The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-069

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:
Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their requests for funding of the costs of their son's tuition and related services at the Beacon School (Beacon) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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 300.515 [b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

According to the hearing record, the student began receiving special education itinerant teacher (SEIT) services at two years of age, and, at age three, he received a diagnosis of a pervasive developmental disorder-not otherwise specified (PDD-NOS) (Tr. pp. 541-44; Parent Ex. D at p. 1). He was then enrolled in an applied behavior analysis (ABA) program at a private special education preschool, and received additional SEIT services and residential habilitation services (Parent Ex. D at p. 1). The student first attended Beacon during the 2010-11 school year, and, for the 2011-12 school year, was enrolled in a 10-month 6:1+1 special class program there with a full-time 1:1 paraprofessional, and related services consisting of occupational therapy (OT) and

speech-language therapy (Nov. 15, 2011 Tr. pp. 187-88, 215-16, 232-33, 278-79;[1] Parent Exs. P; R). During the 2011-12 school year, the student also received both home and school-based 1:1 ABA services (Tr. pp. 395, 400-01, 450-51). Beacon has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; Parent Ex. Q). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On May 31, 2011, the CSE convened for the student's annual review to develop his IEP for the 2011-12 school year (Parent Ex. H).[2] The May 2011 CSE recommended, among other things, a 12-month special education program consisting of a 6:1+1 special class in a specialized school; related services consisting of OT 3 times per week for 30 minutes per session in a 1:1 setting, and speech-language therapy 3 times per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 2:1 setting, and determined that the student was eligible to participate in alternate assessment (id. at pp. 1-5, 14, 16-17; see Tr. pp. 70-73). Although the CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by his special education classroom teacher, the CSE nonetheless developed a behavioral intervention plan (BIP) for the student (Parent Ex. H at pp. 2, 15, 17).

By final notice of recommendation (FNR) dated June 9, 2011, the district summarized the recommendations made by the May 2011 CSE and notified the parents of the particular school to which it had assigned the student (Parent Ex. I). On June 29, 2011,[3] the student's father visited the assigned school, and, on the same day, notified the district in writing that he was rejecting the assigned school as inappropriate for the student and stated the reasons for his objections (Tr. pp. 479-83, 525-31; Parent Ex. J at p. 1). He also advised the district that, in the absence of an appropriate placement offer, he was unilaterally placing the student at Beacon for the 2011-12 school year and would seek reimbursement and/or direct public funding for SEIT services, a SEIT supervisor, OT, speech-language therapy, and transportation costs (Parent Ex. J at pp. 1-2).

On July 19, 2011, the parents filed their due process complaint notice (Parent Ex. A).

On September 1, 2011, the parents signed a "letter of agreement" with Beacon, enrolling the student at the school for the 2011-12 school year and providing him with a 1:1 behavior management paraprofessional, and an agreement with the student's former private special education preschool providing the student with ABA services for the 2011-12 school year (Parent Exs. N-O). The parents also remitted partial payment to Beacon in the amount of $10,000 toward the student's tuition for the 2011-12 school year (Tr. pp. 485-86; Parent Exs. M-O; Q). The student

[1] The impartial hearing transcript contained in the hearing record for November 15, 2011 was not consecutively paginated, resulting in duplicate pagination to the transcript for November 9, 2011. To address this issue within the decision, I differentiate citations to each of these two transcripts by identifying the specific day of the hearing to which the particular transcript refers (compare, Nov. 9, 2011 Tr. pp. 140-243, with Nov. 15, 2011 Tr. pp. 140-311).

[2] The hearing record contains duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both District and Parent exhibits were identical. I remind the IHO that it is her responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

[3] The parent's letter to the district bears an incorrect date of "June 29, 2010" (see Parent Ex. J at p. 1).

began the 2011-12 school year at Beacon on September 12, 2011 (Nov. 15, 2011 Tr. pp. 214-15; Parent Exs. P; R).

A. Due Process Complaint Notice

In their due process complaint notice, dated July 19, 2011, the parents alleged, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, and included more than 70 allegations (see Parent Ex. A at pp. 2-8). Relevant to this appeal, the parents alleged that May 2011 CSE "failed to meaningfully include [them] in the IEP development and placement selection process" and "impermissibly abdicated the school 'placement' decision to an inadequately informed administrator who was not even present at [the May 2011 CSE] meeting" (id. at pp. 4-5). The parents also argued that the May 2011 IEP was not reasonably calculated to provide the student with a FAPE, insofar as it lacked a transition plan addressing the student's transition from an ABA-based program at Beacon to the district's recommended program, which employed the Treatment and Education of Autistic and related Communication Handicapped Children (TEACCH) methodology, that the IEP did not include parent counseling and training services, and that the functional behavioral assessment (FBA) and BIP developed by the district were inadequate (id. at pp. 3-4; see Nov. 9, 2011 Tr. p. 213). The parents also alleged that the assigned school was inappropriate for the student because: it did not offer the "intensive, cohesive, and properly supervised 1:1 instruction and behavioral support" that the student required; the class composition and staff in the assigned 6:1+1 special class would have changed from summer 2011 to September 2011; the student would have been inappropriately grouped in the assigned 6:1+1 special class; the district failed to evaluate whether the TEACCH methodology utilized in the assigned 6:1+1 special class was appropriate to address the student's needs; and that TEACCH was, in fact, inappropriate for the student (id. at pp. 3-4, 6-8).

The parents requested, among other things, tuition and services for July and August 2011, during which the student attended a private summer camp (Parent Ex. A at p. 8). For September 2011 through June 2012, the parents requested tuition and costs at Beacon; 30 hours per week of "ABA/SEIT" services; 5 hours per week of speech-language therapy at Beacon; 90 minutes of OT per week at Beacon; one hour per week of ABA supervision in-school; and transportation to and from Beacon (id. at pp. 8-9). The parents also requested "compensatory education" for any and all services that the student failed to receive through pendency (id. at p. 9).

B. Impartial Hearing Officer Decision

On August 24, 2011, an impartial hearing was convened in this matter, and it concluded on January 12, 2012 after six days of proceedings. Pursuant to pendency (stay put), per an interim decision dated September 16, 2011, the IHO directed the district to continue to provide the student with 30 hours per week of ABA/SEIT services, 5 hours per week of individual speech-language therapy, and 90 minutes per week of individual OT pursuant to a prior unappealed IHO decision dated July 22, 2009 (Interim IHO Decision at p. 2; see Parent Ex. B at p. 17).[4]

[4] As a consequence of the September 16, 2011 IHO interim decision, during the last day of testimony at the impartial hearing, the parents withdrew their claims for reimbursement for tuition and related services expenses in connection with the student's special education program for summer 2011, and they also withdrew their claim for transportation services (see Tr. pp. 487-90).

