The University of the State of New York

The State Education Department
State Review Officer
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No. 12-238

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [redacted]

Appearances:
Thivierge & Rothberg, PC, attorneys for petitioners, Randi M. Rothberg, Esq., of counsel

Harris Beach PLLC, attorneys for respondent, Susan E. Fine, 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 the cost of the students' tuition at a nonpublic school and of home-based services during the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to offer an appropriate educational program to the student for that school year. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a preschool 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 Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present

State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4410; 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

With respect to the student's educational history, the hearing record shows that, during the 2010-11 school year, the student received early intervention services (EIS), consisting of applied behavior analysis (ABA), along with speech-language therapy services and parent counseling and training (see Tr. p. 1147). During the 2011-12 school year, the student received home and community based services pursuant to an IEP developed by the CPSE, consisting of 30 hours per week of 1:1 special education itinerant teacher (SEIT) services, along with speech-

language therapy, and parent counseling and training (see Dist. Ex. 5 at pp. 1-2, 10-11).[1] The hearing record also indicates that, in early 2012, the parents additionally retained outside consultants from an institute that provides services pursuant to a model of ABA that utilizes intensive 1:1 behavioral therapy (private consultants) (Tr. pp. 66-67, 864, 1156-60; see also Tr. p. 793; Parent Ex. FF at p. 1).

On March 19, 2012, a CPSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 4 at p. 1). Finding the student eligible for special education and related services as a preschool student with a disability, the March 2012 CPSE recommended a 12-month school year program in a 6:1+3.5 special class placement for five hours each day, five days per week in a State-approved nonpublic "preschool special education program," along with 1:1 SEIT services for two hours per day, five days per week in the student's home and community, and three 30-minute sessions per week of individual speech-language therapy in the student's home (id. at pp. 1, 18, 20).[2, 3]

In a prior written notice dated March 19, 2012, the district summarized and explained the recommendations in the March 2012 IEP (Dist. Ex. 39 at pp. 1-2).[4] The March 2012 prior written notice indicated that the CPSE would reconvene after the parents had an opportunity to visit a particular nonpublic preschool site, which was discussed at the March 2012 CPSE meeting as a potential center-based program for the student to attend during the 2012-13 school year, beginning in the fall of 2012 (id. at p. 1).

In a letter dated April 24, 2012, the parents confirmed receipt of the March 2012 prior written notice and indicated that the parents "[we]re scheduling a visit" to the identified preschool (Parent Ex. N at p. 1). Initially, the parents noted that the 10 hours per week of 1:1 SEIT services summarized in the prior written notice conflicted with their "understanding that the [d]istrict would be recommending" 20 hours per week of SEIT services (id.). The parents reiterated their contention that the most appropriate setting for the student was within a general education class environment supplemented by "his current level" of "SEIT/ABA services" and speech-language therapy and indicated that they were "unable to accept any recommendations" contained in the prior written notice until they visited the program in question (id.). The parents also "renewed" their request for a copy of the March 2012 CPSE meeting minutes (id.).

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[1] The exhibits introduced into evidence at the impartial hearing were not paginated. Citation to the exhibits will be by reference to their consecutive pagination, without regard to any internal page numbers appearing within an exhibit that related to the original document.

[2] The student's eligibility for special education and related services as a preschool student with a disability is not in dispute in this proceeding (see 8 NYCRR 200.1[mm]; 200.16[a]).

[3] The chairperson who served on the March 2012 CPSE clarified at the impartial hearing that the "3.5" designation in the recommended 6:1+3.5 special class referred to the number of teaching assistants and that one of those assistants might only have been "in the room for half a day" (Tr. p. 411).

[4] The evidence in the hearing record indicates that the March 2012 prior written notice was not actually sent to the parents until April 18, 2012 (Tr. pp. 376-77; see Parent Ex. N at p. 1).

The CPSE reconvened on June 19, 2012 to finalize the student's IEP for the 2012-13 school year (Dist. Ex. 3 at p. 1). The CPSE recommended the following for July and August of 2012, all of which would be delivered in the student's home and community: 1:1 SEIT services for 20 hours per week; three 30-minute sessions per week of individual speech-language therapy; and one hour per week of individual parent counseling and training (id. at pp. 1, 18). As to the student's educational program to commence in September of 2012, the June 2012 CPSE recommended a 12:1+2 special class placement in a State-approved "preschool special education program" for five hours per day, five days per week, along with 1:1 SEIT services in the student's home and community for two hours per day, five days per week, and a 1:1 teaching assistant in "[a]ll locations" for five hours per day, five days per week, to provide the student with redirection to tasks and "hand-over-hand assistance" so that he could "participate in classroom activities" (id. at pp. 1, 17). The June 2012 CPSE also recommended the following related services beginning in September 2012: five 30-minute sessions per week of individual speech-language therapy in a therapy room; three 30-minute sessions per week of individual occupational therapy (OT) in a therapy room; and one hour per week of individual parent counseling and training in the home (id.). The June 2012 IEP also recommended support for the student's management needs, including a small student to teacher ratio with no distractions and frequent redirection, and included 43 annual goals with corresponding short-term objectives (id. at pp. 4-16). The June 2012 IEP identified a particular preschool site to which the district assigned the student to attend during the portion of the 2012-13 school year commencing in September 2012 (id. at pp. 1, 19).

In a letter dated June 20, 2012, the parents indicated that they "disagree[d]" with the June 2012 CPSE's recommendations (Parent Ex. F at p. 1). As to the recommendations in the June 2012 IEP for July and August 2012, the parents indicated the program was "insufficient" to address the student's needs (id.). With respect to the assigned preschool site, the parents asserted their belief that the program would not be appropriate for the student because it "d[id] not offer 1:1 ABA instruction[] and would not provide appropriate educational supports" (id.). The parents indicated that they would provide the student "with 40 hours/week of ABA services (in home, school[,] and community settings), plus additional supervision/coordination, team meetings[,] parent training, and [five] sessions/week of speech[-]language therapy, and placement in a typical preschool" and would "look to the [d]istrict for the costs and expenses" associated with these services (id. at pp. 1-2). The parents stated that they remained "open to visiting any other schools or programs" or attending additional meetings if the district was "able to identify other options" for the student (id.).

In a letter dated June 22, 2012, the parents indicated that they were "deep[ly] concerned" with the fact that an OT provider called the parents' home and spoke with the student's SEIT provider without the parents' advance consent (Parent Ex. E at p. 1). The OT provider allegedly solicited information from the SEIT provider at the district's request to develop OT goals for the student's IEP (id.). The parents objected to this conduct and further contended that the June 2012 CPSE did not explain "how OT services would help [the student]" (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated June 29, 2012, the parents alleged that the district failed to offer the student a FAPE for the 2012-13 school year, that the unilateral placement selected by the parents was appropriate, and that equitable considerations supported an award of tuition reimbursement (Dist. Ex. 2 at pp. 1-9).

Initially, the parents set forth certain factual allegations leading up to the June 2012 CPSE meeting, including, among other things, a description of their objections to the May 2012 IEP (Dist. Ex. 2 at pp. 3-4).[5] Next, the parents alleged that the June 2012 CPSE was improperly composed for lack of an additional parent member (id. at pp. 4-5). The parents further argued that the district improperly pressured the parents into signing a waiver regarding the additional parent member at the June 2012 CPSE meeting (id.). The parents also averred that the district predetermined the student's placement recommendation included in the June 2012 IEP, as evidenced by its failure to consider less restrictive placement recommendations for the student including a part-time general education preschool class (id. at pp. 7, 8). The parents further argued that the June 2012 CPSE did not consider "reports and recommendations" from the student's then-current providers or private evaluators or the "requests for [the student's] programming" expressed by the parents and a private evaluator (id.). The parents also contended that they were not treated as "full and equal" members of the June 2012 CPSE (id. at p. 8). The parents additionally averred that members of the CPSE provided the parents with "inaccurate information"; namely, that the student would be "required to attend a special education center-based program" and that continuation of the student's then-current placement "would be impermissible under New York State law" (id. at p. 6).[6] Next, the parents argued that the student's OT annual goals were impermissibly developed after the June 2012 CPSE meeting and "without the input of all the [CPSE] [t]eam members" (id.). Specifically, the parents alleged that an occupational therapist contacted one of the student's current SEIT providers after the June 2012 CPSE meeting to develop OT annual goals for the student (id. at p. 5).

