). In the area of community and prevocation skills, the student participated in traffic safety, grocery shopping, and basic clerical activities (Dist. Exs. 11 at p. 3; 13 at p. 4). Regarding activities of daily living (ADL) skills, according to the McCarton progress reports, the student engaged in activities to improve his ability to complete basic dressing, meal preparation and hygiene tasks (Dist. Exs. 11 at p. 4; 13 at pp. 3-5).

In addition to reviewing documentary information, McCarton personnel who worked with the student took part in the April 2010 CSE meeting, which according to the school psychologist, was not "rushed" (Tr. pp. 177-79, 207-08; Dist. Exs. 3 at p. 2; 4 at p. 2).<sup>21</sup> A review of the April 2010 IEP present levels of performance reflects information about the student's specific academic skill performance provided by the educational supervisor, which included teacher estimates of the student's approximate grade levels in reading and math (Dist. Ex. 3 at pp. 3-4). The educational supervisor also provided the April 2010 CSE with information reflected in the IEP about the student's social interaction and play skills, inattentiveness, and behaviors that interfered with learning (*id.* at p. 5). The April 2010 IEP also detailed information provided by the McCarton speech-language pathologist regarding the student's then-current skills pertaining to receptive, expressive, and pragmatic language skills and voice production (*id.* at p. 3). The McCarton occupational therapist also provided information about the student's gross and fine motor, sensory processing and daily living skills, which is reflected in the IEP (*id.* at p. 6).

"Both the IDEA and New York law prohibit school districts from using a 'single measure or assessment as the sole criterion for determining ... an appropriate educational program for the child.' 20 U.S.C. § 1414[b][2][B]; 8 NYCRR 200.4[b][6][v]" (E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at \*9 [S.D.N.Y. Sept. 29, 2012]; F.B. v. New York City Dep't of Educ., 2013 WL 592664 at \*7-\*8 [S.D.N.Y. Feb. 14, 2013]; S.F., 2011 WL 5419847, at \*10); however, in this case, as described above, the hearing record shows that the April 2010 CSE

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<sup>21</sup> To the extent the parents assert that the April 2010 CSE failed to meaningfully consider assistive technology, nothing in the reports the CSE considered suggested that the student used assistive technology during the 2009-10 school year, and the school psychologist testified that the occupational therapist who participated during the meeting did not indicate to the CSE that the student used assistive technology (Tr. pp. 220-21; *see* Dist. Exs. 11-13; Parent Ex. K).

appropriately reviewed a variety of sources to ascertain information about the student's cognitive ability and academic, language, gross and fine motor, sensory processing, community/pre-occupation, ADL, and social/emotional skills and developed the student's April 2010 IEP based on this information (Tr. pp. 173-75, 177-79, 183-86, 209-10, 279-81; Dist. Exs. 3; 4; 8-14; Parent Ex. K). Based upon the evidence, the parents' assertions regarding the sufficiency of the evaluative data and its consideration by the April 2010 CSE are lacking in merit.<sup>22</sup>

### **a. Present Levels of Performance**

Next, contrary to the parents' allegation that the evaluative information upon which the April 2010 CSE relied did not establish the student's present levels of performance, I have reviewed the April 2010 IEP in conjunction with the evaluative data before the April 2010 CSE, and as discussed below, I find that the hearing record demonstrates that the CSE carefully and accurately described the student's present levels of academic achievement, social development, physical development, and management needs and that the description of the student's needs was consistent with the evaluative information and McCarton reports before the CSE at the time of the meeting (see F.B., 2013 WL 592664 at \*7-\*8).

As noted earlier, among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). 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]). In this case, the April 2010 IEP present levels of academic performance reflected then-current McCarton progress and teacher reports indicating that the student's word decoding and recognition skills were at a second grade level (Dist. Ex. 3 at pp. 3-4). During the 2009-10 school year, the student had mastered approximately 65 new sight words, decoded "CVC" words and mastered new consonant blends/diagraphs and vowel combinations (id. at p. 3). According to the IEP, the student's reading comprehension skills were at a late first to second grade level (id. at pp. 3-4). The student answered questions about the main idea, setting and character when given a multiple choice answer format, but was otherwise unable to answer those types of questions (id. at p. 3). The April 2010 IEP indicated that the student's listening comprehension skills were on a kindergarten to early first grade level with visual prompts (id.). The student answered literal "where," "what," and "who" questions without picture cues, but not inferential "how" and "why" questions (id.). According to the April 2010 IEP, the student's spelling skills were at a second grade level and he wrote 64 new spelling words (id.). Regarding written expression, the student demonstrated the ability to write a six to eight-word sentence in response

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<sup>22</sup> Regarding the parents' allegation that the district's classroom observation of the student violated the procedures set forth in the district's Standard Operating Procedures Manual (SOPM), the hearing record does not contain the SOPM or information to rebut the district representative's testimony that her observation of the student was conducted in compliance with the SOPM (Tr. pp. 208-09; see Parent Ex. K). Additionally, contrary to the parents' assertion that the district failed to have "any meaningful discussion about classroom observations," the school psychologist testified that the classroom observation of the student was discussed during the April 2010 CSE meeting and that the student's mother was provided the opportunity to fully participate in the meeting (Tr. pp. 173-75, 178; see Dist. Ex. 4 at p. 1).

to personal/social questions (id.). The student's math skills were at a first grade level, as he added and subtracted two-digit numbers through 50 using manipulatives, and solved basic addition word problems using quantities one through ten with manipulatives, although he could not yet complete subtraction word problems (id.). The April 2010 IEP reflected that at the time of the CSE meeting the student was focusing on practical money skills, and that he exhibited difficulty adding "mixed" money amounts (id.).

Information about the student's speech-language skills reflected in the April 2010 IEP indicated, in part, that the student followed three-step related directions with the provision of written prompts (Dist. Ex. 3 at p. 3). In addition, the April 2010 IEP noted that the student receptively attended to language-based tasks for up to five minutes, and that he could identify pairs of pictured objects that belonged/did not belong in a given category (id.). The April 2010 IEP described the student's spontaneous language as "fragmented;" however, it further noted that with the provision of verbal or written prompts, the student produced four to five-word utterances (id.). The April 2010 IEP also reflected that the student worked on pragmatic language skills in a dyad group with a peer, with the assistance of another adult who sat behind him "to redirect attention" (id.). The IEP further indicated that the student took turns, but did not always initiate telling a peer to take a turn without cuing (id.). In addition, the April 2010 IEP revealed that teachers developed four to five-word written role scripts for the student's use, and during lunch or snack, the student engaged in group social activities (id.). Information in the April 2010 IEP about the student's motor speech skills indicated that he spoke in a very low, often inaudible voice, unless he was upset or strongly wanted something, at which time he raised his voice volume (id.). At the time of the April 2010 CSE meeting, the IEP noted that the student was working on improving breath support (id.). The student worked best with written and visual cues, and the April 2010 IEP reflected the speech-language provider's report that the student's self-stimulatory behavior made the student's work "inconsistent" (id.).

The April 2010 IEP social/emotional present levels of performance also reflected teacher reports that the student engaged with peers when prompted with written or verbal cues (Dist. Ex. 3 at p. 5). In addition, the April 2010 IEP indicated that the student engaged in imaginative play with adults with cues, but overall, the IEP depicted the student's interactions with adults as "very basic" (id.). According to the April 2010 IEP, the student answered questions, but did not often ask questions unless prompted and provided with cues (id.). Although the April 2010 IEP revealed that the student did not initiate peer interactions, it further noted that he spontaneously greeted some school staff (id.). The IEP also described the student's attention during group activities as "fairly good," and proceeded to note that he appeared to enjoy group settings, and did not disrupt the group (id.). The April 2010 IEP further reflected teacher reports that the student exhibited poor attention and a high rate of self-stimulatory behaviors such as hand tapping and repetitive body movements (id.).

