



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-119

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the XXXXXX

Appearances:

Law Offices of Lauren A. Baum, PC, attorneys for petitioners, Lauren A. Baum, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the School of Language and Communication Development (SLCD) for the 2011-12 school year. The appeal must be sustained in part.

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 school district representative (Educ. Law § 4402; see 20 U.S.C.

§ 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

At the time of the March 2, 2011 CSE meeting, the student had received diagnoses of a pervasive developmental disorder-not otherwise specified (PDD-NOS), oral motor/motor apraxia, global developmental delays, and sensory integration dysfunction (Dist. Ex. 8 at p. 1;

Parent Exs. I at p. 6; K at pp. 1, 5).^{1, 2} She demonstrated deficits in receptive, expressive, and pragmatic language skills; cognition; academic achievement; gross motor skills including decreased balance, strength, coordination and motor planning; fine motor skills including activities of daily living (ADL), visual motor (handwriting) and visual perceptual; sensory processing; and attention (Tr. p. 714; Dist. Exs. 7; 8; 9; 11; Parent Exs. I at pp. 3-6; K; M). The hearing record reflects that the student was referred for evaluation as an infant due to gross motor delays and that she began receiving occupational therapy (OT) and physical therapy (PT) services through the Early Intervention Program (EIP) at 10 months of age, later adding speech-language therapy and special education instruction (Tr. pp. 864-65; Dist. Exs. 5 at pp. 1-2; 8 at p. 1). At the age of three years, the student was found to be eligible for special education and related services as a preschool student with a disability by the Committee on Preschool Special Education (CPSE) and received special education itinerant teacher (SEIT) services, OT, PT, and speech-language therapy (Dist. Ex. 5 at p. 2).³ Upon reaching five years of age, the student was found eligible for special education and related services as a student with a disability by the CSE and began attending SLCD where, during the 2010-11 school year, she attended a 12:2+2 classroom and received related services including OT, PT, and speech-language therapy (Tr. pp. 439-40; Dist. Ex. 5 at p. 2; Parent Exs. K at p. 2; M at p. 2).⁴ The student also received after-school OT and applied behavioral analysis (ABA) special education services (Tr. pp. 463-64, 618-19, 723-25, 727-28, 776-77, 808, 866; Parent Exs. H at p. 5; K at p. 2).⁵

The CSE convened on March 2, 2011 to conduct an annual review and develop the student's IEP for the 2011-12 school year (Dist. Ex. 2; Parent Ex. I). Attendees included the parents, a district special education teacher who also served as the district representative, a district school psychologist, a district social worker, an additional parent member, the supervisor of the student's after-school ABA program (the ABA supervisor), her SLCD classroom teacher,

¹ The hearing record contains identical copies of certain exhibits; I have reviewed all of the exhibits, but when identical, I have cited to the copies submitted by the parents (Tr. pp. 21-23, 25-26, 29). I remind the parties that they may agree to submit exhibits jointly (8 NYCRR 200.5[j][3][xii][b]).

² The hearing record reflects that the student subsequently received a diagnosis of an attention deficit hyperactivity disorder (ADHD) as a result of a March 30, 2011 neurodevelopmental evaluation (Tr. pp. 676-77; Parent Ex. H at pp. 17, 22-23).

³ The hearing record also indicates that the student began receiving after-school SEIT and OT services when she was approximately two years of age (Tr. pp. 865-66).

⁴ SLCD has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (Tr. p. 392; see 8 NYCRR 200.1[d], 200.7).

⁵ The student's after-school special education services are referred to throughout the hearing record as SEIT, ABA, special education teacher support services (SETSS), or a combination of the three (Tr. pp. 203, 414, 429, 434-36, 463, 618, 668, 693, 699, 706, 710, 866, 891; Dist. Ex. 8 at p. 2; Parent Exs. E at p. 7; H at p. 3; K at p. 2). Because special education itinerant services are statutorily defined as approved programs provided by certified special education teachers to preschool children with disabilities (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]), the student is now school-aged (Dist. Ex. 2 at p. 1; Parent Ex. I at p. 1), and it is apparent from the hearing record that the services provided consisted of ABA-style instruction (Tr. pp. 701-02, 705-06, 776-77), for purposes of this decision I refer to them as after-school ABA services. I note that the supervisor of the student's after-school ABA program is also a State-certified special education teacher (Tr. pp. 701-02).

and a school psychologist from SLCD (Parent Ex. I at p. 2). The CSE determined the student was eligible for special education programs and services as a student with a speech or language impairment and in an IEP recommended placement in a 6:1+1 special class in a specialized school on a 12-month basis (id. at pp. 1, 12). The CSE also recommended in the IEP that the student receive related services including speech-language therapy, OT, and PT (id. at pp. 1, 14).

The parent received a final notice of recommendation (FNR) from the district dated March 16, 2011 which summarized the program and services recommended in the IEP by the March 2011 CSE but did not specify the school site at which the district intended to implement the student's IEP (Tr. p. 877; Parent Ex. F at p. 2). The parents responded to the district by letter dated June 16, 2011, indicating that the district's letter failed to specify a specific school site and that although they believed that the student should remain at SLCD, they were willing to visit and consider any appropriate school location offered by the district (Parent Ex. F at p. 1). The letter reflected that until such time as the district offered the student a school location the parents considered to be appropriate, the parents would send the student to SLCD and seek reimbursement for that unilateral placement (id.). That same day, the parents received notification of the location of the public school site by FNR dated June 15, 2011, which also specified a particular classroom number (Tr. pp. 877-78; Dist. Ex. 3). The parents responded by letter to the district dated June 20, 2011 informing the CSE that they had contacted the assigned school and were informed that the specific classroom referenced in the FNR would not exist until the beginning of the 2011-12 school year (Parent Ex. G at p. 1). The parents indicated that they would visit the assigned school after the classroom opened in July so they could observe the classroom and meet with the student's assigned teacher and teaching assistant, until which time they intended to maintain the student's placement at SLCD and seek public funding for her tuition costs (id.). The parents also requested a class profile and information regarding the ages, functioning levels, disability classifications, and behaviors of the other students assigned to the classroom, as well as the qualifications of and instructional methods that would be used by the classroom teacher and teaching assistant (id.).

On June 27, 2011, the parents signed a contract enrolling the student at SLCD for summer 2011 and paid a deposit toward the student's tuition for the summer (Parent Exs. D; R).

After the 2011-12 school year began, by letter dated July 12, 2011, the parents informed the district that they had visited the assigned school, determined that the classroom specified in the FNR still did not exist, and found the other 6:1+1 classrooms available in the assigned school to be inappropriate to meet the student's needs (Parent Ex. H at p. 1). Specifically, the parents asserted that the student was at "significantly higher functioning, verbal and academic levels" than the students in the classrooms they viewed (id. at pp. 2-3). The parents expressed concern that the OT and PT room at the assigned school was too noisy for the student to make progress (id. at p. 3). The parents also stated their belief that the March 2011 IEP failed to offer the student a free appropriate public education (FAPE) because it did not provide for after-school services or services designed to aid the student's transition to a public school (id.). For these reasons, the parents rejected the March 2011 IEP and assigned school and notified the district of their intention to continue the student's enrollment at SLCD and her after-school ABA and OT services, for which they intended to seek public funding (id. at pp. 3-4). Enclosed with the letter were three newer reports that were not available at the time of the March 2011 CSE meeting: a

May 2011 quarterly progress report from the ABA supervisor; a June 2011 fourth quarter progress report from SLCD; and a March 2011 neurodevelopmental evaluation report prepared by the student's neurodevelopmental pediatrician (*id.* at pp. 5-24). Based on the information contained in these reports, the parents requested "that the CSE reconvene to reconsider keeping [the student] at SLCD" (*id.* at p. 4).

On September 6, 2011, the parents signed a contract enrolling the student at SLCD for the 2011-12 ten-month school year (Parent Ex. T).

A. Due Process Complaint Notice

By amended due process complaint notice dated July 28, 2011, the parents requested an impartial hearing (Parent Ex. E).⁶ Initially, the parents asserted that a regular education teacher was not present for the March 2011 CSE meeting (*id.* at p. 2). Next, the parents contended that the CSE did not adequately consider evaluative materials provided by the parents (*id.*) The parents also asserted that the CSE failed to offer the student a program in accord with the recommendations of her neurodevelopmental pediatrician, SLCD providers, after-school providers, and the parents (*id.*). The parents next alleged that the CSE failed to consider the student's need for after-school services (*id.*). The parents also asserted that they were not provided with a meaningful opportunity to participate in the CSE process (*id.*).

With regard to the IEP developed at the March 2011 CSE meeting, the parents contended that it was not calculated to provide the student with educational benefits; in particular, that the IEP failed to adequately describe the student's present levels of performance or provide sufficient services to address the student's needs in areas including cognition, attention, receptive and expressive language, sensory integration, social/emotional, and oral motor/motor apraxia (*id.* at pp. 2-3). Furthermore, the parents argued that the IEP did not offer the student the level of individual attention and support that she required (*id.* at p. 3). The parents additionally contended that the student's classification as a student with a speech or language impairment failed to sufficiently describe her academic needs (*id.* at p. 4). As well, the parents asserted that the IEP contained an insufficient number of goals to address the student's needs, the goals were overly generic, and the goals did not provide appropriate baseline levels or benchmarks against which to measure the student's progress (*id.* at p. 3). The parents next contended that the IEP did not include promotion criteria (*id.*). The parents also asserted that the March 2011 IEP was inappropriate because it failed to provide services to support the student's transition to a public school placement (*id.*). The parents claimed that the student required a "small, structured program in a small educational setting," together with 1:1 after-school instructional support and OT, in order for her to make progress (*id.* at pp. 3-4). The parents argued that the student required after-school ABA and OT services to address her attending and sensory needs (*id.*). With regard to the assigned public school site, the parents asserted that the classroom specified on the FNR did not exist and, in any event, the assigned school, the available 6:1+1 classrooms within it, and 6:1+1 special classes in general were not appropriate for the student (*id.* at pp. 4-6). In particular, the parents expressed concern that the student would not be appropriately grouped in any of the 6:1+1 classrooms at the assigned school and that the rooms provided for related services were so noisy as to preclude the student from receiving any benefit therefrom (*id.* at pp.

