



The University of the State of New York

The State Education Department
State Review Officer
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No. 14-007

Application of the XXXXXXXXXX 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, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, 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. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 34 CFR 300.507[a]; 300.508[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

On May 2, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (see Tr. pp. 554-55; Dist. Ex. 2 at pp. 1, 10).^{1, 2}

¹ At the time of the May 2012 CSE meeting, the student had attended the Rebecca School since October 2011 (see Tr. p. 524). 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).

² The handwritten pagination on the District Exhibit 2 is incorrect, in that the exhibit includes two pages identified as page "6" and no page identified as page "9" (see generally Dist. Ex. 2). For the purposes of this decision, citations to District Exhibit 2 will refer to the page numbers consecutively in the order that the document was originally paginated, with reference to the page numbers printed on the top right hand corner of

Finding the student eligible for special education as a student with autism, the May 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with the following related services: two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group (3:1); two 30-minute sessions per week of individual occupational therapy (OT); and one 30-minute session per week of OT in a group (3:1) (Dist. Ex. 2 at pp. 1, 7-8, 10).³ The May 2012 IEP indicated the student would participate in the alternate assessment due to his severe cognitive and academic delays (*id.* at p. 9).

In a final notice of recommendation (FNR) dated June 7, 2012, the district summarized the special education and related services recommended in the May 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 4).

In a letter dated June 13, 2012, the parents notified the district that they had visited the assigned public school site identified in the FNR and that, based on their observations and conversations with staff, it was not "an appropriate placement" for the student (Parent Ex. D at p. 1). The parents identified several aspects of the school that rendered it inappropriate; namely, that: (1) there were "not enough rooms" for the student to receive individual related services without distraction; (2) the school cafeteria was too large, "noisy," and "chaotic" for the student; (3) the school facility was too large; (4) there was only one security guard for the entire school building, which concerned the parents given the student's propensity to flee; (5) the school psychologist would only be present at the school one day per week; (6) school staff were inadequately trained to "handle a crisis" involving the student; (7) the school did not offer a "sufficient[ly] therapeutic environment;" (8) not all of the teachers at the assigned public school held certification in ABA; (9) the school applied a "one size fits all" approach to education and offered a single methodology for all students; and (10) the assigned school would be unable to provide the student with the "individualized attention" or "constant sensory integration" that he required (*id.* at pp. 1-2). Therefore, the parents advised the district that they were "unable to accept th[e] program/placement" for the student (*id.* at p. 2). The parents indicated that they intended to place the student at the Rebecca School for the 2012-13 school year and seek tuition reimbursement if the district did not offer "an appropriate program/placement. . . in a timely manner" (*id.*).

On June 18, 2012, the parents signed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year (*see* Parent Ex. I at pp. 3-6).

A. Due Process Complaint Notice

In a due process complaint notice dated June 27, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (*see* Parent Ex. A at pp. 1-7). Specifically, the parents contended that the May 2012 CSE was

each page (*see id.* at pp. 1-12).

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

improperly constituted because it did not include appropriate special education and regular education teachers (id. at p. 3). The parents further alleged that the May 2012 CSE ignored their concerns and did not prepare the student's annual goals at the CSE meeting, thus denying the parents an opportunity to participate in the development of the student's May 2012 IEP (id. at pp. 2-3). Further, the parents alleged that the May 2012 CSE could not "provide the parents with information about the proposed program" (id. at p. 4). The parents additionally contended that the May 2012 CSE failed to consider evaluations obtained by the parents and submitted to the district, including a private neuropsychological evaluation, and did not "present any reports to the parent[s] prior to the meeting" (id. at pp. 2-3). Next, the parents contended that the May 2012 CSE predetermined its recommendations and was "unwilling to offer anything more than [what was included on] the IEP it . . . designed the year before" (id. at pp. 3-4). The parents further asserted that the May 2012 CSE did not conduct its own evaluations, including a classroom observation, "and/or collect appropriate or adequate data" in assessing the student's needs (id. at p. 3). In addition, the parents objected to the May 2012 CSE's consideration of a teacher report from the Rebecca School, as it was written "five months before the meeting" (id. at p. 3).

Regarding the May 2012 IEP, the parents alleged that it failed to address the student's academic, social/emotional, and behavioral needs (Parent Ex. A at p. 2). The parents alleged that the recommendations in the May 2012 IEP were not supported by the evaluations considered by the May 2012 CSE and were "contrary to the opinions of professionals who ha[d] direct knowledge of the student's needs" (id. at pp. 3-4). Additionally, the parents alleged that the program recommended by the May 2012 CSE did not offer "adequate or appropriate instruction, supports, supervision, or services" sufficient to allow the student to achieve progress, consisted of a "class size" and "student to teacher ratio" that was too large to allow the student to "benefit educationally," and failed to provide "enough opportunity for 1:1 instruction or attention" (id. at p. 4). The parents asserted that the May 2012 IEP, including the statement of the student's present levels of performance and the annual goals and short-term objectives, "did not meet all of the student's unique academic needs" (id. at p. 2). With respect to the annual goals included in the May 2012 IEP, the parents also alleged that an annual goal targeting life skills was inadequate because it lacked short-term objectives and the annual goals were developed by the Rebecca School and idiomatic to instruction utilizing the Developmental, Individual-difference, Relationship-based (DIR) Floortime model employed at the Rebecca School (id. at p. 3). The parents further argued that the May 2012 CSE improperly excluded parent counseling and training from the IEP (id.). Following the development of the May 2012 IEP, the parents alleged that they did not receive prior written notice as required by federal regulations (id. at p. 4). Additionally, the parents alleged that they did not receive a timely and/or appropriate FNR (id.).

Regarding the assigned public school site, the parents alleged that they visited the school on June 13, 2012 and concluded that it could not implement the May 2012 IEP for the following reasons: (1) the school's speech-language therapists shared a small office, which would affect the student's ability to focus; (2) OT services were exclusively "push-in" and conducted in the classroom or hallways; (3) the number of students who ate lunch in the cafeteria would overwhelm the student, who is "noise sensitive;" (4) the "program" at the school was "not therapeutic enough," and in particular, the school's one psychologist was present only one day per week, and school staff were unclear as to how the school could handle a "crisis" involving the student; (5) the school's single security guard provided insufficient security should the student, who is impulsive, run away; (6) the student would not be functionally grouped with

students with similar needs in the assigned classroom; (7) the assigned classroom did not provide the "amount of 1:1 instruction or attention" the student required; and (8) the classroom did not employ "appropriate" teaching methodologies (Parent Ex. A at pp. 4-5). Additionally, the parents alleged that this school "did not have a spot for the student" (id. at p. 5).

The parents indicated that the student's unilateral placement at the Rebecca School was appropriate because it provided specialized instruction to meet the student's needs (Parent Ex. A at p. 5). Moreover, the parents asserted that the student "made and continue[d] to make" progress at the Rebecca School (id.). With respect to equitable considerations, the parents indicated that they cooperated with the May 2012 CSE and timely notified the district of deficiencies with the assigned public school site, as well as their intent to seek tuition reimbursement (id. at pp. 4, 5).

The parents invoked the student's right to a pendency placement, identifying an IHO Decision dated May 31, 2012, which ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2011-12 school year (Parent Ex. A at pp. 5-6). For relief, the parents sought: (1) the costs of the student's education at the Rebecca School for the 2012-13 school year; (2) "[d]oor-to-door special education transportation"; (3) reimbursement, an award of compensatory education, or related service authorizations to meet the student's related service needs; and (4) the cost of "[e]valuations" (id. at p. 6).

B. Impartial Hearing Officer Decision

On September 6, 2012, an impartial hearing convened and, following seven days of proceedings, concluded on October 7, 2013 (Tr. pp. 1-648). On December 6, 2013, the IHO issued an interim decision, finding that the Rebecca School constituted the student's last agreed upon placement pursuant to a May 31, 2012 IHO decision (Interim IHO Decision at p. 4).⁴ By final decision dated December 9, 2013, the IHO found 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, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 29-36).⁵

First, the IHO disposed of several of the parents' claims.⁶ Reviewing the conduct of the May 2012 CSE, the IHO found no evidence indicating that the parents were deprived of the opportunity to participate in the development of the student's May 2012 IEP (IHO Decision at p.

⁴ During the impartial hearing, on September 17, 2012, the parents requested that the IHO rule upon their application for pendency (Tr. p. 29). The IHO, with the agreement of the parties, deferred making a determination until an decision was issued relative to the administrative appeal of the May 31, 2012 IHO decision (Tr. pp. 30-31; see Application of the Dep't of Educ., Appeal No. 12-137). The parents renewed their pendency application in a letter dated July 8, 2013 (Parent Ex. O at p. 1). In an e-mail dated July 23, 2013, the district indicated that it had no objection "to a pendency order being issued in this case" (Parent Ex. P at p. 1).

⁵ The IHO who presided over the impartial hearing recused himself and a new IHO was appointed on or before October 7, 2013 (Tr. pp. 632, 634; see IHO Decision at p. 4).

⁶ The IHO made various findings which were adverse to the parents (see IHO Decision at pp. 30-31, 33-34). However, the parents did not assert a cross-appeal or otherwise address these issues in their answer. Therefore, the IHO's determinations which were adverse to the parents are final and binding on the parties and will not be addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

30). Additionally, the IHO found that the parents' allegation that they were not provided reports prior to the CSE meeting was "unsupported by the record" (*id.*). The IHO also found that the May 2012 CSE reviewed "information necessary to develop an accurate IEP" (*id.*). Specifically, the IHO found "no evidence" that the May 2012 CSE failed to consider the private neuropsychological evaluation (*id.*). Further, the IHO held that neither party introduced evidence regarding a classroom observation of the student, which, in any event, was not required (*id.* at p. 30). The IHO also "discount[ed] the various claims made by the parent[s] concerning" the annual goals in the May 2012 IEP (*id.* at p. 33). The IHO specifically rejected the argument that the annual goals could not be adapted and implemented in a public school because they were specifically designed "for use with the Rebecca School methodology of DIR" (*id.*). The IHO dismissed testimony from the Rebecca School director on this point, finding that "the goals could be implemented [by the district] even if the language [wa]s technically from the DIR playbook" (*id.*). The IHO further found that, in developing the student's annual goals, the May 2012 CSE properly relied upon a December 2011 progress report because it was the student's most current progress report and, further, one of the authors of the report was "instrumental" in facilitating the discussion of the student's annual goals at the CSE meeting (*id.*). Finally, the IHO did not find it relevant that the student "later met" some of the goals identified in this progress report (*id.*).

Turning to the CSE's recommendation of a 6:1+1 program, the IHO "view[ed] with skepticism" the contentions of the Rebecca School personnel that such a classroom could not provide the student with sufficient support (IHO Decision at p. 31). The IHO declined to consider the parents' claims related to the student's sensory needs because, no such claims were contained in the due process complaint notice (*id.*). The IHO also determined that testimony related to the student's difficulty with transitions was "countered" by "credible testimony from . . . district witnesses" (*id.*). The IHO further "discount[ed]" the opinion of a private neuropsychologist claiming that moving the student from the Rebecca School to a public school would be "detrimental" for the student (*id.*).

However, with respect to the appropriateness of "the size of the [6:1+1] class" and whether the student would have "sufficient opportunity" for 1:1 instruction, the IHO found that these topics were "largely sidestepped" at the May 2012 CSE meeting (IHO Decision at p. 31). The IHO further found that the May 2012 CSE placed the student into a preconceived classroom ratio without considering his individual needs (*id.*). Citing testimony by the district school psychologist on this point, the IHO concluded that the May 2012 CSE's "failure to keep an open mind as to whether additional support might be appropriate" for the student amounted to predetermination (*id.* at p. 32). The IHO further found that the district failed to include parent counseling and training on the IEP, thus "utterly [failing] to meet the requirements set forth [in State] regulation[s]" (*id.*). Together, the IHO concluded that these deficiencies amounted to a denial of a FAPE (*id.* at pp. 32-33).

The IHO rejected all of the parents' claims regarding the assigned public school site (IHO Decision at p. 33). The IHO credited testimony from a special education teacher at the assigned public school describing the "strategies incorporated in the classroom," including transition activities (*id.*). The IHO further "credit[ed]" both the teacher's "description of a separate speech and language room where only one student receive[d] services at a time" and her testimony regarding "a secluded hallway" where OT took place (*id.* at p. 34).

The IHO also determined that the parents satisfied their burden to establish that the Rebecca School was an appropriate unilateral placement for the student for the 2012-13 school year (IHO Decision at pp. 34-35). The IHO credited the testimony of a private neuropsychologist who opined that the student "needed to be in a small school that specialize[d] in [the] education of extremely low functioning autistic individuals" (id. at p. 34). The IHO found that the student had substantial OT and sensory needs that were appropriately addressed at the Rebecca School through OT services, "sensory gyms, equipment, sensory breaks, and [a] sensory diet" (id. at pp. 34-35). The IHO further found that the student made verbal progress and demonstrated an increased ability to "sit and attend" to classroom tasks, as well as request sensory input when needed (id.). The IHO also observed that the student made progress in his peer interactions (id.).

Finally, the IHO found that "equitable considerations d[id] not operate to deny or reduce an award of tuition payment" (IHO Decision at p. 36, see id. at pp. 35-36). Accordingly, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year (id. at p. 36).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations 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, and that equitable considerations weighed in favor of the parents' request for relief.

The district argues that a 6:1+1 placement with related services was appropriate to meet the student's needs. The district asserts that the IHO erred in determining that the May 2012 CSE "largely sidestepped" the issues of class size and 1:1 support. The district contends that the IHO erred in determining that the May 2012 CSE predetermined the student's May 2012 IEP and asserts that the CSE considered several options for the student before concluding that a 6:1+1 placement was appropriate. The district also asserts that the IHO erred in determining that the May 2012 CSE's failure to include parent counseling and training on the IEP warranted a finding that the district failed to offer the student a FAPE.

The district also contends that the IHO erred in determining that the Rebecca School was an appropriate unilateral placement because the Rebecca School did not provide the student with related services during the summer 2012. The district further contends that equitable considerations do not weigh in favor of the parents' sought relief because the parents did not inform the district about any perceived deficiencies with the May 2012 IEP when they informed the district of their intent to unilaterally place the student at the Rebecca School.

In an answer, the parents argue that the IHO correctly found that the district denied the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition. Additionally, the parents argue that the district's appeal is moot given that all of the reimbursement relief sought by the parents has been achieved by virtue of pendency.

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i]; 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. Predetermination

The district appeals the IHO's finding that the 6:1+1 special class placement recommended in the IEP was predetermined because it represented a predetermined student-to-adult ratio that did not reflect the student's individual needs.

The consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] [noting that "predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd 366 Fed. App'x 239, 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

In this case, the hearing record indicates that the May 2012 CSE did not predetermine the student's placement. Specifically, the evidence in the hearing record shows that the May 2012 CSE considered several placement options for the student, including a 12:1 or 12:1+1 special class in a community school with related services or an 8:1+1, 12:1+1, or 12:1+4 special class in a specialized school with related services (Dist. Exs. 2 at p. 11; 3 at p. 5; see Tr. pp. 69-71, 411-12). These options were rejected because they did not offer adequate support to address the student's academic, social/emotional, or speech-language needs, or, in the case of the 12:1+4 special class placement, was too restrictive to address the student's needs (Dist. Exs. 2 at p. 11; 3 at p. 5; see Tr. pp. 70-71).

In developing the student's program for the 2012-13 school year, the May 2012 CSE reviewed a 2011 Rebecca School progress report (Tr. pp. 77, 525; see generally Dist. Ex. 6). According to the district school psychologist, the Rebecca School teacher indicated at the CSE meeting and the district school psychologist confirmed with the Rebecca School that the report was an accurate and recent assessment of the student's abilities (Tr. pp. 77-78; see Dist. Ex. 6 at p. 1). The school psychologist testified and the contemporaneous minutes of the CSE meeting indicated that the May 2012 CSE thoroughly discussed the student's academic skills, strengths, and weaknesses in the areas of reading, math, writing, sensory regulation, social skills, communication, ADL skills, and motor skills (see Tr. pp. 57-58; Dist. Ex. 3 at pp. 1-5). The hearing record additionally reflects that the parent and the Rebecca School teacher provided input into the development of the May 2012 IEP (see Tr. pp. 57-59, 62-63, 81, 479, 525, 531-32, 613-14).

The May 2012 CSE also developed annual goals and short-term objectives based on the December 2011 Rebecca School progress report, as well as input from the student's then-current

Rebecca School teacher and the parents, to address the student's needs in the areas of social skills, communication, attention, sensory regulation, reading, math, activities of daily living (ADL) skills, science, motor planning, visual-spatial processing, and language processing (Dist. Ex. 2 at pp. 2-7; see Tr. pp. 62-63, 68-69). The minutes of the CSE meeting, as well as the testimonial evidence, reflect that the May 2012 CSE discussed the student's annual goals and short-term objectives (see Tr. pp. 62-63, 68-69; Dist. Ex. 3 at pp. 3-4). He additionally testified that he read the annual goals aloud at the CSE meeting and then asked the Rebecca School teacher whether the annual goals and short-term objectives were appropriate for the upcoming school year (Tr. pp. 62-63, 66-67). The parents testified that the annual goals, targeting the student's speech-language and OT needs, were appropriate (Tr. pp. 615-17).

The parents testified that they shared with the May 2012 CSE their belief that the student required additional support to address his needs, such as additional adults in the classroom (Tr. pp. 613-14).⁷ Although the district did not agree with the parents' request for additional adult support, the IDEA does not require districts to accede to parents' program demands (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999]; see Rowley, 458 U.S. at 205-06). Specifically, courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

As support for his determination that the district predetermined the May 2012 IEP, the IHO cited testimony of the district school psychologist that, although the parents and the student's Rebecca School teacher preferred a student-to-adult ratio similar to the classroom that the student attended at the Rebecca School, the district did not have the "ability to . . . replicate . . . the staffing ratio that [a private] school" might utilize (Tr. pp. 72-74). Initially, that a CSE selected one of the staffing ratios specifically identified in State regulations, a 6:1+1 (8 NYCRR 200.6[h][4][ii][a]), does not, by itself render the program predetermined simply because the district did not recommend the staffing ratio desired by the parents. "[A] school district is not required to provide 'every special service necessary to maximize each handicapped child's potential,'..." Dirocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *1 [S.D.N.Y. Jan. 2, 2013] [citing Cerra, 427 F.3d at 195 and Walczak, 142 F.3d at 132]). Consistent with the testimony of the school psychologist, the May 2012 CSE was required to consider the student's needs and, if possible, recommend an appropriate special education program and services within the district's continuum of services. If the CSE determined that the student's needs could not be met in such a program, then and only then, would the CSE be required to consider placing the student in a nonpublic school (W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148-49 [S.D.N.Y. 2006]; see also 8 NYCRR 200.6[j][1][iii] [providing for the availability of State funds for private schools only where the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [Mar. 19, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F. Supp. 2d at 430-31). In this instance, as

⁷ The parents further testified that, during the meeting, they asked the school psychologist if the CSE's placement recommendation "was the most that they could offer for [the student]" (Tr. p. 561).

discussed below, the recommended 6:1+1 special class was appropriate for the student and, as such, the district was not obligated to replicate the Rebecca School classroom ratio or otherwise consider placing the student in a nonpublic school and the district school psychologist's testimony, in part describing this process, does not indicate that the May 2012 CSE predetermined the student's IEP.

In further support of his conclusion that the May 2012 CSE predetermined the student's program for the 2012-13 school year, the IHO "credit[ed]" the testimony of the parents and parents' advocate that the district school psychologist informed them that the level of support available to the student would rest upon which public school site the district assigned the student to attend (IHO Decision at p. 32; Tr. pp. 410-11, 563).⁸ The IHO concluded that this testimony revealed that the May 2012 CSE failed to keep an open mind with regard to the recommendation for additional supports for the student's sensory needs (IHO Decision at p. 32). Any speculation about a purported variation in the level of support available at a particular public school site, whether relayed to the parents or not, does not support a conclusion that the district predetermined the student's May 2012 IEP. On the contrary, as discussed further below, the May 2011 IEP provided for various supports to address the student's sensory needs (see Dist. Ex. 2 at pp. 2, 5, 6; see also Tr. p. 59), and the appropriateness of the supports included in the student's May 2012 IEP must be reviewed without consideration for whether or not any particular public school site may or may not have been able to implement the student's IEP (see R.E., 694 F.3d at 186-87; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013] [noting that the validity of the IEP should be judged on the face of the IEP, rather than from evidence concerning how the IEP might have been implemented]). Therefore, the IHO also erred in determining that comments of the district school psychologist in this case supported a finding that the May 2012 CSE participants predetermined the student's IEP.

B. May 2012 IEP

1. 6:1+1 Special Class Placement

Turning from the CSE meeting to the substance of the IEP, the district asserts that the IHO erred in finding that the 6:1+1 special class in a specialized school with related services was not appropriate for the student. The district specifically cites the IHO's finding that the "inquiry concerning the size of the class and the question of sufficient opportunity for 1:1 support" was "largely sidestepped at the CSE meeting" (IHO Decision at p. 31). The substance of the IHO's findings in this regard, which were adverse to the district, related more prominently to the IHO's conclusion that the May 2012 CSE predetermined the student's IEP, discussed above. However, since the district has raised the issue on appeal, the appropriateness of the recommended 6:1+1 special class for the student is duly addressed.

The evidence in the hearing record shows that, consistent with the student's needs as identified in the IEP and in conformity with State regulations, the May 2012 CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school (see Dist. Ex. 2 at p. 7; see also Tr. pp. 60-62). 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

⁸ Staffing resources may shift depending on the location, because the number of adults in a particular classroom may very well need to shift depending on the IEP requirements for each child in the room.

requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). According to the evidence in the hearing record, at the time of the May 2012 CSE meeting, the student exhibited such "highly intensive" management needs (see Dist. Ex. 2 at pp. 1-2). The district school psychologist testified that the May 2012 CSE recommended a 12-month school year in a 6:1+1 special class placement in a specialized school because the student required a significant amount of support and the recommended program would offer the student specialized instruction within a structured and small group setting (Tr. p. 61-62, 81).

The Rebecca School teacher, who attended the May 2012 CSE meeting, testified that a 6:1+1 special class was not appropriate because the student required more individualized teacher attention and sensory support than available in such a setting (Tr. pp. 528-29; see Dist. Ex. 2 at p. 12). However, the student's needs and abilities, described in the December 2011 Rebecca School progress report, were consistent with those reflected in the student's May 2012 IEP present levels of performance and with the recommendation for a 6:1+1 special class with related services (compare Dist. Ex. 6 at pp. 1-7, with Dist. Ex. 2 at pp. 1-2, 7). Based upon the 2011 Rebecca School progress report and input from the Rebecca School teacher, and as reflected in the minutes of the CSE meeting, the May 2012 IEP present levels of performance indicated that the student communicated primarily with one word utterances and gestures and was clear and direct regarding his needs and requests (compare Dist. Exs. 3 at p. 2; 6 at pp. 1-2, 7, with Dist. Ex. 2 at p. 1; see Tr. pp. 57-58). Consistent with the December 2011 the Rebecca School progress report, with respect to social skills, the May 2012 IEP indicated the student developed "strong relationships" with teachers but required adult support with peer interactions (compare Dist. Ex. 6 at p. 2, with Dist. Ex. 2 at p. 1). Also, as noted in the December 2011 Rebecca School progress report, the May 2012 IEP indicated that the student demonstrated significant difficulties with sensory regulation when he became frustrated and his needs were misunderstood (compare Dist. Ex. 6 at p. 1, with Dist. Ex. 2 at p. 1). The December 2011 Rebecca School progress report and the May 2012 IEP also indicated that the student would remove himself from an activity and take a short break when experiencing difficulties with sensory regulation and then rejoin the group when ready (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 6 at p. 1). In addition, the present levels of performance, as reflected in the minutes of the CSE meeting, indicated that the student followed one word directions, recognized his own name, and identified colors, shapes, letters, and numbers 1 through 10 (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at p. 3). This description of the student's needs is consistent with the level of support available in a 6:1+1 special class setting together with related services.

The district school psychologist testified that the annual goals were appropriate for the student and that a teacher could implement the annual goals within a 6:1+1 special class setting (Tr. p. 69). Furthermore, the hearing record supports the conclusion that a special education teacher in a 6:1+1 special class would be able to provide the needed accommodations and modifications to instruction required by the student. To address the student's management needs related to academics, sensory processing, and social/emotional functioning, the May 2012 CSE recommended accommodations and strategies including visual prompts and cues, verbal prompts and cues, repetition, practice and review, use of manipulatives, access to sensory tools and strategies, sensory breaks, and transition warnings and transition songs (Dist. Ex. 2 at p. 2; see Tr. p 59). Thus, contrary to the testimony of the Rebecca School teacher that the district program would not provide the student with adequate support regarding his sensory needs, the May 2012 IEP addressed these needs by recommending specific accommodations for the teacher to implement, as well as OT services.

Furthermore, in addition to the May 2012 CSE's recommendation of a 6:1+1 special class, the CSE recommended related services to support this placement in the form of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group (3:1), two 30-minute sessions per week of individual OT, and one 30-minute session per week of OT in a group (3:1) that would address the student's needs related to receptive, expressive, and pragmatic language, as well as his motor skills (see Dist. Ex. 2 at p. 7). The school psychologist testified that the May 2012 CSE discussed the student's need for continuing speech-language therapy and OT (Tr. pp. 67-68). In addition, according to the district school psychologist, the May 2012 CSE considered the frequency of speech-language and OT services the student received at the Rebecca School (Tr. p. 68).

Upon review of the hearing record, the May 2012 CSE's recommendation of a 6:1+1 special class in a specialized school, together with appropriate related services, was reasonably calculated to address the student's significant needs related to academics, sensory processing, ADL skills, language processing, motor skills, and social skills.

2. Parent Counseling and Training

The parents object to the CSE's failure to include on the IEP, or provide, parent counseling and training. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). 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; see 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).

The hearing record reflects that the student's previous IEP, dated May 11, 2011, was also the subject of an impartial hearing (see Parent Exs. B at p. 4; N at p. 3). The parents' due process complaint notice in that proceeding contained an allegation that the district failed to include parent counseling and training in the student's May 2011 IEP (see Parent Ex. N. at p. 3). Although the IHO's decision did not address that claim, the SRO found that the district denied the student a FAPE on multiple grounds, including the CSE's failure to recommend parent

counseling and training in the student's May 2011 IEP (Parent Ex. N. at pp. 16-17; see also Parent Ex. B). Although the SRO's decision in that proceeding post-dated the parents' due process complaint notice in the instant matter, the district was on notice of the parents' allegation by virtue of the due process complaint relative to the May 2011 IEP (see Parent Ex. N at pp. 3, 23). Despite this notice, the district once again failed to include parent counseling and training in the student's May 2012 IEP and provided no explanation for its failure to do so at the impartial hearing (see generally Dist. Ex. 2). Moreover, the district failed to take advantage of yet another opportunity to correct this omission during the resolution period following the instant due process complaint notice. Such continued failures to indentify parent counseling and training services on the student's IEP suggests, not an unintentional oversight, but a knowing violation of the applicable State and federal regulations that require the district to place parent counseling and training on the student's IEP.

However, in spite of the district's apparent intransigence, there is no indication in the hearing record that the failure to place parent counseling and training on the IEP resulted in a denial of a FAPE. Therefore, although the May 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, this violation alone does not support a finding that the district failed to offer the student a FAPE (R.E., 694 F.3d at 191; see also F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *4 [2d Cir. Jan. 8, 2014]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; see also M.W., 725 F.3d at 141-42).

To be clear, however, the district cannot continue to flout its legal obligation to include parent counseling and training on the student's IEP. Therefore, 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[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

C. Mootness

Initially, as asserted by the parents, the hearing record reflects that the district has been required to fund the student's placement at the Rebecca School as a result of its obligation to provide the student with his pendency (stay-put) placement for the duration of these proceedings, including the entirety of the 2012-13 school year for which reimbursement is sought (see Interim IHO Decision at p. 4; Application of the Dep't of Educ., Appeal No. 12-137; see also Tr. pp. 638-39). As all of the relief sought by the parents has been achieved by virtue of pendency, the challenged May 2012 IEP has expired by its own terms, and planning for the 2013-14 school year should have been completed, the parties' dispute regarding the 2012-13 school year has been rendered moot and the discussion of the parties' arguments, set forth above, is entirely academic. Regardless of the merits of a decision concerning whether the district offered the student a FAPE for the 2012-13 school year, no further meaningful relief may be granted to the parents because they have received all of the relief they seek pursuant to pendency (see Parent Ex. A at p. 6). Even if a determination on the merits demonstrated that the district did not offer the student a FAPE for the 2012-13 school year, in this instance it would have no actual effect on the parties

because the 2012-13 school year has expired and the student remains entitled to have his pendency placement—at the Rebecca School—funded by the district through the conclusion of the administrative process (IHO Interim Decision at p. 4). Relief aside from tuition reimbursement, such as special transportation and/or compensatory education was not further addressed in the IHO decision or pursued by either party thereafter. Thus, I agree with the parents' argument that the case has been rendered moot, and the district will be directed to pay for the costs of the Rebecca School, if it has not done so already.

However, in light of recent district court decisions holding that tuition reimbursement cases may, in some circumstances, not be moot even when the requested relief has been achieved as a result of pendency, in the interest of administrative and judicial economy, as set forth above, I have addressed the merits of the district's appeal in the alternative (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. July 29, 2011]; but see V.M. v No. Colonie Cent. Sch. Dist., 2013 WL 3187069, at *13-*15 [N.D.N.Y. June 20, 2013] [explaining that claims seeking changes to the student's IEP/educational programming for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254-55 [S.D.N.Y. 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010] [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]. There was no evidence proffered by the parties that the exceptions applied in this case.

VII. Conclusion

A review of the hearing record reveals that the CSE did not predetermine the student's May 2012 IEP, the recommended 6:1+1 special class placement with related services was reasonably calculated to meet the student's needs, and, although the CSE's failure to recommend parent counseling and training was inexcusable, the hearing record does not show that, alone, it resulted in the district's failure to offer the student a FAPE for the 2012-13 school year. Therefore, the necessary inquiry is at an end and it is not necessary to address the appropriateness of the parents' unilateral placement of the student at the Rebecca School or whether equitable considerations should limit or preclude relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13). However, as asserted by the parents, this appeal has been rendered moot by the passage of time and it is undisputed that the district must pay the costs of the student's tuition at the Rebecca School pursuant to pendency and, it is primarily on this basis that the district's petition must be dismissed.

I have considered the parties remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

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

IT IS FURTHER ORDERED that, if it has not done so already, or the parties otherwise agree, the district shall, pursuant to pendency, reimburse the parents for the student's tuition costs at the Rebecca School for the 2012-13 school year through the date of this decision.

Dated: Albany, New York
February 12, 2014



JUSTYN P. BATES
STATE REVIEW OFFICER