In the area of health status and physical development, the April 2010 IEP indicated that the student was reportedly in good physical health and completed all self-care tasks independently with the exception of tying his shoes (Dist. Ex. 3 at p. 6). The April 2010 IEP reflected the occupational therapist's report that the student continued to "make strides" in gross motor skills, yet the student needed help with core strength and balance (id.). According to the April 2010 IEP, the student demonstrated deficits in motor planning, upper extremity strength and coordination, and he needed to further develop handwriting skills, hand manipulation of objects, and enhance finger strength (id.). In the area of sensory processing, the April 2010 IEP indicated that the student exhibited difficulty achieving an adequate level of arousal when in an overly stimulating room that was noisy (id.). When in such an environment, the April 2010 IEP

stated that the student exhibited an increase in vocal stimulation and hand tapping, as well as difficulty engaging in functional tasks (id.).

The hearing record reflects that the most recent standardized assessment of the student's academic skills occurred approximately nine months prior to the April 2010 CSE meeting, and an assessment of his cognitive skills occurred less than two years prior to the April 2010 CSE meeting (Dist. Exs. 8; 9). Moreover, the student's then-current educational supervisor, speech-language pathologist, and occupational therapist provided reports of the student's current levels of functioning during the CSE meeting (Tr. pp. 177-79, 191-94; Dist. Exs. 3 at pp. 2-6; 4 at p. 2). A review of the information considered by the April 2010 CSE and discussed at the CSE meeting as detailed above, shows that the district had sufficient information relative to the student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—at the time of the CSE meeting to develop an IEP that reflected the student's special education needs with sufficient accuracy to formulate a program designed to help the student progress (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Dirocco, 2013 WL 25959, at \*20; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dept. of Educ., Appeal No. 11-025; Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).

### 3. Adequacy of Goals

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

An independent review of the April 2010 IEP shows that the CSE developed 16 annual goals and, consistent with the CSE's determination that the student participate in the alternate assessment, approximately 83 short-term objectives to improve the student's word reading and decoding, reading comprehension, written expression, math, receptive language, expressive language, pragmatic language/social communication, oral/speech-motor, fine and gross motor, sensory processing, prevocational, ADL, play, and classroom functioning skills, and his ability to participate in adaptive physical education (Dist. Ex. 3 at pp. 7-22, 25).<sup>23</sup>

Although the parents' asserted procedural claims that the district failed to develop the student's goals and objectives individually at the CSE meeting and that the parents were not

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<sup>23</sup> Contrary to the parents' assertion that the April 2010 IEP lacked appropriate annual goals and short-term objectives to address the student's interfering behaviors, a review of the April 2010 IEP shows that it contained short-term objectives specifically designed to be completed without the student exhibiting "maladaptive behaviors," or attempting to "stop or protest[]" (Dist. Ex. 3 at pp. 18-19). The IEP also included short-term objectives to improve the student's attention to classroom lessons, reduce instances of hand-tapping, and limit his engagement in repetitive body movements (id. at p. 22). As noted below in the discussion about the adequacy of the student's BIP, the IEP also adequately addressed the student's interfering behaviors.

afforded a meaningful opportunity to participate in their creation, the evidence fails to support this assertion. According to the school psychologist, the basis for the student's annual goals came "directly" from McCarton, and she noted that the goals were drafted during the April 2010 CSE meeting (Tr. pp. 273-74). The school psychologist also testified that the April 2010 CSE reviewed the student's prior year goals with McCarton personnel who participated in the meeting, and had asked them to consider which goals and short-term objectives needed to be continued, which needed to be modified, and which needed to be removed (Tr. pp. 195, 197-98, 280; Dist. Ex. 3 at p. 2). As noted above, the school psychologist testified that the CSE "went through each goal with [McCarton personnel] during the meeting [] until we got the wording right and the percentages right . . ." (Tr. pp. 195, 210). For example, the April 2010 CSE developed the related services annual goals with the student's McCarton occupational therapist and speech-language pathologist (Tr. pp. 204-05). The school psychologist stated that no one expressed objections to the annual goals or short-term objectives at the meeting (Tr. pp. 195-205).

The parents focus on the argument that the annual goals enumerated in the April 2010 IEP were designed and developed to be implemented using 1:1 ABA teaching strategies at McCarton and the goals were not appropriate for use in a district 6:1+1 special class setting. Initially, I note that, under the IDEA and State and federal regulations discussed above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a preferred or optimal classroom setting or student-teacher ratio, but rather whether said goals and objectives are consistent with and relate to the needs and abilities of the student (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]). I have reviewed all of the annual goals and short-term objectives, and find no support in the hearing record for the parents' contention. Examples of the student's skills the short-term objectives were designed to improve included reading 75 new sight words, reading a story and verbally identifying two or three main characters, using proper grammar and punctuation during writing activities, subtracting using numbers one to five without manipulatives, following three-step unrelated direction with cues, responding to "why" questions, initiating interaction with a peer, improving airflow for speech purposes, copying a four to five-word list/sentences, participating in a therapist-led activity, completing a series of prevocational tasks, tying his shoes, running for five minutes, imitating motor movements, choosing and playing with an appropriate toy, and attending to classroom lessons (Dist. Ex. 3 at pp. 7-22). Although specific to the student and his needs, I do not find that the skills addressed in the annual goals and short-term objectives were so unique that they required implementation in a 1:1 environment.<sup>24</sup>

Turning to the parties' dispute about the measurability of the annual goals and short-term objectives, a review of the April 2010 IEP short-term objectives shows that they all specify the mastery criteria for determining whether the goal has been achieved by the student (e.g., 80 percent, across 3 consecutive sessions, 4/5 times), and many go further and identify particular settings in which the goal will be addressed (e.g., during structured activities, across a variety of contexts, within the classroom), and the particular supports provided to the student (e.g., visual cues, manipulatives, verbal prompts) (Dist. Ex. 3 at pp. 7-21). The IEP indicated that three

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<sup>24</sup> For clarity, the evidence shows that McCarton does not provide the student with a 1:1 environment per se in the sense that the student required exclusion from placement with other same-aged peers. Instead, the student's special class setting at McCarton during the 2010-11 school year consisted of a group of five students, a head teacher, and five assistant teachers, and the head teacher did not provide instruction to the student individually on a daily basis (Tr. pp. 466-68, 473, 496-99).

reports of progress toward the annual goals would be provided during the year (Dist. Ex. 3 at pp. 7-21). I find that overall the annual goals and short-term objectives contained on the student's April 2010 IEP, when read together, target the student's identified areas of need and provide information sufficient to guide a teacher in instructing the student and measuring his progress (see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*8 [S.D.N.Y. Dec. 8, 2011]; Tarlowe, 2008 WL 2736027, at \*9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; W.S., 454 F. Supp. 2d at 146, 147; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).<sup>25</sup>

#### **4. 6:1+1 Special Class with 1:1 Paraprofessional Services**

The parents also maintain that the IEP's provision of a 6:1+1 special class setting with a behavior management paraprofessional was not appropriate to address the student's educational needs. State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with State regulation regarding students with intensive needs, for the 2010-11 school year, the April 2010 CSE recommended placement of the student in a 6:1+1 special class in a specialized school (Dist. Ex. 3 at p. 1). According to the school psychologist, this placement was appropriate for the student because it was a small class with no more than six students in the classroom, and in conjunction with the recommended related services and 1:1 paraprofessional services, would provide the student with an appropriate amount of support (Tr. pp. 189-91).