On February 29, 2012, the IHO issued a decision, finding, among other things, that the district offered the student a FAPE for the 2011-12 school year, as well as alternative findings that the parents nevertheless failed to carry their burden of proving that Beacon was an appropriate placement for the student for the 2011-12 school year, and that equitable considerations favored the district (IHO Decision at pp. 18-24). Specifically, the IHO determined that: the May 2011 CSE was duly constituted and did not require a regular education teacher because the student was not being considered for a general education placement; the May 2011 CSE considered appropriate evaluative information to identify the student's present levels of performance and to develop his IEP; the annual goals and short-term objectives contained in the IEP were appropriate; the lack of a written transition plan in the May 2011 IEP did not render it insufficient to provide a FAPE; the lack of an identified school placement on the IEP did not render the IEP deficient; the omission of parent counseling and training services on the IEP did not rise to the level of a denial of FAPE, especially considering that the hearing record established that the district in fact offered parents various informational workshops; the district's recommendation of a 12-month special education program consisting of a 6:1+1 special class in a specialized school and related services, was appropriate for the student; the FBA and resultant BIP were appropriate; and the district timely offered the student a placement for the 2011-12 school year, and hence, the relief afforded by a stipulation from a federal class action suit, Jose P. v. Ambach (553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]), was not available to the parents in this case (id. at pp. 18-22). Relative to the assigned school, the IHO concurred with the district's argument that "the [district] must be judged on the program it had in place on the first day of school," and concluded that "the [district] was not required to present evidence concerning this student's placement in September [2011];" therefore she limited her analysis to the extended school year (ESY) program offered by the district to the student for summer 2011, ultimately determining that the district's ESY program was appropriate for the student for the 2011-12 school year, that the student could have been suitably grouped for instructional purposes in the assigned 6:1+1 special class, and that the methodology of the assigned 6:1+1 special class, which utilized TEACCH, discrete trial ABA, and a multisensory approach, was appropriate for the student (id. at pp. 21-22). Based on the above, the IHO denied the parents' claims in their due process complaint notice (id. at p. 24).

In addition to finding that the district offered the student a FAPE for the 2011-12 school year, the IHO also determined in the alternative that the parents failed to satisfy their burden of proving that Beacon was an appropriate placement for the student for the 2011-12 school year, because 1) Beacon offered the student only a 10-month special education program; 2) the evidence contained in the hearing record demonstrated that the student regressed over summer 2011; 3) the hearing record lacked evidence sufficient to demonstrate how Beacon's program met the student's individual needs; 4) the hearing record established that the student's difficulties with frustration, language, comprehension, and negative behavior persisted; and 5) there was no objective, measurable evidence indicating whether the student progressed at Beacon (IHO Decision at pp. 22-24).

Lastly, the IHO determined that equitable considerations favored the district, because the hearing record indicated that the parents intended for the student to continue at Beacon for the 2011-12 school year and that they were not willing to consider a public school placement (id. at p. 24). Consequently, the IHO denied the parents' claims in their entirety (id.).

IV. Appeal for State-Level Review

The parents appeal the IHO decision, asserting, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that Beacon was an appropriate placement for the student for the 2011-12 school year, and that equitable considerations supported their claims. Specifically, the parents allege that the district unilaterally selected the particular school to which it assigned the student without any prior input from or discussion with them, thereby depriving them of the opportunity to meaningfully participate in the CSE review process, and, by extension, denying the student a FAPE. The parents also assert that the May 2011 IEP was deficient because it lacked a "transition plan" to help the student transition from Beacon to the district's school and failed to recommend parent counseling and training services; that the FBA conducted by the district was deficient and resulted in an inadequate BIP; and that the recommended 6:1+1 special class was inappropriate for the student. Relative to the assigned school, the parents argue that the IHO improperly required the district to prove only the appropriateness of its recommended ESY program, as opposed to that portion of the program beginning in September 2011, and that the assigned school was inappropriate for the student because: the class composition and staff would have changed from summer 2011 to September 2011; it lacked appropriate 1:1 instruction and behavioral supports that the student required; the student would have been inappropriately grouped in the assigned 6:1+1 special class; and the district failed to properly evaluate whether the TEACCH methodology utilized in the assigned 6:1+1 special class was appropriate for the student, and said methodology was, in fact, inappropriate to address the student's needs. The parents state in a footnote that the IHO forgot to address claims raised in their due process complaint notice.

The parents seek an order reversing the IHO decision in its entirety and finding that the district failed to offer the student a FAPE for the 2011-12 school year, that Beacon was appropriate for the student for the 2011-12 school year, that equitable considerations favored the parents, and that the parents were entitled to tuition reimbursement and direct tuition funding for the student's 2011-12 school year at Beacon.

The district answers the parents' petition, countering, among other things, that the IHO correctly determined that it offered the student a FAPE for the 2011-12 school year, that Beacon was not an appropriate placement for the student for the 2011-12 school year, and that equitable considerations favored the district. Specifically, the district contends that it fulfilled its obligation under State and federal regulations by having an IEP for the student in effect at the beginning of the 2011-12 school year. Relative to the May 2011 IEP, the district argues that the student in this case did not require a transition plan, that the lack of parent counseling and training services did not constitute a denial of FAPE, and that both the FBA and the BIP were appropriate. The district also argues that the parents' allegations relative to the public school site to which the student had been assigned were without merit because the student never attended the assigned school, but that even if the student had the student attended the public school site, he would have been suitably grouped, the district was not required to evaluate whether the TEACCH methodology was appropriate for him, and, that TEACCH was, in fact, appropriate to address his needs. The district requests that the IHO decision be upheld in its entirety, or, alternatively, requests a finding that the parents failed to demonstrate that they were entitled to direct funding of the student's tuition at Beacon for the 2011-12 school year.

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; 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., 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, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not

regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 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. Dep't 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. 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 IHO's findings that the May 2011 CSE was properly constituted and considered sufficient evaluative data to develop the student's 2011-12 IEP, that the May 2011 IEP contained appropriate annual goals and short-term objectives, that the lack of a specific placement recommendation on the May 2011 IEP did not constitute a denial of a FAPE, and that the district timely evaluated the student and timely offered him an educational placement for the 2011-12 school year, thereby rendering Jose P. inapplicable to the facts of this case (see IHO Decision at pp. 18-20).[5] 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]).

