



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-049

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

### Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for petitioner, Francesca J. Perkins, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Maria C. McGinley, Esq., of counsel

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2012-13 school year. Respondents cross-appeal from an interim decision of the IHO determining their son's pendency (stay put) placement. The appeal must be sustained. The cross-appeal must be sustained in part.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes

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

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

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

### **III. Facts and Procedural History**

With respect to the student's educational history, the hearing record shows that the student attended the Rebecca School since 2006 (Tr. p. 212; see Dist. Ex. 4 at p. 2).<sup>1</sup>

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<sup>1</sup> The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On June 5, 2012, the CSE convened to conduct the student's annual review and develop his IEP for the 2012-13 school year (see generally Parent Ex. D).<sup>2</sup> The CSE found that the student remained eligible for special education as a student with autism (*id.* at pp. 1, 16).<sup>3</sup> The June 2012 CSE recommended a 12-month school year placement in a 6:1+1 special class in a specialized school, with a full-time 1:1 crisis management paraprofessional (*id.* at pp. 11-13, 15). The CSE also recommended: three individual 40-minute speech-language therapy sessions, together with one small-group (2:1) 40-minute speech-language therapy session, per week; three individual 40-minute physical therapy (PT) sessions, together with one small group (3:1) PT session, per week; three individual 40-minute occupational therapy (OT) sessions, together with one small-group (3:1) OT session, per week; and two individual 40-minute sessions of counseling per week (*id.* at pp. 11-12). In addition, because the June 2012 CSE determined the student's behaviors interfered with his learning, a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) were developed (*id.* at pp. 2, 19-21; see Tr. pp. 70-71).

In a letter dated June 15, 2012, the parents notified the district that they had not yet received a copy of the June 2012 IEP and, unless an appropriate placement and program was offered, the student would continue to attend the private school "as a component of his educational program" (Parent Ex. E at p. 1 [emphasis in original]). The parents further asserted they would seek reimbursement and/or prospective funding for the student's tuition and the cost for additional services they deemed appropriate to meet the student's needs (*id.*). The additional costs identified in the parents' June 15, 2012 letter included five hours per week of 1:1 home- and community-based speech-language therapy, two hours per week of individualized parent counseling and training, and transportation to and from the Rebecca School, all as part of the twelve month school year, as well as and a compensatory education award for "any and all pendency services [the student] was entitled to but did not receive" (*id.*).

In a final notice of recommendation (FNR) dated June 20, 2012, the district summarized the contents of the June 2012 IEP and notified the parents of the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. F). In a letter to the district dated June 25, 2012, the parents responded to the district's FNR, stating that they had not been afforded an opportunity to participate in a discussion of the site selection, indicating they would make every effort to visit the assigned school, and submitting a list of questions regarding the assigned public, indicating that answers to these questions would help them make an "informed decision" (Parents Ex. G at pp.1-2).

On June 26, 2012, the student's mother visited the assigned school and, by letter dated July 5, 2012, the parents informed the district that they found the June 2012 IEP and the assigned public school site to be inappropriate for the student and cited a number of concerns as the basis

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<sup>2</sup> The hearing record contains two copies of the student's IEP for the 2012-13 school year, which are identical except for the inclusion of an FBA, which the parent testified she received together with the IEP from the district (see Tr. p. 673; see also Dist. Ex. 1; Parent Ex. D). For purposes of completeness of the record, all references to the student's IEP for the 2012-13 school year will reference the parent's exhibit "D."

<sup>3</sup> The student's eligibility for special education programs and services as a student with autism is not in dispute in this proceeding (Parent Ex. A at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

for this conclusion (Parents Ex. H at pp. 1-4). With respect to the IEP, the parents asserted that it offered insufficient teaching intervention, insufficient level of services, no individualized parent-counseling and training, and inappropriate and insufficient behavioral interventions (id. at p. 1).

With respect to the public school site, the parents set forth 36 separate reasons for their assertion that the school was inappropriate, including: that the guidance counselor who provided her with a tour could not assure her what, if any, methodologies would be used at the school; that older children were running through the hallways "completely unattended"; that the building was very noisy; that there were more than 190 children in the school; that, at the time, there were 13 classrooms for children with autism but that this number would change in September and one room would be divided and split to "make" more classrooms; that there had been overcrowding in the 6:1+1 special classes and that in September 2012 the school would convert two of the classes into 8:1+1 despite the recommended ratio of 6:1+1; that the student's teacher could not be identified but that teachers changed from the summer to September; that the guidance counselor could not indicate the functioning levels of any of the students in the proposed classroom; that there were 10 classes of students with the disability classification of emotional disturbance and they were often with the students with the classification of autism; that all classroom doors automatically locked and no one from the hallway could enter a class unless they were "let in"; that one classroom "had very young children" and a movie was playing; that they were unable to see any other classrooms because they were "locked out" and the guidance counselor did not have a key; that teacher's assistants were not required to have any training in autism; that one of the teachers of a 6:1+1 special class said she did not use any specific methodology in her classroom; that no sign language was used in her classroom; that there were no 1:1 teaching classrooms available at the school and no one could tell her how much 1:1 teaching the student would get, if any at all; that the student's "behaviors and meltdowns" would be addressed through "holds and restraints"; that there was no quiet room or playground; that there was no regular community walks available; that she was concerned about the student's Pica issues and was advised that the 1:1 paraprofessional "would take care of it"; that the 1:1 paraprofessional would be responsible for addressing the student's self-injurious behaviors; that the selection of the student's assigned public school site was done by computer and that selection was not driven by the student's IEP mandates or levels of functioning; that changes in classes after the start of the school year were not permitted due to overcrowding; that students with disability classifications of autism and emotional disturbance took gym together and used the same bathrooms, often unaccompanied; that the lunchroom became very loud; that the therapy room was very small; that there was no sensory gym; that the school could not meet all of the student's mandates for OT and PT and could not assure that it could meet the speech-language therapy mandate; that occupational and physical therapists "come and go" and the growing population of students with autism, especially at that school, was the reason the school could not meet students' related services mandates; that speech-language pathologists at the school did not use PROMPT and were not PROMPT certified; that there were no adaptive physical education teachers at the school; that the school was not safe and had violent incidents; and that there was no individualized parent counseling and training offered (Parents Ex. H at pp. 1-3).

The parents' July 5, 2012 letter also notified the district that the student would continue to attend the Rebecca School on a 12-month basis with supplemental services, including but not

limited to 1:1 speech-language therapy outside of school, and that the parents intended to seek reimbursement for the costs of the student's tuition and services (Parents Ex. H at pp. 3-4).

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

The parents filed a due process complaint notice, dated July 9, 2012, alleging, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement, and that equitable considerations justified an award of tuition reimbursement (see generally Parent Ex. A). The parents enumerated 137 allegations in their due process complaint notice, including the following: the district's program was not reasonably calculated to provide the student with a FAPE in the least restrictive environment (LRE); failure to disclose or comply with a stipulation and consent order in a federal class action suit; the CSE team was not duly constituted, i.e., a regular education teacher and related service providers were not present; the CSE predetermined the student's program for the 2012-13 school year; failure to permit meaningful participation by the parents and other team members in the development of the program; failure to appropriately communicate with teachers and related service providers in developing the student's program and placement; failure to provide minutes of the CSE meeting to the parents; the district failed to timely develop critical assessment reports that should have been used as the basis for establishing present levels of performance, including but not limited to interfering behaviors; failure to conduct a classroom observation; failure to consider the student's need for assistive technology; failure to timely provide evaluations to the parents; failure to meaningfully consider the recommendations in the private school documents and failure to follow the recommendations made in the private evaluations; failure to develop a plan to address the student's sensory needs; failure to develop measurable annual goals to meet each of the student's educational needs and failure to address all of the student's unique and individualized needs; failure to develop sufficient life skills annual goals and academic annual goals including but not limited to the area of science; failure to indicate objective methods for measuring progress towards goals; failure to develop adequate short-term objectives for each annual goal; annual goals and objectives were not based on proper assessments and evaluations of the student's present levels of performance; failure to adequately consider the student's method of communication and to recommend appropriate annual goals relating to the use of sign language; a lack of adequate annual goals and short-term objectives to address and remediate interfering behaviors; failure to perform and develop an appropriate FBA; failure to develop an appropriate BIP; failure to recommend individualized parent counseling and training as a related service; failure to provide any annual goals for parent counseling and training; failure to develop a transition plan and appropriate goals and objectives; failure to provide the student with consistent 1:1 teaching support throughout the school day; failure to offer adequate levels and frequencies of related services; the proposed program offered no or inadequate supports for school personnel on behalf of the student; and failure to recommend extended day services and transportation (id. at pp. 3-14).

Relative to implementation of the IEP at the assigned public school site, the parents also alleged: that the district failed to timely recommend or offer a specific school location; that the assigned school building and personnel would have "materially" changed in September 2012; that the student's June 2012 IEP could not and would not have been properly implemented at the

recommended public school site; that the assigned school employed a methodology that was inappropriate for use with the student; that staff at the assigned school were inadequately trained to implement the IEP and to use sign language; that the related services mandated on the June 2012 IEP could not have been implemented at the assigned school and that the use of related services authorizations (RSAs) would not appropriately remedy that failure; that there was an inappropriate range of ages and functional abilities among the students in the particular class at the assigned school; and that the assigned public school site constituted an unsafe environment for the student and improperly used a time-out room (Parents Ex. A at pp. 10-14).

The parents asserted that the unilateral placement, program and interventions that they secured for the student for the 2012-13 school year were appropriate and reasonably calculated to provide meaningful educational benefits, that equitable considerations favored their requests for relief because they acted reasonably and in good faith during the CSE review process and that there are no equitable circumstances that would operate to preclude or otherwise diminish an award for the costs of the student's tuition (Parents Ex. A. at pp. 2, 14). For relief, the parents requested tuition and costs for the Rebecca School, five hours per week of 1:1 home and community-based speech-language therapy, two hours per week of individualized parent counseling and training, transportation to and from the Rebecca School, all on a twelve-month school year basis, as well as a compensatory education award for any and all educational services and pendency services to which the student was entitled but did not receive (id. at p. 14).<sup>4</sup>

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

After a prehearing telephone conference conducted on August 6, 2012, an impartial hearing convened on August 21, 2012 and concluded on December 21, 2012, after six days of proceedings (Tr. pp. 1-781). The first day of impartial hearing was limited to determining the student's pendency (stay put) placement during the course of the proceedings (Tr. pp. 3-11; see Interim IHO Decision). In an interim decision dated September 10, 2012, the IHO noted: that the parties agreed that a prior unappealed IHO decision, dated April 24, 2012, set forth the student's pendency entitlements, including tuition and costs at the Rebecca School, an RSA for five hours per week of 1:1 speech-language therapy, and transportation costs to and from the Rebecca School; that the enumerated entitlements constituted the student's last agreed upon

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<sup>4</sup> The parents submitted an amended due process complaint notice, dated September 7, 2012, which was nearly identical to the July 9, 2012 due process complaint notice, with the exception of an additional claim for at least one hour per week of parent counseling and training as a compensatory education award (Parents Ex. C at p. 15). The parents submitted a second amended due process complaint notice, dated November 15, 2012, which added five claims, as follows: the district failed to timely and adequately implement the student's pendency entitlements; the district failed to put the parents on notice as to what curriculum, if any, would be utilized in the student's placement or program; the district failed to consider, much less recommend, music therapy despite that this has been a necessary and important program component for the student for years; that the district's program did not provide any consistency across teachers, para professionals, service providers, and the student's family; and the failure to recommend any "team" meetings for the individuals working with the student (Parents Ex. FF at pp. 6, 11). The requested relief was amended to include a request for compensatory education award to include, but not be limited to, the provision of a 1:1 crisis management professional (id. at p. 15). At the impartial hearing, the parent waived her claim for two hours per week of individualized parent counseling and training and at least one hour per week of parent counseling and training as compensatory education (Tr. pp. 668-673; Parents Ex. FF at p. 15). She also testified that the district offered the student transportation to and from the Rebecca School, which she rejected (Tr. pp. 677-678).

program; and that the program provided pursuant to that decision would remain in effect during the course of the proceedings (Interim IHO Decision at p. 3; see Parent Ex. B at pp. 1-16). In a letter dated December 14, 2012, the parents asked the IHO to issue a "corrected pendency order" granting the student continuation of a 1:1 crisis management paraprofessional in addition to the services set forth in the IHO's interim order (Parents Ex. R R at pp. 1-4). In a second interim decision, dated December 27, 2012, the parents' request was denied (Second Interim IHO Decision at p. 4).

In a final decision dated February 21, 2013, the IHO determined, among other things, that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement for the student for the 2012-13 school year, and that equitable considerations supported the parents' request for relief (IHO Decision at pp. 12-26).

The IHO also found that the IEP was "woefully inadequate" in addressing the student's management needs because the IEP failed to include any methodologies and/or strategies that had proven successful for the student (IHO Decision at p. 13). The IHO further found that the IEP failed to provide for a sensory diet, the use of a sensory gym, music therapy, community walks, or a transition plan, each of which was required to address the student's needs in order for him to make educational progress (*id.*). The IHO found that the IEP "merely state[d] access to sensory materials and sensory breaks, it fail[ed] to identify what materials or equipment, where or when the breaks [were] to occur or any of the components of the sensory break" (*id.* at p. 14). The IHO also found that sign language was an "incredibly important" component of the student's program and that the IEP was silent in regard to communications supports, such as a Picture Exchange Communication System (PECS) as part of his communication program or needs (*id.* at p. 17). The IHO also found the FBA developed by the CSE was inadequate, in that it failed to identify the frequency, duration, and intensity of the interfering behaviors, and the information contained in the FBA was obtained solely from Rebecca progress reports, a non-behavioral program (*id.* at p. 19). In addition, the IHO found that the BIP developed by the CSE was inappropriate as "it [was] one page, target[ed] only three behaviors and d[id] not contain information on how to implement the expected behavior changes," and that the BIP was not completed at a CSE meeting (*id.* at pp. 18-19). The IHO found that the hearing record showed that the district's recommended 6:1+1 special class placement with a 1:1 paraprofessional would not provide the student with sufficient teacher support to make educational progress (*id.* at p. 12). The IHO found that it was undisputed that the IEP failed to provide for parent counseling and training but that, standing alone, this was not sufficient to warrant reimbursement (IHO Decision at p. 20). The IHO further found that, "although the program recommended by the CSE would necessarily entail the student transitioning to a new school, program, teachers, and students, the IEP fail[ed] to include a transition plan" (*id.* at p. 15). The IHO found that the student required extended school day services consisting of speech-language therapy in order for him to make progress in his educational program, as he required as many opportunities as possible to be able to practice oral motor techniques, practice combining vowels together to be able to learn motoric sequences of sound combination in a structured setting, and to provide opportunities for carryover (*id.* at p. 17). Moreover, the IHO found that the student required such additional services after school because to provide such services during the school day would force the

student to forego his other school activities, such as academics and other related services (id. at pp. 17-18).

In sum, the IHO held: that the IEP was substantively deficient because it failed to provide personalized instruction with sufficient support services to permit the child to benefit educationally from instruction; that the CSE did not have sufficient credible evaluative material before it and that it failed to consider material that was before it; that the recommended program did not provide sufficient support and that the management needs as set forth in the IEP were inadequate; "[t]hat the IEP fail[ed] to provide for a program, supports or resources that address the student's demonstrated need for a relationship[-]based program, sensory support in the form of a sensory and/or [sic] gym, music therapy, an express written strategy for transitioning from one environment to another, communication devices such as PECS and sign language, an extended day for speech[-]language therapy services, an adequate BIP, and parent [counseling and] training (IHO Decision at p. 21). The IHO found that, in light of her finding that the IEP was not substantively adequate, she did not need to address whether the assigned public school site was appropriate to meet the student's needs, but concluded that the district failed to meet its burden of proof that the IEP would be properly implemented at the assigned public school site based on the parent's testimony that, during a tour of the school, she was told that the population was underserved and the school was unable to meet all related service mandates (id.). Moreover, the IHO found that the district failed to establish: the size and composition of the proposed classroom, rendering it impossible to determine its appropriateness based on similarity of individual needs; how the student's management needs would be implemented in the classroom; or whether the student's academic, social/emotional, or physical management needs would be met or the annual goals implemented (id. at p. 22).

The IHO further found that the Rebecca School was an appropriate unilateral placement for the student for the 2012-13 school year because it provided him with services to address his neurodevelopmental delays in relating and communication, in addition to his gross and fine motor delays, his significant sensory processing difficulties and learning disabilities, and supported his ability to focus and attend through the Developmental Individual-difference Relationship-based (DIR) methodology, and because the student received benefit from and made progress in the program (IHO Decision at pp. 22-25). The IHO also concluded that equitable considerations supported the parents' request for relief, because the record lacked any evidence that the parents did not fully cooperate with the CSE, that the parents attended the CSE meeting, shared reports with the district, visited the assigned public school site, and timely notified the district at the CSE meeting and subsequent to visiting the assigned school of their disagreement with the proposed placement and the assigned school and their intent to unilaterally enroll their son at the Rebecca School (id. at pp. 25-26).

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

The district appeals from the IHO's decision, arguing that the IHO erred in determining that the district failed to offer the student a FAPE for the 2012-13 school year and the Rebecca School was an appropriate unilateral placement. The district does not contest the IHO's findings regarding equitable considerations.

The district contends that the June 2012 CSE had sufficient credible evaluative material and properly considered the material before it. It also contends that the IEP adequately addressed the student's sensory and behavioral needs, and that the IEP contained several mechanisms for assisting the student when he became dysregulated. In addition, the district argues that the IEP provided a number of ways to integrate music into the student's classroom instruction and the CSE specifically recommended counseling services in place of a more formal music therapy program to address the student's interpersonal skills. In addition, the district notes that the IEP outlined a number of measures to address the student's interfering behaviors. Moreover, the district asserts that placement in a 6:1+1 special class with a 1:1 crisis paraprofessional would have provided adequate support for the student. The district also contends that there is no requirement under the IDEA for a transition plan when a student moves from one school to another, and that the CSE team believed that any specific transition plan should be developed programmatically. Moreover, the district notes that the IEP also provided for a 1:1 crisis paraprofessional who would have been able to address the student's difficulties with transition. The district contends that the record does not support a claim for the necessity of after-school speech-language therapy, and that the CSE's determination not to recommend such services did not constitute a denial of FAPE, as found by the IHO.

As to the assigned public school site, the district contends that the parents' claims, as well as the IHO's findings regarding the existence, size, and composition of the assigned school were speculative because the student never attended the recommended program. Nonetheless, the district contends that the IHO erred in finding that the assigned school could not have implemented the student's IEP because the hearing record shows that the assigned school would have been able to implement the IEP, including the student's related services, and the student would have received a meaningful educational benefit.

The district also asserts that the Rebecca School was not an appropriate placement for the student because it did not provide a 1:1 paraprofessional or sufficient speech-language therapy to address the student's needs. Finally, the district asserts that the IHO erred in ordering the district to directly fund the costs of the student's tuition, as the parents did not establish an inability to pay the tuition.

In an answer and cross-appeal, the parents answer the district's petition, admitting and denying the allegations raised by the district. They assert that the IHO correctly found that the district denied the student a FAPE for the 2012-13 school year, the Rebecca School was an appropriate placement, and that equitable considerations supported the parents' claims. The parents also make an application seeking recusal of the SRO. In addition, parents cross-appeal from the IHO's interim decisions relating to pendency to the extent that the IHO failed to include continuation of the student's 1:1 crisis management professional as part of the pendency placement. The parents also assert that they presented and briefed "numerous additional claims" that the IHO neglected to adjudicate and ask the SRO to do so. The parents also claim that the IHO should have decided that the district deprived the student of a FAPE by unilaterally selecting and choosing the school site without giving his parents an opportunity to participate in that decision.

In an answer to the parents' cross-appeal, the district asserts: that the SRO should not consider the claims undecided by the IHO but not specifically identified or appealed by the parents; that the IHO properly found that the student was not entitled to a 1:1 paraprofessional as part of the pendency placement; and that the parents were afforded the opportunity to participate in the student's educational placement.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 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 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**

#### **1. Parents' Request for Recusal**

Regarding the parents' request that I recuse myself, I note that State regulations provide that an SRO must have no personal, economic, or professional interest in the hearing which he or she is assigned to review (8 NYCRR 279.1[c][4]) and must be "independent of, and may not report to, the office of the State Education Department which is responsible for the general supervision of educational programs for children with disabilities" (8 NYCRR 279.1[c][3]). An SRO shall recuse himself or herself and transfer the appeal to another SRO if he or she was substantially involved in the development of a state or local policy challenged in the hearing; was employed by a party or a party's representative in the hearing; or engaged in the identification, evaluation, program or placement of the student who is the subject of the hearing (8 NYCRR 279.1[c][4]).<sup>5</sup>

Here, I am not personally familiar with the parties in this case, nor do I have any personal, economic, or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Moreover, the New York State Education Department is not a party in this matter. To the extent that the parents' counsel opines that I am biased in favor of the district, they offer no evidence to support such an assertion. Moreover, with regard to allegations that decisions from the Office of State Review have been untimely due to staffing, such contentions are not relevant to a recusal inquiry. Additionally, recusal in such a context makes little sense insofar as it would only have the opposite effect and exacerbate any delay. Having given the parents' request due consideration, I find that I am able to impartially render a decision and that the provisions of 8 NYCRR Part 279 do not require recusal in this instance.

#### **2. Pendency Placement**

Neither party has appealed the IHO's finding that the student was entitled to placement, tuition, and costs at the Rebecca School, together with an RSA for five hours per week of 1:1 speech-language therapy, and transportation costs to and from the Rebecca School during the

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<sup>5</sup> The third criterion for recusal extends to cases in which an SRO has been involved with "other similarly situated children in the school district which is a party to the hearing" (8 NYCRR 279.1[c][4][iii]).

pendency of this action (Interim IHO Decision at p. 3). Accordingly, those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The parents contend, however, that the IHO erred in denying their request for a "corrected pendency order" and thereby failing to provide for continuation of his 1:1 crisis management professional while these proceedings have been pending.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] ; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "the n current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an

agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001], aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at \*23; Letter to Hampden, 49 IDELR 197; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

A review of the hearing record shows that in each of the 2010-11, 2011-12, and 2012-13 school years, the parents invoked their pendency entitlements. For the 2010-11 and 2011-12 school years, the parents referenced an unappealed IHO decision dated April 6, 2010 in support of their pendency entitlements (Parent Exs. PP at p. 2; QQ at p. 2). For the 2012-13 school year, the parents reference an unappealed IHO decision dated April 24, 2012 in support of their pendency entitlements (Parent Ex. FF at p. 2; see generally Parent Ex. B). In each of the parents' due process complaint notices for the 2010-11, 2011-12, and 2012-13 school years, they alleged that the student's pendency placement included tuition costs for the student's placement at the Rebecca School, together with 5 hours per week of 1:1 speech-language therapy, transportation costs to and from the Rebecca School, and 12-month school year programming (Parents Exs. FF at p. 2; PP at p. 2; QQ at p. 2).

At a pendency hearing relative to a prior administrative proceeding involving the same student, held on August 10, 2010, the parents' attorney stated that they were invoking pendency based upon the April 6, 2010 IHO decision and that, in addition, the parents "accepted on a without prejudice basis from the recent IEP, dated January 12, 2010, the one to one crisis management paraprofessional, which was offered by the [district]," and they contended "that this should also be included as part of [the student's] pendency entitlement" (Parent Ex. DD at pp. 39, 42). In response, the district's attorney confirmed that the April 6, 2010 IHO decision should dictate the student's pendency placement and also stated that, as the district "ha[d] mandated . . . a crisis paraprofessional in each of the past four school years," such a service was "deemed an important part of the child's educational plan" (id. at pp. 43-45). Therefore, in that proceeding, the district agreed that the 1:1 crisis management paraprofessional should have been an element of the student's pendency placement (id.). The evidence in the hearing record also shows that the district issued an RSA dated September 13, 2010 for a 1:1 crisis management paraprofessional for the student (id. at p. 49).

It is clear from a review of the hearing record that the parties previously agreed that a 1:1 crisis management paraprofessional was deemed a part of the child's educational plan and that, in the past, both parties were in agreement that the 1:1 paraprofessional was to be provided as part of his pendency placement. There is no evidence that this agreement was limited to a specific time period (Zvi D., 694 F.2d at 907-08; see also Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 9-10 [1st Cir. 1999]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2002 WL 818008, at \*4-\*5 [N.D. Ill. 2002]; Mayo v. Baltimore City Pub. Sch., 40 F. Supp. 2d 331, 334 [D. Md. 1999]). The hearing record reveals that the district funded the student's 1:1 crisis

management paraprofessional for the 2010-11 and 2011-12 school years, as well as during the summer months of the 2012-13 school year until September 2012 (see Tr. pp. 215-16; Parents Ex. RR at p. 4). Based on the foregoing, I find that a 1:1 crisis management paraprofessional should have been included as part of this student's pendency placement for the 2012-13 school year, that the district's unilateral discontinuance of the paraprofessional commencing September 2012 violated in part the student's right to his pendency, and that the IHO erred with respect to this issue.

## **B. June 2012 CSE**

### **1. CSE Composition**

Attendees at the June 2012 CSE meeting included the student's mother, the student's grandmother, a district school psychologist, who also served as the district representative, a district special education teacher, and a district social worker, as well as Rebecca School employees, including the student's teacher and a social worker, together with an additional parent member (Parent Ex. D at p. 22). The parents contend that the CSE team was not duly constituted because the district failed to include related service providers.<sup>6</sup>

Here, despite the parents' claim to the contrary, the hearing record establishes that the June 2012 CSE was constituted in accordance with State and federal regulations. There is no requirement that related services providers attend a student's CSE meeting. Instead, the IDEA and State and federal regulations provide that, in addition to the required special education teacher or, where appropriate, special education provider of the student, the CSE may include "other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate" (8 NYCRR 200.3[a][1][iii], [ix]; see 20 U.S.C. § 1414[d][1][B][iii], [vi]; 34 CFR 300.321[a][3], [6]). Further, in addition to the attendees listed above, the June 2012 CSE had before it a June 2012 Rebecca School interdisciplinary report of progress update, which included updated information from the student's occupational therapist, physical therapist, and speech-language pathologist (Tr. p. 108; Dist. Ex. 2 at pp. 2-4; Parents Ex. D at p. 22). Additionally, the district representative testified that much of the information contained in the student's IEP was presented at the meeting by the student's Rebecca School providers and the parents were not impeded from participating in the decision-making process (Tr. pp. 57-58, 66-72).

Based on the foregoing, the hearing record establishes that the June 2012 CSE was properly composed. Furthermore, there is no evidence in the hearing record that the lack of attendance of related service providers amounted to a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5 [j][4]).

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<sup>6</sup> The IHO found that a regular education teacher did not participate at the CSE meeting because the student would not be participating in a general education environment during the 2012-13 school year due to global delays (IHO Decision at p. 9, see 20 USC § 1414[d][1][B][ii]; 34 CFR § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). On appeal, the parents do not assert that the IHO erred in this respect and review of the hearing record shows that the determination was correct.

## 2. Evaluative Information and Present Levels of Performance

The district asserts that the IHO erred in finding that the June 2012 CSE did not have before it sufficient evaluative information about the student and in finding that the June 2012 IEP did not accurately reflect the student's management needs. Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847 at \*12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4 [b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYC RR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYC RR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

The hearing record establishes that the description of the student's present levels of performance and academic and social/emotional needs set forth in the June 2012 IEP was based on various evaluative measures. The CSE reviewed the student's IEP for the 2011-12 school year, the June 2012 Rebecca School interdisciplinary report of progress, a February 2012 updated social history report, and the January 2012 psychoeducational evaluation report (Tr. pp.

55-57; see generally Dist. Exs. 2-4).<sup>7</sup> In addition to the above mentioned written reports and evaluations, the CSE also relied on information provided by the student's Rebecca School teacher at the meeting, as well as the student's mother and grandmother with respect to his social development and social functioning, communication skills, and management needs (Tr. pp. 66-70).

As the reports listed above provided detailed information regarding the student's current levels of functioning across time and in varied settings, they provide a sufficient foundation upon which to build the student's IEP. Based upon the CSE's discussion of these documents, the CSE developed the present levels of performance section of the June 2012 IEP, providing estimates of the student's academic achievement in reading, writing, and mathematics, as well as his communication skills and social/emotional and behavioral needs (Tr. pp. 55, 57, 66-68, 70-71, 73, 78-80, 104-106, 123, 126, 133-135; Parents Ex. D at pp. 1-3). The CSE's review of the reports, combined with input provided by Rebecca staff and the student's mother, was also reflected in the descriptions of the student's instructional needs, optimal learning conditions, and methods of managing behavioral concerns that interfered with the student's ability to benefit from instruction (compare Parents Ex. D at pp. 1-3, with Dist. Ex. 2 at pp. 1-5). A review of the hearing record also indicates that the parent did not object to the description of the student's present levels of performance or management needs as set forth in the June 2012 IEP and in fact confirmed that much of what was included in the IEP was accurate (Tr. pp. 612-613, 618-619).

In finding the IEP lacking with respect to the description of the student's needs, the IHO focused on the management needs in the IEP (see IHO Decision at p. 13-15). In reaching this conclusion, the IHO relied, in part, on information about the educational methodology utilized at the Rebecca School, discussed below (see id. at pp. 13-14). However, focusing on the specific supports included in the IEP to address the student's management needs, the hearing record shows that they were consistent with the information before the CSE. The June 2012 Rebecca School interdisciplinary report of progress included information about the student's positive response to music, singing, and reading a book with an adult, and reported that the student needed redirection as he was easily distracted (Dist. Ex. 2 at pp. 1-4). As to sensory supports, in particular, the information before the CSE indicated that the student participated in sensory play, received OT and PT in a sensory gym, enjoyed using a sensory swing, and, when upset and frustrated, benefited from deep pressure and verbal recognition of his feelings (Dist. Ex. 2 at pp. 1, 3).

Consistent with this information, the June 2012 IEP recommended visual and verbal prompts and cues, redirection, presentation of information with a sing-song quality, use of manipulatives, use of a visual schedule, access to sensory materials and sensory breaks, and provision of a 1:1 paraprofessional to ensure the student's safety (Parent Ex. D at p. 2). In the section designated for physical development needs of the student, the IEP also indicated that, when dysregulated, the student benefited from "various strategies and tools," including music,

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<sup>7</sup> Although the district representative testified that he did not recall whether he conducted an observation of the student at Rebecca School in preparation for the 2012-13 school year, the student's teacher at Rebecca testified that he did observe the student in January 2012, that two of the student's related services providers were present at the observation, and that a video shows that the district representative was present (Tr. pp. 85-86, 527-528). A classroom observation report was not offered into evidence at the impartial hearing.

deep pressure/squeezes, brushing, lotion, of offering him comfort (*id.*). In addition, the FBA included with the June 2012 IEP set forth other interventions to address the student's needs, including deep pressure/squeezes, a brushing protocol, use of lotion, sitting with him and offering comfort, reading books and stories to him, access to a quiet space, and use of music and songs to soothe him (*id.* at p. 19). Many of the supports and strategies listed above could be used to provide the student sensory input throughout the day in the manner of a sensory diet found lacking by the IHO (*see* IHO Decision at p. 14). In addition, although the IHO correctly noted that the Rebecca School report referenced the student's use of a sensory gym (*see id.* at p. 3), no information before the CSE indicated the extent to which the student benefited from such access and the progress report also indicated that, in addition to the sensory gym, the student also received OT in "the classroom, hallways, . . . the therapist's office, and the community" (Dist. Ex. 2 at p. 3). The IHO cited the testimony of the student's Rebecca School occupational therapist for the 2012-13 school year that it was "absolutely necessary" that the student "have access to sensory equipment and materials to maintain regulation throughout the day" (IHO Decision at p. 14, citing Tr. pp. 475-78); however, as such information was not before the June 2012 CSE, the IHO should not have relied upon such retrospective testimony (*see R.E.*, 694 F.3d at 186).

Furthermore, as many of the strategies and supports set forth above utilized music, such recommendations, in combination with a relevant annual goal and the recommendation for counseling services, were sufficient to accommodate the student's needs that were responsive to the music therapy he received at the Rebecca School (Parent Ex. D at pp. 2-3, 12; *see* Dist. Ex. 2 at pp. 4-5).

Based on the above, I find that the evaluative data considered by the June 2012 CSE and the input from the participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (*D.B. v. New York City Dep't of Educ.*, 2011 WL 4916435, at \*8 [S.D.N.Y. Oct. 12, 2011]; *see S.F.*, 2011 WL 5419847 at \*12).

### **C. June 5, 2012 IEP**

#### **1. Annual Goals**

The parents contend that the IEP annual goals were taken from the Rebecca School's program and were inappropriate and insufficient for implementation in the recommended 6:1+1 special class placement. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

The district representative testified that the annual goals were developed after a review of the goals the student was working on with staff at the Rebecca School at the time of the meeting (Tr. pp. 73-79). The student's Rebecca School teacher, who attended the June 2012 CSE meeting, testified the district representative read the goals she drafted to the CSE and they were included in the student's IEP for the 2012-13 school year (Tr. p. 520). The June 2012 IEP contains 19 annual goals, with corresponding short-term objectives, targeting the student's needs in the areas of attention, engaging with peers, self-regulation, literacy, mathematics, life skills, science, sensory processing and regulation, motor planning and sequencing, visual spatial skills, functional negotiation skills and overall muscle strength, dynamic balancing skills, endurance, engagement/pragmatic language skills, self-expression, oral motor skills, communication, and inter-responsiveness and interrelatedness (Parents Ex. D at pp. 3-11). Each annual goal included criteria for measuring the achievement of the goal and corresponding objectives, and clearly defined the desired behavioral outcome of instruction (*id.* at pp. 3-11). The methods of measuring progress for each goal were identified as class activities and teacher/provider observation on a daily basis (*id.*).

Although the June 2012 IEP drew heavily upon of annual goals and short-term objectives developed by the Rebecca School, the CSE did not incorporate a number of annual goals and short-term objectives annotated as "met" or "discontinued" by the Rebecca staff (Dist. Ex. 2 at pp. 6-16; Parents Exs. D at pp. 3-11, JJ). Further, although the Rebecca staff asserted the student "require[d]" a DIR instructional model and the student's mother indicated she felt it was most effective, the district representative testified that the goals and objectives were not specific to any methodology of teaching (Tr. p. 80). Under the IDEA and State and federal regulations, discussed above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a particular classroom setting or student teacher ratio, but rather whether the goals and objectives are consistent with and relate to the needs and abilities of the student (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). There is nothing in the hearing record that persuasively indicates that the June 2012 IEP annual goals could not be implemented in another setting aside from the Rebecca School or that they could not be employed with a methodology other than DIR (*cf. A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570 [S.D.N.Y. Mar. 19, 2013] [affirming the SRO's rejection of the parents' contention that the assigned TEACH classroom could not implement the annual goals in the IEP, which contention noted that they were also related to the DIR methodology]).

Based upon the above, I find that the annual goals and short-term objectives in the June 2012 IEP appropriately targeted the student's areas of need, and contained sufficient specificity by which to guide instruction, intervention, and evaluation of the student's progress. Further, I find nothing so unique in the June 2012 IEP annual goals and short-term objectives as to preclude their implementation in a setting other than a classroom providing instruction using a DIR methodology.

## **2. Language and Communication Needs**

The district asserts that the IHO erred in finding that the June 2012 IEP did not adequately address the student's language and communication needs (see IHO Decision at p. 17). The parents assert that the district failed to adequately consider the student's methods of communication and failed to recommend appropriate annual goals that related to his ongoing and developing use of sign language.

The parent testified that she began to communicate with the student in sign language at the student's birth, since it was the parent's first language and it would enable him to communicate with his grandparents, who were deaf-mute (Tr. pp. 599-600). She stated that the student loved to use sign language and she believed that it made him feel empowered (Tr. pp. 600-01). The parent testified that she explained to the June 2012 CSE that the IEP needed a sign language component (Tr. pp. 614-615). The student's Rebecca School teacher, who attended the June 2012 CSE meeting, testified that signing was "incredibly important" for the student but that when she first started working with him, she did not feel that training in sign language was required, although it was helpful, since she was able to communicate with him in other ways (Tr. pp. 509-510, 538-540; see Parent Ex. D at p. 22).

Consistent with the information before the CSE, the June 2012 IEP contained a description of the student's modes of communication, which included a combination of gestures, signs, word approximations and a communication book, and contained short-term objectives to be accomplished through the use of designated methods, including sign language (Parents Ex. D at pp. 1-3, 9-10; see Dist. Exs. 2 at pp. 1, 3; 3 at p. 2; 4 at pp. 1-3). Further, contrary to the IHO's finding that the IEP "was silent with regard to communication supports, such as P-ECs" (IHO Decision at p. 17), the IEP references the use of a communication book, which the hearing record indicates was used for P-ECs (Parent Ex. D at pp. 1, 9-10; see Tr. p. 105). Thus, the hearing record does not support the assertion that the district failed to adequately consider the student's methods of communication and to recommend appropriate annual goals that related to his ongoing and developing use of sign language.

### 3. Special Factors—Interfering Behaviors

The district asserts that the IHO erred in finding that the FBA and the BIP completed by the district were inadequate (see IHO Decision at p. 19). Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also *E.H. v. Bd. of Educ.*, 361 Fed. App'x 156, 161 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; *A.C.*, 553 F.3d at 172; *J.A. v. East Ramapo Cent. Sch. Dist.*, 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; *M.M. v. New York City Dep't of Educ.*, 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; *Tarlowe*, 2008 WL 2736027, at \*8; *W.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; *Piazza v. Florida Union Free Sch. Dist.*, 777 F. Supp. 2d 669, 673

[S.D.N.Y. 2011]; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may 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]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 394 Fed. App'x at 722). The Second Circuit has explained that when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors" (id.).

Here, the hearing record, taken as a whole, supports the conclusion that the CSE was aware of the student's behaviors that interfered with his instruction and that, not only did the CSE conduct and develop an FBA and BIP, the student's behavioral needs were identified on the IEP and the CSE developed management needs and annual goals designed to address those needs (see generally Parent Ex. D). The district representative and the parent testified that the June 2012 CSE engaged in discussion of the student's behavioral needs (Tr. pp. 67-68, 620-621). The CSE discussed the student's ongoing behavioral concerns, including his engagement in specific behaviors, such as hair pulling, eating carpet fibers, retreating to corners, and aggressiveness, and that the implementation of a 1:1 crisis management paraprofessional would provide an extra layer of supervision and potential intervention to help to address those kinds of behaviors (Tr. pp. 67-70; Dist. Exs. 2 at p. 4; 3 at p. 2; 4). The parent testified that she was in agreement with the recommendation for the 1:1 paraprofessional.

The hearing record reflects that, in developing the FBA, the CSE reviewed the June 2012 Rebecca School interdisciplinary report of progress, which provided detailed descriptions of

behaviors that interfered with the student's learning, including attention and the need for 1:1 support for redirection, transition, and his tendency to become dysregulated and exhibit aggressive behavior (Dist. Ex. 2 at pp. 1, 4; Parent Ex. D at p. 19). Based upon information from the educational progress report and additional input from the Rebecca staff and the parent, an FBA was developed, targeting the student's inappropriate behaviors such as pulling his hair, eating carpet fiber, and getting stuck looking at corners or objects when dysregulated (Tr. pp. 70-71, 123; Parent Ex. D at pp. 19-20). The FBA does not delineate frequency and duration of the targeted inappropriate behavior (Parent Ex. D at pp. 19-20). The FBA identified triggers for the behaviors as the student's not getting what he wanted or a change in plans or routines (id. at p. 19). The FBA included strategies the private school had employed to decrease the frequency of inappropriate behaviors and increase the likelihood of positive outcomes, including: a brushing protocol; oral protocol; weighted vest; vestibular input; modeling of pro-social behaviors; reading books and stories to him; and access to a quiet space and using music and songs to soothe him (id.). As to interventions identified to encourage appropriate behavior in the future, the FBA identified the following: deep pressure/squeezes; brushing protocol; lotion; sitting with him and offering him comfort; reading books and stories to the student; and access to a quiet space and using music and songs to soothe him (id.). A positive reinforcement for the student was identified as musical activity (id.). The FBA indicated the expected behavior changes included increasing the amount of time that the student was in a regulated state; elimination of pulling hair and eating carpet fibers; increasing the student's coping skills; increasing the student's tolerance for frustration; and increasing his ability to focus his attention (id. at pp. 19-20). Finally, the FBA indicated that the outcomes would be measured via teacher, paraprofessional, and provider observations (id. at p. 20).

The special factor procedures set forth in State regulations further require that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (regarding disciplinary action taken against a student as a result of conduct that was a manifestation of the student's disability) (8 NYCRR 200.22[b][1]). As noted above, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . .; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).<sup>8</sup> Neither the IDEA nor its implementing

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<sup>8</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

regulations require that the elements of a student's BIP be set forth in the student's IEP ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

The BIP included with the student June 2012 IEP identified personnel responsible for its implementation, a progress monitoring schedule for achieving the targeted behaviors, and a schedule for communicating the results to the parents (Parents Ex. D at p. 21). The BIP also delineated targeted behaviors, expected behavior changes, and methods and/or criteria for measuring the outcome of the intervention initiative (*id.*). Specifically, the BIP identified hair pulling, eating carpet fibers, and getting stuck looking at corners as targeted behaviors to be addressed (*id.*). The expected behavior change for each of the student's interfering behaviors included eliminating pulling his hair, eliminating eating carpet fibers, and making use of regulating strategies to help increase his tolerance for frustration (*id.*). The methods/criteria for outcome measurement included observations by teacher, crisis management paraprofessional, and related service providers (*id.*).

As set forth above, the hearing record shows that the student's behavioral needs were discussed at the June 2012 CSE meeting and that the FBA and BIP were finalized at some time after the CSE meeting (Tr. pp. 70-71, 129). The parent testified that she received the FBA and BIP with the IEP (Tr. pp. 673-674). While the FBA and BIP did not include the level of detail required by State regulations or specify every interfering behavior identified and discussed by the CSE, the June 2012 IEP also identifies the student's behavioral needs and includes an annual goal to address them, as well as provision for a 1:1 paraprofessional to assist in addressing the student's interfering behaviors (Parents Ex. D at 1-2, 4, 12; *see* Tr. at pp. 66-70). As a result, the hearing record does not support the IHO's finding that the IEP insufficiently addressed the student's behavioral needs (*M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*5, \*8 [S.D.N.Y. Mar. 21, 2013] [even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"], quoting *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 [2d Cir. 2009]).

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

The district asserts that the IHO erred in finding that the recommended 6:1+1 special class placement was inappropriate for the student (IHO Decision at p. 12). State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with the student's needs, as described in

more detail above, and State regulations, the June 2012 CSE recommended a 12-month placement in a 6:1 +1 special class in a specialized school with a 1:1 paraprofessional together with related services to address the student's needs in the areas of engagement/attention, awareness and engagement with peers, regulation, literacy skills, mathematics skills, life skills, science skills, sensory processing and regulation, motor planning and sequencing, visual spatial skills, functional negotiation skills and overall muscle strength, dynamic balance skills, endurance, engagement/pragmatic language skills, expressive language skills, oral motor skills, communication skills, and inter-responsiveness and relatedness (Parents Ex. D at pp. 3-11).<sup>9</sup>

The hearing record reflects that the CSE considered and rejected a number of other program options because they would not adequately meet the student's academic and social/emotional needs (Parents Ex. D at pp. 17- 18; see Tr. pp. 618-620). According to the IEP summary, the June 2012 CSE also considered a 12:1 and a 12:1+1 special class in a community school together with related services and a crisis management paraprofessional, but rejected the same because they would not provide the student the support of a twelve-month school year program (Parent Ex. D at p. 17). The IEP also reflect that the CSE considered a 12:1 +1 and an 8:1+1 special class in a specialized school with related services and a crisis management paraprofessional but determined it would not offer the student the support the student required to meet his academic, social/emotional, or speech-language goals (id.). Finally, the CSE considered a 12:1+4 special class in a specialized school with related services and a crisis management paraprofessional, which was rejected as "too restrictive" to meet the student's academic, social/emotional and speech/language needs (id. at pp. 17-18).

The parent testified that she did not believe that a 6:1 +1 special class with a 1:1 paraprofessional had enough support for the student because there were not enough teacher assistants in the room (Tr. pp. 689-690). She stated that his class at the Rebecca School contained 7 students, 1 teacher, and 3 teacher assistants (Tr. p. 690). According to the June 2012 Rebecca School interdisciplinary report of progress, reviewed by the June 2012 CSE, the student attended an 8:1+2 special class at the Rebecca School with a 1:1 paraprofessional (Dist. Ex. 2 at p. 1). Although there was some reference in the hearing record (and in the IHO's decision) to a 2:1 classroom ratio at the Rebecca School (IHO Decision at p. 12; Tr. pp. 45, 110, 247, 520, 522, 620), it appears that such ratio was achieved by considering the total number of adults in the classroom (including paraprofessionals or teacher assistants) relative to the number of students and reducing the ratio to its lowest terms (see Tr. pp. 520). Applying the same operation to the 6:1+1 special class with the 1:1 paraprofessional also results in a 2:1 ratio. In light of this, the IHO's finding that the CSE recommended the 6:1 +1 special class "because an appropriate program with additional support was not available" based, in part, on the district representative's testimony that the district did not offer a special class "capped at two students" is without support in the hearing record since it does not appear that any party ever actually recommended that the

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<sup>9</sup> I also note a guidance document issued by the Office of Special Education in January 2012 indicates that with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (id. at p. 2).

student attend a classroom with no more than two students (IHO Decision at p. 13; Tr. p. 116). There is little difference in the student-to-adult ratio between the student's 8:1+2 special class at the Rebecca School at the recommended 6:1+1 special class. While the parent may have preferred the class ratio at the Rebecca School, districts are not required to replicate the identical setting used in private schools (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]). Given the additional recommendation for the 1:1 paraprofessional and the various 1:1 related services recommended on the IEP (Parent Ex. D at pp. 11-12), the hearing record supports a finding that the 6:1+1 special class placement with the additional recommendations constituted an appropriate placement recommendation that satisfied the student's needs for 1:1 support.

### **5. Parent Counseling and Training**

While the IHO left unclear the extent to which she found that lack of parent counseling and training on the IEP contributed to a denial of a FAPE, the parents continue to assert on appeal that such inadequacy, in combination with others, supported a finding that the IEP was not reasonably calculated to meet the student's needs. State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further require the provision of parent counseling and training to parents of students with autism for the purpose of enabling them "to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]). Parent counseling and training is defined by State regulation as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, the Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; M. W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

In the instant matter, it is undisputed that the June 2012 CSE did not include provision for parent counseling and training on the June 2012 IEP, which violated the State regulation requiring such, and the parent testified that, during the June 2012 CSE meeting, no one from the district offered her parent counseling and training (Tr. p. 617; see generally Parents Ex. D).

However, although the June 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; M.W., 725 F.3d at 141-42; R.E., 694 F.3d at 191; A.D., 2013 WL 1155570, at \*11-\*12 [finding that where the parents had "adequate access to

parental training and counseling for several years . . . the failure of the IEP to explicitly provide for parental training did not rise to the level of "a denial of a FAPE" ]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 585-86 [S.D.N.Y. 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*9-10 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; M.M., 583 F. Supp. 2d at 509). To be clear, however, the fact that the district views parent counseling and training as "programmatic" and therefore unnecessary to specify on a student's IEP continues to remain a procedural violation, and while not amounting to a denial of a FAPE in this proceeding, compliance with State IEP development procedures is nevertheless mandated. In light of the district's failure in this case to identify parent counseling and training on the student's IEP, as required, I will order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).

## 6. Transition Plan

The district asserts that the IHO erred in finding that the June 2012 CSE erred in failing to recommend a transition plan relative to the student's transition from the Rebecca School to the district's program (see IHO Decision at pp. 13, 15-16). The IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (see F.L., 2012 WL 4891748, at \*9). However, the IHO also appears to have also based his conclusion, in part, on considerations relative to the student's transitions throughout the school day (e.g., from classroom to classroom) (see IHO Decision at pp. 15-16). As to the student's transition needs during the day, the June 2012 IEP stated that the student needed warnings for any change in plans or routines (Parents Ex. D at p. 1). Moreover, the CSE provided for a 1:1 crisis management paraprofessional who would have been able to assist the student in making transitions (id. at p. 12). The June 2012 IEP also contained an annual goal and short-term objective designed to increase the student's ability to maintain regulation through his school day (id. at p. 4). Thus, the evidence does not support the parents' contention that the district failed to consider the student's needs relating to transitions.

## 7. Extended Day Services

The district appeals the IHO's determination that the June 2012 IEP should have included after-school speech-language therapy services for the student (see IHO Decision at pp. 14-18). With respect to home-based or extended day services, several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JS K v. Hendry

County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81; Student X, 2008 WL 4890440, at \*17; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at \*7 [Apr. 21, 2008].

A review of the evidence in the hearing record supports the district's position that the student did not require after-school speech-language therapy services to receive a FAPE. At the time of the June 2012 CSE meeting, the student received three 30-minute sessions of individual speech-language therapy and one 30-minute "cooking group" session at the Rebecca School (Dist. Ex. 2 at p. 2). The hearing record reflects that, during the 2011-12 school year, the student additionally received after-school services in the form of five 60-minute sessions of speech-language therapy per week (Tr. p. 551). The student's private provider testified that the speech-language services at the Rebecca School during the school day were not enough (Tr. p. 556). With respect to the information before the June 2012 CSE, the parent testified that, prior to the June 2012 CSE meeting, she provided the district with reports from the private speech-language therapy provider and brought the student's most current progress report with her to the CSE meeting (Tr. p. 612; see generally Parent Ex. K). According to the parent, the district representative did not want to read the report and made no reference thereto during the meeting (Tr. pp. 615-16). The district representative could not recall whether the parent provided any documents or whether the CSE discussed the private speech-language therapy progress report (Tr. pp. 57, 92-93). Review of the January 2012 progress report from the private speech-language providers indicates that the report did recommend that the student continue the previous after-school mandate (Parent Ex. K at pp. 1, 4).

While the student likely benefitted from these services, it does not appear that he required them in order to receive a FAPE. The evidence shows that, in addition to PT, OT, and counseling services, the June 2012 CSE recommended that the student receive three 40-minute sessions of individual speech-language therapy per week and one 40-minute session of group (2:1) speech-language therapy per week (Parents Ex. D at pp. 11-12). Neither party disputes that these mandates were appropriate for the student. Further, the frequency and intensity of the related services recommended in the June 2012 IEP represents a substantial commitment to the student's needs in these areas. Accordingly, the district was not required to maximize the student's potential by offering extended day services above and beyond the related services prescribed by the June 2012 CSE (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

## **8. Educational Methodology**

The district argues that to the extent the IHO held that the lack of a particular methodology on the IEP was dispositive of a FAPE, such a determination was in error. The parent testified that she did not believe that a 6:1+1 special class with a 1:1 paraprofessional was appropriate because of the methodology used in the classroom.

Although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at \*4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L., 2012 WL 4891748, at \*9; K.L., 2012 WL 4017822, at \*12; Ganje, 2012 WL 5473491, at \*11-\*12; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at \*15, \*17 [S.D.N.Y. May 24, 2012], aff'd, 528 Fed. App'x 64 [2d Cir. June 24, 2013]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 2014 WL 5463084, at \*4; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also R.B., 2014 WL 5463084, at \*4; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

The parent testified that she brought up methodology at the CSE meeting and asked whether there were any DIR programs, and what different programs were available (Tr. pp. 617-618). The parent testified that, when the student received ABA at age two, although he memorized information, he did not understand what he was doing and did not carry skills over into the home (Tr. p. 609). According to the parent, the student also received instruction using the Treatment and Education of Autistic and Communication-related handicapped Children (TEACCH) methodology when he attended a public school placement, but it made him very upset and he did not flourish (Tr. p. 610).

Here, there is no evidence in the hearing record suggesting that there was a clear consensus that the student's IEP should be limited to one particular methodology to the exclusion of other approaches and the June 2012 IEP did not set forth a specific instructional methodology (see generally Parents Ex. D). Although testimony from the parent indicates that the student had not made progress using TEACCH and ABA approaches, the student has not received instruction in either since before he first began attending the Rebecca School in 2006. The student's Rebecca School teacher, who attended the June 2012 CSE meeting, testified that the student was a "relationship-based kid" and that DIR and Floortime were very important for him, but that she did not remember the subject of methodology being raised at the CSE meeting (Tr. pp. 514, 523). The IHO relied heavily on the issue of educational methodology to conclude that the district failed to offer the student a FAPE; however, much of the testimony on which the IHO based this conclusion was impermissible retrospective testimony offered by Rebecca School staff who worked with the student during the 2012-13 school year, after the June 2012 CSE meeting (see IHO Decision at pp. 13-14; Tr. pp. 318-19, 382, 483, 496). There is no evidence of any

information before the CSE that the student could not receive educational benefit from educational methodologies other than the DIR model.

## **D. Challenges to the Assigned Public School Site**

### **1. Parental Participation in the Selection of the School Site**

Next I will address the parents' argument that they were denied input or discussion as to the selection of the assigned public school site. Generally, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116; 300.327; 300.501[b][1][i], [c]). The Second Circuit has established that "educational placement" refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]; Concerned Parents, 629 F.2d at 756; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. 2011]). Further, there is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Thus, while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013] [noting that a parent "does not have a procedural right in the specific locational placement of his child, as opposed to the educational placement"], aff'd, 556 Fed. App'x 1, 2013 WL 6726899 [2d Cir. Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013] [holding that the parents' rights to participation "extend only to meaningful participation in the child's 'educational placement,'" not to selection of a particular school building]; see also R.E., 694 F.3d at 191-92 [district may select a specific public school site without the advice of the parents]; F.L., 2012 WL 4891748, at \*11 [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; K.L., 2012 WL 4017822, at \*13; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. 2011]; S.F., 2011 WL 5419847, at \*12, \*14; A.L., 812 F. Supp. 2d at 504; S.H. v. New York City Dep't of Educ., 2011 WL 666098, at \*5 [S.D.N.Y. Feb. 15, 2011]).<sup>10</sup>

Instead, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A., 371 Fed. App'x at 154; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553, 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir.

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<sup>10</sup> However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

2004]; Concerned Parents, 629 F.2d at 756; Tarlowe, 2008 W L 2736027, at \*6; see also Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

Therefore, based upon the foregoing, the parents could not prevail on a claim that the student was denied a FAPE because they were deprived of the opportunity to participate in the selection of the student's specific public school site/classroom because neither the IDEA nor its implementing regulations provides them this right.

## 2. Implementation

Contrary to the IHO's holding, the district argues that any discussion of the size or composition of the proposed classroom or the delivery of related services at the assigned public school site was speculative given that the student never enrolled at the assigned public school site. In the alternative, the district asserts that the hearing record shows that the assigned public school site was capable of implementing the student's June 2012 IEP. To the extent that the parents' answer and cross-appeal may be read as continuing to argue various claims relating to the assigned public school site (by virtue of their recitation of excerpts of the parents' July 5, 2012 letter to the district) (see Parent Ex. H), these claims include: the school's inability to implement the student's related services mandate; the appropriateness of the instructional methodology, if any, utilized; the use of sign language in the proposed classroom; the availability of 1:1 teaching classrooms; and the lack of community walks, sensory gyms, or transition planning.

For the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I agree with the district. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. E; H; L), the district was not obligated to present evidence as to how it would have implemented the June 2012 IEP (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 W L 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; K.L., 530 Fed. App'x at 87; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F., 746 F.3d at 79; C.L.K. v. Arlington Sch. Dist., 2013 W L 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

However, I have reviewed the evidence in the hearing record in order to discuss what alternative findings could be made, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site. The evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation; that is, deviation from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 W L 1049297 [2d Cir. March

23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2008]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L., 812 F. Supp. 2d at 502-03).

As to the IHO's finding that the district "failed to establish the size and composition of the recommended placement" for purposes of evaluating the functional grouping of the class (IHO Decision at p. 22), the assistant principal from the assigned public school site testified that, in July 2012, there were 11 different 6:1+1 special classes at the assigned school and that the student could have been placed in between four and six of those classes based on his age (Tr. pp. 152-53). He also stated that the students who were placed in those classes were predominantly students with disability classifications of autism (Tr. p. 154). With respect to the levels of functioning in the four to six 6:1+1 classes, the assistant principal testified that two to three of those classes contained students who were low to moderate functioning, two classes were moderate to high functioning, and one class consisted of all low functioning students (Tr. pp. 173-174).

As for implementation of related services, the assistant principal testified that, as of July 2012, OT, PT, and speech-language therapy services, as well as a 1:1 crisis management paraprofessional, were available at the assigned public school site (Tr. pp. 153-154). In addition, the parents' remaining arguments relating to the assigned public school site are also without merit. The district special education teacher of the proposed classroom testified that, if she were the student's teacher, she would be willing to learn sign language in order to better communicate with him, but that since she did not have any students who used sign language, she did not use it in her classroom (Tr. pp. 752-753). The assistant principal confirmed that, although there was no sensory gym at the assigned public school site, the physical and occupational therapists had "plenty" of sensory tools to use with the student (Tr. pp. 175, 207). With respect to 1:1 support, the district special education teacher of the proposed classroom testified that 1:1 support was available in the proposed classroom and that it occurred off to the side in the classroom with either a paraprofessional or the teacher (Tr. pp. 753-54). The special education teacher also testified that community walks were not regularly scheduled, but that the teachers were able to do them (Tr. pp. 755-756).

## **VII. Conclusion**

Having determined that the district offered the student a FAPE for the 2012-13 school year, it is not necessary to consider the appropriateness of the Rebecca School or to consider whether equitable factors weigh in favor of 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).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations here.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS SUSTAINED IN PART.**

**IT IS ORDERED** that the IHO's decision dated February 21, 2013 is modified, by reversing those portions that concluded that the district failed to establish that it offered the student a FAPE in the LRE for the 2012-13 school year and ordered the district to reimburse the parents for the costs of the student's Rebecca School tuition;

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

**IT IS FURTHER ORDERED** that the district, if it has not already done so, is directed to pay for the costs of the student's tuition at the Rebecca School from the date of the due process complaint notice through the date of this decision pursuant to pendency;

**IT IS FURTHER ORDERED** that the district shall, to the extent that the parents privately incurred costs for the provision of a 1:1 crisis intervention paraprofessional during the duration of these proceedings and upon receipt of proper proof of payment, reimburse the parents for the cost of the 1:1 paraprofessional from the date of the due process complaint notice through the date of this decision pursuant to pendency.

**Dated:** Albany, New York  
December 23, 2014

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