The school psychologist further testified that the additional support of 1:1 paraprofessional services were recommended for the student in this case based in part upon her March 2010 classroom observation of the student at the McCarton School (Tr. pp. 175, 189). While at McCarton, the school psychologist observed the student participating in a group reading activity and in a speech-language therapy session with one other student while receiving redirection and prompting from a person sitting behind him (Tr. pp. 175, 300-02; Parent Ex. K). According to the school psychologist, the person prompting the student at McCarton functioned as a paraprofessional by supporting the special education teacher who was providing instruction (Tr. pp. 189, 266, 275-77, 306-07). The school psychologist testified that in the district's placement, the recommended 1:1 paraprofessional would specifically support the student's learning in addition to the classroom paraprofessional who would circulate among other students (Tr. pp. 189-90). Although the school psychologist stated that instruction would be delivered by the various adults working with the student in the 6:1+1 special class, the paraprofessional would not be the person providing the "primary education" to the student (Tr. p. 263). Rather, the special education teacher of the proposed class would give instructions to the other adults in the classroom about how to "follow through" with the work the special education teacher had assigned (id.). The paraprofessional would provide refocusing and prompting to the student to

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<sup>25</sup> The school psychologist testified that the IEP did not specify a method of measurement for the annual goals, because it would be determined by the people responsible for implementing the goals as they were the ones measuring the student's progress (Tr. pp. 195-97). However, I note that, in this Circuit, courts are reluctant to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress (J.L. v. New York City Dep't. of Educ., 2013 WL 625064 [S.D.N.Y., Feb. 20, 2013]). I remind the district of its responsibility to ensure that annual goals and short-term objectives, if appropriate, are developed in accordance with State regulations (see 8 NYCRR 200.4[d][2][iii], 200.4[d][2][iv]).

support the instruction provided by the special education teacher and related service providers (Tr. pp. 300-02).

Regarding the parents' assertion that the student required a 1:1 teaching environment, the school psychologist testified that it would be "extremely restrictive" for him, as she had observed the student in group settings at McCarton, and reports from McCarton reviewed by the April 2010 CSE indicated that the student could function in group settings when provided with redirection and prompting (Tr. pp. 189, 191, 206, 266, 297; Dist. Ex. 11 at p. 2; Parent Ex. K).<sup>26</sup> Similarly, April 2010 CSE meeting minutes reflected that at McCarton, the student participated in small and whole class group academic, ADL, speech-language and art instruction throughout the week (Dist. Ex. 4 at p. 2). Likewise, the April 2010 IEP characterized the student as "generally cooperative," and it further described his attention in groups as "fairly good," (Dist. Ex. 3 at p. 5). The IEP further revealed that the student appeared to enjoy group settings, and did not disrupt the group (*id.*). I note that the April 2010 IEP provided the student with daily 1:1 OT sessions, and four hours per week of 1:1 speech-language therapy (Dist. Ex. 3 at p. 25). Although McCarton reports stated that providing instruction in a 1:1 model was necessary for the student to make meaningful progress, they also reflected that the student could learn in group situations (Dist. Exs. 11 at pp. 1-3; 12 at pp. 1, 3; 13 at pp. 1, 4). I note that while a CSE must consider parents' suggestions or input offered from privately retained experts, the CSE is not required to merely adopt such recommendations for different programming (*see, e.g., Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; *E.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; *Z.D. v. Niskayuna Cent. Sch. Dist.*, 2009 WL 1748794, at \*6 [N.D.N.Y. Jun. 19, 2009]). Moreover, the IDEA does not require the district to offer the student what some may view as the "best opportunities" for the student (*Watson*, 325 F. Supp. 2d at 144) or "everything that might be thought desirable by loving parents" (*Walczak*, 142 F.3d at 132). I further note that despite the parents' preference for McCarton, evidence of the alleged appropriateness of a private school placement does not establish that the program offered by a school district is inappropriate (*M.H. v. New York City Dep't. of Educ.*, 2011 WL 609880, at \* 11 [S.D.N.Y. Dec. 16, 2011]; *Application of the Dep't of Educ.*, Appeal No. 11-141; *Application of a Student with a Disability*, Appeal No. 08-043; *see, e.g., M.B. v. Arlington Cent. Sch. Dist.*, 2002 WL 389151, at \*8 [S.D.N.Y. Mar. 12, 2002]; *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1037 [3d Cir. 1993]; *Application of a Child with a Disability*, Appeal No. 06-062; *Application of a Child with a Disability*, Appeal No. 06-054; *see also, B.M. v. Encinitas Union Sch. Dist.*, 2013 WL 593417, at \*8 [S.D. Cal., Feb. 14, 2013] [noting that even if the services requested by the parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, so long as the IEP is reasonably calculated to provide the student with educational benefits]).

Here, an overall review of the hearing record suggests that the student required adult support to manage his behaviors that interfered with learning so he could benefit from instruction, which would have been provided in the district's recommended 6:1+1 special class placement with 1:1 paraprofessional services (*see J.A. v. New York City Dep't of Educ.*, 2012 WL 1075843, \*9-\*10 [S.D.N.Y. Mar. 28, 2012] [resolving conflicting views over the quality and extent of adult support services that must be provided to a student]). Lastly, while I can certainly appreciate the parents' view that intense 1:1 ABA services to be their preferred option for educating the student, it does not necessarily follow that the parents may select one particular method to the exclusion of other approaches (*E.C. v. Bd. of Educ. of*

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<sup>26</sup> To the extent that the parents alleged that the district did not consider the student's need for placement in a 1:1 school, the school psychologist testified that the April 2010 CSE discussed the student's need for 1:1 support through the provision of paraprofessional services (Tr. pp. 213-14).

City Sch. Dist. of New Rochelle, 2013 WL 1091321 at \*25-\*26 [S.D.N.Y. Mar. 15, 2013] [declining to reject the district's view of 6:1+1 special class instruction with an individual paraprofessional support and adopt the contrary view of the parents' privately hired expert advocating for 1:1 ABA instruction]; Dirocco, 2013 WL 25959, at \*23; F.L. v. New York City Dept. of Educ., 2012 WL 4891748, \*9 [S.D.N.Y. Oct. 16, 2012]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F.Supp.2d 417, 436 [S.D.N.Y. 2010], aff'd, 2012 WL 2615366 [2d Cir. July 6, 2012] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] ... deference to the district and its trained educators").

Finally, while arguing on the one hand that the student requires greater attention and individualization in the form of 1: 1 instruction, the parents also assert on the other hand that the district failed to hit the precise mark because in developing the student's program recommendation, the April 2010 CSE also failed to address the student's need for self sufficiency, independence, and generalization. However, a review of the April 2010 IEP shows that the district opted for balanced approach to these competing concerns in this instance insofar as the IEP contained short-term objectives that do not require any prompts/supports, or require the reduction or elimination of prompts/use of manipulatives in order to be achieved (Tr. p. 202; Dist. Ex. 3 at pp. 4, 7-22). Additionally, some of the student's short-term objectives vary the setting in which they would be achieved, for example in a group setting, across a variety of contexts, within structured activities, within the classroom setting (Dist. Ex. 3 at pp. 11, 13, 18-19, 21). The April 2010 IEP further recommended "systematic generalization of skills across people, materials, settings, and contexts," and as noted above, the student would receive instruction provided by the special education teacher, the related service providers, and other adults in the classroom under the direction of the special education teacher to further provide opportunity to generalize skills (Tr. pp. 263, 292-93; Dist. Ex. 3 at p. 25).

## **5. Related Services Recommendations**

Turning next to the parents' claims about appropriate related service recommendations for the student in his IEP, the April 2010 CSE recommended that the student receive daily 60 minute sessions of speech-language therapy; four sessions individually, and one session in a group with one other peer (Dist. Ex. 3 at p. 25). The April 2010 CSE also recommended the provision of daily individual 45-minute sessions of OT to the student (id.). To the extent the parents assert that the district failed to provide adequate "levels" of related services, McCarton reports reviewed at the time of the April 2010 CSE meeting indicated that during the 2009-10 school year, the student received the same frequency and duration of speech-language and OT services that the April 2010 CSE recommended (compare Dist. Exs. 12 at p. 1 and 13 at p. 1, with Dist. Ex. 3 at p. 25).<sup>27</sup> According to the school psychologist, the April 2010 CSE discussed the frequency and duration of speech-language and OT sessions with the student's then-current speech-language pathologist and occupational therapist who expressed the recommendations were appropriate for the student (Tr. pp. 188-89).