2. Scope of Review

Next, I note that as an exhibit to the petition, the parents' attorney attached a copy of the due process complaint notice which contains several handwritten notations and circles around several of its allegations, and a single footnote in the fact exposition portion of the petition states that the parents and their attorney have "annotated" the due process complaint notice to "identify claims that the IHO 'forgot' to address" (Pet. ¶ 7 n. 1; see Pet. ¶ 9); however, the petition itself does not describe why the annotations on these issues should lead to a different result than the one reached by the IHO, and instead simply demands that I "make the additional Prong I findings" that the IHO should have made against the district with respect to the parents' pleaded claims (Pet. ¶ 11). Under the circumstances presented, I will not. A party appealing must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" and this includes clearly identifying which particular issues that the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments] Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]).

State regulations governing appeals also require pleadings to set forth citations to the record on appeal, and shall identify the relevant page number(s) in the transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (see 8 NYCRR 279.18 [b]), however, with respect to the issues that the parents claim the IHO "forgot" to address, neither the

[5] While there are some assertions regarding these claims, as described in the next section there are no allegations of error with respect to these determinations which is why I find them unappealed.

petition nor the circled "annotations" include any references to the evidence in the hearing record at all, despite having utilized little more than half of the maximum 20-page petition length in which to do so. As the petition does not contain any guidance from the parents' counsel indicating the significance of these "forgotten" issues or at least citation to relevant portions of the hearing record, I will not sift through their due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on their behalf and I find the petition insufficient with respect to those issues[6] (8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 12-032); Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

When an IHO has not addressed claims but the issues are not sufficiently addressed on appeal, another option to consider is whether the case should be remanded to the IHO for a determination of claims that the IHO purportedly did not address.[7] Two factors weigh against this course of action in this case. First, there is doubt as to some of the parents' allegation that the IHO "forgot" to address the claims in the "annotated" copy of the due process complaint. For instance, the parents appear to claim that the IHO forgot their triennial assessment claim (Pet. Ex. B at p. 3), but the IHO did address triennial and timeliness of assessments (IHO Decision at pp. 18-19). The parents accuse the IHO of forgetting the issue of conducting an FBA and a BIP (Pet. Ex. B at p. 3, 6), but the IHO did determine whether the lack of an appropriate FBA and BIP denied the student a FAPE (IHO Decision at p. 22). The parents claim the IHO failed to address the transition plan claim (Pet. Ex. B at p. 5), but the IHO addressed the transition plan claim (IHO Decision at p. 19). The same can be said for the parents' Jose P. claims (compare Pet. Ex. B at p. 5 with IHO Decision at p. 20), grouping claim (compare Pet. Ex. B at p. 6 with IHO Decision at pp. 20, 22), TEACCH methodology claim (compare Pet. Ex. B at p. 6 with IHO Decision at p. 21), and parent counseling and training claim (compare Pet. Ex. B at p. 3 with IHO Decision at p. 21) and there is no validity to the allegation that the IHO forgot these issues. If it were true that the IHO overlooked an issue, I can discern no point from the handwritten markings that, if remanded, would likely lead the IHO to a different conclusion.[8]

Second, and more importantly, as further discussed below, the parents cannot prevail on their claim that the unilateral placement was appropriate and in the interests of judicial economy a remand to the IHO would not be warranted.

B. CSE Process/Parent Participation

The parents allege that the district unilaterally selected the particular school to which it assigned the student without any prior input from or discussion with them, and failed to provide them with the opportunity to "[meet] with the [district's] placement office or placement officers" (see Tr. pp. 476-77), thereby depriving them of the opportunity to meaningfully participate in the

[6] I have, however, carefully reviewed the entire hearing record to consider those claims that the parents have identified in their petition (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

[7] As a number of the enumerated allegations in the due process complaint notice were overlapping and even duplicative in some instances (see Parent Ex. A), I remind the IHO that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]) in order to determine which issues need to be addressed in the IHO's decision.

[8] It is further unclear why the annotated demand for due process attached to their petition is dated June 30, 2011 (Pet. Ex. B), whereas the demand for due process in the hearing record is dated July 19, 2011 (Parent Ex. A).

CSE review process and denying the student a FAPE. The district contends that the student was not denied a FAPE because it fulfilled its obligation under State and federal regulations by having an IEP for the student in effect at the beginning of the 2011-12 school year. Although the IHO found that the lack of reference to a specific school placement in the May 2011 IEP did not by itself constitute a denial of a FAPE (see IHO Decision at p. 19), the IHO decision did not further discuss the issue of parental participation in the selection of the assigned school.

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

v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; 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. June 13, 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, 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. 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]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; 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; M.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

Here, the district formulated an IEP for the student that specifically recommended, a 6:1+1 special class in a specialized school (see 8 NYCRR 200.6[h][4]). The hearing record reflects that Beacon's principal and the student's special education classroom teacher at the school (Beacon teacher), as well as the student's parents, participated in the May 2011 CSE meeting telephonically (Tr. pp. 57-58, 83, 470; Parent Ex. H at p. 2). The district's school psychologist testified that the student's mother and the Beacon staff "[were] afforded the opportunity to ask questions or voice any concerns at the meeting," and that the student's mother "was very specific about her request

for more sessions of speech and language therapy and [OT]" (Tr. pp. 73-74).[9] The hearing record reflects that at the time of the May 2011 meeting, the student's mother advised the CSE that "she was happy with Beacon and was going to keep him there," but also indicates that, although the student's father disagreed with some aspects of the district's recommended program, he was "open-minded and willing to accept a public school placement if it were appropriate" (Tr. pp. 83, 473-74, 501-02). The hearing record also demonstrates that the May 2011 CSE also considered a recommending a 10-month special education program consisting of a special class in a community school, but ultimately rejected it as insufficient to address the student's academic needs (Parent Ex. H at p. 15). Based upon my review of the hearing record, I find that the parents were afforded an opportunity to meaningfully participate in the IEP development process (T.P., 554 F.3d at 253; see M.W., 869 F. Supp. 2d at 333-34; M.R., 615 F. Supp. 2d at 294).

Next I will address the assertion by the parents that they were denied input or discussion as to the selection of the assigned school. Generally, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116, 300.327, 300.501[c]; 501[b][1][i]). The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. Aug. 19, 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). In T.Y., the student's IEP did not "name the school [the student] would attend," but rather, the parents received notice "in the mail that recommended a specific school placement" (T.Y., 584 F.3d at 416). The parents in T.Y. visited the recommended site, but thereafter rejected it; the district recommended a second site, which the parents "called" but did not visit, and thereafter unilaterally placed the student in a nonpublic school (id.at 416). Pointing to the IDEA and its implementing regulations, the parents argued in T.Y. that "'procedural safeguards . . . make clear that parents are to be afforded meaningful participation in the decision-making process as to the location and placement of their child's school and classroom'" (id.at 419). The T.Y. Court, however, relied upon precedent establishing that the "the term 'educational placement'" did not refer to the specific school, and expressly rejected the parents' argument (id.at 419-20;[10] see also R.E., 694 F.3d at 191). Moreover, the R.E. Court found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and that "[t]he [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (R.E., 694 F.3d at 191-92; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *12 [S.D.N.Y. Oct. 16, 2012]); K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug.

