



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-024

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Offices of Regina Skyer and Associates, attorneys for petitioners, Jamie Chlupsa, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Diane da Cunha, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2011-12 school year was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (Tr. pp. 20, 39-40; Dist. Ex. 1 at p. 1; see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The parents first enrolled the student in the Rebecca School during the 2008-09 school year (see Tr. p. 463), and had previously commenced a due process proceeding against the district with regard to the 2010-11 school year (see Parent Ex. B).

On February 14, 2011, the CSE convened for the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 1 at p. 1). The February 2011 CSE recommended

a 12-month placement in a 6:1+1 special class in a specialized school with a 1:1 crisis management paraprofessional together with related services (Tr. p. 464; Dist. Ex. 1 at pp. 1, 15).

In a decision dated May 16, 2011, an IHO awarded tuition reimbursement to the parents for the 2010-11 school year at the Rebecca School (Parent Ex. B at p. 23).

In a final notice of recommendation (FNR) dated June 10, 2011 to the parents, the district summarized the February 2011 CSE's recommendations and notified them of the school to which the student would be assigned for the 2011-12 school year (Dist. Ex. 3).

On or about June 13, 2011, the parents entered into a tuition agreement with the Rebecca School for the 2011-12 school year (Parent Ex. G). By letter dated June 17, 2011, the parents advised the district of their concerns surrounding the February 2011 IEP and of their intent to unilaterally place the student in the Rebecca School for the 2011-12 school year and request funding for that placement (Parent Ex. C).

On June 20, 2011, accompanied by a Rebecca School social worker, the student's mother visited the assigned school (Tr. pp. 468-69). By letter to the district dated June 21, 2011, the Rebecca School social worker outlined the reasons why the parents believed the particular public school to which the student had been assigned would be inappropriate for the student (Tr. pp. 476-78; Parent Ex. M).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2011, the parents commenced an impartial hearing, requesting, among other things, tuition reimbursement for the Rebecca School for the 2011-12 school year (Dist. Ex. 8 at pp. 1, 5). The parents maintained that the district denied the student a free appropriate public education (FAPE) for the 2011-12 school year because, in pertinent part, the February 2011 CSE failed to conduct a triennial evaluation of the student, and therefore, developed a program without sufficient and current evaluative information regarding the student (*id.* at p. 3). Additionally, the parents contended that the individuals who participated in the February 2011 CSE meeting by telephone did not have access to the same information that was before the individuals who were physically present at the meeting, and that the CSE did not fully discuss the student's proposed annual goals and short-term objectives with his teacher from the Rebecca School (*id.*). Regarding the 6:1+1 placement recommendation, the parents alleged that the provision of a 1:1 paraprofessional failed to address the student's needs because he required extensive 1:1 support throughout the day in the classroom (*id.*). Further, they asserted that the addition of a 1:1 paraprofessional served as an acknowledgement that the proposed program was inadequate for the student (*id.*). Next, the parents contended that the February 2011 CSE denied the student a FAPE, because it failed to list parent counseling and training on the February 2011 IEP (*id.* at p. 4). Lastly, the parents alleged that the district failed to provide them with a copy of the February 2011 IEP (*id.* at p. 5). As a result, they maintained that they reserved the right to amend the due process complaint notice upon receipt of the February 2011 IEP (*id.*).

The parents also alleged that the assigned public school was not appropriate for the student because, among other things: (1) the environment was too large and overwhelming for the student and would have caused him to become disregulated; (2) the inappropriate number of transitions required of the student throughout the school day; (3) the failure to provide sensory equipment and

of music therapy; (4) the assigned school would not provide the student with suitable and functional peer grouping; (5) the assigned school would not have fulfilled the student's related services mandates; and (6) the provision of the student's related services in a multi-use space would have impeded the student's progress, given his attentional deficits (id. at pp. 4-5).

B. Impartial Hearing Officer Decision

On August 9, 2011, the impartial hearing was convened and after five days of proceedings, concluded on November 15, 2011 (Tr. pp. 1-661). In an interim decision dated August 19, 2011, the IHO determined that the Rebecca School constituted the student's pendency placement, and ordered the district to continue funding the student's placement there during the pendency of the proceedings (Interim IHO Decision at p. 3).

By decision dated December 20, 2011, the IHO denied the parents' request for tuition reimbursement to the Rebecca School for the 2011-12 school year (IHO Decision at pp. 22, 27). Regarding the CSE process, the IHO found that the parents were afforded an opportunity to participate in the development of the student's IEP, and that the February 2011 CSE meeting minutes and the resultant IEP reflected that the CSE "paid close attention to the Student's needs, consulted the Parents and the Student's current teacher" (id. at pp. 11-12). She further found that the February 2011 CSE developed the goals contained in the IEP with participation from the parents and the student's teachers (id. at p. 12). Additionally, the IHO found that the goals reflected the student's needs, and further noted that the parents did not challenge the goals during the CSE meeting or in their due process complaint notice, and that the CSE derived many of the goals from Rebecca School reports (id.). Next, with respect to the parents' claim that the district failed to conduct a triennial evaluation of the student, although the IHO found that the district did not conduct assessments in the related services domains, she noted that the February 2011 CSE had reports from the student's Rebecca School providers and relied on goals developed by those individuals (id. at pp. 13-14). She also determined that the February 2011 CSE reviewed a variety of assessments, and the parents did not allege that the CSE did not understand the student's needs due to the lack of a particular evaluation (id. at p. 13). Similarly, the IHO also rejected the parents' claims that the student was denied a FAPE because his teacher from the Rebecca School who participated in the CSE meeting by telephone did not have the reports and evaluations relied upon by other CSE members and the CSE did not discuss the proposed annual goals and short-term objectives with him during the meeting (id. at p. 14). Rather, the IHO noted that the parents did not dispute the appropriateness of the goals, nor did they argue that the CSE misunderstood the student's functioning or needs in the classroom (id.). Next, regarding the 6:1+1 placement recommendation, the IHO found that the addition of 1:1 paraprofessional services for the student did not render the placement inappropriate (id. at p. 15). In addition, although the IHO found that the February 2011 CSE did not list parent counseling and training on the IEP, she determined that the failure to memorialize it on the IEP did not result in a denial of a FAPE to the student (id. at pp. 15-16). Lastly, the IHO found that the district sent a copy of the proposed IEP to the parents (id. at p. 22).

The IHO also addressed the parents' allegations regarding the assigned school, and ultimately concluded that it was appropriate (IHO at pp. 16-22). Although the IHO noted that the evidence suggested that the student became disregulated when unsure of his schedule, she did not find any evidence that the student would become disregulated due to a large student population

(*id.* at p. 16). Accordingly, the IHO concluded that the size and number of students in the building did not render the assigned school inappropriate for the student (*id.* at p. 17). Next, the IHO determined that the student would have been appropriately supported during transitions at the assigned school (*id.* p. 18). Regarding the parents' claims that the particular school to which the student had been assigned was not appropriate due to the alleged lack of sensory equipment, the IHO found that the district could implement the student's behavioral intervention plan (BIP), which provided interventions to support the student when he became disregulated (*id.* at p. 19). In addition, the IHO also rejected the parents' claim that music therapy was necessary in order to provide the student with a FAPE (*id.*). The IHO next concluded that despite the student's classification of multiply disabled, given his needs, it was appropriate to group him with students who were eligible for special education programs and services as students with autism (*id.*). Moreover, the IHO did not find that the range of academic levels of students in the class rendered the placement inappropriate; rather, she concluded that the district established it could have offered individualized and differentiated instruction, in order to maintain an appropriate range of academic instruction to provide appropriate opportunities to achieve the student's annual goals (*id.* at p. 21). Lastly, the IHO found no indication in the hearing record that the assigned school would have been unable to meet the student's related services mandates (*id.* at pp. 21-22). Next, despite finding that the district offered the student a FAPE, the IHO proceeded to conclude that the parents failed to establish that the Rebecca School was appropriate for the student's educational needs (*id.* at p. 27).

IV. Appeal for State-Level Review

The parents appeal and seek reversal of the IHO's decision. The parents maintain that the student did not receive a FAPE during the 2011-12 school year for the following reasons: (1) the February 2011 CSE failed to conduct a triennial evaluation of the student; (2) the CSE failed to ensure that all CSE members had copies of the documents reviewed by the CSE members before it; (3) the district did not conduct a social history of the student; (4) the district did not conduct a physical therapy (PT) evaluation of the student; and (5) the district failed to list parent counseling and training on the IEP. The parents also challenge the IHO's finding that the student would receive adequate 1:1 instruction at the assigned school. Additionally, the parents raise the following allegations regarding the particular school to which the student would have been assigned: (1) it was too large and overwhelming for the student; (2) it could not provide the student with adequate support during transitions, nor could it provide him with appropriate sensory interventions; (3) the assigned school could not provide the student with an environment that would maintain his regulated state; (4) the assigned school did not provide music therapy, a necessary aspect of a FAPE for the student; and (5) the student would not have been functionally grouped at the assigned school. The parents also submit that the Rebecca School was appropriate for the student and further allege that equitable considerations support their request for relief.

In an answer, the district requests that the IHO's decision be affirmed in its entirety. The district maintains that the IHO properly found that the it offered the student a FAPE during the 2011-12 school year. More specifically, the district alleges that the CSE obtained sufficient evaluative data to accurately and properly report the student's present levels of academic performance and develop an IEP for the student. Moreover, contrary to the parents' claim that the CSE failed to obtain a social history or a PT evaluation of the student, the district initially notes that the parents have raised these allegations for the first time on appeal, and therefore, these claims should not be addressed. Alternatively, even if the parents had properly preserved these issues for

appeal by raising them at the impartial hearing level, the district contends that the CSE did not require additional information in order to develop the student's program. Next, the district argues that the evidence does not demonstrate that the failure to share all of the evaluations reviewed by the CSE with the student's teacher who participated in the meeting by phone compromised the teacher's ability to meaningfully participate in the development of the IEP, and therefore, did not rise to the level of a denial of a FAPE. Regarding the provision of parent counseling and training, while the district admits that it failed to specify it on the resultant IEP, the district alleges that this omission did not result in a denial of a FAPE to the student because parent counseling and training was available at the assigned school. Furthermore, the district also maintains that the assigned school was appropriate for the student for the following reasons, which included, among other things: (1) the evidence did not demonstrate that the student could become disregulated due to the size or population of the assigned school; (2) the student would have been supported while transitioning through the school; (3) the assigned school offered 1:1 instruction; (4) the lack of a music therapy program did not render the assigned school inappropriate; and (5) the assigned school offered appropriate equipment to address the student's sensory needs. Finally, the district argues that the IHO properly determined that the Rebecca School was not appropriate for the student.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; 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 accurately reflects the results of evaluations to identify the student's needs (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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]). 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; Gagliardo v., 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 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. Scope of Review

1. Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed the impartial hearing officer's finding that the assigned school could fulfill the student's related services mandate (IHO Decision at pp. 21-22). Accordingly, this determination is 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]).

2. Scope of Review

Next, a review of the hearing record supports the district's contention that for the first time on appeal, the parents now allege that the district failed to obtain a social history and PT evaluation of the student, which they claim resulted in a lack of sufficient evaluative data on which to base the student's IEP, and ultimately deprived him of a FAPE.

With respect to these contentions, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parents' due process complaint notice, I find that it may not be reasonably read to raise the issue that the district failed to conduct a social history update and PT evaluation of the student (see Dist. Ex. 8). Moreover, the hearing record does not suggest that the district agreed to expand the scope of the impartial hearing to include this issue (Application of the Bd. of Educ., Appeal No. 10-073).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice, I decline to review it. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d

1298, 1303 [9th Cir.1992]; see C.D. and R.D v. Bedford Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 107381, at *33 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

I further note that the IHO understandably did not reach this issue and find that this contention has been raised for the first time on appeal and is outside the scope of my review and therefore, I will not consider it (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

Nor am I persuaded by the parents' assertion in their due process complaint notice that they reserved their rights to raise additional challenges to the February 2011 IEP because they have yet to receive a copy of the IEP, where, as here, they did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice.¹ To hold otherwise would render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; B.P. and A.P. v New York City Dep't of Educ., 2012 WL 33984, at *8 [E.D.N.Y. Jan. 12, 2012] [rejecting the proposition that a general reservation of rights in a due process complaint notice preserves additional procedural arguments later in the proceeding]; Application of the Dep't of Educ., Appeal No. 11-141; Application of a Student with a Disability, Appeal No. 11-010).

B. CSE Process

1. Teleconferencing

Next, I will consider the parents' claim that the student's teacher from the Rebecca School who participated in the meeting by teleconference was not provided with all of the documentation considered by the CSE during the meeting. Here, the hearing record indicates that prior to the CSE meeting, the district provided the student's mother with a copy of the October 2010 classroom observation report and the October 2010 psychoeducational evaluation of the student obtained by the district (Tr. p. 27).² The school psychologist further testified that she believed she could not

¹ Despite the parents' claim on appeal that they have yet to receive a copy of the February 2011 IEP, the evidence compels a contrary conclusion. In this case, the school psychologist testified that the IEP was mailed to the parents (Tr. p. 80). Additionally, according to the February 2011 IEP, it was sent to the parents on February 15, 2011 (Tr. pp. 80-81; Dist. Ex. 1 at p. 2). The school psychologist also testified that the district representative confirmed that the IEP had been sent to the parents (Tr. p. 80). Moreover, although the school psychologist had spoken with the student's mother several times following the February 2011 IEP, the school psychologist testified that at no point did the parent indicate that she had not received the student's IEP (Tr. p. 81). Furthermore, the hearing record demonstrates that the district had the correct address for the parents (Tr. pp. 81-82).

² The school psychologist testified that at the commencement of the meeting, the CSE asked the parent if she had received the October 2010 classroom observation and October 2010 psychoeducational evaluation (Tr. pp. 27-

disclose confidential information regarding the student without the parents' consent; therefore, "it was up the parent" to share that information with the school (Tr. pp. 33-34). The school psychologist testified that she reviewed the evaluations reports verbally at the CSE meeting, which the student's classroom teacher from the Rebecca School participated in by telephone (Tr. p. 34; see Dist. Ex. 1 at p. 2). Moreover, the student's social worker from the Rebecca School attended the CSE meeting in person (Dist. Ex 1 at p. 2). While the evidence is ambiguous regarding whether or not the student's Rebecca School teacher had copies of all of the reports under consideration by the CSE, the hearing record further reflects that none of the student's Rebecca School providers indicated at the CSE meeting that they did not understand the student's deficits based on the information before them, nor did they indicate that they needed to review information that the district had previously provided to the parent (Tr. p. 34). Furthermore, the parent did not request that the district provide copies of the evaluative data to the student's Rebecca School providers (id.).

Based on the above information, regardless of whether the CSE provided copies of all of the documentation before it with the student's teacher from the Rebecca School, the hearing record does not suggest that a failure to do so compromised his teacher's ability to meaningfully participate in the development of the student's IEP (Tr. p. 36; see Application of the of the Dep't of Educ., Appeal No. 11-147). Lastly, even assuming for the sake of argument that the student's teacher did not have copies of all the evaluative data regarding the student considered by other CSE members, there is no evidence in the hearing record that that the failure to furnish him with copies of the evaluations impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2; Application of the Dep't of Educ., Appeal No. 10-070). Under these circumstances, I decline to find a denial of a FAPE based on the parents' allegation that the district failed to provide copies of the evaluative data under consideration by the February 2011 CSE to the student's Rebecca School teacher during the meeting.

2. Discussion of Annual Goals

The parents next claim that the February 2011 CSE did not fully discuss the annual goals contained in the resultant IEP with the student's teacher at the time of the CSE meeting. The student's teacher participated throughout the February 2011 CSE meeting and played what the district's school psychologist described as a "critical" role in terms of providing the CSE with information regarding what the teacher observed regarding the student on a daily basis and goal development for the student (Tr. p. 36). The school psychologist testified that the student's teacher provided the CSE with "a lot of [the] information" regarding the student's present levels of performance and deficits (Tr. p. 55). According to the school psychologist, she read aloud a draft of the February 2011 IEP to the members of the CSE and the student's teacher was afforded an

28, 32-33). Although the parent confirmed that she was in receipt of the classroom observation, the parent could not recall if she had received a copy of the psychoeducational evaluation, although the hearing record reflects that the district mailed a copy of that evaluation report to the parents on December 21, 2010 (Tr. p. 28; Dist. Ex. 2 at p. 1). As a result, before the meeting began, the school psychologist gave the parent a copy of the psychoeducational evaluation and provided an opportunity to review it, so that the parent could familiarize herself with its contents (id.).

opportunity to revise the resultant IEP (Tr. p. 59; Dist. Ex. 2 at p. 1). Furthermore, the hearing record reflects that most of the content of the goals listed in the February 2011 IEP was derived from the student's Rebecca School reports and both the student's teacher and the parent had an opportunity to provide input regarding the goals (Tr. pp. 66, 114-15; Dist. Ex. 2 at p. 1).³

Based on the foregoing, where, as here, the CSE offered the student's Rebecca School teacher a chance to comment on the student's proposed goals and the hearing record reflects a pattern of meaningful and active parent participation, the evidence weighs against a finding of a denial of a FAPE based on the parents' claim that the student's teacher was not present for the entire discussion of the proposed goals (Dist. Ex. 2 at p. 1; see Bougades v. Pine Plains Cent. Sch. Dist., 2009 WL 2603110, at *6 [S.D.N.Y. Aug. 25, 2009] rev'd on other grounds 2010 WL 1838710 [2d Cir. 2010]); E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388-89 [S.D.N.Y. 2009][explaining that proposed IEP goals do not have to be finalized during a CSE meeting]; see also Cerra 427 F.3d at 194).

C. Adequacy of the February 2011 IEP

1. Adequacy of Evaluative Information

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). 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

³ I further note that the parents do not argue that the annual goals were inappropriate or that the February 2011 IEP inaccurately described the student's needs.

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]).

In the instant case, the school psychologist testified that the February 2011 CSE "had quite a bit of material" on which to base the student's program recommendations (Tr. p. 30). Specifically, the February 2011 CSE reviewed a December 2010 Rebecca School interdisciplinary report of progress, an October 2010 classroom observation obtained by the district, a private August 2010 psychological evaluation of the student, and an October 2010 psychoeducational evaluation obtained by the district (Tr. pp. 26-30, 34; Dist. Ex. 2 at pp. 1-2; see Dist. Exs. 4-7). When the CSE meeting began, the February 2011 CSE reviewed the data before it which provided information regarding the student's abilities and related needs in the areas of language processing, articulation, social/emotional functioning, academics, cognition, activities of daily living (ADL) skills, sensory regulation, and fine and gross motor skills (Tr. p. 37). The February 2011 CSE also discussed the student's academic levels and social/emotional functioning in addition to his related needs and goals (Tr. pp. 54-55, 57-61). Specifically, the CSE discussed the student's needs and goals with respect to speech-language and fine and gross motor skills (Tr. pp. 38, 45-46, 69-70, 72). The hearing record further reflects that throughout the CSE meeting, the parent, the student's Rebecca School teacher, social worker, and the private psychologist provided input in the development of the student's IEP (Tr. p. 36; Dist. Ex. 2 at pp. 1-2).

Although the CSE did not conduct its own evaluations with respect to the student's needs in the related services areas, the December 2010 Rebecca School progress report provided the necessary updated information (Tr. p. 31; Dist. Ex. 4 at pp. 1-13).⁴ The hearing record indicates that the student's present levels of academic performance and learning characteristics section of the IEP was gleaned from information provided by the student's teacher at the CSE meeting and the December 2010 Rebecca School report (Tr. pp. 30-31, 34; compare Dist. Ex. 1 at p. 3, with Dist. Ex. 4 at p. 3-4, and Dist. Ex. 7 at p. 2). Based on the evaluative data before it, the February 2011 CSE incorporated information regarding the student's abilities in the areas of cognition, anxiety, decoding, reading, math calculations, attention, sensory processing, motor skills, ADLs, oral motor skills as well as receptive, expressive and pragmatic language into the IEP (Dist. Ex. 1 at pp. 3-5). The school psychologist testified that the February 2011 CSE reviewed adequate evaluative data in the development of the student's educational program, and that no one at the CSE meeting requested additional evaluative information regarding the student's educational needs (Tr. pp. 30-31, 34).

Based upon the foregoing, I find that the district had sufficient information relative to the student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dept. of Educ., Appeal No. 11-025; Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).

⁴ Regardless of whether the issue was properly preserved for appeal, although the district did not conduct a social history or PT evaluation, the hearing record reflects that the February 2011 CSE reviewed sufficient information in these areas as provided by the Rebecca School (see Dist. Ex. 4 at pp. 1-13).

2. 6:1+1 Special Class Placement

Next, I will consider the parties' claims regarding the district's recommendation for a 6:1+1 special class.

The school psychologist testified and the CSE meeting minutes indicated that the parent, the private psychologist, the student's Rebecca School teacher, and the Rebecca School social worker participated in the February 2011 CSE meeting (Tr. pp. 34-36; Dist. Ex. 2 at pp. 1-2). Upon consultation with the student's private psychologist together with input from the parent and the student's teacher, the CSE also developed a BIP that included a discussion regarding the function of the student's behaviors and goals related to those behaviors (Dist. Exs. 1 at p. 16; 2 at p. 2). The February 2011 CSE also developed annual goals and short-term objectives related to the student's needs in the areas of math, reading, speech-language, ADLs, sensory regulation, and fine and gross motor skills that were based on input from the parent, the student's then-current teacher and the goals developed by the staff at the Rebecca School (Dist. Ex. 1 at pp. 6-11; 2 at pp. 1-2).

Information before the February 2011 CSE reflected that the student demonstrated delays in cognition, reading, writing, math, receptive, expressive, and pragmatic language, attention, ADLs, attention, communication, sensory regulation, social/emotional functioning as well as fine and gross motor skills (Dist. Exs. 4-7). According to the August 2010 private psychological evaluation of the student, the student exhibited significant delays in speech-language skills and social functioning (Dist. Ex. 6 at p. 2; see Dist. Ex. 2 at p. 1).⁵ The evaluators further noted that the student had previously received diagnoses of agenesis of the corpus collosum, oral motor apraxia, a sensory integration disorder, and autism (Dist. Ex. 6 at p. 1). According to the August 2010 report, the student's mother reported that due to the student's limited ability to communicate, he could become frustrated and self-directed, and require 1:1 adult direction (id. at p. 2). In addition, the parent also noted that although the student enjoyed other children, he lacked the social skills to develop and maintain friendships (id.).

Behaviorally, the psychologists noted that although the student sat at the table for a short period of time with support, he required constant redirection and prompting (Dist. Ex. 6 at p. 3). Additionally, the student communicated primarily with verbal approximations and gestures (id.). The psychologists also reported that they observed the student at the Rebecca School during structured and unstructured activities (id. at p. 4). According to the psychologists, the student remained well behaved and followed instructions, although other students engaged in behaviors (id.). Although the psychologists noted that the student engaged in some self-stimulatory behavior, they did not find that his behavior interfered with the class activities or were disruptive (id.). Pursuant to his teacher's report, the psychologists stated that the student's focus and attention had improved, and he could remain seated for a 20-30 minute period (id.). The teacher added that the student "tune[d] in more during class activities," and she further described him as "more reciprocal" (id.). The August 2010 report also reflected that according to the student's teacher, his strengths included participation in visual games and rhythmic ability; and while the student could

⁵ Due to significant delays in language, reciprocity, and joint attention, the student could not engage in the testing process; however, the psychologists evaluated the student, in part, by conducting parent and teacher interviews and through observations of the student (Dist. Ex. 6 at pp. 1-7).

become overwhelmed by auditory stimuli, he had made improvements with respect to self-regulation, decreased anxiety, and a higher level of frustration tolerance when other students exhibited behaviors (id.). The teacher added that the student commented more frequently with awareness and more purposeful language, and had also demonstrated improvements in problem solving with regard to his adaptive skills (id.). Based on their findings, the psychologists reported that the student's profile was consistent with a diagnosis of autism (id. at p. 5). Among other things, the psychologists recommended: (1) a small, structured classroom setting; (2) individual attention, support, and instruction with the use of behaviorally based techniques as needed; (3) a 1:1 behavior based program for students with autism; and (4) 12-month instruction (id.).

As noted above, the February 2011 CSE also considered an October 2010 psychoeducational evaluation, obtained by the district of the student to ascertain his level of cognitive/emotional functioning and determine his academic needs (Dist. Ex. 7 at p. 4; see Dist. Ex. 2 at p. 1). The evaluator indicated that the student exhibited echolalia, repetitive behaviors, a tendency to avoid eye contact, and required ongoing redirection (Dist. Ex. 7 at pp. 1-2). With respect to language, the student tended to communicate by gestures, vocalizations, and single word approximations (id. at p. 2). According to the evaluator, the student experienced difficulties with receptive and expressive language, including a decreased ability to organize his thoughts, engage in conversations, and recall information (id.). Demonstrated delays were also observed with respect to attention, concentration, impulse control, and frustration tolerance requiring structured guidance, redirection, and prompts (id.). Results of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-V) indicated that the student demonstrated significantly below average cognitive skills in both verbal and nonverbal reasoning skills (id. at pp. 2-3).

With respect to an informal assessment of academic skills, the evaluator found that the student pointed to at least two letters of the alphabet when directed, at least three numbers written in a page when directed, and at least one geometric design on request (Dist. Ex. 7 at p. 4). The evaluator further noted that the student identified his name, recognized ten words when provided with two choices, and counted numbers one through ten (id.). Additionally, the student exhibited an emerging recognition of directionality and prepositional speech, identified at least one color, and demonstrated self-awareness (id.). Lastly, administration of the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) reflected that the student's adaptive behavior skills fell within the low range, indicating significant deficits in the areas of language, daily living skills, community skills, social and play skills, and coping skills (id.). Although the evaluator deferred programming recommendations to the CSE, the evaluator noted that the student had several strengths and proceeded to characterize him as friendly and cooperative (id. at p. 5). The evaluator further recognized the student's ability to gesture, use vocalizations and single-word approximations to make his needs known, and added that among the student's strengths was some self-awareness and awareness of events occurring within the immediate environment (id.).

The CSE also reviewed the October 2010 classroom observation of the student conducted at the Rebecca School (Tr. p. 35; Dist. Ex. 5; see Dist. Ex. 2 at p. 1). According to the report, the student sometimes followed the teacher's directive, but at other times, was more self-directed (Dist. Ex. 5). During the observation, the student rote counted to five, identified his picture, and with prompting, placed the picture under the school logo (id. at p. 2).

The CSE also reviewed a Rebecca School progress report dated December 2010 (Dist. Ex. 4). The student was enrolled in a 6:1+2 classroom and received OT, speech-language therapy, music therapy, and adapted physical education (*id.* at p. 1). Overall, the evaluators described student's regulatory state as calm, but approximately once per day, he experienced "high anxiety or stress" and would bang on objects including the door, his hands, or the garbage can which could last up to 15 minutes (*id.*). The student could stabilize himself with redirection to a preferred activity and engaged in activities for up to 30 minutes (*id.*).

According to the Rebecca School progress report, during preferred activities, the student remained in purposeful social interactions for 10 to 15 minutes (Dist. Ex. 4 at p. 1). The report further indicated that the student engaged with other students and shared attention during preferred activities for 30 minutes with sensory supports (*id.* at p. 2). To communicate with adults and peers, the student used mostly verbal language including up to a five-word sentence to meet his wants and needs, and responded when peers and adults initiated social interactions (*id.*). The student's Rebecca School providers also described his pretend and symbolic play skills as emerging (*id.* at p. 3). According to the report, although he could not yet read simple sentences, the evaluators described the student as an emerging reader who could identify 25-30 sight words (*id.*). With respect to reading comprehension, the student could answer explicit questions regarding a story, and was starting to answer questions based on conclusions and inferences (*id.* at p. 4). Lastly, regarding math, the student identified numbers one through ten in a field of five, counted to ten, and exhibited an emerging ability regarding 1:1 correspondence (*id.*).

The student's sensory profile revealed that the student presented with a hypo-responsive sensory system and sought sensory input throughout the day (Dist. Ex. 4 at p. 6; *see* Tr. p. 53). Although he exhibited difficulties with motor planning and sequencing of motor activities, the evaluators reported that he navigated around the school with minimal verbal prompts (Dist. Ex. 4 at p. 6). Additional delays were also noted with regard to the student's gross motor skills, such as core muscle weakness, decreased muscle extensibility in his lower extremities, and difficulty with ball skills, coordination, strength, and balance (*id.*).⁶

According to the progress report, the student's speech-language pathologist stated that the student primarily expressed himself in a verbal manner and engaged in conversations using both verbal and nonverbal communication methods (Dist. Ex. 4 at p. 7). The student's ability to listen and respond to language depended on his level of engagement, regulation, and motivation (*id.*). The report reflected that with minimal support, the student answered who and what questions relative to a present activity (*id.*). The report further reflected that to request, the student typically used one to two-word phrases, but with minimal support, he could utilize more complete sentences (*id.* at p. 8).

State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with the student's needs as described in detail above and State regulations, the February 2011 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with a 1:1 crisis management paraprofessional (Dist. Ex. 1 at pp. 1, 15). Related services recommendations

⁶ At the time of the Rebecca School progress report, the student was not receiving PT (Dist. Ex. 4 at p. 6).

included the provision of four 40-minute sessions of individual speech-language therapy per week, one 40-minute session of speech-language therapy per week in a group of two, four 40-minute sessions of individual OT per week, one 40-minute session of OT per week in a group of two, four 40-minute sessions of individual PT per week, and one 40-minute session of PT per week in a group of two, to address the student's needs in the area of articulation, language processing, and social/emotional functioning as well as fine motor and gross motor skills (Tr. p. 46; Dist. Ex. 1 at p. 14). The CSE recommended the provision of group related services in addition to individual related services to give the student socialization opportunities (Tr. p. 78). Additionally, the CSE recommended a 12-month program for the student to prevent substantial regression of skills (Tr. p. 40; Dist. Ex. 1 at p. 13).

Testimony by the school psychologist supports that the CSE's recommendation of a 6:1+1 special class and 1:1 crisis management paraprofessional was based on the student's needs as portrayed in the evaluations before it and which were reflected in the resultant IEP (Tr. pp. 41, 46-49, 51-55). The school psychologist described the 6:1+1 special class as a "very small class, with a lot of adult support, and a very small student-to-teacher ratio" (Tr. pp. 41, 47-48). According to the school psychologist, the CSE added 1:1 paraprofessional services due to the student's significant developmental needs (Tr. p. 41).⁷ She added that based on the information before the CSE, all of the student's needs suggested that he required individual support throughout the day (*id.*). Although the CSE considered other program options for the student, it ultimately rejected them because it believed that the student required a smaller student-to-teacher ratio in order to make meaningful progress (Tr. p. 48). Furthermore, despite the parent's request for a residential placement for the student due to difficulties she was experiencing at home with him, based on input from the student's teacher and the information before it, the CSE determined that the student's needs could be met within a day program (Tr. pp. 49-50; Dist. Ex. 2 at p. 2).^{8, 9}

The February 2011 IEP contained specific information regarding accommodations and strategies for the student based on his special education needs (Dist. Ex. 1 at pp. 3-5). The February 2011 CSE also built a variety of environmental modifications and human/material resources into

⁷ Moreover, the hearing record supports the IHO's conclusion that by providing the student with a 1:1 crisis management paraprofessional within the context of a 6:1+1 special class, the CSE did not acknowledge that the recommended placement is not appropriate (IHO Decision at p. 15). The student's 1:1 crisis management paraprofessional would have provided the student with academic and social/emotional support (Tr. pp. 40-41). As detailed below, the hearing record reveals that the 1:1 crisis management paraprofessional would have provided the student with the additional individual assistance needed to meet his special education needs.

⁸ Regarding the parent's request for residential placement, the school psychologist advised the parent to obtain a psychiatric evaluation of the student to support her position that the student required residential programming and 24-hour care (Tr. p. 49). She further advised the parent that the CSE could reconvene upon receipt of information calling for residential placement of the student (*id.*).

⁹ Notwithstanding the parent's request for residential placement for the student due to problems that she was experiencing with him at home, behavioral problems do not afford a basis for concluding that a student requires a residential placement absent evidence that the student was otherwise regressing educationally in a day program as a result of those problems (see Walczak, 142 F.3d at 131-132 [residential placement not appropriate where student made meaningful social and academic progress in a day program]; Application of a Student with a Disability, Appeal No. 09-130; *c.f.* Mrs. B., 103 F.3d at 1121-22 [residential placement necessary where behavioral problems resulted in the student not advancing more than one grade level in any subject in three years while in a day special education program with a therapeutic component]).

the student's IEP to address his management needs that included: (1) redirection to address his distractibility; (2) visual cues and verbal prompts to increase the student's understanding; (3) sensory input to help the student maintain a calm, focused, and alert state in order to be available for learning; (4) re-regulation with the assistance of a staff member to redirect him to a preferred activity; (5) access to music throughout the day; (6) co-regulation strategies including slowing down, reduction in the use of language, modeling deep breathing; (7) sensory supports such as proprioceptive input including deep pressure to calm and alert his body and increase his body awareness; (8) consistent verbal prompts for transitions; (9) reminders; (10) related services of PT and OT; and (11) deep pressure input to the joints of his upper and lower extremities (Tr. pp. 53-54, 57-58, 60-61; Dist. Ex. 1 at pp. 3-5).¹⁰

The February 2011 CSE also drafted a BIP based on information from the student's Rebecca School teacher to address the student's behaviors that interfered with his learning, such as self-stimulatory behavior, breathing heavily, attention, shouting, scratching, pushing, cognitive inflexibility, and distractibility (Tr. pp. 61-62; Dist. Ex. 1 at p. 16). As a result, the CSE created behavioral goals for the student including maintaining attention, appropriate self-regulation, participation in group activities, and reduction of anxiety to enable him to be available for academics (Tr. p. 63; Dist. Ex. 1 at p. 16). Specifically, the school psychologist noted that the student's primary concern involved disregulation, and that the goal was to help him maintain a regulated state for an extended period of time with support from a 1:1 paraprofessional (Tr. p. 63). The BIP also included the strategies and supports to assist the student achieve his behavioral goals including access to gross motor play, deep pressure in his hands, high affect engagement, therapeutic listening, modeling of slow breathing, reduction of language, instruction regarding emotions as well as the support of the crisis management paraprofessional, special education teacher, occupational therapist, physical therapist, and speech and language pathologist (Dist. Ex. 1 at p. 16).

Based on the above, the hearing record demonstrates that the February 2011 CSE developed its program recommendations based on information gleaned from evaluative data and information from the parent and the student's teacher, and as a result, the proposed 6:1+1 placement with a 1:1 crisis management paraprofessional was designed to address the student's academic, social and behavioral needs, and accordingly, was reasonably calculated to enable him to receive educational benefits.

3. 1:1 Support

I will next consider the parents' assertion that the recommended program in the February 2011 IEP would not have provided sufficient 1:1 instruction to meet the student's needs (Dist. Ex. 8 at p. 3). As indicated below, the evidence supports the IHO's conclusion that the CSE's recommendation of a 6:1+1 special class together with a 1:1 crisis management paraprofessional offered sufficient 1:1 instruction to meet the student's academic and social/emotional needs (IHO Decision at p. 15).

¹⁰ The school psychologist testified that many of the management needs included in the February 2011 IEP were based on techniques that the student's classroom teacher found to be helpful in the classroom (Tr. pp. 60-61). She further noted that no one voiced any objections to the proposed management needs (Tr. p. 58).

The private psychologist recommended a 1:1 program for the student (Dist. Exs. 6 at p. 5; 8 at p. 3). Although the parents argue that the CSE's recommendation of a 1:1 paraprofessional could not address the student's needs because the paraprofessional was not a "trained educator," the hearing record does not support the parents' assertion and reflects that a 1:1 paraprofessional in conjunction with a 6:1+1 special class placement—while perhaps not the ideal sought by the parents—was nevertheless sufficient to offer the student a FAPE (Tr. pp. 41-43, 152-53; Dist. Ex. 8 at p. 3). The school psychologist testified that the provision of the 1:1 crisis management paraprofessional was designed to assist the student with self-regulation and in turn, help him to be available for learning (Tr. pp. 43, 60). Specifically, the school psychologist described the role of the paraprofessional as an individual assigned just to the student to help foster his ability to function in the classroom setting, such as engaging with peers, listening to the teacher, attending to lessons and maintaining a calm, regulated state (Tr. p. 79). In addition, the 1:1 paraprofessional would support the student during transitions, which were a significant concern for him, as well as support him regarding academic instruction and social/emotional functioning under the supervision of the special education teacher (Tr. pp. 41-43, 152-53). Furthermore, the 1:1 paraprofessional could assist the student to meet his IEP goals and the goals on his BIP (Tr. p. 110).

The recent issuance of a guidance document entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide" indicated that with respect to special classes, an additional aide should only be recommended for specialized circumstances based on the student's individual needs and when the CSE determines that a special class with natural supports and a BIP cannot meet those needs (see <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.htm>). Consistent with the student's needs and State regulations, the CSE recommended a 1:1 crisis management paraprofessional, in conjunction with the supports of a special education teacher, occupational therapist, speech and language therapist, and physical therapist to address the student's behavior (Dist. Ex. 1 at p. 16).

Notwithstanding the parents' claim that the student would not have received adequate individual instruction at the assigned school, the special education teacher of the proposed class testified that students received 1:1 instruction as well as whole and small group instruction at the assigned school (Tr. pp. 159, 172). Moreover, the February 2011 IEP provided for four 1:1 sessions of PT each week, four 1:1 sessions of OT each week, in addition to four 1:1 sessions of speech-language therapy each week (Dist. Ex. 1 at p. 14).

Accordingly, I find that the February 2011 CSE's recommendation of a 6:1+1 special class in conjunction with a 1:1 crisis management paraprofessional and the recommended program accommodations and strategies would have provided the student with sufficient individualized support such that he was offered a FAPE for the 2011-12 school year.

4. Music Therapy

Next, the parents maintain that the IHO erred by concluding that the music therapy was not necessary in order to offer the student a FAPE. According to the hearing record, the Rebecca School utilized music to address the student's planning and sequencing skills and his self-regulation deficits, as well as to motivate the student (Tr. p. 317). The district's school psychologist testified that the student did not require a formal music class to address his needs (Tr. pp. 76-78).

She further testified that given the "extensive degree of his disability," the student's daily related service therapy sessions were more important in terms of increasing the student's ability to function in society; however, because the February 2011 CSE recognized the important use of music as a motivating tool for the student, the CSE included music among his management needs and in his BIP (Tr. p. 76; Dist. Ex. 1 at p. 16).

Although the hearing record suggests that the student could benefit from the music therapy and that music was a highly motivating activity for him, it does not show that the student required the provision of music therapy to receive a FAPE during the 2011-12 school year (Tr. p. 61; see Tr. pp. 623-27). Moreover, the hearing record does not indicate that music therapy would address needs or goals of the student that could not be addressed by other means.¹¹

5. Parent Counseling and Training

Next, I turn to the parents' assertion that the omission of parent counseling and training in the February 2011 IEP contributed to a denial of a FAPE to the student. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. March 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011]; adopted at 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).¹²

In the instant case, although the provision of parent counseling and training was not memorialized on the February 2011 IEP, the school psychologist testified that the CSE discussed the provision of it with the parent during the meeting (Tr. pp. 99-100). Additionally, the hearing record reveals that parent counseling and training was a programmatic feature of the assigned school (Tr. pp. 43-44, 106, 284; Dist. Ex. 1). The site coordinator at the assigned school testified

¹¹ Moreover, although a music therapist was not among the staff members at the assigned school, as detailed below, the hearing record does not suggest that the district could not otherwise implement the February 2011 IEP.

¹² To the extent that P.K. or R.K. may be read to hold that the failure to adhere to the procedure of listing parent counseling and training on an IEP constitutes a per se, automatic denial of a FAPE, I note that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y., Oct. 30, 2008]).

that he provided information to parents regarding the parent trainings and distributed surveys to parents to seek input regarding pertinent subjects for trainings (Tr. p. 242). According to the site coordinator, the parent trainings were based on the surveys and therefore, based on the needs of the parents and students (Tr. p. 258).

Under the circumstances presented herein, while the district did not comply with the State regulations by identifying parent counseling and training on the February 2011 IEP, given that parent counseling and training was available at the assigned school, the CSE's failure to incorporate it into the challenged IEP did not result in any substantive harm, nor did it, in this case, rise to the level of a denial of a FAPE to the student.

D. Assigned School

The parents also raise a number of concerns regarding the appropriateness of the assigned school. Once a CSE formulates an IEP, a school district is required provide the special education services in conformity with the student's written IEP (20 U.S.C. § 1401[9][D]). The district correctly argues that this issue is in part speculative insofar as the parents did not accept the recommendations of the CSE or the programs offered by the district and instead enrolled the student in a private school of their choosing. Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student actually attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; DD-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011])). Additionally, the parents' concerns are not adequately supported by the evidence in the hearing record.

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that placement of the student in a 6:1+1 special class at the assigned school would not have deprived him of a FAPE.

1. Size of the Assigned School

Although the parents maintain that the assigned school was too large and overwhelming for the student, the hearing record supports a contrary conclusion. According to the hearing record, the assigned school shared a building with five other general education schools (Tr. pp. 259-60). According to the school psychologist, although the assigned class was housed within a building containing larger schools, she noted that the students were often separated by class and the assigned school itself tended to be small and supportive (Tr. p. 74). Although the student could have come into contact with other students in the building during lunch time, the hearing record reflects that the seating was designed to reduce interaction between classes and there were eight adults to supervise the students during lunch (Tr. pp. 155, 280).

Further, the district correctly notes that there was no evidence that the student became disregulated as a result of large buildings or other students engaging in behaviors while in his

presence (Tr. p. 570; Dist. Ex. 6 at p. 4). Should the student experience anxiety in relation to other students within the assigned school, the hearing record shows that the assigned school could implement a sensory diet to address this anxiety (Tr. p. 257). Additionally, the school psychologist testified that the student could benefit from access to nondisabled peers and also receive instruction within community settings to learn daily living skills (Tr. p. 75). Lastly, as stated above, the 1:1 crisis management paraprofessional could support the student during transitions, academic instruction and social/emotional functioning under the supervision of the teacher (Tr. pp. 41-43, 152-53). In view of the foregoing, I find the parents' concerns regarding the size of the assigned school building are not supported by the evidence contained in the hearing record.

2. Transitions

The hearing record also substantiates the district's argument that in the assigned school, the student could successfully transition throughout the school day. Although the student required moderate support including verbal and gesture cues throughout the day to transition between activities and environments, his Rebecca School teacher testified that he remained regulated when familiar with his schedule and managed transitions better when told about upcoming activities and provided with sensory support (Tr. pp. 542, 558; Dist. Ex. 4 at p. 1). The evidence also indicates that the student transitioned fairly easily with some redirection from the paraprofessional (Dist. Ex. 6 at p. 4).

The site coordinator at the assigned school testified that the student would have transitioned four times per day and during the summer months, one time per day (Tr. pp. 271-72). He added that the student could have been provided verbal cues regarding transitions, and that as needed, students receive sensory breaks throughout the day to assist with transitions (Tr. pp. 255-56). Moreover, the February 2011 IEP provided for consistent verbal prompts for transitions (Dist. Ex. 1 at p. 4). Based on the hearing record, the IHO properly determined that the assigned school could appropriately support the student during transitions at the assigned school (IHO Decision at p. 18).

3. Sensory Equipment

Next, despite the parents' claims to the contrary, the hearing record reflects that the assigned school could address the student's sensory needs had the student attended the school. The student's BIP developed by the February 2011 CSE contained several strategies to address the student's self-regulation needs, including access to gross motor play, deep pressure in his hands, and access to music to motivate him (Dist. Ex. 1 at p. 16). The site coordinator testified that staff at the assigned school could implement the student's BIP (Tr. p. 253). He further noted that students received a sensory diet throughout the school day to address their feeling of being overwhelmed (Tr. p. 257). Furthermore, staff at the assigned school could provide the student with access to gross motor play and deep pressure in his hands (Tr. p. 253). Sensory breaks were also available to the student, which the parents maintain the student requires (Tr. p. 256). The site coordinator stated that the assigned school could obtain any sensory materials required by the student such as a weighted vest, a tactile seat, or a squeezing item (*id.*). The teacher of the proposed class also described other sensory materials such as a jar of sand and deep breathing exercises that she employed (Tr. p. 166). Under the circumstances, I find that the student's sensory needs could have been addressed at the assigned school.

4. Functional Grouping

Lastly, the hearing record offers no support for the parents' assertion that because the student's eligibility for special education and related services as a student with multiple disabilities differed from the classifications of other students in the proposed class, who were eligible as students with autism, the student could not be functionally grouped at the assigned school. 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 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). 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 shall 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, the management needs of students may vary and 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]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

I also note that according to the hearing record, the majority of the students at the Rebecca School were classified students with autism (Tr. p. 364). Additionally, according to the school psychologist, the private psychologist indicated that the student met the criteria for an autism spectrum disorder (ASD) (Tr. p. 79; Dist. Ex. 6 at p. 3). The private psychologist indicated that the student presented with delays in behavior, communication, and social skills, which was consistent with an ASD (Dist. Ex. 6 at p. 5).

Furthermore, contrary to the parents' assertion that the functional grouping was inappropriate due to the wide range of academic levels, the special education teacher at the assigned school testified that with respect to academic and social skills, the student was similar to the students in assigned class (Tr. pp. 166-67). The students at the assigned school were in fourth through sixth grade and all were deemed eligible for special education services as students with autism (Tr. p. 142). With respect to reading and math levels, the students in the assigned class ranged from the kindergarten to the second-third grade level, while the student's academic

instructional levels were at the prekindergarten level, and therefore within the range provided for by State regulation (Tr. p. 149; Dist. Ex. 1 at p. 3).¹³

The special education teacher at the assigned school testified that she provided differentiated instruction to the students based on their individual needs, including the development of a learning program individualized to the student (Tr. p. 161). When the students exhibited difficulties with self-regulation and transitions, she provided them with strategies to address these delays (Tr. pp. 166-67). The special education teacher also testified that the students received extensive individual support including 1:1 instruction approximately 50 percent of the time (Tr. pp. 159-60). The paraprofessionals also provided 1:1 instruction to the students under the teacher's supervision (*id.*). Based on the foregoing, I am persuaded that the student could have been suitably grouped for instructional purposes within the recommended 6:1+1 special class.

Accordingly, based on the evidence before me, the hearing record shows that the district could appropriately support the student during transitions, offer him adequate sensory input, and that he would have been functionally grouped in the class. Additionally, the hearing record does not suggest that the size of the assigned school would overwhelm the student and thereby preclude him from the benefits offered by his IEP. Accordingly, in light of the above, the assigned school was capable of implementing the student's IEP in the 6:1+1 special class in the event that he had attended the public school.

VII. Conclusion

Having determined that the IHO properly found that the district offered the student a FAPE for the 2010-11 school year, it is not necessary for me to consider the appropriateness of the Rebecca School, or whether the equities support the parents' claim for tuition reimbursement (*see MC v. Voluntown*, 226 F.3d 60, 66 [2d Cir. 2000]). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 29, 2012**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹³ Additionally, to the extent that the parents claim that the district failed to establish that it offered the student a FAPE in light of the absence of a class profile of the recommended 6:1+1 class at the assigned school, the Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (*Cerra*, 427 F.3d at 189-90, 194 [finding that the district did not violate its procedural obligations under the IDEA when it did not provide the parents with requested class profiles of the student's proposed reading class and resource room sessions, "which would identify the other students in the classes" and the student did not attend the district's recommended public school placement]).