The parents also contend that the April 2010 CSE's speech-language therapy recommendations failed to meet the minimum mandates pursuant to the regulations regarding

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<sup>27</sup> I note that the McCarton OT and speech-language therapy progress reports prepared during the 2010-11 school year did not reflect changes in the frequency or duration of the student's therapy sessions (compare Parent Exs. N at p. 1 and O at p. 1, with Dist. Exs. 12 at p. 1 and 13 at p. 1).

students eligible to receive special education as students with autism. In relevant part, State Regulations provide that

Instructional services shall be provided to meet the individual language needs of a student with autism for a minimum of 30 minutes daily in groups not to exceed two, or 60 minutes daily in groups not to exceed six

(8 NYCRR 200.13[a][4]).<sup>28</sup>

In this case, contrary to the parents' allegation, the April 2010 CSE's recommendations for speech-language therapy exceeded minimum regulatory requirements regarding the provision of instructional services to address the student's individual language needs, and were instead based upon input from the McCarton speech-language pathologist without objection (Tr. p. 212; Dist. Ex. 3 at p. 25).

Finally, the parents assert that the April 2010 CSE's recommendation that the student's related services be provided in a "pull-out" fashion impaired his entitlement to be educated with his peers to the "maximum extent appropriate" (see Dist. Ex. 3 at p. 25).<sup>29</sup> During the impartial hearing, the school psychologist clarified that the related services "separate location" designation in the April 2010 IEP referred to the student's receipt of those services outside of the general education classroom (Tr. p. 211; Dist. Ex. 3 at p. 25). As the student was recommended for a special class in a specialized school and would not be receiving any services in a general education environment, according to the school psychologist, the service provider would determine where the related services would be provided (Tr. p. 211; Dist. Ex. 3 at pp. 1, 23, 25). She further testified that the student received related services both in and outside of the classroom at McCarton (Tr. pp. 252-53).<sup>30</sup>

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<sup>28</sup> At the time of the April 2010 CSE meeting, State regulations set forth a time frame for the minimum amount of instructional time to meet the individual language needs of students with autism; however, recent amendments to State regulations require that "instructional services shall be provided to meet the individual language needs of students with autism," but they do not specify the frequency, duration or delivery of instructional services (8 NYCRR 200.13[a][4]).

<sup>29</sup> When determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]).[from 12-056] To the extent that the parents argue that the student's related services were not offered in the LRE, I note that in this case neither the district nor the parents appear to seriously assert that the student should be placed with his general education peers for related services – whether attending in the district or at McCarton. I am not convinced that this allegation, even if it can be construed as an LRE violation, constitutes a deprivation of FAPE in these circumstances (see Application of the Bd. of Educ., Appeal No. 12-056).

<sup>30</sup> Regarding the parents' allegation that the April 2010 IEP was deficient because it failed to set forth how the student's related services would be implemented, neither the IDEA or State regulations impose such a requirement on school districts.

## 6. Methodology

Regarding the parents' assertion that the April 2010 CSE failed to select any "core" educational methodology for the student, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045).

A review of the April 2010 IEP shows that it included information about the student's learning style to help guide instruction such as that the student benefitted from clearly stated class rules/routines, redirection when needed, the modeling of basic peer interactions, encouragement and support to interact with school staff/peers, visual and verbal supports/prompts, and positive reinforcement of desired behavior/social interaction (Dist. Ex. 3 at p. 5). Furthermore, as previously stated, the April 2010 IEP contained numerous supports and strategies to meet this student's unique learning style, including a highly structured, predictable learning environment; a consistent, positive reinforcement schedule; systematic visual, verbal, and physical prompting; tasks broken down into small steps; material chunked into manageable units; frequent variation of work tasks and materials; repetition, drill and review; functional application of skills; frequent breaks to improve ability to attend; modeling and hand-over-hand instruction; timed tasks/activities to increase on-task behavior; and manipulatives and a calculator during math instruction (id. at p. 4). Because "[p]arents ... do not have a right under the IDEA to compel a school district to provide a specific program or employ a specific methodology' in educating their child" (Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491 [W.D.N.Y. Sept. 26, 2012] report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; F.L., 2012 WL 4891748, at \*14; L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063 at \*11 [E.D.N.Y. Jan. 13, 2011]; see also A.S., 10-cv-00009 slip opn. at pp. 25-27), and under the circumstances in this case, the April 2010 IEP provided specific information about the student's learning style and supports to address his needs (see Tr. p. 222), I cannot conclude that the lack of a particular methodology on the student's IEP resulted in a denial of a FAPE to the student.

## 7. Home-Based Services

Next I address the parents' cross-appeal of the IHO's decision to the extent that she found that the student did not require a home-based program in order to receive a FAPE, and denied their request for an award of reimbursement for such services. Several courts have held that the IDEA does not require school districts 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 in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also Application of the Dep't. of Educ., Appeal No. 11-031).

The hearing record shows that during the 2010-11 school year, the student received approximately eight hours per week of privately funded, 1:1 home-based ABA services (Tr. pp. 643-44, 653). The ABA service provider who testified during the impartial hearing opined that

the student needed the extended-day services to generalize and maintain skills (Tr. pp. 644-45). The focus of the student's home-based services was to improve his community, daily living, and leisure skills, some skills that were also addressed by McCarton during the school day (Tr. pp. 645, 656).

The parents argue that the student required home-based services to promote generalization and progress, and that the district failed to offer them during the 2010-11 school year. According to the school psychologist, the topic of home-based services was not raised by the student's mother or McCarton personnel during the April 2010 CSE meeting and was not discussed (Tr. pp. 221, 234-37, 298). In this case, the evidence supports the IHO's determination that the information the CSE considered reflected the progress he had made at McCarton during the 2009-10 school year (Dist. Exs. 11-13). The hearing record also provided information regarding how during the 2010-11 school year staff at the McCarton addressed the student's need to generalize skills across different providers and environments, which is one of the reasons the parents sought home-based services (Tr. pp. 446-48, 460-62, 471-72, 479, 524-26, 538, 556-57, 615-16).<sup>31</sup> Additionally, the director of McCarton and the McCarton speech-language pathologist testified about how personnel provided information to the student's parents about what the student was working on and carrying over skills to different environments (Tr. pp. 449-50, 522-23, 526-27). Although the ABA service provider testified that the home-based services were "beneficial" to the student because it afforded him with practice opportunities and the opportunity to generalize skills within the home environment, I agree with the IHO that the district is not obligated to pay for services to maximize a student's educational opportunity (Tr. p. 649; IHO Decision at p. 23; Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). The ABA service provider further testified that the student "needed" the home-based services so that the student would make "more definite progress not just in a school setting," although also stated that McCarton was an appropriate setting for the student (Tr. pp. 649-50, 657). Additionally, I note testimony from the student's mother, who indicated, in part, that she sought a home-based program, because she needed help with the student after school and he needed and enjoyed some "after school structure" (Tr. pp. 682-83). Under the circumstances, while it is understandable that the parents, whose son has substantial needs, desire greater educational benefits through the auspices of special education, it does not follow that the district must be made responsible for them (Application of the Dep't. of Educ., Appeal No. 12-086). The IDEA 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, 873 F.2d at 567 [citations omitted]).

Under the circumstances of this case, the evidence described above shows that the district satisfied the more modest requirement of developing an IEP likely to produce "progress, not regression" (Walczak, 142 F.3d at 130 [2d Cir. 1998]), and I find that the lack of extended-day services on the student's April 2010 IEP did not result in a denial of a FAPE to the student.

## **8. Special Factors - Interfering Behaviors**

The parents allege that the April 2010 CSE failed to develop an appropriate FBA in conformity with the district's Standard Operating Procedures Manual (SOPM) and an appropriate

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<sup>31</sup> The school psychologist testified that the student's mother did not make a request for extended day services during the April 2010 CSE meeting; however, she noted that she was asked about the provision of home instruction (Tr. pp. 221, 234).

BIP.<sup>32</sup> However, as explained more fully below, the procedures for conducting FBA's and developing BIPs are clearly set forth in State regulation (8 NYCRR 200.4[d][3][i], 200.22[a], [b]) and in this case I find that the district had obtained and considered information sufficient to identify the student's interfering behaviors and the strategies/goals used by McCarton to address the behaviors, which were reflected in the April 2010 IEP.