[9] According to the hearing record, the May 2011 IEP recommended the same levels of speech-language therapy and OT that the student received at Beacon during the 2011-12 school year (compare Tr. pp. 509-13, and Parent Ex. H at p. 16, with Nov. 15, 2011 Tr. pp. 249-50, and Tr. pp. 545-46).

[10] The United States Department of Education (USDOE) has clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).

23, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. Nov. 18, 2011]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12, *14 [S.D.N.Y. Nov. 9, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9 [S.D.N.Y. Oct. 28, 2011]; A.L, 812 F. Supp. 2d at 504).

For the same reasons, the parents' argument on appeal must also be rejected because the parents' right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school building or classroom, which is the crux of the parents' arguments in this case (T.Y., 584 F.3d at 416, 419-20; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9). Therefore, based upon the foregoing, there is little purpose in remanding this issue to the IHO for a determination of whether the district denied the student a FAPE by precluding the parents from having the opportunity to participate in the selection of the student's specific school because neither the IDEA nor its implementing regulations entitles them to such right.[11]

C. May 2011 IEP

1. Parent Counseling and Training

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). 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, some 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 M.W., 869 F. Supp. 2d at 335; C.F., 2011 WL 5130101, at *10; M.N. v.

[11] A separate issue that is not relevant to this case, because the parents rejected the IEP and did not permit the district to provide services to the student, is whether a denial of a FAPE occurred because district personnel deviated from substantial or significant provisions of the student's written IEP in a material way when providing special education services to the student (see A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see also Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at *3 [S.D.Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]). The Second Circuit has cautioned that a district will not escape liability for a denial of FAPE by providing an appropriate IEP but then providing the services to the student in a manner that substantially or materially deviates from the IEP- in other words, once the IEP is prepared the district does not have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). While the parents in this case, or in virtually any case, for that matter, may be understandably anxious regarding the provision of services to a student with a disability under their IEP, contrary to the parents' argument, the facts of this case call for analysis of whether the written plan was appropriate, not whether the district thereafter provided the services called for by the IEP (see R.E. v. New York City Dept. of Educ., 694 F.3d at 195 [explaining that "evaluation must focus on the written plan offered to the parents, however. Speculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement"]).

New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 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 [2008]; but c.f., P.K., 2011 WL 3625088, at *9, 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]).[12] Recently, the Second Circuit explained that "because school districts are required by [State regulation][13] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191). The Court further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (id.); see F.L., 2012 WL 4891748, at *10; K.L., 2012 WL 4017822, at *14).

In the case at bar, it is undisputed by the parties that the CSE neither discussed parent counseling and training during the May 2011 CSE meeting, nor recommended these services on the student's 2011-12 IEP (Nov. 3, 2011 Tr. pp. 114-16; Tr. pp. 470-71; see Parent Ex. H). However, neither the parents' claim by itself nor the evidence adduced in the hearing record offer much in the way of insight or rationale regarding how the failure to specify parent counseling and training on the student's IEP in this instance rose to the level of a denial of a FAPE, and as stated above, the Second Circuit does not appear to support application of such a broad rule when the principal defect in the student's IEP is failure to set forth parent counseling and training services (R.E., 694 F.3d at 191, 195; 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]). Where, as here, the hearing record does not contain evidence showing that this defect rose to the level of denying the student a FAPE, I find that the parents' argument must be dismissed.

I further note that in this case, district defended this claim substantively by proffering testimony of the district's unit coordinator, who testified that the assigned school offered monthly Parent Teacher Association (PTA) meetings for parents, during which workshops were typically presented addressing various issues, and that representatives from various agencies presented workshops at the assigned school; that the school's occupational therapist, physical therapist, and speech-language therapist also delivered presentations on various topics; and that the assigned school disseminated to parents information regarding other workshops taking place in the area "that can be helpful to understand autistic behavior" (Nov. 15, 2011 Tr. pp. 153, 163-64). The special education teacher at the assigned school also testified that she typically sent notes home to parents informing them of parent workshops (Nov. 9, 2011 Tr. p. 233). The Second Circuit has recently explained that under the "snapshot" rule, this evidence may not be considered because it constitutes "retrospective testimony" regarding services that the district failed to list in the IEP (R.E., 694 F.3d at 185-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of the parents' placement decision and that "retrospective testimony" regarding

[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, at *16 [E.D.N.Y. Oct. 30, 2008]).

[13] 8 NYCRR 200.13[d].

services not listed in the IEP may not be considered, but rejecting a rigid "four-corners rule" that would prevent consideration evidence explicating the written terms of the IEP]; see B.R. v. New York City Dep't of Educ., 2012 WL 6681046, at *5 [S.D.N.Y. Dec. 26, 2012]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; F.L., 2012 WL 4891748, at *14; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *10 [W.D.N.Y. Sept. 26, 2012]).

However, as discussed above, even acknowledging that the May 2011 CSE's failure to recommend parent counseling and training violated State regulation, the hearing record ultimately supports the conclusion that this violation, alone, did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

2. Transitional Support Services

In this case, the parents argue that the district failed to develop a transition plan for the student with respect to the student's transition from Beacon's private ABA-based program to the district's public school TEACCH-based program. The IHO found that the lack of a transition plan in the May 2011 IEP did not render it insufficient to provide the student a FAPE for the 2011-12 school year because "the absence in the IEP of a written transition plan for moving to a new placement is not a basis for concluding that a FAPE has not been provided" (IHO Decision at p. 19). Although the parties to this appeal do not dispute that the May 2011 IEP did not include a transition plan as set forth in State and federal regulations (Tr. pp. 82-83; see 20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]), the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another;[14] furthermore, assuming for the sake of argument that there was a requirement for the district to provide a transition plan in this case, I am not persuaded that the absence of a such private school to public school transition plan rose to the level of a denial of a FAPE to the student (see R.E., 694

[14] Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student had not attained the age of 15 at the time of the CSE meeting (see Parent Ex. H at p. 1).