⁶ The initial due process complaint notice was dated June 30, 2011 (Parent Ex. A).

5-6). The parents also expressed concern that the student would not have the opportunity to interact with regular education students at the assigned school or with any students outside of her classroom (*id.* at p. 6). The parents indicated that after receiving updated evaluative data, they requested that the CSE reconvene for purposes of reconsidering whether the student should continue to attend SLCD at public expense, and that the district did not respond to their request (*id.* at p. 7). For the foregoing reasons, the parents claimed that the district had failed to offer the student a FAPE for the 2011-12 school year (*id.*). The parents next asserted that SLCD was appropriate to meet the student's needs, and that no equitable considerations weighed against their request for public funding of the unilateral placement (*id.*). For relief the parents requested reimbursement for the student's tuition at SLCD, the costs of her after-school ABA and OT services, and that the March 2011 IEP be amended to specify that the student receive special education transportation with limited travel time on a supervised, air conditioned minibus (*id.* at pp. 8-9).⁷

In a response to the amended due process complaint notice dated October 14, 2011, the district asserted that the March 2011 CSE's recommendation was appropriate to meet the student's needs (Parent Ex. U at pp. 1-4). Initially, the district asserted that there was no reason to change the student's classification from that of a student with a speech or language impairment (*id.* at p. 1). The district asserted that a 6:1+1 special class placement was recommended based on a social history, related service provider and teacher progress reports, a psychological evaluation, and a neurodevelopmental report (*id.* at pp. 2-3). The district listed the members of the March 2011 CSE, asserted that the student's needs, the program recommendation, and the IEP goals were discussed at the meeting, and stated that all members had an opportunity to participate in the CSE meeting (*id.* at pp. 3-4). The district further asserted that the CSE considered documents provided by the parents and that the IEP contained both academic and related services goals (*id.*). With regard to the offered classroom, the district asserted that the parents had been informed by staff at the assigned school that the student could have been placed in another classroom in which she would have been appropriately functionally grouped (*id.* at p. 4).

B. Impartial Hearing Officer Decision

A hearing to determine the student's placement during the pendency of the impartial hearing was convened on August 12, 2011 (Tr. pp. 1-14). Based on a prior unappealed IHO decision regarding the 2010-11 school year, the IHO found that the student's pendency (stay put) placement consisted of her enrollment at SLCD in conjunction with after-school ABA and OT services (Interim IHO Decision at p. 2; Tr. pp. 10-11; Parent Ex. C).

An impartial hearing was thereafter convened on October 13, 2011 and concluded on

⁷ In addition to the claims specified above, the parents included a reservation of rights paragraph in their due process complaint notice; in addition to "reserv[ing] the right" to challenge "any other procedural or substantive issues," the parents specified that they reserved the right to object to: the composition of the March 2011 CSE; the qualifications of district personnel who would have provided services to the student had she attended the assigned school; the inability of the assigned school to "maintain an appropriate staff to student ratio" throughout the school day; the "composition" of the assigned classroom; and the inability of the assigned school to provide all of the related services recommended on the student's IEP (Parent Ex. E at pp. 7-8).

February 9, 2012 after seven nonconsecutive hearing days (Tr. pp. 15-925).⁸ In a decision dated April 25, 2012, the IHO found that the district offered the student a FAPE and denied the parents' request for tuition reimbursement (IHO Decision at pp. 49-58). With regard to the parents' argument that the March 2011 CSE was not properly constituted, the IHO found that a regular education teacher was not a required member of the CSE in this case, as it was not contemplated that the student would be participating in a general education environment (*id.* at p. 49). Addressing the assertion that the CSE improperly classified the student with a speech or language impairment and failed to reference her other diagnoses, the IHO found that the CSE considered and reviewed all available evaluative information at the CSE meeting, provided the parents and the student's private providers with a meaningful opportunity to participate in the CSE meeting, and developed an IEP that was based on the evaluative data and designed to address the student's needs (*id.* at p. 50).⁹ With regard to the appropriateness of the goals contained in the March 2011 IEP, the IHO found that the goals were developed and implemented by SLCD staff—who considered them to be appropriate for the student—and were not objected to by the parents at the time of the CSE meeting (*id.*). The IHO next held that the recommended 6:1+1 program would have addressed the student's needs, provided her with a FAPE in the least restrictive environment (LRE), and enabled her to receive academic benefit (*id.* at pp. 51-54). Turning to after-school services, the IHO found that the hearing record did not support a conclusion that either the ABA or OT after-school services were required for the student to make progress in the recommended program (*id.* at p. 54). With respect to the parents' contention that the FNR did not accurately state the classroom at the public school site to which the student would have been assigned if she had been enrolled in the recommended program, the IHO found that the parents "were aware that that class did not exist and that there was availability in two other 6:1:1 classes at the school [and they] were specifically told that" the student would have been placed in one of these other two classrooms (*id.* at p. 51). The IHO also found that the student would have been appropriately grouped in that classroom (*id.* at p. 53). After finding that the district offered the student a FAPE, the IHO went on to find that (1) SLCD was an appropriate placement for the student; (2) the parents had not established the student's need for after-school ABA and OT services; and (3) equitable considerations did not weigh against the request to be reimbursed for the student's SLCD tuition for the 2011-12 school year (*id.* at pp.

⁸ I note that there are portions of the hearing record where it appears from context that relevant testimony was not fully transcribed (*see, e.g.*, Tr. pp. 101, 106, 113, 282, 299, 318, 357, 457, 511, 520, 534, 581-82, 593, 650, 783, 819-40, 843-62). It is the district's obligation to ensure that a "verbatim record" of the impartial hearing is kept for use by the parents, the IHO, and subsequent administrative and judicial review (20 U.S.C. § 1415[h][3]; 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]; *see* 8 NYCRR 279.9[a] [the district is required to submit "a true and complete copy of the hearing record before the [IHO]" to the Office of State Review]). In the event that a hearing transcript is inadequate to conduct a meaningful review of the underlying proceedings, it may become necessary to consider whether to remand for a reconstruction proceeding (*see Kingsmore v. Dist. of Columbia*, 466 F.3d 118, 120 [D.C. Cir. 2006]). Because the hearing record is sufficient for review of the issues presented, in this instance I need not do so—but I strongly caution the district to ensure that it maintains a verbatim record of the impartial hearing. Additionally, on multiple hearing dates the district failed to make a hearing room available at the scheduled time, necessitating the scheduling of additional hearing dates to accommodate witness testimony (Tr. pp. 84, 219, 422, 657).

⁹ I note that counsel for the parents asserted during the impartial hearing that the student's classification was not being contested (Tr. p. 426).

56-57).¹⁰ Having found that the district developed an appropriate program for the student, the IHO denied the parents their requested relief (id. at pp. 57-58).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in denying their request for reimbursement for the student's unilateral placement for the 2011-12 school year. Specifically, they contend that the IHO erred in finding that the CSE adequately considered sufficient evaluative information that supported the placement recommendation, and should have relied upon testimony from the parents and the student's ABA supervisor that the recommendation was inappropriate. Furthermore, the parents assert that the CSE failed to conduct a classroom observation of the student in violation of State regulations. The parents also argue that the district denied them a meaningful opportunity to participate in the March 2011 CSE meeting by failing to discuss the evaluative information provided by the parents and the concerns of the parents and the student's private providers regarding the offered placement. Despite these stated concerns, the parents assert that the district refused to discuss the possibility of recommending the student's continued placement at SLCD. The parents contend that a 6:1+1 placement without additional after-school services was not reasonably calculated to confer educational benefits on the student, as it was more restrictive than her placement at SLCD, would not provide her with sufficient appropriate peer models, and the student required after-school services to retain and generalize skills. The parents next assert that the IHO erred in finding that the March 2011 IEP accurately reflected the student's areas of need. Specifically, the parents contend that the IEP failed to reference the student's diagnosis of an ADHD or the effects on her education from her diagnoses of a PDD-NOS and apraxia. The parents also assert that the IEP "fails to adequately reflect" evaluative data available to the CSE, does not reference standardized test scores, and "fails to fully or adequately describe [the student]'s receptive, expressive, and pragmatic language issues, fine and gross motor delays, visual tracking difficulties, decreased muscle tone, adaptive skills delays, anxiety, impulsivity, self-stimulatory behavior, sensory integration and regulation dysfunction, imitation of peers, or the extent of her motor planning deficits". Similarly, the parents assert that the management needs included in the IEP were insufficient to address the student's needs "comprehensively." With respect to the goals developed for the student, the parents argue that the goals were developed for implementation at SLCD and the district did not establish that it could have implemented them. The parents also object to the goals on the grounds that they did not include appropriate methods of measurement, baseline functioning levels, or target levels against which to measure the student's progress. The parents next assert that the IHO erred in finding that the assigned school and classroom could have met the student's needs, as no seat was available at the beginning of the school year and she would not have been appropriately functionally grouped. Additionally, the parents assert that the staff in the assigned classroom had insufficient training to provide the student with appropriate instruction. The parents further contend that the IHO improperly failed to address their arguments regarding: the district's failures to conduct a classroom observation of the student at her SLCD placement, develop a transition plan, reconvene the CSE in response to the parents' submission of additional evaluative information, or provide proper notice of the offered

¹⁰ Although not necessary to the IHO's decision because of her determination that the district offered the student a FAPE, it was appropriate for the IHO to make findings with regard to the appropriateness of the parents' unilateral placement of the student and equitable considerations.

placement; the grouping in the assigned classroom; that the assigned classroom used a methodology inappropriate to meet the student's needs; and the inability of the assigned school to provide the student's related services in an appropriate manner. The parents assert that the IHO properly found SLCD to provide an appropriate placement and that the equities supported their request for reimbursement. Finally, the parents argue that the IHO applied an improper legal standard to their request to be reimbursed for the student's after-school ABA and OT services and that the hearing record supported the request.

The district answers, denying the parents' contentions and contending that the IHO's decision should be upheld in its entirety.

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], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; 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 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. New York City Bd. 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. Pendency and Mootness

Initially, I note that the district has been required to fund the student's placement at SLCD as well as her after-school ABA and OT services, as a result of its obligation to provide the student with her pendency (stay-put) placement for the duration of these proceedings, including the entirety of the 2011-12 school year for which reimbursement is sought (see Interim IHO Decision at p. 2). As all of the relief sought by the parent has been achieved by virtue of pendency, the challenged March 2011 IEP has expired by its own terms, and planning for the 2012-13 school year should have already been completed, the parties' dispute regarding the 2011-12 school year has been rendered moot and the discussion of the parties' arguments below is entirely academic. Regardless of the merits of a decision concerning whether the district offered the student a FAPE for the 2011-12 school year, no further meaningful relief may be granted to the parents because they have received all of the relief they sought pursuant to pendency (Parent Ex. E at pp. 8-9).¹¹ Even if a determination on the merits demonstrated that the district did not offer the student a FAPE for the 2011-12 school year, in this instance it would have no actual effect on the parties because the 2011-12 school year expired on June 30, 2012 and the student remains entitled to have her pendency placement—her placement at SLCD together with after-school ABA and OT services—funded by the district through the conclusion of the administrative process (IHO Interim Decision at p. 2). However, in light of recent district court decisions holding that tuition reimbursement cases may not be moot as a result of pendency, in the interest of administrative and judicial economy I continue to the merits of the parents' appeal in the alternative (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. July 29, 2011]; but see Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without

¹¹ As noted below, the parents did not appeal from the IHO's denial of their request for public funding for the cost of transporting the student.

discussing the exception to the mootness doctrine]; F.O. v. New York City Dep't of Educ., 2012 WL 4955124, at *3-*4 [S.D.N.Y. Sept. 10, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010] [finding that the exception did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]).

B. Scope of Impartial Hearing and Review

As noted above, the parents assert that the IHO did not address their claims regarding the CSE's failure to conduct an observation of the student at SLCD or the methodology used in the classroom at the assigned public school site. However, these assertions were not contained in the parents' original or amended due process complaint notices (Parent Exs. A; E), and it would accordingly have been impermissible for the IHO to address these issues (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]).¹² Furthermore, even if a reservation of rights clause were an effective means of preserving an issue for review, the due process complaint notice does not reference the failure to conduct an observation or the methodology used in the assigned school as possible defects in the IEP development process (Parent Ex. E at pp. 7-8) and a general reservation of rights does not preserve arguments not specifically raised in the due process complaint notice (B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; Application of the Dep't of Educ., Appeal No. 12-058; Application of a Student with a Disability, Appeal No. 12-046; Application of the Dep't of Educ., Appeal No. 12-039; Application of a Student with a Disability, Appeal No. 12-026; Application of a Student with a Disability, Appeal No. 12-024; Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 11-154; Application of the Dep't of Educ., Appeal No. 11-141; Application of a Student with a Disability, Appeal No. 11-010). Nonetheless, I find troubling the statements made by the district school psychologist that no observation was conducted because SLCD is outside the geographic boundaries of the district and the CSE would not conduct observations outside of the district (Tr. pp. 145-46). If an observation is necessary to determine the student's needs, the CSE may not abdicate its responsibility to obtain an evaluation of the student on the basis that it would have been inconvenient to do so (8 NYCRR 200.4[b][5], [6]). However, to the extent the challenge raised in the due process complaint notice is to the sufficiency of the evaluative data available to the CSE, as discussed more fully below I find that the district had adequate evaluative data to develop an appropriate program for the student, such that the failure to conduct an observation of the student in her SLCD classroom did not have a deleterious effect on the student's attainment 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]). With regard to the methodology used in the assigned school, I note that even were the issue properly before me, a CSE is not required to specify methodology on an IEP and

¹² Although in certain circumstances, an issue not raised in the due process complaint notice may properly become the subject of an impartial hearing on the basis that the district "open[ed] the door" to the IHO's consideration of the issue by raising the issue in defending against issues explicitly raised in the due process complaint notice (M.H., 685 F.3d at 249-51), in this instance counsel for the parents initially raised the issues of observation (Tr. pp. 144-45) and methodology (Tr. pp. 169, 174-77).

the precise teaching methodology to be used is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; 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]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11-*12 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [Nov. 9, 2012]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *12 [S.D.N.Y. Aug. 23, 2012]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012]; A.S. v New York City Dep't of Educ., 10-cv-0009 [E.D.N.Y. May 25, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-017).

I agree with the parent that the IHO did not directly address issues that were raised in their due process complaint notice including: the lack of a transition plan in the student's IEP; the district's failure to provide proper notice to the parents of the offered placement; the grouping in the assigned classroom; the inability of the assigned school to provide the student's related services in an appropriate manner; and the district's failure to reconvene the CSE in response to the parents' submission of additional evaluative information (see Parent Ex. E at pp. 3, 5-7). Although courts have recently indicated that an SRO may remand to an IHO when the IHO has not made determinations on issues raised in the due process complaint notice (see T.L. v. New York City Dep't of Educ., 2013 WL 1497306, at *16 [E.D.N.Y. Apr. 12, 2013]; F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *15 [S.D.N.Y. Feb. 14, 2013]), the hearing record in this proceeding is sufficient for a determination on these issues and I address them herein.

Finally, the parents have not appealed from the IHO's determinations that the CSE was not required to include a general education teacher or that the student's classification with a speech or language impairment failed to fully describe her needs, or the IHO's denial of their request for public funding for the costs of transporting the student; accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]).

C. March 2011 CSE Meeting—Sufficiency of Evaluative Data and Predetermination

Turning to the parents' assertions that the March 2011 CSE predetermined its placement recommendation and that their participation in the March 2011 CSE meeting was impeded because the district failed to adequately consider recommendations made in private evaluations, 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., 554 F.3d at 253; 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 Cent. 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]). 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 Sch. Dist., 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]). Furthermore, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP does not amount to a denial of meaningful participation (see P.K., 569 F. Supp. 2d at 383 ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). A component of the parents' right to participate is the requirement that the CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the documents, or that the CSE accord the private evaluations any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). In any event, "[n]othing in the IDEA requires the parents' consent to finalize an IEP. Instead, the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd 2012 WL 6684585 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

With respect to the parents' assertion that the district failed to "justify" the CSE's recommendation to modify the student's placement from her pendency placement consisting of SLCD and additional after-school services, although the IDEA requires districts to ensure that they have sufficient evaluative information to ascertain the student's needs, the CSE is not required to "justify" its recommendations with evaluative data, because the IDEA does not specify a particular level of educational benefit that must be provided through the IEP (Rowley, 458 U.S. at 189; Walczak, 142 F.3d at 130; S.F. v. New York City Dept. of Educ., 2011 WL 5419847, at *13 [S.D.N.Y. Nov. 9, 2011] [noting that once access to appropriate educational services is provided, no particular level of education is guaranteed]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *3 [S.D.N.Y., Sept. 22, 2011]; see Application of a Student with a

Disability, Appeal No. 12-050; Application of a Student with a Disability, Appeal No. 11-154). For the reasons stated below, I find that the CSE did not require additional evaluative information to support its recommendation.

A review of the hearing record demonstrates that the CSE had available to it and considered sufficient evaluative information in developing the student's March 2011 IEP. First, testimony by the district school psychologist present at the March 2011 CSE meeting indicated that the CSE had a social history report, several reports from SLCD including draft goals and short-term objectives for the student for the 2011-12 school year, a classroom report, PT, OT and speech-language therapy reports, and two reports submitted by the parents consisting of a psychological evaluation report and a neurodevelopmental evaluation report (Tr. pp. 94, 141-42; see Dist. Exs. 5; 7-11; Parent Exs. K; M). The CSE meeting minutes reflect that during the meeting the district school psychologist reviewed a February 2011 speech and language report, an October 2010 psychoeducational report, a July 2010 neurodevelopmental report, and a February 2011 SLCD classroom report—which included the student's scores from a January 2011 administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (Dist. Ex. 2 at p. 6; see Dist. Exs. 8-9; Parent Exs. K; M). The February 2011 classroom report indicated that these scores correlated with the student's classroom performance, which was reflected in the IEP in the instructional levels provided by the student's teacher (Tr. p. 110; Parent Exs. I at p. 3; M at p. 2).