### **a. Development of the FBA**

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at \*1 [S.D.N.Y. Apr. 7, 2011]; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-

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<sup>32</sup> As stated previously, the hearing record does not contain the district's SOPM; nor does it contain information to rebut the school psychologist's testimony that she prepared the FBA according to the SOPM (Tr. p. 218). However, defects arising out of the Standard Operating Procedures Manual that do not also constitute violation of State or federal law and policy do not appear to constitute a deprivation of a FAPE warranting tuition reimbursement (see, e.g., M.P.G., 2010 WL 3398256 at \*9-\*10). In addition, I note at the outset of this discussion that the student was attending McCarton at the time of the April 2010 CSE meeting and conducting an FBA to determine how the student's behavior related to that environment has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at McCarton and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]).

disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

State regulations call for the procedure of using an FBA when developing a BIP, and the Second Circuit has explained that when required "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all (R.E., 694 F.3d at 190). However, the failure to comply with this procedure does not automatically render a BIP deficient (R.E., 694 F.3d at 190; A.C., 553 F.3d at 172; A.H., 2010 WL 3242234, at \*4; see F.L., 2012 WL 4891748, at \*8; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*11 [S.D.N.Y. Aug. 23, 2012]; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796, at \*9 [S.D.N.Y. Sept. 26, 2012]; M.W., 869 F. Supp. 2d at 333; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*8-\*9 [S.D.N.Y. Dec. 8, 2011]; C.F., 2011 WL 5130101, at \*9).

As discussed previously, the April 2010 CSE reviewed the student's January 2010 McCarton educational, speech-language, and OT progress reports, and the March 2010 classroom observation report (Tr. pp. 173-75, 183-85; Dist. Exs. 4 at p. 1; 11-13; Parent Ex. K). Descriptions of the student's behaviors that interfered with learning from these reports included that he exhibits poor attention, and a high rate of self-stimulatory behaviors such as tapping his hands/fingers on objects, surfaces, self and others; walking purposefully out of his way; touching objects repeatedly; pushing his hands against his nose, hand clapping, and body rocking (Dist. Exs. 11 at pp. 1-2; 12 at p. 1; 13 at p. 2). The student's sensitivity to loud noises resulted in difficulty concentrating on tasks, covering his ears, rocking back and forth, humming, and whining (Dist. Exs. 12 at p. 1; 13 at p. 2). A review of the report from the school psychologist's hour-long observation of the student showed that on one occasion the student got upset and made noises, and on another occasion after clapping his hands was told to keep his hands down (Parent Ex. K at p. 2; see Tr. p. 217). The observation report indicated that in both instances, the student was able to be verbally redirected to the task at hand (Parent Ex. K at p. 2). The school psychologist testified that the McCarton providers currently working with the student provided the CSE with information used to develop the FBA and BIP (Tr. p. 217).

The school psychologist testified that her understanding of an FBA was the process of collecting data to better understand the function, antecedent, frequency, intensity, and duration of the behaviors, and current interventions (Tr. p. 215). According to the school psychologist, prior to the April 2010 CSE meeting, McCarton conducted an FBA of the student and orally presented that data at the CSE meeting (Tr. pp. 246-48). Using information from McCarton providers and the student's mother, the school psychologist prepared a "worksheet," which was then used to

develop the student's BIP (Tr. pp. 215-16, 246-49).<sup>33</sup> The school psychologist further testified that at the time of the April 2010 CSE meeting, McCarton was targeting the student's hand tapping and repetitive body movement behaviors (Tr. p. 217). She further opined that the CSE had sufficient information from the student's then-current special education providers and parent to develop an appropriate BIP (Tr. p. 218).

In light of the circumstances of this case, particularly where the evaluative information before the April 2010 CSE is consistent with the resultant IEP, where the IEP identifies the student's major interfering behaviors and provides services and supports to address them, and where it was not possible to conduct the FBA in the public school setting in which the BIP would have been implemented due to the then-current placement of the student in a private school, I find that any deficiencies in the procedures the district implemented to prepare an FBA does not amount to a finding that the district failed to offer the student a FAPE (see A.C., 553 F.3d at 172; Cabouli, 2006 WL 3102463, at \*3 [2d Cir. Oct. 27, 2006] [stating that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). I further note that, as set forth below, State regulations require in pertinent part that a CSE consider developing a BIP when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1]). Here, because the student has not attended the district's recommended program, the district has not had an opportunity to determine if the student's impeding behaviors would have persisted despite consistently implemented general school-wide or class-wide interventions, yet the CSE proceeded to develop a BIP for the student anyway.<sup>34</sup>

### **b. Adequacy of the BIP**

The parents also challenge the adequacy of the BIP included in the IEP, and allege that it lacks meaningful information regarding the nature of the student's behaviors. With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s);

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<sup>33</sup> The FBA "worksheet" referred to by the school psychologist was not incorporated in the hearing record.

<sup>34</sup> While the IDEA does not preclude a CSE from initially formulating a BIP, it is not unusual for a classroom teacher or other special education provider to formulate or modify a BIP over the course of a school year when a BIP is called for in the implementation of the student's IEP (see, e.g., Application of a Child with a Disability, Appeal No. 05-107). As noted above, if the district creates a BIP for the student, the CSE is thereafter required to review the BIP at least annually (8 NYCRR 200.22[b][2]).

and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).<sup>35</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

The April 2010 IEP described the student as "generally cooperative," and that he did not "disrupt the group" (Dist. Ex. 3 at p. 5). The April 2010 IEP also reflected that the student exhibited poor attention and engaged in a high rate of self-stimulatory behaviors that interfered with learning such as hand tapping and repetitive body movements (*id.*). According to the April 2010 IEP, the student demonstrated difficulty with sensory processing, "when in an overly stimulated room that is too noisy" (*id.* at p. 6). When in such an environment, the April 2010 IEP indicated the student displayed an increase in vocal stimulation and hand-tapping behaviors, and exhibited difficulty engaging in functional tasks (*id.*). The April 2010 IEP further described the student's work in speech-language therapy as "inconsistent" due to the presence of self-stimulatory behaviors (*id.* at p. 3).

A BIP attached to the April 2010 IEP described the behaviors that interfered with the student's learning as a variable attention span, and engagement in frequent tapping of two fingers together or tapping objects or people in a rapid manner (Dist. Ex. 3 at p. 26). According to the BIP the student also engaged in repetitive body movements/rituals, such as turning around a couple of times, spinning around, and touching objects or people before opening the door (*id.*). The expectations in providing the student with a BIP were that the student would focus on classroom activities and tasks, and reduce the amount of time engaged in the interfering behaviors identified (*id.*). Contrary to the parents' allegation in their answer that the BIP did not adequately plan for how the student's behaviors would be addressed, a review of the BIP shows that it identified strategies to change the behaviors including providing prompts and redirection to refocus the student on classroom tasks, positive reinforcement for on-task behavior, a visual schedule, and a predictable routine (*id.*). To reduce tapping and vocalization behaviors, the BIP provided visual and verbal prompts (*id.*). To reduce instances of finger tapping, the BIP indicated physically redirecting the student's hand and holding it for 12 seconds on his lap, reviewing rules for hand/finger tapping, and providing redirection to the current task (*id.*). The BIP permitted the student to exhibit "short" duration body movement/rituals; however, rituals lasting more than one minute required redirection to a change in task or environment (*id.*).

While the lack of information with respect to the frequency, intensity and duration of the student's behaviors constituted a procedural violation of State regulations, where, as here the hearing record demonstrates that the student's interfering behaviors were nevertheless sufficiently addressed by the May 2011 IEP, these technical violations did not in this instance

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<sup>35</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

result in a denial of a FAPE to the student. (A.C., 553 F.3d at 172; E.M. v. New York City Dept. of Educ., 2011 WL 1044905, at \*9 [S.D.N.Y. Mar. 14, 2011]; Application of a Student with a Disability, Appeal No. 12-069; Application of the Dep't of Educ., Appeal No. 11-141). Here, the April 2010 IEP indicated that the student benefitted from clearly stated class rules/routines, redirection when needed, the modeling of basic peer interactions, encouragement and support to interact with school staff/peers, visual and verbal supports/prompts, and positive reinforcement of desired behavior/social interaction (Dist. Ex. 3 at p. 5). Supports provided in the April 2010 IEP to address the student's attention and self-stimulatory behavior needs included a highly structured, predictable learning environment; a consistent, positive reinforcement schedule; systematic visual, verbal, and physical prompting; tasks broken down into small steps; material chunked into manageable units; frequent variation of work tasks and materials; repetition, drill and review; functional application of skills; frequent breaks to improve ability to attend; modeling and hand-over-hand instruction; timed tasks/activities to increase on-task behavior; and manipulatives (id. at p. 4).<sup>36</sup> The IEP contained annual goals and short-term objectives designed to improve the student's ability to verbally request to leave an environment that is too auditorially stimulating, participate in therapist-directed activities without engaging in non-purposeful hand movements, complete a "free time" activity without exhibiting maladaptive behaviors, attend to classroom lessons with prompting and sensory breaks, reduce instances of hand-tapping, and limit his engagement in repetitive body movement rituals lasting more than one minute (id. at pp. 16, 18, 22). The April 2010 CSE also recommended that the student receive the services of a full time 1:1 behavior management paraprofessional (id. at p. 25). Accordingly, in this case, where the district formulated a BIP based on information from the evaluative reports available to the CSE and input from the student's mother, and developed management needs designed to target the student's interfering behaviors, I find that, contrary to the parents' contention, the lack of information regarding the frequency, duration, intensity of function of the student's behavior in the BIP did not result in a loss of educational opportunity for the student or rise to the level of a denial of a FAPE (R.E., 694 F.3d at 190-91; S.H., 2011 WL 6108523, at \*8-\*9; C.F., 2011 WL 5130101, at \*9-\*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at \*10 [S.D.N.Y. Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at \*4 [S.D.N.Y. Oct. 13, 2009]).

## 9. Transition Plan

With regard to the parents' allegation that the district denied the student a FAPE in part due to its failure to develop a "transition plan" for the student to facilitate his transfer from a nonpublic school to a district school, the IDEA does not specifically require a school district to formulate a "transition plan" as part of a student's IEP when a student transfers from one school to another (see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*9 [S.D.N.Y., Oct. 16, 2012]; A.L. v. New York City Dept. of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dept. of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011] aff'd sub nom. R.E., 694 F.3d at 195; see also ).<sup>37, 38</sup>

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<sup>36</sup> To the extent the parents allege that the management needs in the April 2010 IEP were "developed and designed for a 1:1 ABA teaching program and were not appropriate for a 6:1+1 program," I find this argument to be unpersuasive. A review of the supports/management needs provided in the IEP described above shows that while they were recommended to address the individual needs of the student in this case, there is nothing in the hearing record that indicates these supports are only effective in the particular student-to-staff ratio and setting that the parents seek.

<sup>37</sup> Distinct from the "transition plan" at issue in this case, the IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and

It is undisputed that the April 2010 IEP lacked a written provision that pertained to a transition plan for the student's enrollment in a district school (Tr. pp. 340-41; see Dist. Ex. 3). Further, while the school psychologist could not recall any specific discussion during the April 2010 CSE meeting with respect to the student's transition from McCarton to a district school, she opined that "the entire IEP" dealt with transition because it contained a BIP (Tr. pp. 294, 296). She further explained that the April 2010 CSE took "so much time working with [McCarton] because [the CSE] want[ed] to assist with the transition so things that [the student] was working on there would be things that would be continued in a new program" (Tr. p. 295). Thus, I find that the April 2010 CSE designed the IEP with services in mind to address the student's needs relating to transitioning to a new environment and any such deficiency alone, in light of the array of other services provided on the IEP, is not sufficient to conclude that the IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]).

Moreover, although the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another, a review of the evidence nevertheless suggests that had the student attended the district placement, the district would assisted the student as he adjusted in his transfer from McCarton to the district-recommended class (see F.L., 2012 WL 4891748, at \*9; E.Z.-L. v. New York City Dep't of Educ., 763 F.Supp.2d 584, 598 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d at 195; M.S., 734 F. Supp. 2d at 280).<sup>39</sup> For example, the school psychologist testified that personnel from the assigned public school site could ease the

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independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student had not yet attained the age of 15 at the time of the April 2010 CSE meeting (see Dist. Ex. 3 at p. 1).

<sup>38</sup> I also note that also distinct from the "transition plan" at issue in this case, the parents do not assert that the district failed to recommend "transitional support services" pursuant to State regulations governing the provision of educational services to students with autism. That particular State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

<sup>39</sup> To the extent that it could be argued that there was any change at all in the restrictiveness of the settings between McCarton and the public school program, such change would appear to have been de minimus, which further diminishes a need to recommend transitional support services on the student's IEP (8 NYCRR 200.1[ddd]).

student's transition to a district school, because they work with students with autism, who experience extreme difficulties with transition, and those individuals could facilitate the student's transition (Tr. p. 295). Likewise, the assistant principal from the assigned public school site (assistant principal) testified that had the student enrolled in the district school, a representative from McCarton could accompany the student on the first day of school and personnel from the assigned public school site would also ask McCarton personnel about which strategies they employed with the student (see Tr. p. 324; Tr. p. 338). Assigned public school personnel would also work with the parents to gain a better understanding of the student's medical needs and his likes and dislikes (Tr. p. 338). In the event that McCarton personnel was not available to work with the assigned public school to aid in the student's transition, the assistant principal explained that staff would rely on their expertise to determine the best way for the student to transition (Tr. p. 339). He added that personnel from the assigned public school site would give the student the necessary space to feel comfortable and communicate with the student (*id.*).

Based on the foregoing, no violation of the IDEA or State regulations has been identified due to the lack of a transition plan in the student's IEP, and even if there was such a requirement, it would not result in a denial of a FAPE in this instance.

## **10. Parent Counseling and Training**

Turning next to the parties' claims regarding whether the omission of parent counseling and training from the April 2010 IEP resulted in a denial of a FAPE to the student, State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see *R.E.*, 694 F.3d at 191; *M.M.*, 583 F. Supp. 2d at 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [State regulation]<sup>40</sup> to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (*R.E.*, 694 F.3d at 191). The Second Circuit further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (*id.*).

In the instant matter, it is undisputed that the April 2010 CSE did not recommend parent counseling and training in the student's April 2010 IEP, which violated the requirement for setting forth this related service in the student's IEP. However, the hearing record demonstrates that although the school psychologist did not remember the specific details of the discussion during the impartial hearing, parent counseling and training was discussed at the April 2010 CSE meeting and had the student attended the particular school to which the district had assigned the

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<sup>40</sup> 8 NYCRR 200.13[d].

student during the 2010-11 school year, the parents would have had access to parent counseling and training in accordance with State regulation (Tr. pp. 244-45; Dist. Exs. 3 at p. 1; 4 at p. 1).<sup>41</sup> According to the school psychologist, the April 2010 CSE did not incorporate parent counseling and training into the IEP, because it was "programmatic," and therefore, offered within the specialized school setting (Tr. p. 214). Similarly, the assistant principal testified that if parents requested parent counseling and training, they received it (Tr. pp. 331-32). Furthermore, if parents requested training in a certain area, personnel from the assigned public school site took the necessary steps to meet the parents' requests (*id.*). The assistant principal added that when parents had specific requests for training, they could contact the assigned public school's parent coordinator who made the arrangements (Tr. pp. 331-32; 359).

Based upon the foregoing, I find that although the April 2010 CSE's failure to recommend parent counseling and training in the student's IEP was a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; F.L., 2012 WL 4891748, at \*9-\*10; C.F., 2011 WL 5130101, at \*10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 2010]; M.M., 583 F. Supp. 2d at 509; M.W. v. New York City Dep't of Educ., 2012 WL 2149549, at \*13 [E.D.N.Y. June 13, 2012]). Therefore, the IHO's finding that the district's failure to expressly provide for parent counseling and training in the IEP denied the student of a FAPE, must be reversed.

To be clear, however, the fact that the district views parent counseling and training as "programmatic" and therefore unnecessary continues to remain a procedural violation since this student's case was last before me (see Application of a Student with a Disability, Appeal No. 11-032), and while not amounting to a denial of a FAPE in this proceeding, compliance with the procedures is nevertheless mandated. In light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I will order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).

In summary, based on the evidence above, the hearing record demonstrates that the recommended 6:1+1 special class program with related services was appropriate to address the student's needs as identified in the evaluative information before the CSE and was reasonably calculated to enable him to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]). Consequently, in view of the foregoing evidence, I find that the parents' claims that the April 2010 IEP was so deficient that it denied the student a FAPE are without merit, and the IHO's determination that the district denied the student a FAPE during the 2010-11 school year must be reversed.

#### **D. Assigned School**

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<sup>41</sup> To the extent that the parents asserted during the impartial hearing that the district failed to discuss the provision of "individualized" parent counseling and training during the April 2010 CSE meeting, State regulations do not require the provision of "individualized" parent counseling and training to parents (Tr. p. 668; see 8 NYCRR 200.13[d]).

I will next address the parties' contentions regarding the district's choice of assigned school. In her decision, the IHO characterized district's decision to demonstrate that it was prepared to begin implementation of the IEP on the date it was scheduled to become effective as "ridiculous" (see IHO Decision at p. 18). She further found that where, as here, the district's own course of conduct included material changes to students' programs and placements after the summer in September, the district was required to establish that the classroom in September was reasonably calculated to provide the student with a FAPE (*id.*). Ultimately, the IHO concluded that the district was required to demonstrate that the assigned public school site provided the student with a FAPE throughout the school year (*id.* at pp. 18-19). However, the IHO's characterization of the district's argument as "ridiculous" and application of the legal standards is misplaced. The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; *Cerra*, 427 F.3d at 194; *Tarlowe*, 2008 WL 2736027, at \*6), but this does not render every subsequent change to the delivery of services that flow as a result of that IEP (such as the classroom, building, or staff member) an actionable violation under the IDEA, especially when the parents have refused the services under the proposed IEP and unilaterally placed the student (*K.L.*, 2012 WL 4017822, at \*16 [declining to hold that the district was required to defend the delivery of services under the IEP in the fall when the parents had already rejected the services by the previous summer]). To hold otherwise would require the district to establish the appropriateness of the IEP *retrospectively*, and the Second Circuit has recently explained that under the "snapshot" rule, this evidence may not be considered because it constitutes "retrospective testimony" regarding services that the district failed to list in the IEP (*R.E.*, 694 F.3d at 185-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of the parents' placement decision and that "retrospective testimony" regarding services not listed in the IEP may not be considered, but rejecting a rigid "four-corners rule" that would prevent consideration evidence explicating the written terms of the IEP]). Additionally, the Second Circuit explained that in a case where the parents have rejected placement under the proposed IEP the focus must be placed on the adequacy of the IEP and, [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).<sup>42</sup>

Consequently, as further described below, the district correctly argues that because the parents rejected the proposed IEP, and enrolled the student in McCarton, the district was not required to show that every day or every change at the assigned public school site would be reasonably calculated to provide the student with a FAPE, or that there would have been no delays in implementing the IEP, including the related services.

Generally, challenges to an assigned school involve implementation claims, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see *E.H.*, 2008 WL 3930028, at \*11 [N.D.N.Y. Aug. 21, 2008], *aff'd*, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]), and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see *R.E.*, 694 F.3d at 186-88). Once again, as noted

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<sup>42</sup> The Second Circuit has also made clear that just because a district is not required to place details such as the particular school site or classroom location on a student's IEP, the district is not to choose any school and provide services that deviate from the provisions set forth in the IEP (see *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 420 [2d Cir. 2009] [IEP [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]).

above, the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L., 2012 WL 4891748, at \*15-\*16; Ganje, 2012 WL 5473491, at \*15 [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at \*16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; but see E.A.M., 2012 WL 4571794, at \*11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

However, even assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site, as further explained below, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation, that is, deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011] aff'd 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L., 812 F. Supp. 2d at 502-03).

Moreover, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at \*6). The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320).

In order to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at \*2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at \*6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application

of a Student with a Disability, Appeal No. 09-063).<sup>43</sup> Additionally, the United States Department of Education (USDOE) has also clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

Here, it is undisputed by the parties that the district had a program available to the student at the start of the school year and the parents rejected the district's program (Dist. Exs. 3; 4; Parent Ex. G). Notwithstanding the parents' assertions that the district must establish the appropriateness of the assigned public school site during summer 2010 and the balance of the school year, in light of material changes that ensued following summer 2010, case law does not support a finding that a future change in a school building amounts to an actionable claim pursuant to the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*16 [S.D.N.Y. Aug. 23, 2012]). Thus, the district established that it offered the student a FAPE, by demonstrating that it had an IEP in place that it was prepared to implement, had the student attended the public school program.

## 1. Grouping

State regulations 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]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). 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 (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics

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<sup>43</sup> The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; K.L.A., 2010 WL 1193082, at \*2; Concerned Parents, 629 F.2d at 756). Moreover, there is no legal requirement that the particular school building be identified or discussed at the CSE (J.L., 2013 WL 625064 at \*10). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504). Rather, it means that the CSE must identify where the student will receive services, i.e., in a specialized school (see J.L., 2013 WL 625064 at \*10).

exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

As detailed herein, the parents' contention that the students in the proposed class were grouped primarily by age, and not by functioning level or their classifications lacks a basis in the hearing record. The assistant principal stated that he made class placement decisions, and had the student attended the assigned public school site during summer 2010, the student would have been placed in the 6:1+1 special class taught by the special education teacher who testified during the impartial hearing (Tr. pp. 321, 328-29; see Tr. pp. 570-71, 596-97). The assistant principal testified that he based his rationale for placing the student in that particular special class on the student's functioning ability, chronological age, and IEP (Tr. pp. 327-28, 360, 371-72, 404-07). According to the assigned public school site's special education teacher, during summer 2010, the four students in her 6:1+1 special class were classified as students with autism and were between 13 and 15 years of age (Tr. pp. 570-72, 583, 586-87). One of the students in her class verbally communicated and the hearing record was unclear if either one or none of the students required BIPs for interfering behaviors (compare Tr. pp. 417-18, 599, with Tr. pp. 590-91). Although the IHO determined that the functioning levels of the students in the assigned 6:1+1 special class during summer 2010 inappropriately ranged from pre-K through fifth grade, a careful read of the special education teacher's testimony showed those were the functioning levels of the students in the special class as of September 2010 (Tr. pp. 587-89, 597-99; IHO Decision at p. 21). The hearing record did not otherwise contain information about the functional levels of the students in the 6:1+1 special class at the assigned public school site during summer 2010 (see e.g., Tr. pp. 360-62, 404-07, 424-25).

Lastly, I note that the special education teacher testified that all of the students who attended her class during summer 2010 "aged out" after the summer session, and she had a new class of students in September 2010 (Tr. pp. 571-72, 574). The hearing record did not show which 6:1+1 special class to which the student would have been assigned, had he attended the district's program in September 2010, therefore it is beyond speculative to compare the student's skills to those of the students in the September 2010 6:1+1 assigned school special class (see Tr. pp. 328-29, 402-05, 571-72).

Accordingly, upon review of the hearing record, I find that the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned district school for the recommended program beginning July 2010.

## **2. Related Services**

Next, I will consider the parties' claims regarding the implementation of the student's related services. In finding that the district did not offer the student a FAPE, the IHO also relied in part on testimony from the assistant principal of the assigned public school site, who indicated that the student's related services mandates would not have been met in the building (Tr. pp. 333, 336). In any event, I disagree with the IHO's conclusion, and find that the hearing record supports a finding that the district was capable of providing the student with his related services

mandates had he attended the assigned public school site. Even assuming for the sake of argument that the student had attended the public school as further discussed below, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEPs in a material or substantial way (R.C., 2012 WL 5862736, at \*16; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at \*3 [S.D.Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]; Burke v. Amherst Sch. Dist., 2008 WL 5382270, at \*8-\*10 [D.N.H. Dec. 18, 2008][discussion of implementation standards]).

A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604[30], 1709[33], 2503[3], 2554[15][a] and 4402[2][b] to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(<http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; see <http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2010covermemo.pdf>).

Here, the special education teacher of the proposed class testified that during summer 2010, students received their related services at school (Tr. p. 594). Although the assistant principal testified that the assigned public school site had a speech-language pathologist on staff, he further noted that during summer 2010, an occupational therapist was not employed there (Tr. p. 334).<sup>44</sup> Notwithstanding the assistant principal's testimony that the student's related services needs as prescribed by the April 2010 IEP could not have been fulfilled on-site, the hearing record also reflects that the assigned public school would have provided the student with related

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<sup>44</sup> According to the special education teacher of the proposed class, the assigned public school site had an occupational therapist on staff during summer 2010; however, she added that the occupational therapist worked with the other school, and that the assigned public school site at issue retained an occupational therapist in spring 2011 (Tr. pp. 602-03). The assistant principal confirmed that the assigned public school had retained an occupational therapist in March 2011 (Tr. p. 344).

services authorizations (RSAs) in order to satisfy the balance of his related services mandates (Tr. pp. 335-36; 342-43, 348-49, 398).<sup>45</sup> In addition, the assistant principal confirmed that the assigned public school site would have been able to provide the student with 1:1 paraprofessional services in accordance with the April 2010 IEP (Tr. p. 334).

Lastly, although the parents submitted evidence during the impartial hearing that they argue demonstrates that the assigned public school site had a history of difficulty delivering related services to students, data indicating that a school has not always delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding (Parent Ex. U; see M.S., 734 F. Supp. 2d 271 at 278-79; see K.L., 2012 WL 4017822 at \*15). Therefore, even if the district had needed to provide the student with an RSA for related services, this would not itself have denied the student a FAPE.<sup>46</sup>

### **3. Classroom Teaching Methodology**

Lastly, to the extent that the parents submit that the teaching methodology employed at the assigned public school site was not appropriate to meet the student's special education needs, The special education teacher of the assigned school 6:1+1 special class testified that the structure of the class was based upon the Treatment and Education of Autistic and related Communication-handicapped Children (TEACCH) method (Tr. pp. 583-84; Parent Ex. Y at p. 1).

The hearing record contains a document prepared by the district describing the TEACCH methodology

Provides physical structure, scheduling and organization to the classroom in order to minimize the negative impact of student weaknesses in communication, social skills, hypersensitivity to sensory input, distractibility, etc. while maximizing the positive impact of student strengths, including visual skills, memory and personal interests and preferences. Utilizes class and individual scheduling, verbal and visual prompts and 1-on-1 (teacher/student) joint activity routines based on meaningful and enjoyable social situations as the platform for teaching work, communication, social and leisure skills

(Parent Ex. Y at p. 1).

Information the April 2010 CSE reviewed indicated that the student learned "best" when provided with individualized, fast-paced instruction with frequent opportunities for repetition, specialized programming, a predictable routine, visual support, positive reinforcement and systematic prompting (Dist. Ex. 11 at p. 1). As noted previously, the April 2010 CSE

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<sup>45</sup> Although the assistant principal testified that RSA letters would have been issued near the end of July 2010, he added that he did not receive any complaints from parents in receipt of RSA letters that they experienced difficulty obtaining services (Tr. pp. 398-400).

<sup>46</sup> The assistant principal has acknowledged that parents can sometimes face difficulties in obtaining all of the services through the provision of RSAs (see Tr. pp. 343-45, 399), but this does not result in a per se denial of a FAPE (F.L. v. New York City Dept. of Educ., 2012 WL 4891748, at \*17).

recommended and the IEP provided the student with a highly structured, predictable learning environment; a consistent, positive reinforcement schedule; systematic visual, verbal, and physical prompting; frequent variation of work tasks and materials; functional application of skills; frequent breaks to improve ability to attend; modeling and hand-over-hand instruction; and timed tasks/activities to increase on-task behavior, strategies similar to those used by McCarton personnel and in classrooms using TEACCH methods (Dist. Exs. 3 at p. 4; 11 at p. 1; Parent Ex. Y at p. 1).<sup>47</sup>

Although the assigned public school classroom was structured around the TEACCH method, the special education teacher testified that she did not use a "strict TEACCH system," rather used a "combination of different methods" to instruct students (Tr. pp. 583-84). During summer 2010, the special education teacher provided group instruction, then divided the class into pairs or worked with students individually (Tr. p. 584). During summer 2010, she estimated that students received approximately 30-45 minutes of 1:1 instruction provided by the special education teacher per day, and the hearing record reflects that the special education teacher used prompting, modeling, and cuing with her students (Tr. pp. 585, 597). I further note that Although it is understandable for the parents to prefer the student receive instruction using the ABA method familiar to him, the hearing record shows that the April 2010 IEP provided him with instructional and management strategies appropriate to meet his needs that could have been implemented had the student attended the assigned school during the 2010-11 school year. Based on the above, even if the student has become accustomed to ABA during the time he has spent at McCarton, the hearing record does not support a conclusion that the district's use of the TEACCH methodology at the assigned public school site would have amounted to a denial of a FAPE.

## VII. Conclusion

Based on the hearing record evidence, I find that the recommended 6:1+1 special class in a specialized school with related services was reasonably calculated to provide the student with educational benefits in the least restrictive setting and, therefore, offered him a FAPE during the 2010-11 school year. Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether McCarton was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at \*12; D.D-S., 2011 WL 3919040, at \*13).

As a final matter, I note that even though the district offered the student a FAPE, the district has been required to fund the student's placement at McCarton and requested extended day services for the entirety of the 2011-12 school year as a result of its obligation to provide the student with his pendency (stay-put) placement for the duration of these and prior proceedings, the underlying basis for which was described in the interim decision issued by the IHO (IHO Interim Decision). In addition to the interim order on pendency, the parents indicated in their answer that all of the student's McCarton tuition and costs for the student's home-based services

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<sup>47</sup> To the extent that the director of the McCarton Upper School testified that the student would not gain skills in a TEACCH environment and that the TEACCH methodology "teaches kids to be dependent on situational prompts," I note that the student has attended McCarton since 2002, and received 1:1 instruction using ABA methods including visual and verbal prompts (Tr. pp. 607; Dist. Exs. 11 at p. 1; 13 at p. 1). Under the circumstances, the student has never received instruction utilizing a methodology other than ABA, nor failed to progress utilizing a methodology other than ABA.

for the 2010-11 school year, have been paid or were expected to be paid pursuant to the student's pendency rights (IHO Interim Decision; Answer at p. 2; Parent Mem. of Law at p. 4). As all of the reimbursement relief sought by the parent has been achieved by virtue of pendency, the challenged April 2010 IEP has expired by its own terms, and planning for the 2011-12 and 2012-13 school years should already be well underway or completed, I find that the parties' dispute regarding the 2010-11 school year is no longer a live controversy and has been rendered moot, the discussion of the parties' arguments on the merits above has been rendered academic, and "it is not capable of repetition because each year a new determination is made based on [the student's] continuing development" (M.S. v. New York City Dept. of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]).

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

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated April 4, 2012 is modified by reversing the portion that concluded that the district failed to establish that it offered the student a FAPE in the LRE for the 2010-11 school year.

**IT IS FURTHER ORDERED** that at the next CSE meeting regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision; and

**IT IS FURTHER ORDERED** that the parents are entitled by operation of law to the costs of the student's tuition at McCarton for the 2010-11 school year as well as home-based services in accordance with pendency through the date of this decision.

**Dated:** Albany, New York  
March 26, 2013

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