F.3d at 195; F.L., 2012 WL 4891748, at *9). Based upon the foregoing, I find that the parents' argument must be dismissed.[15, 16]

3. 6:1+1 Special Class

The parents appeal the IHO's determination that the district's recommendation of a 12-month special education program, consisting of a 6:1+1 special class in a specialized school and related services, was appropriate for the student (see IHO Decision at p. 20). The evaluative information available to the May 2011 CSE reflected that the student exhibited significant delays in cognition; academics; receptive, expressive and pragmatic language; behavior and socialization; focus and attention; sensory processing; and fine motor/graphomotor skills (Tr. pp. 49-55; Dist. Ex. 3; Parent Exs. C-D; H at pp. 3-11; U). Beacon's principal, who participated in the May 2011 CSE meeting, and the student's ABA services providers further testified as to the student's needs with regard to academics, graphomotor deficits, his difficulties initiating and maintaining appropriate conversation, his distractibility and difficulty focusing, and his need for positive reinforcement of appropriate behaviors, such as focusing, staying in his seat, and demonstrating appropriate eye contact (Nov. 15, 2011 Tr. pp. 218-23, 226, 285-89, 301-02; Tr. pp. 322-27, 371-73, 401-03, 425-26, 456-57).

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 reflected in the evaluations before the CSE and State regulations, the May 2011 CSE recommended a 6:1+1 special class placement n a specialized school for the student for the 2011-12 school year (Tr. pp. 70-73; Parent Ex. H at pp. 1, 14). In addition, recognizing the level of the student's management needs, the May 2011 CSE also developed an FBA and a BIP, and included in the student's IEP an annual goal with six short-term objectives addressing the student's interfering behaviors (Dist. Ex. 3; Parent Ex. H at pp. 2, 10, 17). The May 2011 IEP also detailed the program modifications and human/material resources needed to address the student's management needs, including a structured academic environment, one-step directions and instructions, redirection as needed, praise, encouragement, modeling, positive reinforcement, refocusing, and OT and speech-language therapy (Parent Ex. H at pp. 3-5).

In addition to recommending the student for placement in a small, highly structured environment, the May 2011 CSE developed annual goals and short-term objectives designed to

[15] I note that the parents do not assert that the district failed to recommend transitional support services pursuant to State regulations governing the provision of educational services to students with autism. The particular State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]).

[16] In April 2011, the Office of Special Education issued an updated guidance document entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

address the student's academic deficits in reading (phonetic and comprehension skills), math (problem solving and calculation skills), and expressive writing, as well as his social skills deficits (Parent Ex. H at pp. 7, 9-10). The May 2011 IEP also included annual goals and short-term objectives drafted by the student's current speech-language therapist targeting his pragmatic, expressive, and receptive language skills deficits, and recommended three 30-minute 1:1 and one 30-minute small group (2:1) speech-language therapy sessions per week (see Tr. pp. 55, 104-05; Parent Exs. E at p. 6; H at pp. 3, 8, 11, 16-17). Relative to the student's fine motor and sensory processing delays, the May 2011 IEP included annual goals and short-term objectives drafted by the student's current occupational therapist, that targeted improving the student's fine motor and handwriting skills and his ability to process proprioceptive sensory input in order to improve his focus and attention deficits; to assist the student in achieving these goals, the May 2011 CSE recommended that the student receive three 30-minute OT sessions in a 1:1 setting per week (Tr. pp. 51, 54, 104-05; Parent Exs. H at pp. 2, 6, 16-17; U at pp. 1, 3).

Based upon the foregoing, I find that the evidence contained in the hearing record supports the IHO's finding that the district's recommended 6:1+1 special class in a specialized school was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

4. Consideration of Special Factors—Interfering Behaviors

Turning to the parents' appeal of the IHO's findings regarding the student's FBA and BIP, The parents argue that the FBA was deficient because it was created during the May 2011 CSE meeting, and was based solely upon verbal information obtained from the student's teachers at Beacon regarding the student's interfering behaviors. As set forth in greater detail below, I find that the May 2011 CSE properly considered special factors relating to the student's behavioral concerns that impeded his learning, and that the IEP and BIP developed for the student appropriately addressed those concerns.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some

circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (R.E., 694 F.3d at 190; A.H., 2010 WL 3242234, at *4; see F.L., 2012 WL 4891748, at *8; K.L., 2012 WL 4017822, at *11; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796, at *9 [S.D.N.Y. Sept. 26, 2012]; M.W., 869 F. Supp. 2d at 333; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8-*9 [S.D.N.Y. Dec. 8, 2011]; C.F., 2011 WL 5130101, at *9).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the

behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[17] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the parties do not dispute that the district did not conduct an FBA prior to the date of the May 2011 CSE meeting (Tr. pp. 84-85). However, as noted above, the district's failure to conduct an FBA prior to the May 2011 CSE meeting did not, by itself, automatically render the BIP deficient. While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

In this case school psychologist testified that the CSE developed an FBA during the May 2011 CSE meeting based upon information provided by the Beacon principal and the student's teacher, as well as the parents, and from information contained in a March 29, 2011 psychological evaluation report and a February 2011 classroom observation report, both of which were reviewed by the May 2011 CSE (Tr. p. 50; see Dist. Ex. 3; Parent Exs. C-D). The school psychologist also testified that during the CSE meeting, the principal and Beacon teacher related to the other CSE members the specific behaviors the student demonstrated that affected his ability to learn in the classroom, including his significant focusing difficulties that required constant redirection, his poor eye contact, and his need for encouragement in order to socialize with others; the behaviors he exhibited when upset, including withdrawing, leaving his seat, biting his arm and repeating the same words "over and over;" and his attention seeking behaviors, such as jumping in front of or between people who were talking to each other (Tr. pp. 61-63; see Dist. Ex. 3; Parent Ex. H at p. 17). The school psychologist further testified that the principal and Beacon teacher also advised the other CSE members as to when the behaviors occurred and explained how Beacon staff addressed these interfering behaviors, information that was documented in the FBA itself and was consistent with the March 2011 psychoeducational evaluation report and the February 2011 classroom observation report (Tr. pp. 61-65; compare Dist. Ex. 3, with Parent Exs. C-D). The

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

school psychologist added that the information furnished by the Beacon representatives prompted the May 2011 CSE to determine that the purpose of the student's interfering behaviors was primarily attention seeking, and stemmed from his difficulty with making his needs known (Tr. p. 64).

Turning to the appropriateness of the BIP developed at the May 2011 CSE meeting, I note that BIP identified the student's interfering behaviors as biting his arm; repeating the same words; withdrawing from others; "significant" difficulty focusing, which resulted in out of seat behavior; and poor social communication skills, which led to his jumping in between people in order to get attention (Parent Ex. H at p. 17). The BIP outlined the student's expected behavior changes, such as staying in his seat for at least 15 minutes, seeking help when frustrated (instead of biting his arm), improving his self-awareness with his teacher's help, paying attention to his environment, verbalizing his needs, and learning to approach other people appropriately (id.). The BIP set forth strategies to be employed in an effort to change the student's behavior, consisting of positive reinforcement of appropriate behavior (such as computer time and tangible reinforcers); verbal praise and positive attention; short, high interest activities; breaks between academic activities; structured socialization; and reminders to pay attention to his immediate surroundings (id.). The BIP also indicated the supports to be employed to help the student to change his interfering behaviors, including a small, structured academic environment, speech-language therapy, OT, and consistent contacts between his parents, teachers and therapists (id.).[18] However, I note that the BIP lacked a baseline measure of the student's problem behaviors[19] and a schedule to measure the effectiveness of interventions as mandated by 8 NYCRR 200.22[b][4][i], [iii] (see id.).