Regarding the student's present levels of performance, the parents argued that the June 2012 IEP did not detail the student's performance, strengths, or needs in "all areas" (Dist. Ex. 2 at p. 6). The parents also alleged that, generally, the June 2012 IEP's annual goals and short-term objectives: contained insufficient mastery criteria; were geared toward a "traditional ABA program" that was not offered at the assigned preschool site; and were insufficient, vague, and incapable of measurement (id. at p. 8). The parents also alleged that the IEP's single social interaction annual goal was inadequate to facilitate social interaction in the identified classroom (id.). The parents also averred that the June 2012 IEP did not provide for "progress to be measured at a sufficient level" (id.).

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[5] For the purpose of clarity, the May 2012 IEP was superseded as a result of the June 2012 CPSE meeting and the resulting June 2012 IEP became the operative IEP for purposes of the impartial hearing and subsequent State-level review (see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215; see generally Dist. Exs. 3; 4).

[6] The parents also alleged that a district employee and the county representative later reneged on this position and indicated that the student could maintain his then-current programming (Dist Ex. 2 at p. 7).

The parents also argued that the June 2012 CPSE failed to recommend necessary assistive technology services, including an iPad, which was explicitly mentioned in the one of the annual goals included in the IEP (Dist. Ex. 2 at p. 7). The parents further alleged that the district should have conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) for the student (id.). The parents further argued that the June 2012 IEP did not contain any "supports, services, or [g]oals" to assist the student's transition to the educational program recommended in the June 2012 IEP (id. at p. 6).

The parents also contended that the March and June 2012 CPSEs recommended "inconsistent" placements "without justification," particularly as compared to the student's educational program for the 2011-12 school year (Dist. Ex. 2 at 5). The parents further alleged that the June 2012 IEP's recommendation of a 1:1 teaching assistant would make the student "prompt dependent" and could not compensate for the 1:1 SEIT provider the student "require[d]" (id. at p. 7).

Regarding assigned preschool site identified on the June 2012 IEP, the parents alleged that the proposed 12:1+2 classroom offered group instruction that would not provide the student with the "individualized . . . ABA instruction" that he required (Dist. Ex. 2 at p. 8). Additionally, the parents alleged that the June 2012 prior written notice did not include the reasons the CPSE rejected the parents' requested services (id. at p. 4)

With respect to the unilateral placement, the parents alleged that the services obtained were "appropriate to meet [the student's] special educational needs" (Dist. Ex. 2 at p. 2; see also id. at p. 8). The parents also posited that equitable considerations weighed in favor of their request for relief (id. at pp. 2, 8).

For relief, the parents requested that the IHO order the district to fund the costs of the student's educational program, provided on a 12-month basis, consisting of (a) "40 hours of 1:1 ABA services" per week in the student's home, community, and school environments; (b) placement in a general education preschool class placement; (c) three 30-minute sessions per week of individual speech-language therapy; (d) "team meetings and program coordination/supervision"; and (e) "at least" one hour per week of individual parent training (Dist Ex. 2 at pp. 8-9). The parents additionally invoked the student's right to pendency (stay-put placement) during the course of the impartial hearing, identifying a December 2011 IEP as the student's last agreed upon placement (id. at pp. 2, 8-9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 28, 2012 and concluded on September 21, 2012 after six days of proceedings (Tr. pp. 1-1449). In a decision dated November 21, 2012, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that the services selected by the parents constituted an inappropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 35-42).

The IHO found that the parents and their educational consultant had a "full and fair opportunity to present opinions and positions" at the June 2012 CPSE meeting (IHO Decision at p. 38). The IHO also found that although the district developed a plan for the student prior to the CPSE meeting, this did not constitute predetermination (id.). Notwithstanding these findings, the IHO found that the district committed several procedural violations that cumulatively resulted in a denial of FAPE to the student (id. at pp. 35-38). First, the IHO found that the parents' consent to dispense with an additional parent member at the June 2012 CPSE meeting was "in some measure, coerced" (id. at p. 35). The IHO found that the parents were "first informed of the non-availability of an additional [p]arent [m]ember" at the June 2012 CPSE meeting and, further, that rescheduling the meeting would have been inconvenient for the parents (id. at pp. 35-36). Therefore, according to the IHO, the parents would have been "hard pressed not to execute the [waiver] form" (id. at p. 35). Next, the IHO found that the parents were told that, if the CPSE did not agree on a placement for the student, that "services for [the student] would end" (id. at p. 36). The IHO held that this statement, combined with the district's failure to offer "an explanation of pendency" and information contained in the June 2012 prior written notice that "explicitly threaten[ed] termination of services" constituted a "serious procedural . . . violation" (id.).

The IHO next found that the June CPSE's failure to conduct an FBA or otherwise address the student's "problematic behaviors" in the June 2012 IEP contributed to a finding of a denial of a FAPE (IHO Decision at p. 37). The IHO found that the student's present levels of performance offered "very little information" regarding the student's self-stimulatory behaviors and failed to "offer mechanisms for decreasing the . . . behaviors" (id.). The IHO further noted that the June 2012 IEP only contained an annual goal to "decreas[e] self-stimulatory behaviors" but offered "no mechanisms whatsoever for accomplishing that goal" (id.). The IHO additionally observed that the IEP indicated that the student required "strategies . . . to address [the student's] behavior[s] that impede[d] [his] learning," but concluded that the student did not require a BIP (id. at pp. 37-38).

The IHO proceeded to find that the cumulative effect of the above violations constituted a denial of a FAPE (IHO Decision at p. 38). Finally, the IHO stated that, if not for the procedural violations detailed above, he would have found that the district offered the student a FAPE (id. at p. 41).

Turning to the parents' unilateral placement, the IHO found that the student's program, consisting of placement in a general education preschool class placement with 1:1 SEIT services, as well as "additional hours of ABA services and payments to [the parents'] . . . consultants," was not appropriate for the student for the 2012-13 school year (IHO Decision at p. 38). First, the IHO found that the general education preschool class placement provided no specially designed instruction to the student (id. at p. 39). This deficiency was not cured by the presence of a 1:1 SEIT, according to the IHO, because application of discrete trial techniques "or other intense ABA services" at the preschool "would interfere with the peer interaction" which formed the basis for the student's placement in a general education preschool environment "in the first instance" (id.). Additionally, the IHO found that the Lovaas services were "an educational luxury" and not a necessary service for the student (id.). Were the Lovaas providers to deliver services to the student at the general education preschool placement, the IHO contended that this

"further demonstrate[d] the inappropriateness of the pre[-]school setting" (id. at p. 40). Finally, although a discussion of equitable factors was not necessary to his determination, the IHO found that "the parties, while disagreeing, did adequately work with each other" (id.).

Accordingly, the IHO denied the parents' request for the costs of the student's unilateral placement (IHO Decision at pp. 39-40, 42). The IHO further denied the parents' request for an "[o]rder implementing their requested program," noting the student's "slow and inconsistent progress" in the program during the 2011-12 school year (id. at p. 40). The IHO further observed that the parents' services entailed, among other things, "too many providers, questionable consistency among the providers[,] . . . and a desperate need for structured interaction" (id. at p. 41). Finally, the IHO found that the hearing record did not support the parent's request for the student's program on a 12-month basis, in that there was no evidence regarding the student's regression (id.).

The IHO ordered that the CPSE conduct an FBA and a BIP for the student (IHO Decision at p. 42). Upon completion of these evaluations, the IHO ordered that the CPSE reconvene and "state that [the student] will be entitled to programming whether or not the [p]arents sign[ed] [a] [p]reschool [e]nrollment form" (id.). The IHO then ordered the district to offer the student an appropriate program, which could include the particular nonpublic preschool site identified in the June 2012 IEP, as well as "10 hours of home 1:1 ABA services," parent counseling and training, and speech-language therapy and OT (id.). The IHO noted that the parents would be free to "decline the [d]istrict's offer" at that time, but the district "would not be obligated to fund or implement" the parents' preferred services (id.).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn certain of the IHO's determinations relative to the June 2012 CPSE and resulting IEP, in addition to the finding that the general education preschool placement, along with the SEIT and related services, did not constitute an appropriate unilateral placement for the student. Initially, the parents contend that the IHO's decision did not comply with State regulations, in that it failed to appropriately reference the evidence in the hearing record in support of its conclusions.

The parents argue that the IHO correctly determined that the district committed several procedural violations that, considered as a whole, denied the student a FAPE for the 2012-13 school year. However, the parents assert that the IHO erred in finding: that the June 2012 CPSE considered the views of the parents and experts and that the student's June 2012 IEP was not predetermined; that the June 2012 IEP's goals were appropriately developed; and that the assigned preschool site was appropriate for the student. The parents also argue that the June 2012 CPSE's failure to consider and determine the student's need for assistive technology constituted an additional basis upon which to find that the district failed to offer the student a FAPE. Regarding the proposed placement in the June 2012 IEP and the assigned preschool site, the parents assert that such recommendations did not offer sufficient amounts of ABA therapy or 1:1 instruction. The parents further contend that a 12:1+2 special class in a center-based preschool program did not constitute the least restrictive environment (LRE) for the student.

Next, with respect to the student's unilateral placement, the parents appeal the IHO's determination that the general education preschool placement with SEIT and related services did not offer specially designed instruction to meet the student's needs. The parents argue that the general education preschool placement constituted the LRE for the student and that certain program modifications afforded the student specially designed instruction. The parents further contend that the 40 weekly hours of 1:1 SEIT/ABA services offered a comprehensive program that targeted the student's cognitive, expressive/receptive language, fine/gross motor, and activities of daily living (ADL) needs. The parents additionally argue that the student made progress while receiving 1:1 SEIT services. The parents further posit that the ABA consulting services, as well as speech-language therapy, and parent counseling training constituted necessary components of the student's program. The parents also argue that the IHO erred in determining that the student did not require 12-month services. Finally, the parents object to the IHO's order to the extent that it gives the district discretion to recommend the same assigned preschool site.

The district answers, denying the parents' material assertions and contending that it offered the student a FAPE for the 2012-13 school year. The district further argues that the IHO correctly determined that the services selected by the parents for the 2012-13 school year were inappropriate. The district also interposes a cross-appeal arguing that the IHO erred in finding that the district committed procedural violations that, considered together, resulted in a denial of FAPE. Specifically, the district cross-appeals the IHO's determinations: that the parents were pressured into signing a waiver of their right to an additional parent member; that the parents were told that the student's services would cease if the CPSE did not agree on a placement; that the district should have conducted an FBA; and that the June 2012 IEP did not otherwise address the student's interfering behaviors. The district further argues that the June 2012 IEP offered the student a FAPE and that it could have been implemented at the assigned preschool site. The district additionally objects to the IHO's order that the CPSE reconvene, conduct an FBA, and reconsider the student's placement.

In an answer to the district's cross-appeal, the parents deny the district's material assertions. The parents additionally argue that the SRO may not consider arguments made by the district in its memorandum of law that are not also contained in its answer and cross-appeal and that the student's pendency services were not provided in a timely matter.[7]

V. Applicable Standards

[7] With respect to the arguments contained solely in the district's memorandum of law, the parents are correct that such arguments are not validly raised on appeal (see 8 NYCRR 279.6; see also Application of a Student with a Disability, Appeal No. 14-024; Application of a Student with a Disability, Appeal No. 12-172; Application of the Board of Educ., Appeal No. 12-142). However, upon review of the pleadings, it appears that the arguments addressed exclusively in the memorandum of law respond to the parents' contentions and do not set forth independent grounds for challenging the IHO's decision. As for the timely delivery of the student's pendency services, although the parents did not discuss this delay in their petition, I will order that the district comply with its obligations under the IDEA and fund the costs of the student's last agreement upon placement during the pendency of these proceedings.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 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, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the

potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 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. Preliminary Matters

Initially, the parents argue that the IHO failed to properly reference the hearing record in support of his determinations that the June 2012 CPSE was not predetermined; that 40 weekly hours of 1:1 SEIT services would not be appropriate for the student; and that the placement recommended by the June 2012 CPSE would have provided the student with a FAPE. State regulations provide that an IHO "shall set forth the reasons and the factual basis for [his or her] determination" and "shall reference the hearing record to support [his or her] findings of fact" (8 NYCRR 200.5[j][5][v]).

The IHO began his decision with a thorough summary of the testimony and evidence adduced at the impartial hearing (IHO Decision at pp. 5-24). Portions of this discussion are relevant to each of the IHO's conclusions to which the parents object on appeal (see id. at pp. 15-16, 18, 20 [predetermination]; id. at pp. 10, 15-16 [appropriateness of 1:1 SEIT services]; id. at pp. 18, 20-22 [June 2012 IEP placement]).[8] Further, the IHO's review of the testimony and evidence is accompanied by appropriate citations to the hearing record (see id. at pp. 5-24). Therefore, a review of the IHO's decision reveals that the IHO properly analyzed and issued findings on the parents' claims accompanied by citations to the evidence in the hearing record.

B. June 2012 CPSE Meeting

1. CPSE Composition—Additional Parent Member

The district asserts that the IHO erred in his determination that the parents' consent to waive the presence of an additional parent member at the June 2012 CPSE meeting was "in some measure, coerced" (IHO Decision at p. 35). A review of the hearing record supports the district's assertion; therefore, the IHO's finding in this regard must be reversed.

At the time of the June 2012 CPSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CPSE meeting convened to develop a student's IEP (Educ. Law § 4410[3][a][1]; 8 NYCRR 200.3[a][2][v]; see M.S. v. New York City

[8] Additionally, the IHO's conclusion that the placement recommended in the June 2012 IEP offered the student a FAPE was an alternative finding (see IHO Decision at p. 41).

Dep't of Educ., 2010 WL 9446052, at *3, 19 [S.D.N.Y. Mar. 12, 2010]; see generally J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]).[9] State law and regulation in effect at the time further provided that parents had the right to decline, in writing, the participation of the additional parent member at any meeting of the CPSE (Educ. Law § 4410[3][a][1]; 8 NYCRR 200.3[a][2][v]).

In this case, attendees at the June 2012 CPSE meeting included the chairperson, the district assistant director of pupil personnel services, a county representative, four special education providers from the agency that provided the student home and community based services, a special education provider from the assigned preschool site, a private educational consultant, and the parents (Dist. Ex. 3 at p. 1; see Tr. p. 64). It is undisputed that the parents waived their right in writing to have an additional parent member serve as a member of the June 2012 CPSE (Dist. Ex. 10; see Tr. pp. 1192-93, 1365-66). The parties dispute, however, whether this waiver was freely made. At the impartial hearing, the parents testified that it was their understanding that the June 2012 CPSE meeting could have been rescheduled if the parents desired the participation of an additional parent member (Tr. p. 1245). This is consistent with testimony provided by both the district assistant director of pupil personnel services and the CPSE chairperson, both of whom served on the June 2012 CPSE (see Tr. pp. 343, 347, 402-03, 1365-66). The chairperson testified that she told the parents at the June 2012 CPSE meeting that an additional parent member was unavailable and that the meeting "could be rescheduled" or they could "move forward" with the meeting if the parents were "willing to sign a form [indicating] that they . . . requested no parent member at the meeting" (Tr. p. 1366; see Tr. pp. 1365-66). It appears, then, that the parents were aware of their right to reschedule the CPSE meeting and voluntary waived their right to attendance of an additional parent member (see Mills, 2005 WL 1618765, at *2, *5 [noting some dispute surrounding the parent's execution of the waiver but affording the parent's subjective feelings that her consent was coerced little weight in determining that the parent voluntarily waived her right to an additional parent member]; see also M.S., 2010 WL 9446052, at *19).

Moreover, when asked what benefit an additional parent member may have provided, the parents indicated that they hoped he or she "could [have] be[en] an impartial third party" whose presence might have ameliorated the district's alleged "hard line . . . take it or leave it" stance (Tr. p. 1198). Assistive guidance from the Office of Special Education indicates that "[t]he additional parent member can provide important support and information to the parents of the student during the meeting and, in addition to the student's parents, participates in the discussions and decision making from the perspective of a parent of a student with a disability" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 7,

[9] Effective July 31, 2013, amendments to State law and, subsequently to State regulations, provide that an additional parent member is no longer a required member of a CPSE unless specifically requested in writing by the parents or by a member of the CPSE at least 72 hours prior to the meeting (Educ. Law § 4410[3][a][1]; 8 NYCRR 200.3[a][2][v]).

Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). To the extent that the parents contend that an additional parent member may have provided additional insight and information into the CPSE process or the parents' due process rights, the hearing record indicates that the parents were knowledgeable in both respects. The parents have remained adamant throughout this appeal that, in their view, the only appropriate strategy for instructing the student was "intensive" 1:1 ABA instruction (Tr. p. 1205; see, e.g., Tr. pp. 1205-06, 1215-18, 1264, 1274). Further, the parents have not professed that they did not understand the June 2012 CPSE's recommendations; on the contrary, the hearing record reveals that the parents rejected the June 2012 IEP's recommended program because it did not offer sufficiently intensive 1:1 ABA instruction (see Parent Ex. F at p. 1). Additionally, the hearing record reveals that the parents attended the June 2012 CPSE meeting, along with a private consultant and the student's then-current providers, participated in a meeting that lasted "at least" two hours, and were permitted to "fully express anything [they] wanted to" at the meeting (Tr. p. 1249; see Tr. pp. 1248-49; Dist. Exs. 3 at p. 2; 38 at pp. 1-2). The parents also testified that they received a procedural safeguards notice and that they were aware at the June 2012 CPSE meeting that they could exercise their due process rights by requesting an impartial hearing (Tr. pp. 1245, 1246).

Therefore, although it is conceivable that an additional parent member may have been able to provide what can be described as nominal support or information to the parent during the June 2012 CPSE meeting, it is unclear from the hearing record how an additional parent member could have contributed any more knowledge, expertise, or support to the parents than they already had available to them. Therefore, there is no basis in the hearing record to conclude that the absence of an additional parent member, or the circumstances surrounding the parents' execution of the waiver, 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]).

2. Conduct of CPSE meeting

The district additionally argues that IHO erred in finding that the parents were told that the student's special education services would cease if the parents did not agree to the district's offered program. A complete review of the evidence in the hearing record contradicts the IHO's conclusion that the parents may have been coerced or threatened with the cessation of special education services.

The IHO found that the district assistant director of pupil personnel services told the parents that the student's continued eligibility for district-provided special education services was conditioned upon the parents' execution of a preschool enrollment form (IHO Decision at p. 36; see Tr. p. 1194-97). The IHO acknowledged that the assistant director "may have intended to communicate that it would be problematic for providers to get paid by the [c]ounty should the [p]arents not execute [the form]" and that the district "provided the [p]arents with [a] procedural [d]ue [p]rocess [n]otice" (IHO Decision at p. 36). Nevertheless, the IHO found that the district made an improper threat to stop the student's services unaccompanied by an explanation of the parents' right to file a due process complaint notice and receive services under pendency (id.).

Although not introduced into evidence at the impartial hearing, it appears from the hearing record that the preschool enrollment form was a document required in order to obtain approval for funding of services and to ensure that providers employed by the county were paid for their services (see Tr. pp. 426, 1387-88). In a prior written notice dated March 19, 2012, the district indicated that the parents were entitled to procedural safeguards and, further, indicated that the parents "[p]reviously . . . received a [p]rocedural [s]afeguards [n]otice that explain[ed] [their] rights regarding the special education process" (Dist. Ex. 39 at p. 2). The prior written notice provided contact information if the parents required an additional copy of this form (id.). Although the procedural safeguards notice was not introduced into the hearing record, the parents testified that they received a procedural safeguards notice from the district (Tr. p. 1246).

In a prior written notice dated June 19, 2012, the district reiterated the statement contained in the March 2012 prior written notice regarding the parents' receipt of a procedural safeguards notice (Dist. Ex. 38 at p. 2; see Dist. Ex. 39 at p. 2). The June 2012 prior written notice further indicated that the parents refused to sign the preschool enrollment form at the CPSE meeting and, accordingly, the district could not "implement the [IEP]" and the student's "services through the [CPSE] w[ould] end on 6/29/12" (Dist. Ex. 38 at p. 2; see also Tr. pp. 1271, 1273). The parents testified that they were told at the June 2012 CPSE meeting that they could "exercise their due process rights" if they did not agree with the CPSE's recommendations (Tr. p. 1246). However, the parents offered equivocal testimony as to whether they knew by the end of the June 2012 CPSE meeting that the student could continue to receive services through pendency and that the student's services would not, in fact, cease (see Tr. p. 1246).

Although a district's cessation of special education services based upon a parents' failure to execute an administrative form could constitute a violation of the IDEA under certain circumstances, these are not the facts of this case. Rather, the parents, aware of their due process rights, rejected the June 2012 CPSE's recommendations the day after the CPSE meeting and indicated their intention to seek district funding for their preferred program (see Parent Ex. F). Additionally, nine days after the parents rejected the June 2012 IEP, the parents filed a due process complaint notice including requests for pendency and reimbursement (Dist. Ex. 2 at pp. 8-9). Although the parents testified at the impartial hearing that they did not understand the purpose of the preschool enrollment form, they did not otherwise explain why they refused to sign the document (Tr. p. 1285).[10]

Therefore, even assuming for purposes of argument that the district improperly threatened to cease delivery of the student's special education services, it would appear that the district's "threat" had no effect on the student in this case. While the district may have inaccurately expressed the meaning or intention of the preschool enrollment form, this deficiency

[10] Although their testimony is unclear on this point, the parents testified that, in the past, they previously signed "forms . . . so that [the student] could participate in CPSE" (Tr. p. 1285). However, the parents could not recall at the impartial hearing whether or not they signed a consent form to initiate services for the student (Tr. pp. 1234, 1273). While it appears that the preschool enrollment form was not a consent form, I remind the parties that a parent's refusal to provide initial consent or revocation of consent for the provision of special education ensures that a district "[w]ill not be considered to be in violation of the requirement to make FAPE available to the [student]" (34 CFR 300.300[b][3][ii], [4][iii]).

did not impede the student's right to a FAPE; significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or cause 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]).

3. Parent Participation/Predetermination

Next, the parents argue that the IHO erred by finding that the district afforded the parents an opportunity to participate in the development of the student's June 2012 IEP and did not predetermine its recommendations for the student. The parents assert that the June 2012 CPSE's recommendation that the student attend a State-approved nonpublic preschool special education program constituted predetermination insofar as the district did not consider the parents' preferred program. The evidence in the hearing record indicates that the district afforded the parents an opportunity to participate in the June 2012 CPSE meeting and, further, supports the IHO's determination that the June 2012 CPSE did not engage in impermissible predetermination of the student's educational program.

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 and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["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]).

Here, while the level of the parents' participation is discussed in detail throughout this decision, the parents specifically object to the IHO's failure to address their claim that the student's annual goals were improperly developed after the June 2012 CPSE meeting and, thus, the parents were not included in their development. As a preliminary matter, the annual goals contained in the March and June 2012 IEPs are identical except for three new goals added to the June 2012 IEP (compare Dist. Ex. 3 at p. 11, with Dist. Ex. 4 at p. 11). As to the annual goals that remained unchanged between the March and June 2012 IEPs, the evidence in the hearing record indicates that these goals were discussed and developed at the March 2012 CPSE meeting and the parents do not assert a claim to the contrary (Tr. pp. 314, 1200, 1236, 1369-70). As to the three new goals contained in the June 2012 IEP, the hearing record indicates that these goals were developed in conjunction with the June 2012 CPSE's recommendation of OT for the student. The evidence in the hearing record demonstrates that these goals were developed after the June 2012 CPSE meeting (Tr. pp. 323-25; see also Tr. pp. 122, 1205-6). Specifically, it appears that an employee of the agency through which the district provided the student with

SEIT services contacted one of the student's current SEIT providers to obtain assistance in drafting OT goals for the student (Parent Ex. E at p. 1).[11] However, the parents' objection to the drafting of OT goals after the CPSE meeting must fail, as "there is no 'requirement in the IDEA or case law that the IEP's statement of goals be typed up at the CSE meeting itself, or that parents or teachers have the opportunity to actually draft the goals by hand or on the computer themselves, or that the goals be seen on paper by any of the CSE members at the meeting'" (E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y Sept. 29, 2012], quoting S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *11 [S.D.N.Y. Nov. 9, 2011]).

Turning to the parents' predetermination claim, as several courts have held, the IDEA prohibits a district from "mak[ing] educational decisions too early in the planning process[] in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team" (R.L. v. Miami-Dade Cnty. Sch. Bd., 2014 WL 3031231, at *12 [11th Cir. July 2, 2014]). However, advance consideration 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]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see R.L., 2014 WL 3031231, at *12; D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294.

The hearing record demonstrates that, contrary to the parents' contentions, the June 2012 CPSE maintained an open mind as to the student's program and considered the parents' views in developing an appropriate program for the student. In order to place the parents' argument in context, it is necessary to briefly review the student's educational history within the district. On December 1, 2011 a CPSE convened in response to a request made by the student's speech-language therapist to increase the amount of the student's speech/language services (Dist. Ex. 5 at pp. 1, 2). The parents testified that the December 2011 CPSE engaged in a two and a half hour discussion about the student's current program (Tr. p. 1169). The parents further testified that the chairperson who served on the December 2011 CPSE recommended that the parents visit center-based preschool programs in anticipation of the student's next CPSE meeting (Tr. p. 1170). The parents toured one such suggested program sometime prior to the March 2012 CPSE meeting (Tr. pp. 1171-72; see Parent Q at pp. 8-11).

[11] The evidence in the hearing record indicates that this employee is an occupational therapist who conducted an evaluation of the student in December 2010 (compare Dist. Ex. 17 at pp. 1, 7, with Tr. pp. 338, 1401).

The March 2012 CPSE meeting, according to both the parent and the CPSE chairperson, lasted a few hours (Tr. pp. 1236, 1365). A representative from the center-based preschool program visited by the parents attended the March 2012 CPSE meeting and described the program (Tr. p. 315). According to the district assistant director of pupil personnel services, the particular preschool program employed the ABA instructional method utilized by the student's then-current providers (id.). The assistant director further testified that she recommended the program because she knew that the particular ABA methodology "was important" to the parents (Tr. p. 367). The March 2012 CPSE, except for the parents, agreed that the student would benefit from a highly structured and center-based preschool program (Tr. p. 314; Dist. Ex. 39). The assistant director explained that the March 2012 CPSE felt that the student needed to be in a program where he could learn routines, interact with other children, and prepare to enter kindergarten (Tr. p. 314).

The March 2012 prior written notice indicated that the March 2012 CPSE discussed the parents' request that the student attend a general education preschool setting and receive 30 hours of 1:1 SEIT services in the home/community, as well three 30-minute sessions of home-based speech-language therapy but rejected this placement because it determined that the student's "needs could be better addressed in a center-based program" (Dist. Ex. 39 at p. 1). Nevertheless, the district agreed to reconvene the CPSE after the parents visited another center-based preschool program discussed at the March 2012 CPSE meeting as a potential placement for the student beginning in the fall of 2012 (id.).

The CPSE reconvened on June 19, 2012 (Dist. Ex. 3 at p. 1). The CPSE recommended, among other things, placement in a 12:1+2 special class five days per week, five hours per day to be implemented at a State-approved preschool special education program (id.). Moreover, the CPSE offered an educational program for July and August 2012 more similar to that preferred by the parents (see id. at pp. 1, 18). The parents previously visited the particular nonpublic preschool program identified in the June 2012 IEP with an educational consultant in May 2012 (Parent Ex. Q at pp. 6-8; see Tr. p. 1182). In a letter dated June 20, 2012, the parents rejected the district's offered placement because it "d[id] not offer 1:1 ABA instruction" (Parent Ex. F at p. 1).

On appeal, the parents allege that the June 2012 CPSE's recommendation that the student attend a center-based program constituted predetermination because the district did not consider the parents' preferred program. The above evidence dispels any notion that the June 2012 CPSE predetermined its recommendations for the student; instead, the evidence reveals that the district considered the parents' suggestions in designing a program that would meet the student's needs. As the director of the agency that employed the student's SEIT providers testified at the impartial hearing, it is "very valuable" to introduce a student to a school-based setting if, as is the case with the student, his or her parents do not intend to provide home-school services (Tr. pp. 143, 1192). Therefore, it was not unreasonable for the district to recommend a center-based program for the student.

The facts of this case are unlike those in Deal, where the Sixth Circuit held that a district predetermined its recommendations for a student by refusing to consider the model of ABA services employed by the private consultants (392 F.3d at 855-60). In Deal, the parents "outlined

the impressive results [the student] had achieved" with the particular ABA methodology at the CSE meeting (id. at p. 856). Nevertheless, the parents were categorically told by district employees that the "powers that be" would not permit the district to provide the student with the particular 1:1 ABA therapy (id. at pp. 856, 859). Here, by contrast, the evidence before the June 2012 CPSE indicated that the student was making minimal progress in a program designed by the parents utilizing ABA instruction. Moreover, the evidence in the hearing record reveals that the district considered the parents' concerns and preferred methodology in recommending a program for the student, including a program that offered ABA (Tr. pp. 315, 367).

To the extent the parents argue that the district did not ultimately recommend the particular program recommended by the private consultants and preferred by the parents, a CSE or CPSE is not obligated to accede to recommendations made by private evaluators (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9, 2005 WL 1791553 [2d Cir. July 25, 2005]; see T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. Sept. 16, 2013]); E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010], aff'd, 487 Fed. App'x 619, 2012 WL 2615366 [2d Cir. 2012]). Accordingly, the hearing record demonstrates that the district considered the parents' preferences and did not predetermine its recommendations for the student.

4. Consideration of Evaluative Information

On appeal, the parents argue that the IHO erred by finding that the June 2012 CPSE appropriately considered the evaluative material before it. Specifically, the parents argue that the June 2012 CPSE did not consider a May 2012 private educational observation review report and recommendation or a June 2012 private treatment summary and recommendation report (see generally Parent Exs. L; Q).

A CSE must consider privately-obtained evaluations, 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 document, or that the CSE accord the private evaluation 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]). Moreover, the IDEA "does not require a [CSE] to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S., 2013 WL 3975942, at *11; see T.G., 973 F. Supp. 2d at 340).

The evidence in the hearing record demonstrates that the June 2012 CPSE considered both the May 2012 private educational observation review report and recommendation and the June 2012 private treatment summary and recommendation report. With regard to the May 2012 private educational observation review report and recommendation, a significant portion of this report detailed a May of 2012 visit made by the parents and a private consultant to the assigned preschool site ultimately recommended in the June 2012 IEP (see Parent Ex. Q at pp. 6-8). The CPSE chairperson and district assistant director of pupil personnel services testified that the portion of the report detailing the visit to the assigned preschool site was discussed insofar as its contentions were refuted by the clinical coordinator from the visited program, who also attended the June 2012 CPSE meeting (Tr. pp. 346, 1381). Further, the district assistant director of pupil personnel services testified that the report was received and considered "as [it] came up" during the CPSE's discussion (Tr. p. 346). Although the author of the report testified that her report was "an afterthought," she attended the June 2012 CPSE meeting and "ha[d] the opportunity to express [her] opinion regarding what was appropriate for [the student]" (Tr. p. 1101; see Tr. pp. 1100-01). Therefore, even assuming that the June 2012 CPSE did not consider the May 2012 private educational observation review report and recommendation, such a failure was mitigated by the author's attendance at the June 2012 CPSE meeting and her admitted ability to express her views.

Regarding the June 2012 private treatment summary and recommendation report, the district assistant director of pupil personnel services testified that this report, like the private educational observation review report and recommendation, was available to the CPSE and that the CPSE "look[ed] through . . . as [it] came up" during discussion (Tr. p. 346). Although the assistant director initially testified that she "d[id] not remember" whether this report was discussed, she subsequently clarified that she recalled "talk[ing] about some of this stuff" including "haircutting" but did not recall "how much we referred to [the report] specifically" (id.; see Parent Ex. P at p. 4). Therefore, based upon the foregoing, the district established at the impartial hearing that the June 2012 CPSE considered both the May 2012 private educational private educational observation review report and recommendation and the June 2012 private treatment summary and recommendation report.[12]

C. June 2012 IEP

1. Special Factors—Functional Behavioral Assessment

The district asserts that the IHO erred in his determination that the district failed to conduct an FBA and, further, that this procedural violation constituted a denial of FAPE. The evidence in the hearing record supports the IHO's determination that the district violated the IDEA by neglecting to develop an FBA for the student; however, it does not support the IHO's ultimate conclusion that the June 2012 IEP otherwise failed to recommend supports and strategies to manage the student's interfering behaviors.

[12] Furthermore, as explained above, the CPSE was not obligated to accede to recommendations made by these private consultants (J.C.S., 2013 WL 3975942, at *11; Watson, 325 F. Supp. 2d at 145; T.G., 973 F. Supp. 2d at 340; E.S., 742 F. Supp. 2d at 436).

Among the special factors a CSE must consider in the development of an IEP for a student whose behavior impedes his or her learning or that of others is the use of positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 72-73 [2d Cir. 2014]; E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. 2009]; A.C., 553 F.3d at 172; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *14 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *9 [S.D.N.Y. Mar. 31, 2014]; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149).

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

The Second Circuit has explained that "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE", but that in such instances "particular care" must be taken to determine whether the IEP address the student's problem behaviors" (id., see F.L. v. New York City Dep't of Educ., 553 Fed. App'x. 2, 3, 2014 WL 53264 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131 140-41 [2d Cir. 2013]).

The March 2012 CPSE considered information that, at the time of the CPSE meeting, the student engaged in behaviors that significantly interfered with instruction (Tr. pp. 308-10; see Dist. Exs. 22, 24, 25). A February 2012 SEIT annual review progress report observed that the student engaged in side-sighting behavior that interfered with the student's progress towards his goals (Dist. Ex. 25 at p. 2). This behavior "continued and increased" during the dates of service (id.). A second SEIT annual report from February 2012 indicated that the student was highly

distractible and required constant supervision to remain on task and refrain from side-sighting, tapping objects, twisting fingers, and biting (Dist. Ex. 22 at pp. 2-3). This report further indicated that the student required frequent redirection, in order to attend to directions, and that his compliance fluctuated depending on his sleeping, eating, and health patterns (id. at p. 5). It was also reported that the student continued to alter his behavior based upon who was present in his environment; for example, the presence of a parent resulted in an increase in escape behaviors (id.). A third SEIT report from February 2012 noted that the student "engage[d] in atypical and self-stimulatory behaviors such as tapping and banging items together" (Dist. Ex. 24 at p. 2). This SEIT provider further reported that the student engaged in "aggressive" behaviors during the previous "couple of months" including "biting and scratching family members and therapists" (id.). The SEIT provider also noted a "significant decrease in aggressive behaviors" in the week prior to the report (id.).[13]

Although the March 2012 CPSE considered this information, neither the March 2012 CPSE nor June 2012 CPSE conducted an FBA of the student. This omission is particularly curious as the June 2012 IEP indicated that the student "need[ed] strategies, including positive behavioral interventions, supports[,] and other strategies to address behaviors that impede the student's learning or that of others" (Dist. Ex. 3 at p. 5). Therefore, based upon the uncontested evidence of the student's interfering behaviors presented to the March 2012 CPSE, as well as the district's indication on the June 2012 IEP that the student possessed behavioral needs that interfered with the student's learning, I find that the district's failure to conduct an FBA under these circumstances constituted a procedural violation of the IDEA.

The next question, therefore, is whether this procedural violation resulted in a denial of FAPE to the student, taking "particular care" in assessing whether the June 2012 IEP "address[ed] the student's problem behaviors" (R.E. 694 F.3d at 190). A complete review of the June 2012 IEP reveals that it sufficiently addressed the student's interfering behaviors to the extent that the district's failure to conduct an FBA did not result in a denial of FAPE.

First, review of the June 2012 IEP reveals that it sufficiently identified the student's interfering behaviors, consistent with the descriptions in the February 2012 SEIT service annual reports (compare Dist. Exs. 22, 24, 25, with Dist. Ex. 3 at p. 8). The social development section of the June 2012 IEP indicated that the student demonstrated parallel play in the community, did not have age-appropriate play skills, and exhibited frequent self-stimulatory behaviors (Dist. Ex. 3 at p. 4). Additionally, the management needs section of the IEP indicated that the student possessed delays across all domains and required "a small teacher to student ratio with no distractions to demonstrate progress" (id.). This section further indicated that the student required frequent redirection to remain on task because his self-stimulatory behaviors impeded his ability to attend (id.).[14]

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[13] Additionally, although the hearing record is unclear as to whether this report was considered by the June 2012 CPSE, a June 2012 SEIT annual report indicated that the student "started displaying new self-injurious behaviors" including "head banging, hitting himself in the head . . . and pulling of his hair" (Dist. Ex. 19 at p. 3). Redirection from these self-injurious behaviors, according to the report, "sometimes" caused the student to hit or scratch in response (id.).

[14] The student's SEIT providers utilized redirection strategies in order to prevent the student from engaging in interfering behaviors (see, e.g., Dist. Exs. 19 at p. 2; 22 at p. 5; 25 at p. 3).

Next, consistent with information before the June 2012 CPSE indicating that the student required "constant redirection" and "hand over hand" supervision (Tr. p. 311; see also Tr. pp. 326, 339, 383-84; Dist. Ex. 19 at p. 3), the June 2012 IEP included a recommendation for an individual teaching assistant for the student (Dist. Ex. 3 at pp. 1, 18). The Second Circuit has held recognized that 1:1 assistance can constitute a behavioral management service (see C.F., 746 F.3d at 81; F.L., 553 Fed. App'x at 6). Therefore, it appears that the 1:1 services of a teaching assistant were reasonably calculated to manage and redirect the student's interfering behaviors.

Additionally, the June 2012 IEP contained annual goals that both addressed the student's social/emotional and behavioral needs generally and described and targeted the student's specific interfering behaviors (Dist. Ex. 3 at pp. 8-10, 15). The June 2012 IEP contained 43 annual goals, ten of which targeted the student's social/emotional and behavioral skills (id.). These ten annual goals addressed the student's interactions with adults and peers and encouraged the cultivation of situation-appropriate behavior (id.). With regard to the student's interfering behaviors, an annual goal provided that the student would "decrease or eliminate self[-]stimulatory behaviors (i.e., eye gazing, tapping, finger twisting) when presented with demands" (id. at p. 8). This annual goal contained four short-term objectives to be measured throughout the school year (id.). A second annual goal indicated that the student would "demonstrate an increase in appropriate responses when reinforced with a token economy system" (id.). This goal also contained four short-term objectives to be measured throughout the school year (id.).

Therefore, a review of the hearing record demonstrates that the June 2012 IEP described the student's interfering behaviors and offered strategies, including 1:1 hand-over-hand assistance, frequent redirection, targeted annual goals, to manage these behaviors. Accordingly, the June 2012 CPSE's failure to conduct an FBA, under these circumstances, did not impede the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]).

2. 12:1+2 Special Class with 1:1 Teaching Assistant and 1:1 SEIT Services

The parents argue that the district's recommended placement of a 12:1+2 special class with 1:1 teaching assistant services, 1:1 SEIT services, speech-language therapy, and OT was not reasonably calculated to provide the student with educational benefit. A review of the hearing record contradicts the parents' argument and reveals that the district's recommended program offered the student a FAPE.

Although not in dispute in this proceeding, a brief discussion of the student's needs at the time of the June 2012 CSE meeting is necessary to evaluate the appropriateness of the June 2012 CPSE's recommendations. The student presents with significant cognitive, speech/language, social-emotional, behavioral, and fine-motor delays.

With respect to the student's cognitive ability, administration of the Bayley Scales of Infant Development, Third Edition as part of a December 2010 psychological evaluation yielded a standard score of 75 (borderline), placing the student in the fifth percentile (Dist. Ex. 13 at p. 3).[15] The student's "ABA teacher" provided physical prompts, verbal prompts, and redirection support through the evaluation (id.). The evaluator also assessed the student using the Vineland-II Adaptive Behavior Scales (Vineland-II) with the parent serving as informant (id. at pp. 3-5). Administration of the Vineland-II yielded an adaptive behavior composite of 82 (moderately low) as well as the following standardized domain scores: communication 79 (moderately low); daily living skills 89 (adequate); socialization 76 (moderately low); and motor skills 96 (adequate) (id. at pp. 4-5).

Regarding the student's speech/language abilities, a December 2010 speech-language evaluation revealed substantial delays in the student's speech abilities (Dist. Ex. 15). Administration of the Preschool Language Scale-4 (PLS-4) yielded the following standardized scores: auditory comprehension 55 (first percentile), expressive communication 67 (first percentile), and total language score 57 (first percentile) (id. at p. 2). Administration of the Kaufman Speech Praxis Test resulted in an oral movement score of 47 (second percentile) (id. at pp. 3-4). The evaluator additionally concluded that the student's pragmatic language skills were "significantly below" expected levels and that the student's "limited verbal output" precluded an assessment of his fluency (id. at p. 4). Reports by the student's speech-language therapist and SEIT providers dating from November 2011 to June 2012 detailed continued difficulties in these areas (see generally Dist. Exs. 19-37).

At the time of the June 2012 CPSE meeting, the student experienced delays in his ability to appropriately interact with peers. A February 2012 SEIT annual review report indicated that despite "unstructured exposure to other children", the student did not "attempt[] to engage in play or communication with peers" (Dist. Ex. 22 at p. 3). The SEIT provider indicated that the student occasionally approached other student's but, due to a lack of social skills, would "tend[] to get overexcited and bite" (id.). The student was able to sit and attend to group activities with adult assistance (id. at pp. 3-4). The SEIT provider concluded that the student's social/emotional delays were "well below age expectations" and constituted the student's "primary area of deficit" (id. at p. 4).

As described in some detail above, the student has also exhibited impulsive and interfering behaviors since first receiving special education services from the district. A December 2010 psychological examination noted that the student engaged in self-stimulatory behavior by "banging items together" during the examination (Dist. Ex. 13 at p. 2). A speech-language evaluation conducted in December 2010 noted that the student engaged in limited toy exploration and possessed "limited play skills" (Dist. Ex. 15 at p. 2; see also Dist. Ex. 16). A February 2012 SEIT report indicated that the student engaged in "tapping and banging" behaviors "both at home and in the community" (Dist. Ex. 24 at p. 2). The report further indicated that the student was "engag[ed] in aggressive behaviors [over] the past couple of months, biting and scratching family and therapists" under certain circumstances (id.). A June 15, 2012 SEIT annual report indicated that the student "started displaying new self-injurious

[15] The evaluator cautioned that these testing results "should be interpreted with caution as standardization procedures were not adhered to" (Dist. Ex. 13 at p. 3).

behaviors" including "head banging, hitting himself in the head . . . and pulling of his hair" (Dist. Ex. 19 at p. 3). Redirection from these self-injurious behaviors, according to the report, "sometimes" caused the student to hit or scratch in response (id.).

A December 2010 OT evaluation assessed the student's behavior, neuromuscular/gross motor, fine motor, visual motor/perceptual, integration of sensory input/sensory motor, and self-help skills (Dist. Ex. 17 at pp. 1-7). Administration of the Peabody Developmental Motor Scales-Second Edition (PDMS-2) elicited the following scores: grasping 3 (first percentile); visual motor integration 5 (fifth percentile); and fine motor quotient 64 (id. at p. 2). The evaluator noted that these scores were not standardized because the PDMS-2 permits directions to be repeated up to three times, and the student required "all directions . . . repeated and/or demonstrated" more than three times (id.). The report concluded that the student presented with delays in the areas of "visual motor skills, bilateral hand usage, prehension skills (grasp patterns), visual perceptual skills, sensory processing skills, and crossing midline" (id. at p. 6). With respect to the student's fine motor skills, the evaluator noted "poor grasp patterns . . . requir[ing] hand-over-hand assistance" to cut paper with a pair of scissors (id.).[16]

After developing goals and objectives to target the student's areas of need, the June 2012 CPSE recommended a 12:1+2 special class placement in a State-approved "preschool special education program for 25 hours per week with 25 hours per week of 1:1 teaching assistant services and ten hours per week of 1:1 SEIT services (Dist. Ex. 3 at pp. 1, 17). The CPSE additionally recommended the related services of speech-language therapy and OT, as well as one hour per week of parent counseling and training (id.). State regulations provide that the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction (8 NYCRR 200.6[h][4][i]).

Here, the appropriateness of the March 2012 CPSE's recommendation of a 12:1+2 special class with 1:1 teaching assistant services, 10 weekly hours of SEIT services, and the related services of speech-language therapy and OT is supported by the evidence in the hearing record. The supervisor of the 12:1+2 program at the assigned preschool site attended the June 2012 CPSE meeting and, at the impartial hearing, testified regarding the program that the CPSE recommended for the student (Tr. pp. 488, 493; Dist. Ex. 3 at p. 1; see Tr. p. 470).[17] According to the supervisor, the program was designed for early learners, who the supervisor described as students that lack communication, language, play, and socialization skills and, therefore, require more intensive one-to-one instruction (Tr. p 473). She further explained that the 12:1+2 special class at the assigned preschool site consisted of two separate components during the school day (Tr. pp. 474-76). For one half of the school day, six students work primarily on individual

[16] Reports generated by the student's SEIT providers between January and June of 2012 reveal that the student continued to demonstrate needs in this area (Dist. Exs. 25 at pp. 2-3; 29 at p. 1; Parent Ex. HH at pp. 1, 2).

[17] Because the assigned preschool site was explicitly identified on the June 2012 IEP as the location where the district would implement the IEP, this evidence has been considered as evidence "explain[ing] [and] justify[ing] what is listed in the written IEP" (R.E., 694 F.3d at 185).

programming designed to address each student's unique needs (see id.). For the second half of the day, six regular education students joined the class accompanied by an early childhood teacher for activities such as center time, circle time, and group snack time (Tr. pp. 475-76).[18] The typical peers selected for the program exhibit age-appropriate language, social, behavior and play skills, and are trained to interact with the children with autism in the classroom (Tr. 474-75, 489).

The hearing record reveals that the 12:1+2 special class placement recommended by the June 2012 CPSE would have provided specialized instruction to the student to address his cognitive delays (Dist. Ex. 3 at pp. 1, 17; see Tr. pp. 474-76). Additionally, the program targeted the student's social/emotional delays by offering structured exposure to nondisabled peers specially trained to encourage socialization and social development. Although the parent argues on appeal that a 12:1+2 special class did not represent the LRE for the student and that a general education classroom would be more appropriate, the hearing record reveals that the student exhibited significant delays in his speech and socialization skills justifying placement in a special class (see generally Dist. Exs. 13; 15; 22). Therefore, the structured interaction with typically-developing peers offered by the 12:1+1 special class in the assigned preschool site would have allowed the district to address the student's needs in a more restrictive environment while still providing access to nondisabled peers (see Tr. p. 86).[19]

Further, the June 2012 IEP offered the related services of speech-language therapy and OT to address the student's speech-language delays and fine/gross motor needs. Specifically, the June 2012 IEP offered five 30-minute sessions of individual speech-language therapy per week based upon the student's then-current provider's suggestion that, with three 30-minute sessions per week, the student demonstrated slow steady progress, generalization challenges, and the rapid dissipation of skills over a matter of days (Dist. Ex. 26 at pp. 1-2). The June 2012 IEP also contained eight speech-language annual goals provided by the student's speech-language therapist (compare Dist. Ex. 26 at pp. 4-6, with Dist. Ex. 3 at pp. 6-8). The CPSE additionally recommended three 30-minute sessions of individual OT per week and eight annual goals targeted to increase the student's fine motor ability (Dist. Ex. 3 at pp 11-13, 18).

Finally, with respect to the student's behavioral needs, the above discussion analyzing the extent to which the June 2012 addressed the student's behavioral needs reveals that the June 2012

[18] The supervisor also testified that, if required due to their needs, some children in the program receive a full day of discrete trial programming (Tr. p. 485).

[19] Moreover, a substantial portion of the parents' preferred program involved home-based services. Home-based services are a more restrictive placement according to New York State's continuum of special education services, and it is well-settled that "once [a] CSE determine[s] that a . . . placement [i]s appropriate . . . it [i]s under no obligation to consider more restrictive programs" (B.K., 2014 WL 1330891, at *9; see also E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]).

IEP adequately described and offered strategies to manage the student's interfering behaviors.[20] Accordingly, based on the foregoing evidence the educational program outlined in the student's June 2012 IEPwas tailored to address the student's individual special education needs and reasonably calculated to provide him with educational benefits in the LRE.

3. ABA Services

On appeal, the parents argue that the student can only receive educational benefit in a program employing ABA services. This argument is not substantiated by the evidence in the hearing record.

As a preliminary matter, a CSE or CPSE is not required to specify a particular methodology on an IEP, as this is a matter ordinarily left to the discretion of classroom teachers. An exception to this general rule is if the facts of a particular case reveal that a student could only receive educational benefit from instruction utilizing a particular methodology (see R.E., 694 F.3d at 192 [upholding SRO's determination that no evidence in the hearing record demonstrated that the student "could not make progress with another methodology and 1:1 paraprofessional support"]; see also R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *11 [S.D.N.Y. Sept. 27, 2013] [deferring " to the SRO's finding that there [wa]s no evidence in the record that DIR/Floortime was the only methodology from which [the student] could have received an educational benefit . . ."]).

A review of the hearing record does not support the conclusion that the student could only achieve educational benefit from ABA instruction. The hearing record reveals that the student, who was four years old at the time of the June 2012 CPSE meeting, primarily received ABA instruction since he was first received special education and related services from the district (Dist. Exs. 5 at p. 2; Parent Exs. P at p. 1; Q at p. 1).[21] To the extent that the parents argue that the student required ABA due to his success with these services, the evidence in the hearing record demonstrates that the student made minimal progress in his program during the 2011-12 school year. Several individuals who knew and worked with the student, including the director of the agency who employed the student's then-current SEIT providers, one of the student's then-current SEIT providers, his speech-language pathologist, and a private consultant all indicated that the student made "slow" progress (Tr. pp. 69, 98, 677-78, 961, 975; Dist. Ex. 20 at pp. 1-2). Further, it appears from the hearing record that the student did not meet any of his

[20] On appeal, the parents allege that the June 2012 CPSE failed to consider and recommend an iPad for the student. However, it appears that the June 2012 CPSE contemplated the student's use of the device as the June 2012 IEP contains annual goals that explicitly identify an iPad (see Dist. Ex. 3 at pp. 14, 15). However, as the parents note, the June 2012 IEP does not recommend an iPad as an assistive technology device (id. at pp. 1, 5). It further appears from the hearing record that the parents provided the student with an iPad prior to the June 2012 CPSE meeting (see Tr. pp. 181, 1154). A district cannot require parents to pay for or provide assistive technology that it is the district's responsibility to provide; therefore, the district shall, if it has not done so already, reimburse the parents for the iPad utilized by the student or provide the student with an iPad purchased by the district.

[21] The student's speech-language therapist reported that the student received speech-language therapy utilizing the "PROMPT" methodology (Dist. Ex. 26 at p. 1).

IEP goals during the 2011-12 school year and that the CPSE discussed this fact at the June 2012 CPSE meeting (Tr. pp. 706, 716, 1101, 1135, 1418, 1428). Therefore, the June 2012 CPSE's decision not to prescribe an exclusive regimen of ABA services was reasonable under the circumstances.

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2012-13 school year, it is not necessary for me to consider the appropriateness of the parents' private services or consider whether equitable factors favor an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; D.D-S., 2011 WL 3919040, at *13).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 21, 2012, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that, to the extent it has not already done so, the district shall pay for the cost of the student's last agreed upon placement during the pendency of this matters; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the assistive technology device (iPad) utilized by the student during the time of this proceeding.

Dated: **Albany, New York**
August 13, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER