



# The University of the State of New York

## The State Education Department

State Review Officer

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Nos. 13-041 & 14-008

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

### **Appearances:**

Thivierge & Rothberg, PC, attorneys for petitioners, Christina D. Thivierge, Esq., of counsel

Shaw, Perelson, May & Lambert LLP, attorneys for respondent, Michael K. Lambert, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) that determined that respondent (the district) offered the parents' son a free and appropriate public education (FAPE) and denied their request to be reimbursed for the costs of their son's attendance at a nonpublic school (the NPS) and additional services for the 2012-13 school year. In a related matter under Appeal No. 13-041, the district appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from the interim decision of the IHO determining the student's pendency placement. The parents' appeal in Appeal No. 14-008 must be sustained in part. The district's appeal in Appeal No. 13-041 must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a

school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The student exhibits social, behavioral, fine motor, proprioceptive and sensory deficits (Dist. Ex. 1 at pp. 3-4; Parent Exs. I at pp. 5-6; J at pp. 5-6; L at pp. 3-4; M at p. 2-4). Testimony

from the student's mother indicated that the student taught himself to read by the age of two (Tr. p. 1331). She also reported that he read with inflection, and would use tone and different voices when reading (Tr. p. 1342). The student's mother also reported that the student had an unusual memory and could rationalize, problem solve, and had a strong vocabulary (Tr. pp. 1332, 1342). Additionally, she indicated that the student could add, subtract, multiply, and divide; add fractions; and understood powers and negative numbers (Tr. pp. 1331, 1342-43). The student was evaluated in December 2010 after a referral by his mother regarding language, social, and developmental concerns (Dist. Ex. 10 at p. 1).

A committee on preschool special education (CPSE) convened a meeting on August 25, 2011 to develop the student's IEP for the 2011-12 school year (Dist. Ex. 1).<sup>1, 2</sup> The CPSE determined that the student was eligible for special education services as a preschool student with a disability (*id.* at p. 1). The CPSE recommended SEIT services for 16 hours per week in a 1:1 setting, an individual teaching assistant for 4 hours per week individually, and individual OT for two 45-minute sessions per week (*id.* at pp. 1, 11). The August 2011 IEP indicated that the placement was for "preschool itinerant services only" and further indicated that the SEIT services were to be delivered at "home/school" (*id.*). The hearing record indicates that the student's services were changed in February 2012 by removing the services of a teaching assistant and increasing the SEIT services to 20 hours per week (Parent Ex. J at pp. 1, 11). The hearing record further indicates that the student has attended the NPS since June 2011 (Tr. p. 1341).

A March 2012 psychological evaluation estimated the student's full scale IQ to be 141 (99.7 percentile) with a verbal IQ of 143 (99.8 percentile) and a performance IQ of 142 (99.7 percentile) placing him in the "very superior range" (Dist. Ex. 22 at p. 3-4).

A combined CPSE and CSE meeting convened on June 19, 2012 to develop the student's IEP for the 2012-13 school year (Tr. pp. 233-34; Parent Exs. I; J). The June 2012 CPSE determined that the student continued to be eligible for special education and related services as a preschool student with a disability and recommended that the student receive services for July and August 2012 school year (Parent Ex. J at pp. 1, 11-12).<sup>3</sup> After the conclusion of the CPSE

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<sup>1</sup> The hearing record contains multiple duplicative exhibits (Dist. Exs. 2-4; 15-17; 19; 20; 25; 27-30; 32; Parent Exs. C; D; H-J; Q-S; U-W; IHO Ex. 1). For purposes of this decision, only Parent exhibits were cited in instances where both a Parent and District exhibit were identical. I remind the IHO that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]). In addition, the parents and the district both included copies of the student's August 2011 IEP in the hearing record; however, those two IEPs differ in that the district exhibit includes a recommendation for two 45-minute sessions of individual occupational therapy per week, which is not included in the parents' exhibit (compare Dist Ex. 1 at pp. 1, 11, with Parent Ex. K at pp. 1, 11).

<sup>2</sup> Although the August 2011 IEP indicates that it was an initial eligibility determination meeting, the hearing record includes evidence the student had been receiving special education services since February 2011 (Tr. p. 101, Dist Ex. 1 at p. 1; Parent Ex. M at pp. 1, 4).

<sup>3</sup> Although the IEP indicates a recommendation that the student receive services for July and August 2011, the district representative for the CSE portion of the meeting testified that the CPSE recommended the student continue to receive SEIT services for 20 hours per week during July and August 2012 (Tr. p. 32; Parent Ex. J at pp. 1, 11-12).

portion of the meeting, the June 2012 CSE met and determined that the student was eligible for special education and related services as a student with autism (Tr. p. 32; Parent Ex. I at p. 1).<sup>4</sup> The CSE recommended that the student attend a 12:1+2 special class at his neighborhood school and receive related services of a one hour speech-language therapy session one time per week in a small group and a one hour OT session one time per week in a small group (Parent Ex. I at pp. 1, 8; see Tr. p. 256). The CSE also recommended a one hour parent training session one time per month in a small group (Parent Ex. I at pp. 1, 8).

By way of a letter dated August 2, 2012, the parents indicated that they had received a copy of the June 2012 IEP and were rejecting the recommended program and placement (Parent Ex. AA at p. 1). The parents indicated that since the student had been attending a "mainstream setting with supports," placing him in a self-contained classroom with students who were "below his level academically, behaviorally and socially would be detrimental to his continued growth and progress" (id.). Finally, the parents indicated that the letter served as notice of their intention to place the student in a "typical school" and provide support services, including: 20 hours of 1:1 applied behavior analysis (ABA) services per week, two 45-minute sessions per week of 1:1 speech-language therapy, and three 45-minute sessions per week of 1:1 OT; and they further indicated that they would seek public funding for the costs of the student's program (id.).

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

By due process complaint notice dated August 21, 2012, the parents requested an impartial hearing (Parent Ex. H). The parents alleged that the district failed to offer the student a FAPE for the 2012-13 school year, the services provided by the parents for the student were appropriate to address his special education needs, and equitable considerations support the parents' requested relief (id. at pp. 1-2).<sup>5</sup> The parents raised a number of challenges related to the development of the student's June 2012 IEP, including that the June 2012 CSE was improperly composed because the district staff did not know the student, the CSE predetermined the student's classification and program recommendation, the CSE failed to listen to the parents or treat them as equal team members and ignored their requests during the CSE meeting, the CSE did not adequately consider private assessments and progress reports, and the CSE relied on "old" evaluations and scores (id. at pp. 3-6). The parents also alleged that the June 2012 IEP itself was defective for a number of reasons (id. at pp. 4-6). The parents alleged that the present levels of performance were copied from previous IEPs and did not accurately reflect the student's performance as set forth in the evaluative reports available at the CSE meeting (id. at p. 4). The parents further alleged that the June 2012 IEP did not contain academic or behavioral goals, did not address the student's core areas of need, and did not identify an appropriate method for measuring the student's progress or who would be responsible implementing the student's goals and tracking his progress (id. at pp. 4-5). Regarding the goals, the parents also alleged that they were insufficient, lacked short-term objectives, did not contain baselines, were not appropriate to promote progress, and were vague and immeasurable (id. at p. 5). The parents also alleged that

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<sup>4</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>5</sup> The parents raised 32 enumerated points as a basis for their allegation that the district did not offer the student a FAPE; however, many of those points raised similar allegations (Parent Ex. H at pp. 3-6).

the goals were inappropriate because they did not indicate if they were to be completed independently or with prompting (*id.*). Regarding the recommended program, the parents alleged that a 12:1+2 special class was not appropriate because it was not in the least restrictive environment (LRE) for the student, that the student required ABA services, and that overall the IEP did not offer sufficient supports and services (*id.* at pp. 3-5).

As relief, the parents requested reimbursement or direct funding for the student's program and services, including 40 hours per week of 1:1 ABA services, ABA supervision and parent training by a board certified behavior analyst (BCBA), placement in a "typical" prekindergarten classroom, two 45-minute sessions of individual speech-language therapy per week, three 45-minute sessions of individual OT per week, and transportation, all as part of a 12-month program (Parent Ex. H at p. 6). In addition, the parents requested pendency based on the student's last agreed upon February 2012 IEP, consisting of 20 hours of 1:1 SEIT services per week at home and school and two 45-minute sessions of individual OT per week (*id.* at p. 2).

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

After a pendency hearing on November 13, 2012, the IHO issued an interim decision on pendency dated February 4, 2013, determining that the student's pendency placement consisted of 20 hours per week of 1:1 SEIT services and two forty-five minute sessions of individual OT per week, retroactive to September 5, 2012 (Tr. pp. 1-164; Interim IHO Decision at pp. 8-9).<sup>6</sup>

An impartial hearing was convened on February 5, 2013 and concluded on June 13, 2013 after five days of non-consecutive hearing dates (Tr. pp. 185-1453). In a decision dated December 9, 2013, the IHO found the district offered the student a FAPE for the 2012-13 school year (IHO Decision). As an initial matter, the IHO determined the parents and the CSE had a disagreement during the CSE meeting to the extent the parents wanted the student to remain in preschool with SEIT services, while the CSE could not agree to the parents' request because the district had no authority to fund the student's preschool program (*id.* at p. 10). As a result, the IHO found the June 2012 CSE "an exercise in futility" (*id.*). The IHO found no errors with the development of the IEP and determined that the June 2012 CSE was properly composed, adequately reviewed available evaluative materials, and held a meaningful discussion in which the parents were able to participate (*id.* at pp. 10-12). The IHO found that the June 2012 CSE meeting had a sufficient number of attendees from the district who knew the student and were familiar with his needs (*id.* at p. 15). The IHO also found that to the extent the CSE did not discuss the annual goals during the meeting, it did not deny the student a FAPE (*id.* at p. 14). In addition, the IHO found that the present levels of performance and goals read together adequately described the student's needs (*id.* at p. 13). While the IHO acknowledged errors in the present levels of performance section of the June 2012 IEP, the IHO found that those errors were not material and did not deny the student educational opportunities or impede the parents' ability to participate in the development of the IEP (*id.* at pp. 13-14). Additionally, the IHO found that the student did not require SEIT services in order to receive a FAPE, the program and placement recommended in the June 2012 IEP was consistent with the information contained in the evaluative reports, and the annual goals appropriately addressed the student's needs (*id.* at p.

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<sup>6</sup> Although not stated in the interim decision, it appears that the IHO determined that the student's pendency entitlement ran from the day on which the district's 2012-13 ten-month school year began (Tr. pp. 62, 148).

10, 16-17). Consequently, the IHO declined to address the appropriateness of the parents' unilateral placement or equitable considerations and dismissed the parents' claims raised in their due process complaint notice (*id.* at p. 17).

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

The parents appeal the IHO's December 9, 2013 decision, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year and that the IHO's decision was untimely, arbitrary, and unreasoned. Initially, the parents assert that the IHO's decision did not adequately reference the hearing record to support his findings of fact. The parents also assert that the delay in rendering the decision prejudiced the student because the district has not paid for the student's pendency services. The parents allege that the district failed to offer the student a FAPE in the LRE for the 2012-13 school year, the parents' unilateral placement of the student at the NPS with 1:1 ABA support was appropriate, and equitable considerations favor the parents' request for relief as asserted in their due process complaint notice.

As a general matter, the parents assert that the testimony of the district witnesses should be afforded little weight because they lacked familiarity with the student. The parents assert that the June 2012 CSE predetermined the student's program and failed to consider the parents' concerns or those of the professionals who worked with the student. The parents also assert that in developing the June 2012 IEP, the CSE relied on outdated evaluations and the description of the student in the present levels of performance does not reflect his actual skill levels. Regarding the student's annual goals, the parents assert the CSE prepared the annual goals without input from all of the CSE members, there were insufficient goals for the student to work on throughout the year, the goals were inappropriate, the student had already mastered some of the goals, and the CSE did not include goals recommended by the student's ABA providers.

Regarding the recommended placement, the parents assert that the IHO erred in failing to apply the appropriate standard or address their claim that the district's recommendation for a 12:1+2 special class was not in the student's LRE. The parents assert that the student was able to attend a general education setting with supports and the recommended 12:1+2 classroom would not have been in the student's LRE. In addition, the parents assert that the June 2012 IEP did not identify any opportunities for educating the student in a general education setting and did not provide the student with access to his nondisabled peers to the maximum extent appropriate. The parents assert that the recommended 12:1+2 special class would have also been inappropriate due to the grouping of the other students within the class. The parents assert that because the student was cognitively in the superior range he would not have been appropriately grouped with students with low-average to average cognitive ability. In addition, the parents assert that the student would not have had appropriate peer models because the other students in the classroom had social/emotional and behavioral needs which the student did not.

The district answers, denying the allegations in the petition to the extent that they assert the IHO erred and to the extent that they challenge the evidentiary value of the district's witnesses. Regarding the parents' unilateral placement of the student at the NPS, the district asserts it was not appropriate because it did not offer an instructional curriculum or educational

services and the district further asserts that the support services were not appropriate because their necessity was based on the student being in an inappropriate placement. The district further asserts that the NPS was not the LRE for the student because it is a private school. The district also asserts that the parents should be denied relief on equitable grounds because they never intended to enroll the student in public school. In addition, the district requests that an SRO dismiss the parents' petition because it does not conform to the page length or font requirements of the Commissioner of Education. The parents reply, asserting that their papers are in compliance with State regulations.

Under Appeal No. 13-041, the district appeals the IHO's February 4, 2013 interim decision on pendency. Although the district acknowledges that the student's pendency entitlement consists of 20 hours per week of 1:1 special education teacher support and two 45-minute sessions per week of individual OT, the district asserts that the services should be delivered in a district general education kindergarten class rather than at the NPS. The district asserts that the student is not eligible to remain in the preschool program because he aged out of the CPSE and that a comparable program would be an age-appropriate general education classroom with the same supports. The district further asserts that the IHO erred in considering the appropriateness of a general education kindergarten classroom and in determining that the district was obligated to develop a transition plan for the student to transition from his private preschool to a district kindergarten classroom. The parents answer and assert that placement in a general education kindergarten classroom would constitute a material change in the student's educational placement. The parents also assert that the district's petition should be dismissed as untimely and because the district failed to effectuate personal service on the parents. The district replies, admitting that it did not timely personally serve the parents and requesting that an SRO excuse its failure to timely seek review.

## **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. Form Requirements for Pleadings**

The district asserts that the parents' petition was not in compliance with the form requirements set forth 8 NYCRR 279.8(a)(2) and that if the petition were in compliance with the form requirements it would not have been in compliance with the page limitations set forth in 8 NYCRR 279.8(a)(5). Pursuant to State regulations, "[a]ll pleadings and memoranda of law shall be in . . . 12-point type in the Times New Roman font (footnotes may appear as minimum 10-point type in the Times New Roman font)" and "[c]ompacted or other compressed printing features are prohibited" (8 NYCRR 279.8[a][2]). Additionally, "the petition . . . shall not exceed 20 pages in length" (8 NYCRR 279.8[a][5]). Further, State regulations provide that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the

State Review Officer" (8 NYCRR 279.8[a]). Upon review of the petition, in this instance, any violation of the State regulations regarding formatting or page length requirements was minimal and, accordingly, I exercise my discretion and accept the petition for review.

## **2. Finality of Unappealed Determinations**

Neither party has appealed the IHO's determinations that the June 2012 CSE was properly composed or that the student did not require SEIT services in order to receive a FAPE (IHO Decision at p. 10). Accordingly, these 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]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

### **B. June 2012 CSE Meeting and IEP**

#### **1. Predetermination/Parent Participation**

I first address the parents' allegations that the district impermissibly predetermined the student's classification and the June 2012 IEP program and placement recommendations and thereby denied the student a FAPE by significantly impeding the parents' ability to participate in the development of the student's IEP.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 210 Fed. App'x 1, 3, 2006 WL 3697318 [D.C. Cir. Dec. 6, 2006]).

Moreover, 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] ["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]; D.D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at \*7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at \*6-

\*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; 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 accord with the IHO's decision, the hearing record indicates that a meaningful discussion took place during the June 2012 combined CPSE/CSE meeting, in which the parents had an opportunity to participate. Participants at the June 2012 meeting included two district representatives—one for the CPSE and one for the CSE, a speech-language therapist, an occupational therapist, a psychologist, a special education teacher, a general education teacher, an additional parent member, the student's ABA provider from CARD,<sup>7</sup> the director of CARD, the student's teacher at the NPS, the NPS director, a private educational consultant, and the parents (Tr. p. 229-30; Dist. Exs. I at p. 1; J at p. 1).<sup>8</sup> The combined meeting lasted approximately 45-60 minutes (Tr. pp. 983, 1045, 1285, 1368). During the meeting, the student's parents, both participants from CARD, the student's teacher from the NPS, and the parent's private educational consultant were given opportunities to speak regarding the student (Tr. pp. 709, 979-80, 1164-65, 1348-52).

The district representative testified that the district and parents agreed the student needed special education teacher supports, but disagreed as to how they should be provided (Tr. p. 255). The district representative further testified that the CSE listened to the parents' concerns that the student remain in his preschool program and recommended a 12:1+2 special class to provide a similar amount of support in a kindergarten program (Tr. pp. 273-74). Although the parents assert that the CSE did not consider options other than the recommended 12:1+2 classroom, the student's mother and the parent's private educational consultant both testified that the district representative mentioned a general education kindergarten but dismissed it as being too large for the student (Tr. pp. 1167-68, 1441). In addition, the student's mother testified that the parents voiced their opinion that the student should stay in a general education setting and continue to receive ABA services (Tr. pp. 1356-57). As an additional option, the hearing record indicates that the parents and CSE discussed the possibility of the student remaining in his preschool class and receiving related services at the district elementary school (Tr. pp. 289-90, 1439; Parent Ex. I at p. 2). A discussion also took place regarding the student's classification (Tr. pp. 1166-67). The district representative felt that the student should have been classified as a student with an other health-impairment; however, at the parent's request, after discussion, and upon review of a private neurodevelopmental evaluation indicating the student had received a diagnosis of autism, the CSE classified the student as a student with autism (Tr. pp. 244-45, 248-49, 981, 1166-67, 1353; Parent Ex. N at p. 6).

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<sup>7</sup> The hearing record reflects that CARD is an acronym for the Center for Autism and Related Disorders, an agency that provides ABA services to students with disabilities (Tr. p. 96; Parent Ex. O). CARD provided the student's ABA services at the NPS (Tr. pp. 1336-37).

<sup>8</sup> The participants in the June 2012 CPSE and CSE meetings were the same, except a different person led each of the meetings (Tr. pp. 233, 980, 1419).

During the June 2012 CSE meeting, the district representative provided the parents with a class profile identifying the particular 12:1+2 special class the district intended to recommend for the student and identifying the student as being classified as a student with an OHI (Tr. pp. 246-47; 710-11; 1354; Parent Ex. D).<sup>9</sup> The district representative testified that she had prepared a projected class profile in advance of the CSE meeting because other parents had asked for class profiles (Tr. p. 247). The student's mother testified that she was given a class profile as a response to her questions about the other students in the recommended class (Tr. p. 1354). The student's mother also indicated that she asked questions about how instruction was provided and if the parents could observe the classroom and the CSE invited the parents to visit the class (Tr. p. 1356). The student's mother further indicated that although she was prevented from asking further questions about the classroom, all of her questions were answered during her subsequent visit to the classroom (Tr. pp. 1356, 1442-43, 1447-48).

In this instance the hearing record indicates that while the June 2012 CSE maintained a firm position as to the recommended program, significant discussions took place during the CSE meeting regarding the student and the student's needs, and changes were in fact made to the student's classification on the IEP at the parents' request, thus affording the parent the opportunity to participate in the development of the student's IEP (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17-\*18 [E.D.N.Y. Aug. 19, 2013] [explaining that a CSE does not have to follow parents' suggestions as long as it listens to them]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a disagreement between the parents and the district does not mean that the parents were denied the opportunity to participate or that the outcome of the CSE meeting was predetermined]; Sch. for Language & Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]).<sup>10</sup>

In addition, while the hearing record suggests that annual goals may not have been discussed during the June 2012 CSE meeting, nothing in the hearing record indicates that the lack of a discussion significantly impeded the parents' opportunity to participate in the decision-making process (Tr. pp. 710, 1329, 1359; see E.A.M. v. New York City Dep't of Educ., 2012

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<sup>9</sup> Although the district representative indicated that the class profile included in the hearing record may not have been the one she brought to the CSE meeting due to the date, the district special education teacher who taught the class testified that the class profile in the hearing record looked like a profile of the students in her class (Tr. pp. 327-28, 444; Parent Ex. D).

<sup>10</sup> The IDEA, rather than requiring parental consent to an IEP, "only requires that the parents have an opportunity to participate in the drafting process" (D.D.S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F., 2013 WL 4495676, at \*17 [noting that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

WL 4571794, at \* 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]). Pertinently, the district representative testified that the CSE used the student's prior IEP as a starting point in developing the goals for the June 2012 IEP, the student's providers were present to help develop the goals, and no one voiced any objections regarding the goals (Tr. pp. 238-40, 251-52). Although goals may not have been specifically discussed, overall the evidence in the hearing record indicates that the parents had an opportunity to participate in the development of the June 2012 IEP and accordingly, there is no reason to disturb the IHO's finding that a meaningful discussion, in which the parents participated, took place during the CSE meeting.

## **2. Evaluative Information/Present Levels of Performance**

The parents assert that the June 2012 CSE relied on out-of-date evaluative data and did not review and consider private evaluations provided by the parents. The parents also contend that the June 2012 IEP present levels of performance are inaccurate and do not reflect the student's needs as exhibited in the evaluative data available at the time of the CSE meeting. As discussed below, while the hearing record demonstrates that the June 2012 CSE had sufficient evaluative information available to develop the student's June 2012 IEP, it also indicates that the CSE did not incorporate the available current evaluative information into the student's present levels of performance, resulting in an inaccurate description of the student.

Among the required elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). 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]).

With regard to the parents' assertion that the June 2012 CSE did not consider private evaluations provided by the parents, the hearing record indicates that the parents submitted two evaluation reports to the CSE on June 12, 2012, which were both discussed, at least in part, during the meeting (Tr. pp. 1166-67, 1182-83, 1346-47; Parent Exs. C; N; BB). A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation

be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [E.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9, 2005 WL 1791553 [2d Cir. July 25, 2005]; see T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at \*18 [S.D.N.Y. Sept. 16, 2013]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F.Supp.2d 417, 436 [S.D.N.Y. 2010]). The parents' educational consultant, who authored one of the reports the parents provided to the district, attended the June 2012 meeting and had an opportunity to speak at the meeting regarding her report (Tr. pp. 1182-83, 1283-84, 1351-52; Parent Ex. C). In addition, regarding the April 2012 private neurodevelopmental evaluation the parents provided to the district, the parents' educational consultant testified that the student's classification was changed to autism based on the most recent diagnosis contained in that report (Tr. pp. 1166-67; Parent Ex. N at p. 5). Under these circumstances, the district considered the parents' private evaluation reports to the extent required by law, although perhaps not to the extent that the parents would have preferred (see CLK v. Arlington Sch. Dist., 2013 WL 6818376, at \*10 [S.D.N.Y. Dec. 23, 2013] [a CSE is not required to follow all of the recommendations contained in a private evaluation]; T.G., 2013 WL 5178300, at \*18-\*19 [CSE considered privately obtained evaluative report even though it was not discussed at CSE meeting]).

The hearing record also establishes that the June 2012 CSE had sufficient evaluative data available to develop the student's June 2012 IEP, including a December 2011 psychological evaluation, a March 2012 psychological evaluation, a March 2012 classroom observation, a March 2012 educational evaluation, an April 2012 educational progress report, an April 2012 private neurodevelopmental evaluation, a June 2012 private program review and observation report, a June 2012 annual educational evaluation report, a speech/language report, and an OT report (Tr. pp. 233, 730-31, 739, 1182-83, 1346; Dist. Exs. 10; 12; 13; 18; 21-23; Parent Exs. C, I at pp. 2-3, N, O, V, W, BB).<sup>11</sup> The NPS director, who attended the CSE meeting, testified that she was provided with a packet of evaluations that included the March 2012 psychological evaluation, the private neurodevelopmental evaluation, a classroom observation report, an OT report, and a speech-language report (Tr. pp. 738-39).<sup>12</sup> In addition, the student's then-current

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<sup>11</sup> Testimony from the district representative and review of the June 2012 IEP indicate that the June 2012 CSE considered a December 2011 psychological evaluation; however the hearing record only includes a December 2010 psychological evaluation (Tr. p. 233; Dist. Ex. 10; Parent Ex. I at p. 2).

<sup>12</sup> The hearing record includes two OT progress reports, dated January 2012 and June 2012, two OT evaluations, dated August 2011 and January 2011, an April 2012 related service progress note, a January 2011 speech and language evaluation, and a June 2012 speech progress note; however, it is unclear from the hearing record which of these reports were available to the June 2012 CSE (Dist. Exs. 12; 13; 18; 21; 24; 27; 29). While the NPS director testified that a speech-language and OT report were included in the packet of materials available at the meeting, nothing in the hearing record indicates to which reports she was referring (Tr. pp. 739). In addition, although the parents do not assert a claim on this basis, the hearing record does not include a copy of prior written notice from the district or evidence that such notice had been sent, and I remind the district of its obligation to provide prior written notice consistent with State and federal regulations on the form prescribed for that purpose by the Commissioner (34 CFR 300.503; 8 NYCRR 200.5[a]; see also <http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>). In this instance, inclusion of prior written notice from the district would have clarified this issue, as the district was required to provide written notice to the parents describing "each evaluation procedure, assessment, record, or report the [district] used as a basis for

teacher and related service providers, the parents, and the parents' educational consultant all spoke during the CSE meeting and provided information about the student (Tr. pp. 231, 747-48, 980, 1163-65, 1271-72, 1349-50).

However, notwithstanding the information available to the CSE at the time of the meeting, a review of the hearing record indicates that the present levels of performance contained in the June 2012 IEP were, in large part, copied verbatim from earlier IEPs, including April 2011 IEPs for the 2010-2011 and 2011-12 school years, the August 2011 IEP, and the June 2012 CPSE IEP (compare Parent Ex. I at pp. 5-6, with Dist. Ex. 1 at pp. 5-6, and Parent Exs. J at pp. 5-6; L at pp. 3-4; M at pp. 2-4). Additionally, all of the parent concerns, student strengths, and management needs included in the June 2012 present levels of performance also appeared—word for word—in the prior IEPs (id.).

In addition, a comparison of the June 2012 IEP present levels of academic performance with the evaluative information available to the June 2012 CSE indicates that the June 2012 IEP contained inaccurate and outdated information (compare Parent Ex. I at p. 5, with Parent Exs. C; O at pp. 5-6; N at pp. 2-3). Specifically, the June 2012 IEP present levels of academic performance indicated that the student's cognitive skills fell within the superior range and his self-help and speech-language skills were age appropriate (Parent Ex. I at p. 5). However, the evaluative information considered by the June 2012 CSE indicated that the student's cognitive skills had advanced to the "very superior range" and that although his speech and receptive and expressive language skills continued to be within the age appropriate range, he exhibited deficits in his pragmatic language skills (Dist. Ex. 13 at p. 2; Parent Ex. N at p. 3). Additionally, the June 2012 IEP described the student as being able to identify animals, body parts, and some shapes and colors; follow two-step verbal directions; understand basic qualitative, spatial and temporal concepts; respond to "yes/no" and "wh" questions; make inferences; speak in lengthy phrases; and ask "wh" questions (Parent Ex. I at p. 5). However, the evaluative information available to the June 2012 CSE indicated that the student had strong verbal skills; had mastered advanced language skills such as features, functions, colors, attributes, information, people and actions; was able to answer intraverbal questions;<sup>13</sup> could comment on his environment; could make detailed requests for objects (i.e., asking for the small red ball on the table); could tell multiple functions of an object; and used appropriate language to gain attention (Parent Ex. O at p. 5). Furthermore, the June 2012 IEP present levels of academic performance indicated that the student was in the process of being toilet trained, could wash his hands, and could put on and remove loose clothing independently; however, the evaluative information available to the June 2012 CSE indicated that the student was independent in the bathroom and had learned to initiate when he needed to use the bathroom, as well as that he had learned to dress himself (Parent Exs. I at p. 5; O at p. 6). The June 2012 present levels of academic performance further indicated that the parents were concerned with the student's preoccupation with letters and numbers, his echolalic speech, and that he produced "very little" spontaneous language despite being able to answer direct questions (Parent Ex. I at p. 5). However, the student's mother testified that as of

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the proposed or refused action" (34 CFR 300.503[b][3]; 8 NYCRR 200.5[a][3][iv]).

<sup>13</sup> The hearing record reflects that the ability to answer intraverbal questions meant that the student could "answer questions related to things around him" (Tr. p. 469).

the June 2012 CSE meeting, the student had made progress in his spontaneous language and that the parents were no longer concerned about his echolalic speech (Tr. pp. 1362-63).

Consistent with the evaluative information available to the June 2012 CSE, the June 2012 IEP present levels of social performance indicated, among other things, that the student was beginning to demonstrate some pretend play skills; was beginning to interact more appropriately with his younger brother; was working on functional communication skills including initiating conversations; would follow a written schedule but had difficulty with flexibility; was tantruming less; and had made gains in understanding that others may have thoughts different from his own and in his ability to take the perspective of others (Tr. pp. 741, 748, 1034; Parent Exs. I at p. 5; O at pp. 3-4, 7). As indicated above, the student's strengths as described in the June 2012 IEP appeared verbatim on the previous IEPs; however, they appear to be consistent in part with the evaluative information available to the June 2012 CSE and reflected the student's ability to follow classroom routines; that he was attentive during circle time; and that he had learned songs and finger plays, but did not voluntarily participate (compare Parent Ex. I at p. 5, with Dist. Ex. 1 at p. 5, and Parent Exs. C at pp. 3-4; L at p. 3; M at p. 3; O at p. 2). Additionally, the student's mother testified that the parent concerns included in the June 2012 IEP present levels of social performance were not their primary concerns at the time of June 2012 CSE meeting (Tr. p. 1363; Parent Ex. I at pp. 5-6).

With regard to the student's physical development, a review of the OT reports included in the hearing record indicated that the June 2012 present levels of physical performance directly reflect the information contained in the August 2011 OT evaluation (compare Dist. Ex. 18 at pp. 2-5, with Parent Ex. I at p. 6). Notably, the June 2012 IEP present levels of physical performance reflect that the student's fine motor skills were delayed; he had difficulty sitting, attending, and maintaining an upright posture; he had little awareness of his body in space; he demonstrated difficulty with auditory, vestibular, and touch processing; he had "great difficulty" with modulation; he had been observed to mouth objects; he would spin and twirl frequently; his hand strength was decreased; and he had poor grasping skills (compare Dist. Ex. 18 at pp. 2-5, with Parent Ex. I at p. 6). However, the student's mother testified that the student had made significant progress with mouthing objects, spinning and twirling, and hand strength and grasping (Tr. p. 1364). Furthermore, the June 2012 IEP indicated that the student had difficulty tolerating loud noises and would "crawl away to avoid noise"; however, the student's mother testified that loud noises were no longer a problem for the student and the student had not been crawling for approximately two years (Tr. p. 1364-65).

In the June 2012 IEP, the student's management needs indicated that he "require[d] additional support of special education services to be successful in the regular education classroom" (Parent Ex. I at p. 6). However, the management needs as written in the June 2012 IEP had not changed from the past four IEPs and do not appear to accurately reflect the student's current needs (compare Parent Ex. I at pp. 5-6, with Dist. Ex. 1 at pp. 5-6, and Parent Exs. J at pp. 5-6; L at pp. 3-4; M at pp. 2-4). While the student may continue to require additional support to be successful in a regular education classroom, the June 2012 IEP present levels of performance failed to indicate particular modifications, supports, or strategies that the student required in order to be successful in his educational program (see Parent Ex. I at pp. 5-10).

The June 2012 IEP also indicated that the student required a behavioral intervention plan (BIP) to address interfering behaviors; however, the description of the student's behaviors and the interventions to address those behaviors appears to have been repeated verbatim from the April 2011 IEP for the 2011-12 school year; the August 2011 IEP, and the June 2012 CPSE IEP (compare Parent Ex. I at p. 6, with Dist. Ex. 1 at p. 6; Parent Exs. J at p. 6; L at p. 4). The June 2012 IEP description of the BIP addressed noncompliance, tantrums, and visual and vocal stereotypy by using "facilitation of functional communication," token boards, limiting access to reinforcers, and differential reinforcement of appropriate behaviors (Dist. Ex. 1 at p. 6; Parent Exs. I at p. 6; J at p. 6; L at p. 4). While some of these interventions may still have been appropriate, the June 2012 annual educational evaluation report indicated that the student had improved significantly with noncompliance to the point that the student's ABA service provider was no longer taking data on that behavior, and that the student was "generally compliant;" however, his compliance was not generalized to all adults (Parent Ex. O at p. 3). The June 2012 annual educational evaluation report further indicated that the use of proactive measures—such as transitional warnings, frequent breaks, a session schedule, and established reinforcers—helped to reduce noncompliance (id.). Furthermore, the report indicated that the student's behaviors changed as targeted behaviors became extinguished, for example, when the student's tantrum behavior was extinguished inappropriate vocalizations emerged, and when inappropriate vocalizations were extinguished nonresponsiveness emerged (id. at p. 4).

Based on the aforementioned, I agree with the parent that the June 2012 IEP present levels of performance do not contain accurate information based on the most recent evaluative information that was available to the June 2012 CSE. In some circumstances, a district's failure to adequately describe a student's present levels of performance, alone, is sufficient to rise to the level of a denial of a FAPE (see 20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 103-04 [2d Cir. 2000] [holding that the failure to describe in an IEP some of a student's "major learning difficulties" may constitute a failure to develop a program that is reasonably calculated to confer educational benefits on the student], abrogated on other grounds by Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]; Application of the Dep't of Educ., Appeal No. 12-183; Application of the Dep't of Educ., Appeal No. 12-062; Application of the Dep't of Educ., Appeal No. 09-051). For reasons stated below, however, I need not determine whether the district's failure to adequately reflect the student's current functioning at the time of the June 2012 CSE meeting, alone, rose to the level of a denial of a FAPE in this instance.

### **3. Annual Goals**

Turning to the parents' remaining contentions concerning the annual goals contained in the student's June 2012 IEP, 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 also required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]). Under the IDEA and State and federal regulations, 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][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]).

The June 2012 IEP contained eight annual goals related to speech-language skills, social/emotional and behavioral skills, and motor skills (Parent Ex. I at pp. 7-8). A review of the evidence contained in the hearing record demonstrates that the speech-language goals and the social/emotional and behavioral goals targeted the student's areas of need as identified in the June 2012 program review and observation report, the April 2012 neurodevelopmental evaluation, and the June 2012 annual educational evaluation report, and as described by the student's then-current teacher and related service providers (Tr. pp. 1163-65; 1271-72; 1349; Parent Exs. C at pp. 2-4, 6-7; I at p. 7; N at pp. 5-6; O at pp. 2, 4-6). However, a review of the motor goals recommended by the June 2012 CSE reveals that they were not consistent with the student's needs as identified in the physical development present levels of performance (compare Parent Ex. I at pp. 7-8, with Parent Ex. I at p. 6). While the hearing record is unclear as to the specific evaluative information considered by the June 2012 CSE regarding the student's OT needs, and assuming for the sake of argument that the description of the student in the June 2012 IEP present levels of performance was accurate, the two annual goals recommended by the June 2012 CSE do not adequately address the student's identified needs (*id.*). Specifically, the two annual goals recommended in the June 2012 IEP address the student's ability to work with various textures and his ability to work in the presence of sounds and visual stimulation (Parent Ex. I at p. 7-8). The physical development portion of the June 2012 IEP present levels of performance indicate that in addition to the student's difficulty with touch, vestibular, and auditory processing and modulation, the student had deficits in his fine motor skills, grasping skills, and hand strength as well as an inability to maintain an upright posture and had little awareness of his body in space (Parent Ex. I at p. 6). Furthermore, the June 2012 IEP also indicated that the student needed to improve his grasp and visual motor skills (*id.*). These needs are not adequately addressed in the annual goals recommended by the June 2012 CSE, nor are they otherwise addressed in the June 2012 IEP (Parent Ex. I). Furthermore, the hearing record included a January 2012 OT annual review and a June 2012 OT progress report, which demonstrate that the student continued to exhibit deficits in grasping and fine motor skills, decreased muscular endurance, decreased awareness of his body in space, and weakness in his upper extremities, indicating that these remained significant areas of need for the student (Dist. Ex. 21 at pp. 2-3; Parent Ex. V at pp. 1-2).

With regard to the parents' argument that the June 2012 IEP did not contain any of the goals recommended by the student's ABA service provider, a comparison of the annual goals recommended by CARD to the June 2012 IEP annual goals illustrates that the June 2012 IEP annual goals addressed similar areas and skills (compare Dist. Ex. 31 at pp. 2-5, with Parent Ex. I at pp. 7-8). A review of the recommended goals from CARD indicates that the goals addressed, among other things, social/emotional needs, self-stimulatory behaviors, eye contact during

conversation, flexibility with regard to changes in routine, and conversation maintenance skills (Dist. Ex. 31 at pp. 2-5). Notably, the June 2012 IEP recommended annual goals address improving similar skills such as the student's conversation skills; awareness of others; and ability to use coping skills and express displeasure appropriately (Parent Ex. I at p. 7).

Although the June 2012 CSE developed appropriate annual goals to address the student's speech-language, social/emotional and behavioral needs, the IEP did not provide appropriate annual goals to address the student's OT needs. As detailed above, the June 2012 IEP present levels of performance indicated significant delays in his fine motor and grasping skills, his awareness of his body in space, his inability to maintain an upright posture and his visual motor skills; however, the June 2012 IEP did not include appropriate annual goals or otherwise provide supports or strategies to address those needs.

#### **4. 12:1+2 Special Class Recommendation and LRE Considerations**

The June 2012 CSE recommended that the student be placed in a combined kindergarten and first grade 12:1+2 special class with related services to include: one 60-minute speech-language therapy session per week in a small group, one 60-minute OT session per week in a small group, and one 60-minute parent training session per month in a small group (Parent Ex. I at pp. 1, 8). The June 2012 IEP also indicated that the student would "receive instruction in a special class setting and will be mainstreamed as appropriate" (*id.* at p. 10). The June 2012 CSE rejected a general education kindergarten classroom because the class size would have been too large for the student and the student would have required too much adult support to navigate the school day and be successful in that setting (Tr. pp. 40-41, 255-56, 1167-68, 1290-91, 1441). The parents assert that the recommended 12:1+2 special class placement was not the LRE for the student because he would not have had appropriate access to typically developing peers. In this case, based on the information contained in the hearing record, although a 12:1+2 special class was not a conceptually inappropriate placement for the student had appropriate mainstreaming opportunities been adequately described in the IEP, with hearing record supports the parents' contention that without providing the student with access to his nondisabled peers in the IEP, the recommended program did not meet the mainstreaming requirements set forth in the IDEA.

The IDEA requires that a student's recommended program must 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by

the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit has adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).<sup>14</sup>

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

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<sup>14</sup> The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

With regard to the first prong of the Newington test, as to whether the student could be educated satisfactorily in a general education classroom with supplementary aids and services, testimony presented by both parties indicated that a general education kindergarten classroom would not have been an appropriate placement for the student (Tr. pp. 40-41, 255-56, 263-65, 1172-74, 1381-82). The district representative testified that the student's parents and service providers indicated during the CSE meeting that the student was not ready to attend a general education kindergarten class and the CSE recommended a special class to provide the student with necessary supports (Tr. pp. 255-56). She explained that the CSE did not recommend a general education kindergarten class with the addition of 1:1 support because the extent of the student's reliance on the 1:1 support would have hindered the student's ability to participate in the larger class environment (Tr. pp. 264-65). In a May 2011 psychological evaluation, the evaluator recommended that the student be placed in a "small, highly supportive, language-based special education setting" (Dist. Ex. 14 at p. 12). In an April 2012 private evaluation, the evaluator noted the student would not be ready for kindergarten in September 2012 and recommended that he continue in his prekindergarten class (Parent Ex. N at p. 7). While the parent's private educational consultant also recommended that the student remain in his general education prekindergarten class, she testified that she agreed that a general education kindergarten class in a public school would have been too large for the student at that time (Tr. pp. 1290-91; Parent Ex. C at pp. 14). The parent also testified that the student would have been overwhelmed in a larger class and would have "shut down" (Tr. pp. 150-51). Additionally, although the CARD director testified that the student could be successful in a general education kindergarten classroom with supports and that it would have been more appropriate than a special class, she also testified that even with 1:1 support the student would not have been successful in a district general education kindergarten classroom that contained twice the number of students of his preschool class (Tr. pp. 112-13, 1071-72, 1084-85). She further explained that although the student would have done well with academics in that setting, he would have struggled with making friends and socialization (Tr. p. 113). The student's parents, the private educational consultant, and the student's providers agreed that at the time of the CSE meeting, the student was academically ready for kindergarten but lacked appropriate social skills (Tr. pp. 733-34, 771-72, 828-31, 848, 1039, 1057-58, 1172-73, 1378, 1393). Additionally, while the district representative stated during the June 2012 CSE meeting that a general education kindergarten classroom would have been inappropriate for the student, no one at the CSE meeting objected or indicated that the student should be placed in a general education kindergarten classroom (Tr. pp. 1075-76, 1290-91, 1441-42).<sup>15</sup> Instead, the parents, the student's providers, and the private educational consultant recommended that the student remain in his general education prekindergarten class (Tr. pp. 984-85, 1061-62; Dist. Ex. 31 at p. 2; Parent Ex. C at p. 14).

While I understand the parents' concerns that the student have access to appropriate peer models and at the same time remain in a small class, the district is responsible to exercise reasonable efforts to accommodate the student in a general education classroom with supports, not to create the particular type of general education class desired by the parents (see, e.g., T.M.

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<sup>15</sup> Although the CARD director testified that she believed the student could be successful in a general education kindergarten with supports, she also testified that she did not voice her opinion during the June 2012 CSE meeting (Tr. pp. 1071-72, 1075-76).

v. Cornwall Cent. Sch. Dist., 900 F.Supp.2d 344, 352 [S.D.N.Y. 2012] [holding that a district "is not obligated to create [a particular program] simply to satisfy the LRE requirements of the IDEA"). In addition, although small class size alone does not constitute special education within the meaning of the IDEA, courts have considered it in analyzing the appropriateness of a recommended program and, as detailed above, in this instance there was sufficient evidence in the hearing record to support the June 2012 CSE's determination that in order to make progress the student required a smaller class size than what would have been available in a general education kindergarten classroom (see Frank G. v. Board of Educ., 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., [S.D.N.Y. March 21, 2013] [evidence in hearing record supported SRO's decision that student could have obtained an educational benefit in a class size as set forth in the IEP]; T.M., 900 F.Supp.2d at 354-55 [finding that class size alone does not necessarily outweigh other considerations with regard to whether a student was offered a FAPE]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \* 10-\*11 [S.D.N.Y. October 12, 2011] [in analyzing LRE the court found that although a class size of 30 students may not have been preferred, it fulfilled the student's educational needs while mainstreaming him in a regular education class to the maximum extent possible]). In this instance, there was no information in front of the CSE to suggest that the student could have been successful in a class the size of the district's general education classrooms; therefore it was reasonable for the CSE to determine that a district kindergarten classroom would have been too large for the student to make progress, even with supports, and was justified in recommending a special class placement for the student.

However, upon review the district's offered program does not meet the second prong of the Newington test, as to whether the district included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120). Although, as stated above, the student would have had difficulty functioning in a district general education kindergarten classroom, evidence in the hearing record suggests that the student needed access to appropriate peer models (i.e., regular education students) in order to develop appropriate social skills (Tr. pp. 717, 1139-42, 1171, 1370-71). Contrary to the student's needs and the strong preference for educating student's alongside their nondisabled peers, according to the June 2012 IEP the student would have been in a "non-integrated" setting for the entirety of the school day, as the June 2012 IEP provided for instruction in a 12:1+2 special class and for speech-language therapy and OT in "non-integrated" settings (Parent Ex. I at p. 8). Although the IEP also indicated the student would be "mainstreamed as appropriate," the IEP does not otherwise describe at all how the student would have been mainstreamed or for how much of the school day he would have been educated alongside his nondisabled peers (Parent Ex. I at p. 1-2, 5-10).

In order to make up for the deficiency in the June 2012 IEP, the district provided abundant after the fact testimony explaining how the student could have been mainstreamed in the recommended 12:1+2 classroom (Tr. pp. 267-69, 315-18, 377-78, 440-43, 451-52, 489-90, 509-10, 623-29, 631-40). However, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision" (R.E., 694 F.3d at 187). Therefore, in reviewing the program offered to the student, the focus of the inquiry is on the

information that was available at the time the June 2012 IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; D.A.B. v New York City Dept. of Educ., 2013 WL 5178267, at \*12 [S.D.N.Y. Sept. 16, 2013] [same]). In this instance, the information provided to the parents at the time of the June 2012 CSE meeting was not sufficient to support the district's later assertions that the student would have been educated alongside his nondisabled peers to the maximum extent appropriate (Tr. pp. 321, 1032, 1180, 1355-56). The district representative testified that at the time of the June 2012 CSE meeting, she described the 12:1+2 special class as a class that would be "paired with" and "spend time in" a kindergarten class, and that they hoped to increase the amount of time in the kindergarten class as the year went on (Tr. pp. 319-21). The CARD representative testified that mainstreaming opportunities for students in the 12:1+2 class were mentioned but the specifics of those opportunities were not discussed (Tr. p. 1032). Additionally, the private educational consultant testified that the CSE indicated the student could attend a general education class for literacy class (Tr. p. 1180). The student's mother testified that the June 2012 CSE discussed that there would be opportunities for students to "join portions of the day" in specials (such as art or music) or in literacy, based on whether or not they are able to "handle being in the mainstream," but the CSE never discussed specifically how the student would have been mainstreamed (Tr. pp. 1355-56).

Based on the student's needs and abilities, a 12:1+2 special class was not necessarily inappropriate; however, due to the district's failure to describe the extent to which the student would be educated alongside nondisabled students as of the time of the placement decision—either in the June 2012 IEP or during the June 2012 CSE meeting—the district has failed to meet the second prong of the Newington test and has not established that it provided the student with a placement in the LRE (see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 654-55 [S.D.N.Y. March 31, 2011] [second prong of Newington test not met where student's IEP did not include a mainstreaming component]).

### **C. Public School Site—Functional Grouping**

The parents also argue that the proposed classroom at the public school site was inappropriate due to the grouping of the other students within the class as set forth in a class profile provided to the parents during the CSE meeting. Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*14-\*16 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]

[explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at \*19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13, 2013 WL 1234864 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. However, since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x. at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective (see, e.g., C.L.K., 2013 WL 6818376, at \*13). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school

would not have been able to implement the IEP is "entirely speculative"; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]. Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at \*6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (*id.*, quoting R.E., 694 F.3d at 187 n.3).

In this instance, the parents rejected the district's placement by letter dated August 2, 2012 and notified the district of their intention to enroll the student in a typical school with 20 hours per week of 1:1 ABA/SEIT services as well as additional related services (Parent Ex. AA at p. 1). Normally under these circumstances, where the parents rejected the June 2012 IEP prior to the time the district became obligated to implement it, claims that the district would have failed to implement the June 2012 IEP would require a retrospective analysis of how the district would have executed the student's June 2012 IEP at the assigned public school site and would not be an appropriate inquiry (K.L., 530 Fed. App'x at 87, 2013 WL 3814669; R.E., 694 F.3d at 186, 195; A.M., 2013 WL 4056216, at \*13; R.C., 906 F. Supp. 2d at 273). However, considering that the district provided the parents with a class profile during the June 2012 CSE meeting, identifying specific details regarding the class the student would have been enrolled in at the public school as of the start of the 2012-13 school year, the parents' claims relating to the class profile may not be entirely retrospective and speculative (see F.L., 2014 WL 53264, at \*2, \*6 [leaving open the question as to whether parents are entitled to rely on information outside of the written plan provided by the district at the time of the placement decision]). However, in R.E., the Second Circuit also acknowledged that some information is inherently speculative in noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP (R.E., 694 F.3d at 187, 192). Generally, the identification of the particular students in a proposed classroom is the same type of information as the identification of a specific teacher of the classroom, to the extent that, like a teacher, a district cannot guarantee that a particular student will not relocate or otherwise become unavailable (see R.E., 694 F.3d at 187; Cerra, 427 F.3d at 194 [the IDEA does "not expressly require school districts to provide parents with class profiles"]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*11 [S.D.N.Y. Feb. 20, 2013] [the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). However, in an abundance of caution, I address the parents' claims related to whether the student would have been grouped appropriately with the other students listed on the class profile provided to the parents during the June 2012 CSE meeting.

The parents assert that because the student was cognitively in the superior range he would not have been appropriately grouped with students with low-average to average cognitive ability. In addition, the parents assert that the student would not have had appropriate peer models

because the other students had social/emotional and behavioral needs.<sup>16</sup> State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]).

According to evidence contained in the hearing record, the 12:1+2 special class recommended for the 2012-13 school year was a combined kindergarten and first grade class (Tr. p. 256; Parent Ex. D).<sup>17</sup> The district special education teacher testified that the 12:1+2 special class was designed to support students who have higher cognitive abilities, but also have social/emotional and behavioral difficulties (Tr. p. 367). The class profile indicated that the students' IQs ranged from low average to very superior and the academic skills range was low average to above average, with the majority of students in the average range (Parent Ex. D). All of the students included in the class profile were described as having delayed play and social skills and 9 of the 10 students were described as having sensory motor and/or fine motor delays (id.). The management needs described on the class profile indicated that the students ranged from minimal behavioral needs to maximum needs, requiring "limits clearly set" (id.). The class profile described the student as having a very superior IQ with above average academic skills, delayed play and social skills, delayed sensory and fine motor skills and needing moderate assistance to participate in activities (id.). The description of the student when compared to the other students included on the class profile indicated that he fell within the high end of the ranges provided which would have placed him with suitable peers who had similar individual needs (id.). Accordingly, the hearing record does not support a conclusion that the student was denied a FAPE based on the grouping of the students according to the class profile provided to the parents at the time of the June 2012 CSE meeting.

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<sup>16</sup> While I understand the parents' concerns with having the student placed in a classroom with students exhibiting similar social/emotional needs, and thus lacking peer models, I note that if the district had provided for appropriate access to regular education students in the IEP, the student would have had access to peer models during his mainstreaming opportunities. Accordingly the parents' claims regarding the student having access to appropriate peer models is more appropriately related to the district's failure to place the student in his LRE as discussed above, rather than the grouping of the students in the recommended 12:1+2 special classroom.

<sup>17</sup> Although the student would have been the youngest student in the class, the hearing record contains no indication that the student would have been grouped inappropriately or in violation of State regulations in terms of chronological age (Parent Ex. D; see 8 NYCRR 200.6[h][5]).

## D. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S., 231 F.3d at 104). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

As an initial matter, the parents seek reimbursement for a package of services for the student's 2012-13 school year, including (1) 40 hours per week of 1:1 ABA services;<sup>18</sup> (2) ABA supervision and parent training; (3) placement in a typical prekindergarten classroom; (4) two 45-minute sessions per week of 1:1 speech-language therapy; and (5) three 45-minute sessions per week of 1:1 OT (Parent Ex. H at p. 6). However, upon review, there is no evidence in the hearing record indicating that the student received speech-language therapy during the 2012-13 school year.<sup>19</sup> In addition, the only reference to OT during the 2012-13 school year is the testimony that the student received one session of OT per week outside of school (Tr. pp. 155-56).<sup>20</sup> Accordingly, the services that are considered the parents' unilateral placement for purposes of this appeal are the 40 hours per week of 1:1 ABA services and the student's placement at the NPS.

During the 2012-13 school year the student attended the NPS in a classroom consisting of ten students in a general education prekindergarten classroom (Tr. pp. 71, 144). The student also continued to receive 1:1 ABA services during the school day and at home (Tr. pp. 72, 1371-72). The district objects to the parents' placement of the student at the NPS and asserts that the NPS is not an appropriate placement because it did not provide special education services or academic instruction. Pertinently, the parents need not show that the placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at \*9). As set forth in greater detail above, the parents had rejected the district's program, at least in part, due to the district's failure to recommend a program in the student's LRE (Parent Ex. AA at p. 1). Considering the district's failure, the parents' decision to place the student at the NPS in a general education prekindergarten classroom with the additional support of 1:1 ABA services was designed to meet the student's unique needs, as it allowed the student

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<sup>18</sup> Although the parents' due process complaint notice indicated that they were seeking 40 hours per week of 1:1 ABA services, the parents' ten-day notice to the district only indicated that they intended to provide the student with 20 hours per week of 1:1 ABA services (Parent Exs. H at p. 6; AA at p. 1).

<sup>19</sup> Regarding the student's speech-language needs, although the record does not include any evidence regarding speech-language therapy, I note that the student's ABA providers worked on a variety of skills that could also have been addressed by a speech-language pathologist. Specifically, the student was working on identifying emotions; following multiple step directions; improving his conversation skills; improving his requesting skills; understanding another person's intentions; oral motor skills; peer play; identifying feelings; identifying other people's preferences; and sequencing (Dist. Ex. 31 at pp. 9-11). Furthermore, the April 2012 CARD recommendations and IEP goals included recommended annual goals and benchmarks for the 2012-13 school year that were designed to continue to address and build on these skills (Dist. Ex. 31 at pp. 4-9). The recommended annual goals addressed, among other things, improving the student's conversation skills; improving his ability to accept peers' choices for activities; maintaining eye contact in social situations; playing appropriately with his baby brother; inviting peers to play based on the peers' preferences; and participating in group songs (Dist. Ex. 31 at pp. 3-9).

<sup>20</sup> Although the parents provided the student with one session per week of OT, pursuant to pendency the district was required to provide the student with two individual 45-minute OT sessions per week, as discussed further below.

access to his nondisabled peers and provided a small class size, as recommended by private evaluators (Tr. pp. 1440-41; Parent Ex. C at p. 14, N at p. 6).<sup>21</sup>

In addition, although, the student's class at the NPS may not have been as academically oriented as a kindergarten classroom, it did provide the student with opportunities for learning (Tr. pp. 114, 269-70, 797-800). The NPS director testified that because the student was reading, his teacher would provide him with opportunities to read to the class and would give him books on topics that interested him, which he was allowed to read on his own during "library time" (Tr. p. 797). The director indicated that reading to the class not only provided the student with an opportunity to read, but also to work on his social skills, sharing his reading with the class (Tr. pp. 797-98). She further indicated that reading activities were built into the class schedule to provide the student with opportunities to read to the class (Tr. pp. 798-99). The director also indicated that the student was provided with opportunities to work on his math skills (Tr. p. 799). At the beginning of the school year, when the other students were not able to participate in calendar activities (e.g., days of the week, the month, the year), the student was "the calendar helper" and would count and cross off the days for the other children (*id.*). As the other students began developing calendar math skills, the teacher began creating math problems and mathematical equations so the student could use his number skills (Tr. pp. 799-800). Overall, while the student may not have received the same academic instruction he would have received in a kindergarten classroom, the hearing record indicates that the NPS individualized its program to provide the student with opportunities for learning (Tr. pp. 269-70, 797-800, 1392).

The hearing record also indicates that during the 2012-13 school year, with the support of a 1:1 ABA service provider, the student made progress, his social/emotional skills improved, and he became more independent. The CARD representative testified that by the end of the 2012-13 school year, the student did not need as much support from his ABA provider, he generalized knowledge taught in the 1:1 home setting to the school setting, his desire to please people had improved, his social cognition improved, he was more independent, he was able to sit and attend for longer periods of time, he was able to initiate and maintain an entire conversation, his ability to shift attention had improved, and his interactions with peers had improved (Tr. pp. 966-78). After another observation in May 2013, the private educational consultant reported seeing improvement in the student's interactions with peers, social/emotional skills, attending, and play skills (Tr. pp. 1156-61). Specifically, she indicated that the ABA provider was able to fade across the room, and to provide support only when the student needed it; in addition, the student had improved in his ability to interact and initiate with peers, was telling jokes and reciting poems, and the other students were "very engaged and laughing and talking to him" (Tr. p.

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<sup>21</sup> The district also argues that the parents' unilateral placement of the student at the NPS was not in the student's LRE because a private school placement is more restrictive than placement in a public school. Initially, I note that although the analysis regarding a student's LRE is applicable to unilateral placements, the purpose of an LRE analysis is to assess the extent to which a student will have access to nondisabled peers or whether the student can be educated in the school that he or she would otherwise attend if not disabled (34 CFR 300.116[c]; 8 NYCRR 200.4[d][4][ii][b]; Newington, 546 F.3d at 112, 120-21). In addition, the district's arguments regarding LRE appear to be misguided, as a unilateral parental placement will, almost necessarily, be placement in a nonpublic school, and in this instance the parents corrected a deficiency in the district's offered program by placing the student in a general education classroom with access to nondisabled peers at the NPS (see Berger, 348 F.3d at 523 [for a unilateral private placement to be appropriate, it must "provide some element of special education services in which the public school placement was deficient"]).

1161). The private educational consultant also reported that during play time the student did not get frustrated or whine, his tolerance for peers had improved, and he was able to cope with social interactions (Tr. p. 1158-59). The director of the NPS also reported that while the student exhibited an increase in interfering behaviors and difficulty with transitions in the beginning of the 2012-13 school year, he made progress over the course of the year (Tr. pp. 790, 793). Notably, she reported that the student was able to sit through circle time, follow the classroom schedule, transition from one activity to another without tantrums, have more conversations with other children; and made more eye contact (Tr. pp. 792-97). Finally, the student's mother indicated that the student had improved in many areas discussed above, as well as showing an interest in his play dates and was also showing a preference for certain friends (Tr. p. 1372-73). She further reported that the student was able to participate in a sing-along and finger plays at his graduation (Tr. p. 1373).

While progress in a unilateral placement is not dispositive, it is a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522, and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). Considering the student's progress in the unilateral placement, which included placement in a general education prekindergarten class and the support of a 1:1 ABA teacher, and considering that the program allowed the student to be educated alongside his nondisabled peers—a significant feature that was missing from the district's program—the parents' placement was appropriate.<sup>22</sup>

### **E. Equitable Considerations**

Having determined that the program provided by the parents was appropriate to address the student's needs during the 2012-13 school year, I now consider whether equitable considerations warrant a reduction in tuition reimbursement. The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see T.M. v. Kingston City Sch. Dist., 891 F. Supp. 2d 289, 295 [N.D.N.Y. 2012]; J.P. v. New York City Dep't of Educ., 2012 WL 359977, at \*13-\*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at \*10; S.W., 2009 WL 857549, at \*13-14; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; see also Frank G., 459 F.3d at 363-64; Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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<sup>22</sup> As the parents did not challenge the program recommended for the student by the June 2012 CPSE for services to be provided during summer 2012, reimbursement is warranted only for that portion of the costs of the student's tuition at the non-public school relating to the ten-month 2012-13 school year.

The district contends that equitable considerations should preclude or diminish an award of relief in this case because the parents did not intend to enroll the student in a public school placement. Upon review, the hearing record does not support the district's assertion. The parent's entered into a contract with the NPS for the 2012-13 school year in February 2012, four months prior to the June 2012 CSE meeting; however, the contract provided that the parents could withdraw the student from the NPS at any time prior to June 30, 2012 without penalty other than the loss of their deposit (Parent Ex. X). In addition, the parents testified that they came to the June 2012 CSE meeting with an open mind and were willing to consider the placement recommended by the June 2012 CSE (Tr. pp. 1357, 1382). The parents visited the proposed public school on June 24, 2012, prior to the time they were obligated for the full tuition at the NPS (Tr. pp. 1382-83; Parent Ex. X). Finally, the parents properly notified the district, by letter dated August 2, 2012, of their intention to place the student privately and seek reimbursement from the district for the costs of the student's program, and specifically identified the student's need for a mainstream environment as their reason for rejecting the offered program (Parent Ex. AA at p. 1).

Based upon the evidence contained in the hearing record, the parents acted reasonably under the circumstances of this case and did nothing to hinder the district from developing an appropriate IEP. In addition, the district did little, equitably speaking, to better its position, such as by voluntarily holding an additional CSE meeting (or offering to modify the IEP without a meeting) to increase the chances of satisfactorily addressing the parent's concerns with the IEP.<sup>23</sup> Had the district done so and the parents then refused appropriate corrections to the IEP, the district's argument that the parents did not intend to enroll the student in a public school might have been more convincing. Therefore, equitable considerations weigh in favor the parents overall and justify an award of tuition reimbursement under the circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at \*8-\*9 [S.D.N.Y. Jan. 3, 2013]; B.R., 910 F. Supp. 2d at 679-80; R.K. v. New York City Dep't of Educ., 2011 WL 1131522, at \*4 [E.D.N.Y. Mar. 28, 2011]).

## **F. Appeal on Pendency**

The district appeals from the February 2013 interim IHO decision determining that the student's pendency placement consisted of 20 hours per week of 1:1 ABA/SEIT services and two forty-five minute sessions of individual OT per week (Interim IHO Decision at pp. 8-9).

### **1. Timeliness of Appeal**

The parents assert that the district failed to timely initiate its appeal from the interim IHO decision. An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]).

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<sup>23</sup> To be clear, a CSE is not required to reconvene simply because a parent provides 10-day notice identifying concerns with an offered program; however, when a parent has provided a 10-day notice window—which was envisioned as providing public schools with an opportunity to cure deficiencies in the IEP—and the district makes no attempt at all to do so, such inaction does nothing to enhance a district's position in the weighing of equitable factors.

Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by a State Review Officer (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).<sup>24</sup>

A petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the IHO's decision was served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]). The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]; see 8 NYCRR 279.2). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). State regulations provide an SRO with the authority to dismiss sua sponte an untimely petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see, e.g., Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service of the petition on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for

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<sup>24</sup> Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

In the present case, this appeal was not initiated within the timelines prescribed in Part 279 of State regulations. The IHO's decision is dated February 4, 2013 and was transmitted to the parties by electronic mail that same date (Interim IHO Decision at p. 9; see March 19, 2013 Parent Mem. of Law Ex. AA). As such, the regulatory exception permitting the exclusion of the date of mailing and the four days subsequent thereto is not applicable in calculating the 35-day period within which timely service of the petition could be effectuated; therefore, the petition was required to be personally served on the parent no later than March 11, 2013, a Monday (8 NYCRR 279.2[c]).<sup>25, 26</sup> By letter to this office dated March 12, 2013, the district requested permission for alternative service upon the parents, which request was granted by letter dated March 12, 2013 authorizing service by affixing the appeal papers to the door of the parents' residence and mailing a copy via certified mail. The petition includes two affidavits of service, both dated March 12, 2013, indicating that the district served the parents utilizing the alternative means of service set forth in the March 12, 2013 letter: the first affidavit indicates service on the parents by certified mail on March 12, 2013; the second indicates service on the parents by affixing a copy of the notice of petition and petition to the door of the parents' residence on March 12, 2013 (March 12, 2013 District Affs. of Service). Accordingly, service of the petition on March 12, 2013 was untimely, in that it was one day late. In addition, although the district requested permission to effectuate service by alternative means, the district did not request permission, either at that time or in its petition, to extend the time for service of the appeal papers. While the district asserts in its reply that its attempts to serve the parents on March 11, 2013, the last day the appeal could have been timely served, should be considered good cause for its failure to timely serve the appeal papers, I note that the district did not contact the parents'

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<sup>25</sup> Although the district suggested in a letter to this office dated March 12, 2013 that the appeal was timely because the calculation of the 35-day time period began on February 5, 2013, the district has not asserted that position in its reply and admits that service on March 12, 2013 was untimely, as it was made on the 36th day from the IHO's February 4, 2013 decision.

<sup>26</sup> I note that in addition to an appeal from an IHO's interim decision on pendency, pursuant to 8 NYCRR 279.10(d), a party may seek review of "any interim ruling, decision or refusal to decide an issue" in an appeal from the final decision of an IHO. However, in this instance, the district has not appealed or cross-appealed from the IHO's final decision and 8 NYCRR 279.10(d) does not provide a party with an extension of the timeline to file an appeal from an interim decision through the time to file an appeal from the IHO's final decision.

attorney or this office until March 12, 2013, by which point the appeal was already untimely. In this instance, the district has not raised sufficient good cause to excuse the district's failure to timely effectuate personal service of the petition on the parents (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 13-cv-3499, at pp. 9-12 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late and noting that it was foreseeable that difficulties might arise when attempting to effectuate service on the day service was due]). Therefore, because the district did not effectuate timely service upon the parents, the appeal must be dismissed.

## 2. Pendency

Notwithstanding the above determination that the district's appeal is dismissed for failure to timely serve the petition on the parents, upon review of the hearing record and the parties' arguments the appeal must also be dismissed on the merits.

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]; 8 NYCRR 200.16[h][3][i]; 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. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 08-009). 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] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require that a student 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, 753-54, 756 [2d Cir. 1980]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at \*6 [S.D.N.Y. Jan. 31, 2012]; Application of the Bd. of Educ., Appeal No. 99-90; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), 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). However, even though a change in location does not necessarily constitute a change of placement, "parents are not free to unilaterally transfer their child from one school to another" (Application of the Bd. of Educ., Appeal No. 00-073; see Ambach, 612 F. Supp. at 235). Furthermore, the pendency provisions of the State Regulations do not require that a student who has been identified as a preschool student with a disability remain in a preschool program for which he or she is no longer eligible for reasons of age pursuant to Education Law § 4410 (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]).

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]; Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 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 United States Department of Education (DOE) 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 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, 290 F.3d 476, 483-84 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

The Second Circuit has described three variations on the definition of "then current educational placement:" (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163; see Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625-26 [6th Cir. 1990]; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4069299, at \*4 [S.D.N.Y. Aug. 7, 2012]; Application of a Student with a Disability, Appeal No. 09-125; Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006). Additionally, if a "private school placement funded by the school district is the pendency placement, then the school district must continue to pay for that placement for the duration of the proceedings regardless of the final outcome of the dispute" (T.M., 2012 WL 4069299, at \*4; see Zvi D., 694 F.2d at 906, 908; Vander Malle v. Ambach, 673 F.2d 49, 52 [2d Cir. 1982]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at \*1, \*6, \*8-\*9 [S.D.N.Y. Mar. 17, 2010]; Ambach, 612 F. Supp. at 233-34).

In this instance the parties agree that the student's pendency services should be 20 hours per week of 1:1 special education teacher support and two 45-minute sessions of OT per week, which were the services provided by the district pursuant to the student's last agreed upon IEP (IHO Exs. 4 at p. 2; 5 at p. 2).<sup>27</sup> However, the district asserts that it does not have to deliver the pendency services at the NPS because the student aged out of the jurisdiction of the CPSE into the jurisdiction of the CSE.<sup>28</sup> The district's position is contrary to previous decisions of SROs, who have long noted that the IDEA makes no distinction between preschool and school-age

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<sup>27</sup> Although neither copy of the August 2011 IEP included in the hearing record fully details the services provided by the district, both parties agree that the student's last agreed upon placement was 20 hours per week of ABA/SEIT services at school and at home and two 45-minute sessions of individual OT per week at a separate facility (Dist. Ex. 1 at pp. 1, 2, 11; Parent Ex. K at pp. 1, 2, 11).

<sup>28</sup> It should be noted that the district does not argue that the student's 2012-13 class at the NPS is not comparable to the student's 2011-12 class, except to the extent that the student should have been moved from preschool into kindergarten due to his age.

children, and that even if a student is no longer eligible to remain in a particular preschool program, the district remains obligated to provide the student with "comparable special education services during the pendency of an appeal from the CSE's recommendation for [the student's] first year of education as a school age child" (Application of a Child with a Disability, Appeal No. 03-032; see Application of the New York City Dep't of Educ., Appeal No. 10-112; Application of a Child with a Disability, Appeal No. 02-095; Application of a Child with a Disability, Appeal No. 01-023; Application of a Child with a Disability, Appeal No. 00-063; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-48; Application of a Child with a Disability, Appeal No. 94-33; see also Makiko D. v. Hawaii, 2007 WL 1153811, at \*10 [D. Haw. Apr. 17, 2007]; Laster v. Dist. of Columbia, 394 F. Supp. 2d 60, 65-66 [D.D.C. 2005]). In addition, the United States Department of Education has stated that federal regulations require a district to continue to provide special education and related services which it had previously provided to a student in a preschool day care program during the pendency of a challenge by the student's parents to the district's offer of a kindergarten placement to the child (Letter to Harris, 20 IDELR 1225 [OSEP 1993]). The district has not offered a sufficient legal basis to depart from these long-standing principles. In this instance, the last agreed upon IEP provided for the student's 1:1 ABA/SEIT services to be provided at "home/school," and his OT at a "facility" (Dist. Ex. 1 at p. 11). According to testimony, the student received 1:1 ABA/SEIT services at the NPS for the entire time he attended his preschool program and the remainder of the 20 hours were delivered at the student's home (Tr. pp. 25-28, 72-73; but see Tr. pp. 1371-72). It is also relevant to my analysis that the parents were not yet required to send the student to school, as he had not yet reached compulsory education age during the 2012-13 school year (see Educ. Law §3205[1][a] ["each minor from six to sixteen years of age shall attend upon full time instruction"]). Considering that the district had previously provided the student with services at the NPS and at a separate facility, and further considering that the student had not yet reached compulsory education age, the district is required under pendency to continue to provide the special education and related services it had previously provided the student in the student's prekindergarten classroom.

For the forgoing reasons, I agree with the IHO that the student is entitled to a pendency placement consisting of 20 hours of 1:1 ABA/SEIT services per week to be delivered at the NPS and two 45-minute sessions of individual OT per week, retroactive to the beginning of the ten-month 2012-13 school year.<sup>29</sup> It appears from the hearing record that during the pendency of this proceeding, despite the IHO's order, the district failed to implement the student's pendency placement and the parents have provided the student with 20 hours of 1:1 ABA/SEIT services per week and one 45-minute session of individual OT per week at their own expense. When a district wrongfully fails to provide pendency services and the parents privately secure those services, pendency requires the district to continue paying the providers chosen by the parents (T.M., 2012 WL 4069299, at \* 9). Additionally, compensatory education is warranted for services that the district unlawfully fails to provide (Student X, 2008 WL 4890440 at \*23-\*24). Accordingly, the parents' are entitled to reimbursement for the services they provided and to compensatory education to make up for the additional OT session that the student did not receive during the pendency of these proceedings.

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<sup>29</sup> Prior to the ten-month school year, the student was still eligible for services as a preschool student with a disability and received services under the auspices of the CPSE and the June 2012 CPSE IEP, which the parents did not challenge in their due process complaint notice (Parent Exs. H; J; see Educ. Law §§ 3202; 4410[1][i]).

## G. Relief

Having determined that the parents' unilateral placement was appropriate for the student for the 2012-13 school year and that equitable considerations do not bar an award of tuition reimbursement, the inquiry in this case does not end there, because in addition to the 1:1 ABA support the student received in his educational environment at the NPS, the parents seek an additional 15-20 hours per week of at home 1:1 ABA instruction (Parent Ex. H at p. 6). While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the [IDEA] requires"). Similarly, "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are per se [reimbursable]; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA" (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]).

In this matter, there is insufficient evidence in the hearing record to indicate that during the 2012-13 school year the parents' provided, or the student benefited from, the two 45-minute per week sessions of 1:1 speech-language therapy or the three 45-minute per week sessions of 1:1 OT requested by the parents' in their due process complaint notice (Parent Ex. H at p. 6).<sup>30</sup> There is also insufficient evidence to indicate that the home-based 1:1 ABA services were

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<sup>30</sup> To the extent that the parents seek reimbursement for "ABA supervision, parent training and team meetings provided by a board certified behavior analyst," although the parents do not specify the particular services provided during the 2012-13 school year, I note that pursuant to State regulations the district was required to provide for parent training for the purpose of enabling the parents to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Accordingly, reimbursement is appropriate for parent counseling and training sessions provided to the parents during the 2012-13 school year. Although the hearing record indicates that the parents received between four and eight hours of these services per month, and that they were appropriate for the student (Tr. pp. 549-50, 1000-01, 1376); there is no indication in the hearing record that amount was necessary for the student to receive educational benefit from his unilateral placement. Accordingly, the district will be directed to reimburse the parents for up to one hour per month of such services.

necessary for the student to receive educational benefits from his school-based program. Although the parents' educational consultant testified that the student was taught skills at home that he would then generalize into the classroom, the hearing record does not explain why those skills were not being taught to the student during the school day (Tr. pp. 1124-25, 1154). 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 environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir. 1991]). In this instance, although the student is generalizing skills from home into the school environment, the hearing record indicates that the ABA therapists used the home-based time for 1:1 instruction and faded back from the student during the school day; there is no indication that the ABA instructors could not have taught the student during the school portion of the day (Tr. pp. 969-75). It should also be noted that in the parents' August 2, 2012 letter to the district, rejecting the district's program, the parents only requested 20 hours per week of 1:1 ABA services, rather than the 40 hours per week they requested in the due process complaint notice (compare Parent Ex. X at p. 1, with Parent Ex. H at p. 6).<sup>31</sup> The district will be required merely "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; C.B., 635 F.3d at 1160). Reimbursement does not require maximization of the student's potential, although the parents can of course choose to provide extra services on their own (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Under the circumstances herein, the hearing record, as a whole, does not support the conclusion that the requested home-based ABA services or level of speech-language therapy and OT were required under the IDEA for the student to benefit from special education, and I conclude that an appropriate remedy for the district's failure to offer the student a FAPE does not require the district to reimburse the parents for those services (see Luke P., 540 F.3d at 1152-53; L.B. v. Nebo Sch. Dist., 379 F.3d 966, 979 n.18 [10th Cir. 2004] [whether the student required the entirety of the home-based services to succeed in the private placement is an appropriate equitable consideration]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996] ["The appropriate amount (of reimbursement) thus bears a relationship to the quantum of services that the state would have been required to furnish"] [emphasis added]; J.P. v County Sch. Bd., 447 F. Supp. 2d 553, 591 [E.D. Va. 2006], rev'd on other grounds 516 F.3d 254 [4th Cir. 2008] [the district "must reimburse the parents for the reasonable costs of educating (the student) at the (private school) and any related services and accommodations that would have been covered under the IDEA had (the district) provided (the student) with an appropriate education"] [emphasis added]).<sup>32</sup>

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<sup>31</sup> The parents also testified that beginning January 1, 2013, they received funding for the home-based portion of the ABA services through their insurance carrier, and are only seeking funding for the home-based portion of the services from September through December 2012 (Tr. pp. 1383-84).

<sup>32</sup> This is not to imply that, in every instance in which a parent provides services which are not strictly necessary for the student to attain educational benefit, reimbursement will be improper (see Bd. of Educ. v. Gustafson, 2002 WL 313798, at \*6 [S.D.N.Y. 2002] ["Receiving more services than required does not automatically mean that full tuition reimbursement should be denied"]).

## VII. Conclusion

Based on the inadequacies in the student's present levels of performance and the annual goals identified in the June 2012 IEP, and based on the district's failure to recommend a program in the student's LRE, the totality of the evidence in the hearing record supports a finding that the district failed to offer the student a FAPE for the 2012-13 school year (Newington, 546 F.3d at 119-20; M.S., 231 F.3d at 103-04; J.G., 777 F.Supp.2d at 654-55; see also Karl v. Bd. of Educ., 736 F.2d 873, 877-78 [2d Cir. 1984]). The hearing record further supports a finding that the parents' placement of the student at the NPS along with the support of a 1:1 ABA provider was appropriate to address the student's needs and that equitable considerations do not preclude awarding the parents the relief requested (Gagliardo, 489 F.3d at 115; Berger, 348 F.3d at 522; Rafferty, 315 F.3d at 26-27). In addition, due to the district's failure to initiate its appeal from the IHO's February 2013 pendency order in a timely manner, I exercise my discretion and dismiss the petition (S.H., 13-cv-3499, at pp. 9-12; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at \*5 [N.D.N.Y. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at \*5 [N.D.N.Y. Dec. 19, 2006] [upholding dismissal of an untimely petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]). Nevertheless, I also find that the parents were entitled to the pendency services awarded by the IHO and dismiss the district's appeal of the IHO's February 2013 pendency order on the merits (T.M., 2012 WL 4069299 at \* 9; Student X, 2008 WL 4890440 at \*23-\*24)

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

**THE APPEAL IN NO. 14-008 IS SUSTAINED TO THE EXTENT INDICATED.**

**THE APPEAL IN NO. 13-041 IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated December 9, 2013 is modified, by reversing that portion which determined that the district offered the student a FAPE for the 2012-13 school year; and

**IT IS FURTHER ORDERED** that pursuant to pendency, the district shall reimburse the parents for the cost of 20 hours per week of 1:1 ABA services and two 45-minute sessions of OT per week, retroactive to the beginning of the ten-month 2012-13 school year throughout the pendency of these proceedings; and

**IT IS FURTHER ORDERED** that pursuant to pendency, the district shall provide the student with one 45-minute session of OT per week as compensatory services for each week that the district failed to provide the student with his pendency entitlement; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for the cost of the student's tuition at the NPS for the 2012-13 ten-month school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for the cost of one one-hour session per month of parent counseling and training sessions attended by the parents during the 2012-13 school year upon presentation of satisfactory proof of payment.

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

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