Although the lack of a baseline measure of the student's problem behaviors and a schedule to measure the effectiveness of interventions constituted a procedural violation of State regulations; I find that the student's interfering behaviors were nevertheless sufficiently addressed by the May 2011 IEP, and therefore, these technical violations did not deny a FAPE to the student. As discussed above, the May 2011 IEP included in the student's IEP an annual goal with six short term objectives addressing the student's interfering behaviors, and detailed the program modifications and human/material resources needed to address the student's management needs, including a structured academic environment, one-step directions and instructions, redirection as needed, praise, encouragement, modeling, positive reinforcement, refocusing, and OT and speech-language therapy (Dist. Ex. 3; Parent Ex. H at pp. 2-5, 10, 17). Accordingly, in this case, where the district formulated a BIP based on information from the evaluative reports available to the CSE and input from the student's parents, principal, and Beacon teacher, and developed management needs designed to target the student's interfering behaviors, I find that, contrary to the parents' contention, the absence of a baseline measure of the student's problem behaviors and a schedule to measure the effectiveness of interventions neither resulted in any substantive harm to the student

[18] According to the hearing record, the Beacon representatives who participated in the May 2011 CSE meeting indicated that they were not using an individual BIP for the student because his behavior was "'not very disruptive.'" Rather, they were using the same behavior plan for all students in the class (Parent Ex. H at p. 15; see Tr. p. 108). Additionally, one of the student's current ABA services providers testified during the impartial hearing that he did not perform an FBA of the student, but did "an informal assessment" in order to determine the "essential components to understanding [the student's] behavior" (Tr. pp. 360-62).

[19] The school psychologist testified that during the May 2011 CSE meeting, the CSE inquired of the parents and the Beacon representatives about the frequency of the student's problem behaviors, but that the Committee members did not receive "a very specific answer did not "get this information" (Tr. pp. 108-11).

nor rose to the level of a denial of a FAPE (R.E., 694 F.3d at 190-91; S.H., 2011 WL 6108523, at *8-*9; C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y. Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

In summary, based on the evidence above, the hearing record demonstrates that the recommended 6:1+1 special class program with related services was appropriate to address the student's needs as identified in the evaluative information before the CSE and was reasonably calculated to enable him to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]). Consequently, in view of the foregoing evidence, I find that the parents' claims that the May 2011 IEP was so deficient that it denied the student a FAPE are without merit, and there is no reason to disturb the IHO's finding that the district offered the student a FAPE for the 2011-12 school year.

D. Assigned School

I will next address the parties' contentions regarding the district's choice of assigned school. In this case, a meaningful analysis of the parents' claims with regard to the alleged changes in class composition and staff, lack of adequate 1:1 instruction and behavioral supports, functional grouping, and appropriateness of the TEACCH methodology would require me to determine what might have happened had the parents actually enrolled the student in the public school instead of unilaterally placing the student in a private school district been required to implement the student's May 2011 IEP.

The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct, through veto, a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11, aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). 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 it (id.; 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 appropriate, but the parents chose not to avail themselves of the public school program]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186; Ganje, 2012 WL 5473491, at *10; F.L., 2012 WL 4891748, at *14; but see E.A.M. v. New York City Dept. of Educ., 2012 WL 4571794, *11 [S.D.N.Y. Sept. 29, 2012] [holding that some speculation after the written plan has been developed regarding the provision of services to the student may be permissible even if the student did not enroll in the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; 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]). In this case, the parent rejected the IEP and unilaterally placed the student prior to the time that the

district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student would have been provided with appropriate 1:1 instruction and behavioral support, an appropriate grouping, and an appropriate methodology upon the implementation of his IEP in the proposed classroom (see R.E. 694 F.3d 167 at 195).

In short, while I can appreciate that loving parents would want as much assurances as possible that there will never be a lapse in the provision of their child's IEP services, I do not believe that under circumstances such as those in this case in which the IEP services were rejected by the parents that the parents may thereafter assert and prevail on claims that the district would not have provided the services called for in the written IEP because a district must be given a reasonable opportunity to implement the IEP before it can be held liable for a failure to provide services in conformity with an IEP. Unlike the analysis of a student's IEP, which is now firmly established as a prospective analysis (R.E., 694 F.3d at 195), the assessment of claims regarding the provision of services in conformity with that IEP is in my view a retrospective analysis that must be grounded in evidence of events that have in fact occurred (see e.g., D.D-S, 2011 WL 3919040, at *13).

Therefore, the findings below are offered in the alternative in the event there is need to reach the issues of what might have occurred had the IEP services been accepted and student attended the public school. 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 the 6:1+1 special class at the assigned district school was capable of providing the student with appropriate 1:1 instruction and behavioral support, suitable functional grouping, and an appropriate methodology, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at * 14 [E.D.N.Y. Mar. 30, 2012]; D.D-S, 2011 WL 3919040, at *13; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

1. Assigned 6:1+1 Classroom

The parents assert that the district should have been required to defend the appropriateness of its entire 2011-12 program, including that portion beginning in September 2011, instead of only the summer 2011 placement. The parents further contend that when finding the assigned placement appropriate for the student, the IHO failed to consider that the student composition and staff of the assigned 6:1+1 special class would change from summer 2011 to September 2011.

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. Jan. 6, 2012]; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"]). However, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v.

Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; 584 F.3d 412 [2d Cir. 2009]; Application of the Dep't of Educ., Appeal No. 11-147; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability,[20] and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).[21] This view is consistent with the opinion of the US Doe's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

In this case, the district developed the student's 2011-12 IEP and offered the student a placement by June 8, 2011, prior to the start of the 12-month school year, and was therefore in conformity with State and federal regulations (see Parent Exs. H-I). Moreover, because the student in this case did not ultimately attend the assigned classroom after the parents rejected the student's IEP on June 29, 2011, I find that the district was not required to defend the recommended placement from the fall to the end of the 2011-12 school year, and that the IHO's decision to limit her analysis to the appropriateness of the district's recommended ESY class was not improper, and there is no reason to reverse it (K.L., 2012 WL 4017822, at *16; Application of the Bd. of Educ., Appeal No. 12-096).

Turning next to the parents' contention that the assigned 6:1+1 special class at the public school site was inappropriate for the student because its composition and staff would change from summer 2011 to September 2011, assuming for the sake of argument that the district was obligated to defend the recommended placement from fall 2011 on, the assigned classroom teacher testified that in September 2011 the five students enrolled in the district's ESY class were split up into two other classrooms taught by different special education teachers, because in the assigned school "the classes are set up based on age. [W]e had new students and you have to move them up according to their age" (see November 9, 2011 Tr. pp. 182-83). However, while it is clear from the hearing record that, had the student attended the assigned classroom, the composition of the

[20] See 8 NYCRR 200.6 for New York State's continuum of services.

[21] The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room? (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 CFR § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

assigned classroom would have changed in September 2011, it is unclear from the hearing record whether the student would have remained in the assigned classroom come September 2011 or been placed in a different classroom for the balance of the 2011-12 school year (see Nov. 9, 2011 Tr. p. 186). Moreover, even assuming for the sake of argument that the student would have changed classrooms and teachers in September 2011, the USDOE has clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]; see Application of a Student with a Disability, Appeal No. 12-044). In consideration of the above, even given the student's difficulty with transitions, I decline to find that, had he attended the assigned classroom, the changes in composition, staff, and location of the assigned classroom, by themselves, show that the district would have deviated from substantial or significant provisions of the student's IEP in a material way, thereby denying the student a FAPE.

2. 1:1 Instruction and Behavioral Supports

Relative to 1:1 instruction, the assigned classroom teacher testified that students in the assigned 6:1+1 special class received at least 25 minutes per day of 1:1 attention or ABA discrete trial instruction during 1:1 time (Nov. 9, 2011 Tr. pp. 152, 163-64). She also indicated that in addition to initial whole group instruction in reading, writing and math, her students were paired together by functional levels in groups of two, for small group instruction and practice of a given skill (Nov. 9, 2011 Tr. pp. 160-62). She also noted that because students with autism often exhibit socialization difficulties, "we try as much as possible to pair them up with other kids and work together, and in groups, and during playtime they make choice of [whom] they want to play with" in order that "they will put everything into working with the [other] person … and that will cut down the time for inappropriate behavior" (Nov. 9, 2011 Tr. p. 165).

Relative to behavioral supports, the school psychologist testified that the May 2011 CSE recommended the 6:1+1 special class placement because the student "needs a small, structured, environment, with his tendency to leave his seat, and to go to sleep, it's very important [for him] to be in a very small, highly supervised environment," and noted that attention was also a "big factor" for the student, because he became frustrated and exhibited interfering behaviors such as biting and leaving his seat if he did not receive attention right away (Tr. pp. 72-73). The assigned classroom teacher testified that in July 2011, the classroom staff available to instruct and support the student included one teacher, one classroom paraprofessional, and an additional 1:1 paraprofessional assigned to another student in the class (Nov. 9, 2011 Tr. pp. 147-48). The special education teacher further testified that the assigned classroom staff modeled and facilitated appropriate social interactions among students, and kept close watches on students to ensure they were working together and not harming themselves (Nov. 9, 2011 Tr. pp. 165-66). She indicated that assigned classroom staff completed sensory and reinforcement assessments of students with input from parents, in order to determine the stimuli to which each student best responded, and then provided those items for use in the assigned classroom (Nov. 9, 2011 Tr. pp. 168-70). For those students who appeared "withdrawn or solitary," she explained that "we need to put more into his social skills," adding that "we would try as much as possible to bring him closer to his peers in the classroom." (Nov. 9, 2011 Tr. pp. 170-71). For those students demonstrating poor safety awareness, the special education teacher testified that she removed everything posing a danger from the classroom and closely supervised such students (Nov. 9, 2011 Tr. pp. 171-72). During

the impartial hearing, the special education teacher reviewed the student's BIP and explained how she would implement those strategies listed on the BIP to change the student's behavior, such as providing positive reinforcement of appropriate behavior (such as edibles or computer time) and breaks between academic activities, and testified that she currently employed several of the strategies listed on the student's BIP, including "structured socialization in class for a small group with interaction with playing with peers" (Nov. 9, 2011 Tr. pp. 198-200; see Parent Ex. H at p. 17). She also stated that like the student, "many" of her current students in the assigned 6:1+1 special class "need[ed] to be directed every minute, every moment, so that is what we normally do in class" (Nov. 9, 2011 Tr. p. 199). Accordingly, based upon the foregoing, I do not find support in the hearing record for the parents' contention that the assigned 6:1+1 special class would not have provided the student with the requisite level of 1:1 instruction and behavioral supports, nor do I find that staff in the assigned 6:1+1 classroom would have deviated from substantial or significant provisions of the student's IEP in a material way.

3. Assigned 6:1+1 Special Class—Functional Grouping

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 the Dep't of Educ., Appeal No. 11-113; 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).

In this case, the IHO found that the student was suitably grouped for instructional purposes in the district's summer program (IHO Decision at p. 22). The parents argue that the student would have been inappropriately grouped for instructional purposes in the district's summer program because students in the assigned 6:1+1 special class were grouped according to their ages and classifications, without consideration of their functional levels. Assuming for the sake of argument

that the district had been required to implement the student's IEP in accordance with State regulations regarding grouping, the parents' contention that the student would not have been offered a FAPE is not supported by the hearing record.

In this case, the assigned classroom teacher testified that as of the first day of the ESY program in July 2011, her classroom was composed of five students, ranging in age from six to seven years, who were classified as students with autism and functioned at between preschool and kindergarten levels, with the exception of one student, whom she described as "high functioning" and who possessed abilities similar to those of the student, insofar as he was able to read and count out loud up to 100, and was trying to write (Nov. 9, 2011 Tr. pp. 147, 174-175, 183-86, 202-04). By comparison, the May 2011 IEP reflected that the student was functioning at the following instructional levels: relative to reading, 2.1 in decoding, and 1.9 in both reading comprehension and listening comprehension; relative to writing, 2.0; and relative to math, 2.2 in computation, and 2.0 in problem solving (Parent Ex. H at p. 3; see Nov. 9, 2011 Tr. pp. 203-04). The assigned classroom teacher testified that the student would have been appropriately placed in her class, although he would have been the highest functioning student in both reading and math (Nov. 9, 2011 Tr. p. 204). She also testified that, like the student, one of her students in the assigned 6:1+1 special class also had a BIP (Nov. 9. 2011 Tr. p. 188).

Accordingly, upon review of the hearing record, I find that the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned district school for the recommended program beginning July 2011.

4. TEACCH Methodology

The parents allege that the district failed to properly evaluate whether the TEACCH methodology utilized in the assigned 6:1+1 special class was appropriate for the student, and that said methodology was, in fact, inappropriate to address the student's needs. Although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Ganje, 2012 WL 5473491, at *11; F.L., 2012 WL 4891748, at *9; K.L., 2012 WL 4017822, at *12; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

In this case, I find the parents' assertions regarding classroom methodology unpersuasive. Initially I note that while 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]), neither the IDEA nor federal nor State regulations require a district to evaluate a student with a disability relative to the potential efficacy of a particular teaching methodology.