Although the parent contends that the CSE failed to adequately review these materials, the district psychologist's testimony indicated that she discussed each report during the course of the CSE meeting and that she pointed out the strengths and weaknesses noted in the reports as well as their summaries and recommendations, rather than reading each report verbatim to the CSE (Tr. pp. 137-39). The meeting minutes also reflect that the district social worker reviewed the social history at the CSE meeting and clarified and corrected information regarding the student's articulation and socialization (Dist. Ex. 2 at p. 6). Testimony by the district psychologist was consistent with information in the meeting minutes indicating that the social worker also reviewed the OT and PT reports, noting that the student demonstrated decreased strength and motor planning, and that the student continued to need PT services (Tr. p. 140; Dist. Ex. 2 at p. 6). In addition, testimony by the student's father reflected that he provided the CSE with documentation describing the student's needs in preparation for the CSE meeting, including the October 2010 private psychological evaluation, all of the reports from SLCD, and reports from the student's ABA supervisor (see Tr. pp. 866-67). I note also that testimony from the student's ABA supervisor indicated that although she did not remember the specific reports that were discussed at the CSE meeting, she did remember the CSE ensuring that all the reports were in its possession (Tr. pp. 755-56). The ABA supervisor also testified that during the CSE meeting, SLCD staff (via telephone) discussed the SLCD progress report and the goals that they recommended for the student going forward (Tr. p. 755). Additionally, testimony by the SLCD school psychologist who participated in the CSE meeting indicated that in preparing for CSE meetings, SLCD typically provided the CSE with reports by the classroom teachers and related service providers who work with the student, as well as a list of testing accommodations, recommendations for classroom size and related services, a statement of the student's LRE, and a list of recommended goals based on the student's needs (Tr. pp. 396-97). She further testified that the district shared with her the private reports that were being considered by the CSE and

that these reports were discussed during the CSE meeting (Tr. p. 400). Based on the preceding, the hearing record demonstrates that the CSE had and considered sufficient evaluative material to develop the student's March 2011 IEP (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; F.B., 2013 WL 592664, at *8). Moreover, testimony from the student's father indicated that he was given an opportunity to provide input, including that he believed SLCD was the appropriate school placement for the student (Tr. p. 903). Testimony by the student's ABA supervisor indicated that at the CSE meeting both she and the parents voiced concerns regarding the recommendation that the student attend a 6:1+1 special classroom, including that it was very small and would not provide the student with enough peer models (Tr. p. 757). As such, the parents' participation was not impeded and I find that under the circumstances of this case, the CSE adequately considered the private evaluations provided to it by the parents. Although many of the recommendations made by the private evaluation reports were not included in the student's IEP, the district was required only to consider the parents' privately obtained evaluations; it was not required to adopt the private evaluators' recommendations over those of district personnel (Watson v. Kingston, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005]; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641 [7th Cir. 2010]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *10 [S.D.N.Y. Jan. 13, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]).

The hearing record further reflects that after-school services were discussed and considered during the CSE meeting. Minutes of the CSE meeting reflected that the student had been receiving eight hours per week of ABA services, two hours a day for four days per week, and that she received outside OT on the fifth day; the minutes noted that the ABA supervisor considered these hours to be "most imperative" to the student's continued progress (Dist. Ex. 2 at p. 6). The minutes indicated that a discussion of the ABA supervisor's role took place, noting that the ABA supervisor assisted the student with her delays by breaking down instruction and providing repetition of skills when working on reading, writing, math, social studies, science, and socialization (id. at pp. 6, 10). The minutes also reflected that the student's generalization of skills needed to be facilitated, prompted and encouraged (id.). However, the hearing record reflects that the CSE determined that after-school services were not necessary to meet the student's needs. The district psychologist testified that the program recommended by the district included OT services which would address the student's sensory processing integration issues during the school day and that the academic skills the ABA supervisor worked on with the student would be provided for during the school day within the 6:1+1 program recommended by the CSE (see Tr. pp. 199, 201-02). The psychologist further testified that the CSE did not recommend additional 1:1 services such as those provided by the ABA supervisor based on teacher reports from the student's teacher including the oral reports and based on the functional levels of the student (Tr. p. 204). She added that although the discussion of the after-school services was not documented in detail in the meeting minutes, it was nevertheless discussed (id.). I find that the hearing record reflects that the CSE approached the meeting with the necessary "open mind" and that its recommendations were not predetermined or the parents' opportunity to participate in the March 2011 CSE meeting impeded (J.G., 2011 WL 1346845, at *30-31).

D. March 2011 IEP

1. Present Levels of Performance

Among the required 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]). I note that the present levels of performance sections of the March 2011 IEP describe the student's abilities and needs related to academic achievement, language development, learning style, social/emotional development, sensory processing (attending skills), and gross and fine motor development with some detail (Parent Ex. I at pp. 3-6). The hearing record reflects that the student's then-current teacher at SLCD provided the information reflected in the academic present levels of performance section of the IEP and that the social/emotional present level of performance was based on teacher report, information from the ABA supervisor who worked with the student, and the parents' social history report (Tr. pp. 109-10, 113-14; Dist. Ex. 2 at pp. 1-2). The description of the student's present levels of health and physical development were developed based on a social history interview with the parent, oral reports given during the CSE meeting, and OT and PT reports from the student's then-current therapists (Tr. p. 116). Testimony by the district school psychologist indicated that none of the CSE members disagreed with the characterization of the student's academic or social/emotional present levels of performance and nothing in the hearing record indicates that anyone at the meeting disagreed with the characterization of the student's present levels of health and physical development (Tr. pp. 114-116). Moreover, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]). For the reasons set forth below I do not find that the present levels of performance set forth in the IEP were so inadequate as to constitute a denial of a FAPE to the student.

Addressing the parents' allegation that the IEP did not specifically reference the student's ADHD diagnosis, I note that the hearing record reflects that the student did not receive a formal diagnosis of an ADHD until after the March 2011 CSE meeting, as reflected in the report of a March 2011 neurodevelopmental evaluation by a private neurodevelopmental pediatrician (Parent Ex. H at pp. 22-23; see Tr. pp. 669, 671; Parent Ex. K at pp. 1-5). In any event, the student's attentional needs were reflected in the social/emotional performance section of the student's March 2011 IEP, including that the student was highly distractible and required frequent refocusing and teacher redirection (Parent Ex. I at p. 5). The student's attentional needs were also reflected in management strategies designed to address the student's academic and social/emotional needs, including the provision of frequent teacher redirection and refocusing, repetition of clear and simple directions, verbal and visual reminders, nonverbal cues, verbal and physical prompting, positive reinforcement, and instruction and activities broken into small steps (id. at pp. 3, 5). Additionally, the IEP included annual goals which specifically targeted the student's deficits in attending skills as well as a goal in the area of speech-language that targeted

the student's ability to attend to a given directive and respond appropriately (*id.* at pp. 9-10).¹³

With regard to the parents' contention that the IEP failed to indicate the effect of the student's diagnosis of a PDD-NOS on her ability to learn,¹⁴ I note that in addition to the strategies mentioned above that addressed the student's attentional needs, the academic and social/emotional management needs listed in the student's IEP include a large number of strategies and modifications that the student required in order to learn and progress (Parent Ex. I at pp. 3, 5). Specifically, the IEP reflected that the student required a small, structured, and nurturing special education classroom; a multimodal approach to learning; use of manipulatives; adaptation of the curriculum; immediate feedback; ample opportunity for success; consistent review, repetition and reinforcement to learn materials; information delivered in a clear/concise manner, in small steps, and in both verbal and written form; teacher prompts/praise and positive reinforcement (*id.*). I find that the student's needs, as reflected in the evaluative data available to the CSE, were clearly identified in the IEP. Furthermore, the district school psychologist testified that the strategies listed in the IEP to address the student's academic and social/emotional management needs were adopted from those used at SLCD because they were reported to have worked well for the student (Tr. p. 182).

With regard to the student's diagnosis of motor apraxia, the IEP described the effect of this diagnosis in the present level of health and physical development section by noting that the student presented with decreased motor planning (Parent Ex. I at p. 6). The IEP further reflected the effects of motor apraxia on the student's ability to learn and function in the classroom by recommending OT and PT and by developing annual goals which addressed the student's ability to perform tasks which require motor planning such as alternating stride jumps, jumping rope while swinging the rope, walking a line in tandem, performing manuscript handwriting, and various dressing skills (*id.* at pp. 6, 9-10).¹⁵

As noted above, the district psychologist testified that the present levels of performance and management needs sections of the March 2011 IEP were developed at the CSE meeting and based in part on information provided in the reports from the student's SLCD classroom teacher

¹³ Although each of the goals on the IEP contains subsidiary goals that are labeled as short-term objectives, they are in the nature of annual goals, with each intended to be attained over the course of the 2011-12 school year (*see* Parent Ex. I at pp. 7-11). For purposes of this decision, I refer to them as annual goals. I note that the IEP recommended that the student take the New York State alternative assessment (*id.* at p. 14), such that the district was required to "include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal" in the IEP (8 NYCRR 200.4[d][2][iv]; *see* 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). However, this failure was not raised by the parents as a basis for finding a denial of FAPE and I need not address it.

¹⁴ The parents do not specify any particular effect of the student's PDD-NOS that was not reflected in the March 2011 IEP.

¹⁵ Although the IEP reflects that the student had also received a diagnosis of oral motor apraxia, the July 2010 neurodevelopmental evaluation report is silent with regard to effects on the student's ability to learn specifically related to this diagnosis, as is the February 2011 SLCD speech-language progress report (Parent Ex. I at p. 6; *see* Dist. Ex. 9; Parent Ex. K). The parents have asserted no particular effect of the student's motor apraxia that was not included on the March 2011 IEP.

and related service providers, as well as from information provided by the student's ABA supervisor and the parents (Tr. pp. 114-16). Although the parents contend that the IEP did not adequately reflect the SLCD reports or the July 2010 private neurodevelopmental evaluation report, as discussed below, after careful review and comparison of the IEP with these reports I find that the hearing record indicates that the CSE considered the information contained in these reports in developing the student's IEP.

With regard to the student's present levels of academic performance and learning characteristics and her academic management needs, information in the February 2011 classroom report from SLCD was reflected in the March 2011 IEP, including that the student was a multisensory learner and that she required a multimodal approach to learning and a structured, nurturing classroom (compare Parent Ex. I at p. 3, with Parent Ex. M). The IEP also reflected information in the classroom report that the student demonstrated a relative strength in decoding and reading fluency; was able to recognize sound-symbol correspondence for initial and final consonants and short vowels; that she inconsistently comprehended simple concrete stories; and demonstrated difficulty in responding to abstract or inferential questions and weakness in story recall and reading comprehension (compare Parent Ex. I at p. 3, with Parent Ex. M at p. 2). With regard to math skills, both the IEP and the classroom report reflected that the student performed better on tasks involving math concepts and quantitative reasoning; was able to add and subtract single digits with the use of manipulatives; had difficulty interpreting graphs, solving word problems and comparing numbers; and demonstrated weaknesses in calculation and problem solving tasks (compare Parent Ex. I at p. 3, with Parent Ex. M at p. 2). Both the IEP and the classroom report reflected that the student required consistent teacher support and reinforcement including repetition, review, and positive reinforcement to learn information, as well as redirection and refocusing by her teacher (compare Parent Ex. I at p. 3, with Parent Ex. M). Deficits in the student's pragmatic, expressive and receptive language abilities were also noted in both of these documents (compare Parent Ex. I at pp. 3-4, with Parent Ex. M at p. 1).

With regard to the student's present levels of social/emotional performance, both the IEP and the classroom report reflected that the student was able to greet teachers and peers independently, had difficulty maintaining a topic and eye contact while conversing, was highly distractible and required frequent refocusing and teacher redirection; however, when focused the student was able to follow the daily classroom routine and simple directives (compare Parent Ex. I at p. 5, with Parent Ex. M at p. 1). Both the IEP and the classroom report also reflected that, at times, the student engaged in loud tapping of her hands and feet (compare Parent Ex. I at p. 5, with Parent Ex. M at p. 1).

The IEP also included reflected information contained in the February 2011 SLCD speech-language progress report. Specifically, the present levels of academic performance and academic management needs sections of the IEP reflected information from the speech-language report including that the student had significant deficits in expressive, receptive and pragmatic language (compare Parent Ex. I at pp. 3-4, with Dist. Ex. 9 at pp. 1-2). With regard to pragmatic language, both documents reflected that although she had significant delays in conversational skills, the student was able to greet, respond, request, deny, comment, question, and command independently (compare Parent Ex. I at pp. 3-4, with Dist. Ex. 9 at p. 1). Both the IEP and the SLCD speech-language report reflected that the student had difficulty maintaining a topic of

conversation and needed redirection to task via verbal and nonverbal (i.e., visual) reminders and cues (compare Parent Ex. I at p. 3, with Dist. Ex. 9 at p. 1). The IEP included goals focusing on deficits that were noted in the speech-language report relating to pronoun use, vocabulary, word relationships (classification), verb tense, formulating grammatically correct sentences, recalling and comprehending sentences of increasing length, and attending to speaker responsibilities during conversation (compare Parent Ex. I at pp. 8-9, with Dist. Ex. 9 at pp. 1-2).

A comparison of the July 2010 private neurodevelopmental evaluation report with the March 2011 IEP reveals that both reflected that the student had received diagnoses of an autism spectrum disorder, oral motor/motor apraxia, and global developmental delays and was a multi-sensory learner who required a multimodal approach to learning in a small structured, nurturing classroom environment (compare Parent Ex. I at pp. 3, 6, with Parent Ex. K at p. 5). As reflected in the IEP, the neurodevelopmental report indicated that the student presented with deficits in gross and fine motor skills, including handwriting; delays in visual motor and visual perceptual skills; and delays in expressive, receptive and social/pragmatic language (compare Parent Ex. I at pp. 3-4, 6 with Parent Ex. K at pp. 4-5). The evaluation report, like the IEP, noted that the student had difficulty carrying on a conversation, understanding complex questions, recalling and repeating sentences, and using pronouns correctly (compare Parent Ex. I at pp. 3-5, 8 with Parent Ex. K at pp. 2, 4-5). Both documents also reflected that the student required consistent repetition to master skills, repetition of directions and redirection to stay on task, and that the student benefited from visual supports (compare Parent Ex. I at p. 3, 5 with Parent Ex. K at pp. 2, 5). The report also noted the student's foot stomping behavior and reported it to be associated with excitement, although in the IEP it was reported to be related to frustration (compare Parent Ex. I at p. 5 with Parent Ex. K at p. 2).

Moreover, I note that the IEP also included information that was contained in the SLCD OT and PT reports. For example, the January 2011 OT annual report and the IEP each reflected that the student demonstrated difficulty in fine motor, visual motor and visual perceptual skills, which impacted her functional performance in the classroom setting including her ability to perform handwriting and maintain an upright position for fine motor tasks (compare Parent Ex. I at pp. 3, 6-7, 10, with Dist. Ex. 7 at pp. 1-3). The OT report reflected the student's difficulty in sensory processing, characterized by limited ability to attend to task and decreased ability in motor planning, deficits also noted on the IEP (compare Parent Ex. I at pp. 5-6 with Dist. Ex. 7 at p. 2). The report and IEP also noted the student's need for positive reinforcement in the form of frequent encouragement and praise, as well as a need for verbal prompts and cues to assist the student in staying on task (compare Parent Ex. I at pp. 3, 5, with Dist. Ex. 7 at p. 3). The November 2010 PT annual report, like the IEP, reflected that the student presented with decreased balance, strength and motor planning and demonstrated a delay in gross motor function (compare Parent Ex. I at p. 6, with Dist. Ex. 11 at pp. 1-2). Like the IEP, the PT report also recommended that the student continue to receive PT services (compare Parent Ex. I at p. 14, with Dist. Ex. 11 at p. 2).

Accordingly, for all of the above reasons, I find that the student's present levels of functional performance, as related in the March 2011 IEP, were consistent with the evaluative data available to the CSE at the time of the meeting (D.B., 2011 WL 4916435, at *8; see 20 U.S.C. § 1414[a][1][A][i][I]).

2. Adequacy of IEP 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 CSE (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The parents contend that the goals contained in the student's March 2011 IEP were inappropriate because, as they were taken directly from draft goals provided by SLCD, they were designed for implementation in a 12:2+2 special class setting and the CSE did not inquire whether they were appropriate for implementation in a 6:1+1 special class.¹⁶ However, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the goals and objectives are consistent with and relate to the identified 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]). To hold otherwise would suggest that CSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]). Furthermore, testimony from the SLCD school psychologist who attended the CSE meeting indicated that SLCD provided the CSE with suggested goals drafted by the student's SLCD teachers and related service providers that were based on the student's needs and classroom performance, took into account projections of the student's expected progress over the 2011-12 school year, and were not necessarily drafted with any particular classroom size recommendation in mind (Tr. pp. 397-98; see Tr. pp. 118-19, 122-24, 159). The hearing record reflects that to address the student's needs, the IEP contained 24 goals across eight domains including reading, writing, mathematics, speech-language skills, fine and gross motor skills, attending skills, and social skills (Parent Ex. I at pp. 7-11).

With regard to the parents' assertion that the IEP goals did not include baselines of the student's then-current functioning, appropriate methods of measurement, or target levels against which to measure the student's progress, I note initially that State regulations do not require

¹⁶ Important but noticeably absent from the parents' allegations is that the goals, in fact, were not capable of being implemented in a 6:1+1 special class.

"baseline" functioning levels to be included in IEP goals. Furthermore, the parents assert no harm to the student as a result of these alleged deficiencies. Addressing the merits of the parents' claim nonetheless, the March 2011 IEP did not include, as required by the IDEA, a description of the methods by which the student's progress toward the annual goals would be measured (20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3][i]; 8 NYCRR 200.4[d][2][iii][b]). However, the IEP did indicate that the student's progress toward meeting the goals would be reflected in reports issued four times during the school year and each goal contained criteria for mastery (e.g., with 80% success on 10 successive occasions), indicating target levels against which to measure the student's progress over the course of the 2011-12 school year (Parent Ex. I at pp. 7-11). I find that the goals targeted the student's identified areas of need and provided sufficient information to guide a teacher in instructing the student and measuring her progress. Specifically, because the IEP provided appropriate criteria for mastery, a teacher could independently determine the appropriate manner by which to measure the student's progress toward her goals (Tarlowe, 2008 WL 2736027, at *9). Accordingly, in this instance the hearing record does not support a conclusion that the failure to specify the evaluation procedures to be employed in measuring the student's progress toward her annual goals rose to the level of a denial of a FAPE (see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; J.A. v. New York City Dep't of Educ., 2012 WL 1075843, at *7-*8 [S.D.N.Y. Mar. 28, 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289 [S.D.N.Y. 2010]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F Supp 2d 283, 294-95 [S.D.N.Y. 2009], aff'd 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

3. 6:1+1 Classroom

State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with State regulations and with the student's needs as indicated in the evaluative data reflected in the student's IEP and discussed in detail above, the March 2011 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school (Parent Ex. I at p. 1). The parents allege that the IHO erred in determining that the recommended 6:1+1 program was the LRE for the student, contending that the 6:1+1 classroom size was overly restrictive because it would not provide the student with a sufficient number of appropriate peer models. I disagree. The IDEA's LRE requirement does not relate to the number of students in a classroom but rather requires that, to the maximum extent appropriate, students with disabilities are educated with nondisabled students and are removed from the "regular educational environment" only if their education in a general education classroom cannot be satisfactorily achieved with the use of supplementary aids and services (20 U.S.C. § 1412[a][5]; 34 CFR 300.114; 8 NYCRR 200.1[cc]; see M.W. v. New York City Dept. of Educ., 2013 WL 3868594, at *9 [2d Cir. July 29, 2013]; Newington, 546 F.3d at 114, Gagliardo, 489 F.3d at 108). Furthermore, regardless of classroom size or student-to-teacher ratio, the district was not required to consider removing the student altogether from the public school and placing the student in a nonpublic school if it believed that the student could be satisfactorily educated in the public schools (W.S., 454 F.Supp.2d at 148-49 ["If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school

is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort"]; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F.Supp.2d at 430-31).

The parents also allege that the recommended 6:1+1 program was not appropriate for the student because the hearing record shows that it was necessary for the student to have two teachers and two teaching assistants in a small structured special education school in order to address her complex educational needs. However, while a review of the record demonstrates that the student presented with significant educational needs, none of the evidence reflects that she required the support of two teachers and two teaching assistants to address those needs. For example, the hearing record reflects that the student was able to function in a group of five for speech-language therapy and in a small group setting for instruction in the classroom (Parent Exs. K at p. 2; M at p. 1). Testimony by one of the student's SLCD teachers during the 2011-12 school year indicated that, similar to the student-to-teacher ratio in the recommended 6:1+1 special class, at SLCD the student's class was often divided into two groups of six students with one teacher and one teaching assistant in each group (see Tr. pp. 441-44). The hearing record also reflects that, although the student required frequent refocusing in order to complete tasks, she was easily redirected and responded well to a classroom management plan to increase attending and task participation and did not require her own individualized behavioral intervention plan (Tr. p. 489; Dist. Exs. 2 at p. 4; 8 at p. 2; Parent Ex. M at p. 1). Additionally, the hearing record reflects that when focused, the student was able to follow the daily routine within the classroom as well as simple directives, and that she was able to ask for help with difficult or challenging tasks (Dist. Ex. 2 at p. 4; Parent Ex. M at p. 1). Moreover, the October 2010 psychological evaluation report reflected that during the evaluation, the student was easily engaged and although she was rather excited initially, she calmed quickly and was attentive and persevered with difficult tasks (Dist. Ex. 8 at p. 2).

Based on the above, I find that the hearing record demonstrates that the recommended 6:1+1 program would have provided the student with adequate and appropriate support in the LRE, and was reasonably calculated to enable the student to receive educational benefits.

4. After-school Services

The hearing record also supports the IHO's conclusion that the student's after-school ABA and OT services were not necessary for her to receive educational benefits from the recommended program. Although the parents contend that the IHO relied exclusively on the district psychologist's testimony that the recommended 6:1+1 program would sufficiently

address the student's needs without the after-school services, the hearing record reflects that no witnesses indicated that the student required those services. Testimony by the student's ABA supervisor indicated that, although she did not believe that she student would make no progress without the after-school ABA services, she believed the student would not make the same amount of progress (Tr. pp. 796-97). Testimony by the neurodevelopmental pediatrician who conducted the July 2010 neurodevelopmental evaluation indicated that she also believed the student would not make as much progress without the after-school ABA services (Tr. p. 694). Testimony by the SLCD teacher who taught the student during the 2010-11 school year and during summer 2011 indicated that he did not think that the student "required" the after-school support but that he believed the after-school support would "benefit" her (Tr. pp. 580, 583, 633). He further testified that he believed that the after-school services helped the student make more progress toward her goals than she would make without the services and that she would still be able to learn at school if she did not receive the after-school ABA services (Tr. pp. 634, 642). This testimony indicated that although the after-school services allowed the student to make progress over and above the progress she would have made without them, the services were not necessary for the student to benefit from the recommended program. With regard to OT, the student's occupational therapist at SLCD testified that she could not determine whether the student needed the after-school services in order to progress toward her OT goals because during the time that the occupational therapist had worked with the student, the student had received OT after school and the occupational therapist considered the student's progress to be a product of both her in-school and after-school OT services (Tr. pp. 528-29, 544-45). The occupational therapist who provided the student's after-school OT opined that the student should receive after-school OT because of her significant global delays and to avoid missing academic instruction in school (Tr. pp. 833-34, 854-55).¹⁷

The hearing record also reflects that the purpose of the after-school services was to provide the student with opportunities to generalize skills to other settings and to other people. Minutes of the March 2011 CSE meeting reflected that the student required the ABA supervisor to facilitate, prompt, and encourage the generalization of skills after they were worked on in isolation (Dist. Ex. 2 at p. 6). Testimony by the ABA supervisor indicated that she brought in another ABA provider for generalization purposes to expose the student to different modes of instruction and to allow the student to adapt to a new provider (Tr. pp. 706-08, 727). Testimony by the student's current speech pathologist at SLCD indicated that she believed the student required as much help as she could get to carry over the goals that they were working on, to the home setting (Tr. pp. 500-01, 525). The July 10, 2010 neurodevelopmental evaluation report also reflected that the after-school ABA services were "crucial for generalization of skills learned at school to home and other environments" (Parent Ex. K at p. 6 [emphasis in original]). However, I note that 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

¹⁷ Large portions of the student's after-school OT provider's testimony are incomprehensible and there are gaps in the hearing transcript on nearly every page of her testimony (Tr. pp. 819-40, 843-62). Accordingly, it is unclear to what extent she considered the student's after-school OT to be necessary for the student to make progress. I caution the district that if it fails to maintain verbatim transcripts in the future, I may consider ordering reconstruction proceedings. In this instance, counsel for the parents—who represented the parents at the impartial hearing—does not assert that the occupational therapist testified in a manner not reflected in the hearing transcript or otherwise object to the state of the transcript, and I find the record to be sufficiently complete to reach a determination in this matter.

skills to other environments outside of school, 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]; L.G. v. Sch. Bd., 2007 WL 3002331, at *5-*6 [11th Cir. Oct. 16, 2007]; 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. 12-086; Application of the Dep't. of Educ., Appeal No. 11-031).

The hearing record reflects that another purpose of the after-school services was to provide the student with repetition of skills in order to solidify and maintain previously learned skills (see Tr. pp. 718-19). Testimony by the ABA supervisor indicated that she provided the student with additional practice and repetition of skills that she had difficulty with in school and that once the student learned a skill she needed to practice the skill on occasion or she would lose it (Tr. pp. 718-19). Further testimony by the ABA supervisor indicated that, while the student needed to maintain her skills through repetition, if the student practiced a skill "a little bit" then she would not lose it (Tr. pp. 777-78). Although the ABA supervisor indicated that SLCD did not "keep practicing" previously learned skills, the March 2011 IEP provided for the student to receive consistent review, repetition, and reinforcement as part of her academic management needs, which addressed the parents' concern regarding the student's difficulty with retention of information and skills (Tr. pp. 796-97; Parent Ex. I at p. 3). As such, the hearing record supports the IHO's conclusion that the after-school services, although beneficial to the student and understandably desired by the parents to be continued, were not necessary for the student to receive educational benefits from the recommended 6:1+1 program (C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355, 359-60 [S.D.N.Y. 2010]; see Rowley, 458 U.S. at 189, 199-200; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

5. Transition Plan

The parents further contend that the IHO improperly failed to address their arguments regarding the district's failure to include a transition plan of supports to enable the student to transfer from SLCD and her after-school program to a district placement. However, 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.D., 2013 WL 1155570, at *8; F.L., 2012 WL 4891748, at *9; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).¹⁸ Assuming for the sake of argument that there was a requirement for the district to provide a transition plan in this case, the parents have asserted no reason why the

¹⁸ Distinct from the "transition plan" at issue in this case, the IDEA—to the extent appropriate for each individual student—requires that "transition services" contained in an IEP focus on providing instruction and experiences that enables the student to prepare for post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Pursuant to federal law and State regulation, beginning with the first IEP to be in effect when a student turns 16 years of age (15 under State regulation), the student's IEP 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][i][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 has not yet attained 15 years of age (see Parent Ex. D at p. 1).

absence of a private school to public school transition plan rose to the level of a denial of a FAPE to the student in this instance, and I have found none upon an independent review of the hearing record (see R.E., 694 F.3d at 195; F.L., 2012 WL 4891748, at *9).¹⁹

E. Assigned School

Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has 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" (R.E., 694 F.3d at 195; see F.L., 2012 WL 4891748, at *14-*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 Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; 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]; K.L., 2012 WL 4017822, at *13, aff'd 2013 WL 3814669, at *7 [2d Cir. July 24, 2013]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue and determined that parents may prospectively challenge the proposed implementation of an IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to

¹⁹ I also note that distinct from the "transition plan" at issue in this case, the parent does 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. Transitional support services are "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]). 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]). In April 2011, the Office of Special Education issued an updated guidance document 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>). There is no indication in the hearing record that the parties contemplated the student being placed in a general education program or any less restrictive program than a special class setting, and testimony indicated that many if not all of the students in 6:1+1 classrooms at the assigned school had received diagnoses of autism spectrum disorders (Tr. pp. 264, 312, 322-24).

accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [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]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that under factual circumstances similar to those in this case in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v New York City Dept. of Educ., 2013 WL 3814669, at *7, quoting R.E., 694 F.3d at 187 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. 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 to be appropriate, but the parents chose not to avail themselves of the public school program]).²⁰ In view of the forgoing and under the circumstances of this case, I find that the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site.

Here, the parents enrolled the student at SLCD prior to the time that the district would have been responsible to implement the March 2011 IEP (Parent Ex. G) and rejected the IEP after visiting the assigned school (Parent Ex. H). However, even assuming for the sake of argument that the parents could make such speculative claims and 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. v. Woodstock Bd. of Educ., 2010 WL 1049297, at *2 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D-S., 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502-03).

1. FNR

The IDEA and State regulations require that a district must have an IEP in effect at the

²⁰ The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y., 584 F.3d at 420 [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

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; K.L., 2012 WL 4017822, at *13; B.P., 841 F. Supp.2d at 614; 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., 584 F.3d at 419-20). 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).

When determining how 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 420; 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). 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). 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 CFR 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 (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504).

As noted above, by FNR dated June 15, 2011 the district informed the parents of both the assigned school and a particular classroom to which the student would be assigned (Dist. Ex. 3). Additionally, the hearing record reflects that the district developed the student's 2011-12 IEP and offered the student a placement by June 15, 2011, prior to the start of the 12-month school year. However, when the parents attempted to visit the specified classroom, they were informed that the class had not yet been established (Parent Exs. G; H at p. 1). The parents instead observed a different classroom, which they considered to be inappropriate for various reasons addressed below (Parent Ex. H at pp. 1-3). The parents have not submitted any applicable legal authority to show that the district's failure to provide an updated FNR specifying the particular classroom in which the student's IEP would be implemented amounts to an actionable claim pursuant to the IDEA (see K.L., 2012 WL 4017822, at *16). Moreover, the United States Department of Education has 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]). Additionally, a possible change in location

of the delivery of the services required by the student's IEP cannot be considered to have significantly impeded the parents' opportunity to participate in the decision making process, as there is no requirement that the district identify a specific school location (Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013] [noting that a parent " does not have a procedural right in the specific locational placement of his child, as opposed to the educational placement"]; J.L., 2013 WL 625064, at *10 [holding that the parents' procedural rights "extend only to meaningful participation in the child's 'educational placement,'" not to selection of a particular school building]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-9 [S.D.N.Y. October 28, 2011]; A.S., 10-cv-0009, see T.Y., 584 F.3d at 419). The FNR, rather than being an entitlement created by the IDEA or State law, is the mechanism by which this particular district notifies parents of the school to which their child has been assigned and at which his or her IEP will be implemented. For these reasons, I decline to find a denial of a FAPE based on a possible change in the classroom the student may have attended had she attended the public school program from the one listed on the FNR (see Application of the Dep't of Educ., Appeal No. 12-159).

2. Grouping

State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; 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 between the students]). State regulations also 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]). The levels of social and physical development of the individual students must be considered in grouping students, although neither may be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of the students may vary so long as the modifications, adaptations, and other resources provided to one student 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 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, and the general levels of social development, physical development and management needs 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 (A.D., 2013 WL 1155570, at *13; Application of a Child with a Disability, Appeal No. 01-090; Application of a Child with a Disability, Appeal No. 01-073 Application of a Child with a Disability, Appeal No. 99-71). Furthermore, the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates" (J.L., 2013 WL 625064, at *11 [noting with disapproval arguments regarding potential functioning levels of students in an assigned school]).

The parents allege that the student would not have been appropriately functionally grouped in the district classroom²¹ with regard to age, disability classification, academics, and language skills. The hearing record reflects that the student was seven years eight months of age at the start of the 2011-12 school year and that—based on testimony by the teacher in the classroom visited by the parents—in July 2011 the class contained five students, all of whom were seven or eight years of age, and all of whom were classified as students with autism (Tr. p. 264). Testimony by the teacher of the district classroom indicated that she believed the student would have fit well in her class because there were two students in the class who, compared to the student, had "parallel strengths and things they needed to work on" (Tr. pp. 287-88). With regard to language ability, the district classroom teacher testified that her class included two students who were "really verbal and very communicative" and that the other students had less language ability and used language less appropriately (Tr. p. 316). She indicated that the two students who were more verbal spoke in sentences of three to six words and that their language abilities included coming to class and speaking about what they had done at home, communicating messages, and approaching other students and initiating communication by way of showing them something (Tr. pp. 316-18). The teacher indicated that one of these students frequently engaged in spontaneous communication, while the other student was less spontaneous and needed more encouragement and support but at times spoke in longer sentences (Tr. pp. 317-18). Similarly, the February 2011 speech-language progress report indicated that the student's mean length utterance was 4.33 words and that she demonstrated difficulties with conversational skills (Dist. Ex. 9 at p. 1). Testimony by the teacher in the district classroom also indicated that, like the description of the student in the IEP, two of the students in the class were able to greet, respond, request, deny, comment, question, and command independently (Tr. p. 356; see Parent Ex. I at p. 3).

With regard to social/emotional development, the teacher in the district classroom testified that some of the students in the class played well with other students, interacted with, and sought out communication with both adults and students and that other students needed encouragement and support to interact but, once provided with these, were able to interact and to play games with each other, taking turns and sharing materials (Tr. pp. 265, 283). Similarly, the student was described in the February 2011 SLCD classroom report as a friendly child who seemed to enjoy being with her peers and was able to greet teachers and peers independently (Parent Ex. M at p. 1). The report also reflected that the student had received standard scores at the "very poor" level on the Pragmatic Language Skills Inventory (PLSI), a teacher-rated instrument designed to assess skills in classroom interaction, social interaction and personal interaction and further reflected that the student had difficulty maintaining a topic and eye contact while conversing and would inappropriately terminate conversations (id.).

With regard to academics, the teacher in the district classroom testified that the functional level of students in the class ranged from pre-K to high first grade in reading and math, which encompasses the academic levels of the student as they were presented to the March 2011 CSE by the student's then-current teacher and reflected in the student's IEP (Tr. p. 265; Dist. Ex. 2 at p. 1; Parent Ex. I at p. 3). The teacher in the district classroom also indicated that there were at

²¹ The district classroom was one of the classrooms in the assigned school that the parents visited in July 2011 and was defended by the district at the impartial hearing as the classroom in which the student's IEP would have been implemented had she attended the assigned school (Tr. pp. 234-38).

least two other students in her classroom who had similar needs as the student and were on a similar level to the student in reading (Tr. p. 283). Similar to the description of the student in the IEP, testimony by the teacher in the district classroom indicated that one of the students in the class was able to decode CVC words, consonant digraphs, recognize sound symbols correspondence for short vowels and initial and final consonants, and had a large sight word vocabulary (Tr. pp. 356-57). Another student was able to decode beginning and ending sounds but was at a slightly lower level with regard to vowels and had a smaller sight word vocabulary (Tr. p. 357). With regard to math skills, similar to the description of the student in the IEP, two of the students in the district class were able to count to 100 and add and subtract using manipulatives, and one was able to add without the use of manipulatives (Tr. pp. 357-58).

Based on the above, the hearing record establishes that the student could have been appropriately grouped in the district classroom, notwithstanding observations made by the parents during their visit to the assigned school (F.L., 2012 WL 4891748, at *13-*14). The parents also contend that the student was inappropriately grouped in a class where all of the other students were classified as students with autism and that placement in a classroom of all male peers would limit the student's ability to socialize appropriately. However, State regulations provide that students who are placed together for purposes of special education must be grouped by similarity of individual needs rather than by disability classification (8 NYCRR 200.6[a][3]). Additionally, although the student had been classified by the CSE as a student with a speech-language impairment, as noted and described above the hearing record reflects that the student had received a diagnosis of a PDD-NOS and that the student was similar to students in the district class with regard to age, academic ability, language, and socialization skills. Similarly, the hearing record does not indicate that the gender composition of the classroom would have resulted in the student being placed in a class composed of students with dissimilar social needs. Testimony by the SLCD school psychologist indicated that, although the student may have preferred to play with dolls and "girly things," being in a class of all boys would not be a detriment to her, and the student's SLCD teacher at the time of the hearing testified that although the student preferred to play with girls, she would also play with boys (Tr. pp. 314, 404, 463).

3. Related Services

Next, I consider the parents' claims regarding the implementation of the student's related services. I find that the hearing record supports a finding that the district was capable of providing the student with her related services mandates had she attended the assigned public school site. Even assuming for the sake of argument that the student had attended the public school, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP 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, 75-76 [D.D.C. 2007]; see also L.J. v. Sch. Bd., 850 F. Supp. 2d 1315, 1319-20 [S.D. Fla. 2012] [explaining how the standard of review used to address implementation claims 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] [discussing the implementation standard]).

The primary evidence cited by the parents to support their assertion that the district could not have "appropriately" implemented the student's OT and PT mandates at the assigned school is the parents' observations of the room used for OT and PT at the assigned school. Specifically, in their visit to the assigned school the parents observed that OT and PT were provided in the same room where computer classes were taught and where the nurse was located, on which basis they believed that the student would not be able to receive "meaningful" OT or PT services due to ambient noise (Parent Ex. H at p. 3; see Tr. pp. 882-83).²² The student's after-school OT provider indicated that, having not seen the OT and PT room at the assigned school, it was "really hard to say" if the room was an appropriate environment in which the student would receive services, but that it would not be "the most ideal treatment" (Tr. pp. 838-39). I find that this testimony is far from evidence that the district would have deviated materially or substantially from the student's IEP had she attended the assigned school, and that the hearing record provides no basis for a finding that the student was denied a FAPE on this ground (Reyes, 2012 WL 6136493, at *7; see F.L., 2012 WL 4891748, at *14).

4. Staff Training

With regard to the parents' assertions that the student would not have received appropriate instruction or an appropriate level of individual attention in the assigned class because the paraprofessional did not have a Bachelor's degree and the classroom teacher did not have specific training in ABA or TEACCH certification, I note that neither the IDEA nor federal or State regulations require that the duties or training of district staff be specified in a student's IEP (20 U.S.C. § 1414[d][1][A]; 34 CFR 300.320; 8 NYCRR 200.4[d][2]; see Ganje, 2012 WL 5473491, at *11 [holding that the IDEA does not require providers to have specific training in the student's disabilities]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8, 2011]; L.K. v. Dep't of Educ. of New York, 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]; M.P.G., 2010 WL 3398256, at *12), and the IDEA specifies that IEPs must contain only that information explicitly required to be included (20 U.S.C. § 1414[d][1][A][ii]; see 34 CFR 300.320[d][1]). Furthermore, states have broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized that the proper inquiry when challenging a district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (Ganje, 2012 WL 5473491, at *18; S.H., 2011 WL 6108523, at *12; see L.K., 2011 WL 127063, at *11), and that the purposes of the IDEA may be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is by personnel who are not certified (Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]; see Carter, 510 U.S. at 14 [noting that in a tuition reimbursement case, the lack of services provided by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE; rather, the issue is a fact-specific inquiry. I also note, however, that the precise extent to which each distinct state requirement is adopted for

²² To the extent that the parents now claim that the assigned school did not have necessary sensory equipment, no such claim was raised in the parents' due process complaint notice and so is not properly before me. In any event, the cited portions of the hearing transcript do not support the parents' contentions.

purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 821 F. Supp. 2d 1197, 1200 n.3 [S.D. Cal. 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 734-35 (2d Cir.2007)]).

Nothing in the hearing record reflects that the staff in the classroom the parents visited would not have been able to implement the IEP. Testimony by the teacher of the district classroom indicated that she held a Master's degree in special education, was certified and licensed to teach special education, had 20 years of teaching experience in the district, and had been at the assigned school for approximately 10 years (Tr. p. 261). She testified that as a 6:1+1 teacher, she planned differentiated instruction for all of her students; conducted regular formal pre and post assessments to determine appropriate grouping of students as well as constantly conducting informal assessments; created IEP goals; matched classroom curriculum to IEP goals and to the common core standards; communicated with parents regarding the goings on in the class, students' progress, and how parents could assist their children; communicated with other teachers and therapists regarding her students; provided students with access to the emotional literacy curriculum; maintained portfolios of students' work; and prepared report cards (Tr. pp. 261-62, 269-70). The district special education teacher also testified that she had worked with the paraprofessional in her classroom for two school years and that although she was unsure whether or not he had received a Bachelor's degree, he had taken some college courses (Tr. pp. 269, 327). Based on the above, the hearing record contains no indication that the teacher and paraprofessional in the assigned classroom would have been unable to implement the IEP and provide the student with sufficient individual attention in the event that the student had attended the assigned school (Ganje, 2012 WL 5473491, at *18; S.H., 2011 WL 6108523, at *12; see L.K., 2011 WL 127063, at *11).

E. Request to Reconvene the CSE

Having found that the district otherwise offered the student a FAPE by providing an appropriate IEP, I nonetheless find that it impeded the parents' right to participate in the development of the student's program by failing to reconvene the CSE in response to the parents' requests that it do so. In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a recent guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR

200.5[j][4][ii]).

Although the district argues that the parents' request that the CSE reconvene was "disingenuous" because the 2011-12 school year had already begun, the parents had previously reenrolled the student in SLCD, and the parents had already filed the initial due process complaint notice for this proceeding, it cites to no authority for its assertion that the parents' request was "untimely." Instead, the district contends that the failure to reconvene the CSE did not deny the student a FAPE because the March 2011 CSE had sufficient evaluative data available to it and the parents do not specify any information contained in the private evaluations that was not available at the time of the March 2011 CSE meeting. As noted above, with their July 2011 letter to the CSE the parents submitted three reports prepared subsequent to the March 2011 CSE meeting: a May 2011 quarterly progress report from the ABA supervisor; a June 2011 fourth quarter progress report from SLCD; and a report regarding a March 2011 evaluation of the student by her neurodevelopmental pediatrician (Parent Ex. H at pp. 5-24). Based on the information contained in these reports, the parents requested "that the CSE reconvene to reconsider keeping [the student] at SLCD" (*id.* at p. 4). I agree with the district that the hearing record does not support a conclusion that its failure to reconvene the CSE in response to the parents' July 12, 2011 letter deprived the student of educational benefits.²³ Nonetheless, I find that the district violated the IDEA by failing to either reconvene the CSE in response to the parents' request or responding with written notice stating the reasons why the district did not believe a reconvening of the CSE to be necessary (*cf. Application of a Student with a Disability*, Appeal No. 12-071 [finding no violation where the parents stated only that they were "willing to meet" with the CSE to discuss their concerns]). By failing to even acknowledge the parents' concerns—supported, they believed, by new evaluative information not previously available to the CSE—the district undermined the "cooperative process" between parents and districts that the Supreme Court has held constitutes the "core of the [IDEA]" (*Schaffer v. Weast*, 546 U.S. 49, 53 [2005], citing *Rowley*, 458 U.S. at 205-06; *see also* 20 U.S.C. § 1400[c][5] [stating Congress' finding that the education of students with disabilities can be improved by "strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home"])). I find that the district's failure to respond to the parents' request to convene and consider updated information in fact significantly impeded the parents' ability to participate in the decision-making process regarding their daughter's placement and thereby denied the student a FAPE (20 U.S.C. § 1415[f][3][E][ii][II]; 34 CFR 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]).

F. Unilateral Parent Placement and Remedy

As noted above, the district did not cross-appeal from any of the IHO's findings; accordingly, her determinations that SLCD was an appropriate placement for the student and that equitable considerations did not weigh against the parents' request for reimbursement for the student's 2011-12 tuition at SLCD have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, the district argues that it was not required to

²³ Although the new reports contained some information not previously before the CSE, such as the student's receipt of an ADHD diagnosis (Parent Ex. H at pp. 22-23), this information did not reflect a change in the student's needs and abilities to such an extent that the placement recommended by the March 2011 CSE became inappropriate as a result.

provide after-school services to the student because the March 2011 IEP offered her a FAPE. Because I find that the district impeded the parents' participation rights, I must consider whether these services were appropriate for the student.

With respect to the IHO denying reimbursement for the student's after-school OT and ABA services on the basis that they were not necessary for her to receive educational benefit from her placement at SLCD, I agree with the parents that the IHO applied an improper analysis. Although the IHO found that the parents had not met their burden of establishing the necessity of the after-school services, whether the student required these additional services to make progress in her educational program is more properly subject to an equitable considerations analysis. The parents' burden with regard to the unilateral placement is limited to establishing that it was appropriate to meet the student's special education needs, not that every individual component of the student's program was necessary for the student to receive educational benefits (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370; see Gagliardo, 489 F.3d at 112, 115; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided the special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]). Accordingly, in order to support a finding that the after-school services obtained by the parents were inappropriate for the student, the services either must have been harmful to the student or at least not designed to enable the student to receive educational benefits. As there is no evidence in the hearing record to support these conclusions, and as the IHO did not make any such findings, the parents' request for public funding for the student's after-school services is more appropriately analyzed in the context of equitable considerations than with regard to whether the after-school services were appropriate to meet the student's needs (see L.B. v. Nebo Sch. Dist., 379 F.3d 966, 979 n.18 [10th Cir. 2004] [whether the student required the entirety of the after-school services obtained to succeed in the private placement is an appropriate equitable consideration]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996] ["The appropriate amount (of reimbursement) thus bears a relationship to the quantum of services that the state would have been required to furnish"] [emphasis added]; J.P. v County Sch. Bd., 447 F. Supp. 2d 553, 591 [E.D. Va. 2006], rev'd on other grounds 516 F.3d 254 [4th Cir. 2008] [the district "must reimburse the parents for the reasonable costs of educating (the student) at the (private school)

and any related services and accommodations that would have been covered under the IDEA had (the district) provided (the student) with an appropriate education" [emphasis added]). Additionally, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow they may take advantage of deficiencies in the district's offered placement to obtain maximization of their child's potential at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). As the Ninth Circuit has explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]). Similarly, "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are per se [reimbursable]; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA" (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009]).

Nonetheless, it is not the case that in every instance in which a parent provides services which are not strictly necessary for the student to attain educational benefit, reimbursement will be improper (see Bd. of Educ. v. Gustafson, 2002 WL 313798, at *6 [S.D.N.Y. 2002] ["Receiving more services than required does not automatically mean that full tuition reimbursement should be denied."]). Here, I find that the IHO's determination that the student's after-school services were beneficial but not necessary for her to receive educational benefits from her placement at SLCD is supported by the weight of the evidence in the hearing record. In particular, the student's special education teacher at SLCD for summer 2011 testified that the after-school services did not interfere with the student's progress at SLCD and enabled her to make additional progress, but that she did not require the after-school services and that she received educational benefit from her placement at SLCD (Tr. pp. 618-20, 622-23, 633-34, 642). Similarly, the student's classroom teacher at SLCD since September 2011 testified that the student's needs were met by the amount of related services she received at SLCD but that the after-school ABA and OT services benefitted her and did not impair her progress at SLCD (Tr. pp. 464, 490). The student's SLCD speech-language pathologist opined that the student benefitted from receiving after-school ABA services and required them to "help her carry over" to home the progress she made in school on her speech-language goals (Tr. pp. 524-26). The student's occupational therapist at SLCD indicated that the student benefitted from receiving OT after school but that she could not determine to what extent the student's progress was attributable to which source of therapy (Tr. pp. 544-45). The student's neurodevelopmental pediatrician testified that the student "would not make as much progress" without the after-school services (Tr. p. 694). The student's ABA supervisor opined that SLCD was an appropriate placement for the student but stated that the student required additional after-school services to address the student's need for repetition in her instruction, without which she would make less progress than the "slow and steady" progress she made while receiving the after-school services (Tr. pp. 777-78, 796-97). Accordingly, I find that the hearing record does not support a conclusion that the student required all of the after-school services the parents obtained for her as part of her unilateral placement. However, as noted previously the district has already

been required to entirely fund these services for the 2011-12 school year pursuant to pendency and it is unnecessary to set forth exhaustive factual findings that weigh the equities to explain the extent to which the parents are entitled to public funding of these services on the merits of their claim since the district must pay for them by operation of law in any event.²⁴

VI. Conclusion

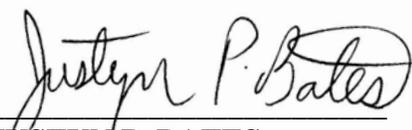
Although I find that the parties' arguments regarding the student's placement for the 2011-12 school year have been rendered moot by virtue of the passage of time and the operation of the pendency provision of the IDEA, I also find that the district significantly impeded the parents' opportunity to participate in the development of their child's IEP by failing to reconvene the CSE in response to the parents' request. I further find that the parents established the appropriateness of the after-school services they obtained for the student and that, under the particular circumstances of this case, no equitable considerations would warrant a reduction of reimbursement therefor. I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's determination is modified, by reversing those portions which determined that the district offered the student a FAPE for the 2011-12 school year and found that the parents failed to establish the appropriateness of the student's after-school ABA and OT services; and

IT IS FURTHER ORDERED that the district, if it has not already done so, is directed to pay for the student's tuition costs at SLCD and the costs of her after-school ABA and OT services for the 2011-12 school year pursuant to pendency.

Dated: **Albany, New York**
 August 6, 2013


JUSTYN P. BATES
STATE REVIEW OFFICER

²⁴ I note that in addition to disavowing any intent to cross-appeal any of the IHO's adverse findings, the district does not assert any equitable considerations that would weigh against awarding the parents reimbursement for the student's after-school services, contending only that they were not necessary for the student to make progress. Suffice it to say after reviewing all of the evidence in this case, I do not consider the after-school services obtained for the student by the parents to be so excessive as to be objectively unreasonable (20 U.S.C. § 1412[a][10][C][iii][III]; 34 CFR 300.148[d][3]).