Furthermore, I find that the hearing record does not support the parents' argument that the TEACCH methodology in the assigned 6:1+1 special class was inappropriate for the student. The special education teacher testified that she recommended a TEACCH style classroom "for a student who is able to work on a particular instruction that has been taught, independently. That is when they are able to do the work, they master the work, and then they go to that TEACCH section to work … on their already-mastered skills" (Nov. 9, 2011 Tr. p. 214). She also indicated that, based upon her review of the student's 2011-12 IEP, she considered him an appropriate candidate for a TEACCH style classroom because "he has some skills that he has already mastered … and these skills can be worked upon at a TEACCH center, so that number one, he won't forget, and he will improve on it" (Nov. 9, 2011 Tr. pp. 214-215). She testified that she considered some ability to sit and attend to a previously mastered task as a fundamental requirement for TEACCH, and while she acknowledged that the student's BIP reflected the student's limited attention span, she stated that "[i]t doesn't indicate to me that he has no attention – no attention at all. … [B]ut that doesn't mean he cannot sit at all. If he cannot sit at all, he wouldn't be able to do all those things that his [Beacon] teacher says … he is doing" (Nov. 9, 2011 Tr. pp. 215, 217-18; see Nov. 15, 2011 Tr. pp. 266-71; Parent Ex. H at pp. 4, 17). She further testified that upon the student's arrival in the assigned 6:1+1 special class, she would have observed him to verify that he had the skills reflected on his IEP (Nov. 9, 2011 Tr. p. 217). She also indicated that the assigned classroom methodology was not exclusively limited to TEACCH, and that she employed a combination of methodologies in addition to TEACCH, including 1:1 ABA discrete trials, "cooperative learning," which involved collaboration between other teachers, classroom staff, and related services providers designed to reinforce each other's goals, and a multisensory teaching approach (November 9, 2011 Tr. pp. 152, 155-56, 158, 213). Consequently, the hearing record demonstrates that the assigned classroom special education teacher could have employed other methodologies, in addition to or instead of TEACCH, in the event that she determined that TEACCH was not addressing the student's needs. Moreover, there is no indication in the hearing record that the student had any prior experience in a TEACCH style classroom, or any evidence suggesting that the student could not receive educational benefits from any methodologies other than ABA. In consideration of the foregoing, I find that the hearing record does not support the parents' argument that the methodology of the assigned 6:1+1 special class was inappropriate for the student.

Assuming for the sake of argument that the student had attended the public school and that the district had the obligation to show that it implemented the IEP, the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see T.L., 2012 WL 1107652, at *14; D.D-S, 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502-03].

VII. Unilateral Placement

As I briefly mentioned above in the discussion of whether to remand to the IHO for further findings regarding whether the district offered the student a FAPE, the parents also have not established that the IHO's decision should be reversed with respect to the unilateral placement of

the student. 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 offered an educational program which met 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; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). 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; see Frank G., 459 F.3d at 364-65).

In this case the IHO determined that it was undisputed that the student required a 12-month program but that the parents failed to establish that the student was provided a 12-month placement (IHO Decision at p. 23; see generally M.W. v. New York City Dept. of Educ., 869 F.Supp.2d 320, 334 [E.D.N.Y. 2012] [describing the purpose of 12-month services, which are provided when necessary to prevent substantial regression]; Antignano v. Wantagh Union Free School Dist., 2010 WL 55908, at *12 [E.D.N.Y. Jan. 4, 2010] [same]). However, the parents' petition does not appeal this determination, and as such, this determination has become final and binding on the parties and cannot be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Even if the parents had appealed the determination, with regard to the district's argument that Beacon was inappropriate because it did not provide the student with summer services, the hearing record shows that Beacon is only a 10-month program which, for the 2011-12 school year, began on September 1, 2011 and that it appears that the student attended a day camp during July and August 2011 (November 15, 2011 Tr. pp. 278-79; Parent Ex. N at p. 1). The evidence shows that beginning in September 2011 for the 2011-12 school year, the student also received ABA services through an agency (Yeled V'Yalda) which were provided in part at Beacon, at home, and beginning in January 2012, at the providing agency (Tr. pp. 320, 335-36, 400-01, 435-36, 450-52, 548-51, 559). However, the evidence in the hearing record does not show that either Beacon or Yeled V'Yalda provided services to the student during summer 2011 (Tr. pp. 335-36, 435-36). Although in a June 29, 2010 letter to the district the student's father indicated the parents would be seeking reimbursement for 30 hours per week of SEIT (ABA) services, one hour per week of SEIT (ABA) supervisor services, as well as five hours per week of speech and language therapy, three 30-minute sessions of OT per week, and transportation to and from school, the parents later abandoned that claim reimbursement (see Tr. pp. 489-95; Parent Exs. A at pp. 8-9; J at pp. 1-2) and did not offer evidence or describe any special education services that the student received in summer 2011. While the hearing record shows that the student attended camp during summer 2011 it does not show that he received SEIT/ABA services or other specially designed instruction during that period to prevent substantial regression (see e.g., Application of the Bd. of Educ., Appeal No. 11-075). In view of the forgoing, the evidence does not afford a sufficient basis for granting the parents' request to overturn the impartial hearing officer's determination that the parents' unilateral placement was inappropriate.[22]

[22] I am more hesitant to adopt the other branch of the impartial hearing officer's determination regarding Beacon, which essentially held that the parents were required to demonstrate progress at Beacon in order to prevail, because it must be kept in mind that "[a] student's academic progress in a unilateral private placement is relevant, but not dispositive, of the determination of whether it is appropriate" (Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *8 [S.D.N.Y. Mar. 18, 2010]; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F.Supp.2d 90, 115 ([E.D.N.Y. 2011]). In the absence of evidence regarding 12-month extended school year services, any difference in viewpoint between myself and the IHO regarding the weight that should be afforded to the evidence regarding the student's progress or lack thereof would not lead me to conclude that the parents should prevail with respect to their unilateral placement of the student.

VIII. Conclusion

In summary, upon due consideration of the evidence contained in the hearing record, I find that the May 2011 CSE's recommendation in the IEP of a 6:1+1 special class with related services in the IEP was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record demonstrates that the May 2011 IEP identified the student's multiple needs, developed annual goals and short-term objectives to address those needs, and recommended a program in the LRE (see 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]). I also find that the parents have not prevailed on their assertion that the unilateral placement of the student was appropriate. Having reached this determination, it is not necessary to address whether equitable considerations support the parents' requests; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 18, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER