The University of the State of New York

The State Education Department
State Review Officer
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No. 12-074

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:
Thivierge & Rothberg, PC, attorneys for petitioners, Randi Rothberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Ilana Eck, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2011-12 school year was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (Tr. p. 17; Parent Ex. A at p. 1; 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). When the student was approximately 18 months old, he received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS), at which time he began to receive home-based instruction using an applied behavior analysis (ABA) approach, speech-language therapy, occupational therapy (OT), and physical therapy (PT) through the Early Intervention Program (EIP) until age three (Tr. pp. 519-20; Parent Exs. C at p. 12; K at p. 1). At age three, per district recommendation, the student enrolled in a nonpublic preschool; however, he experienced difficulty adjusting to the program, and in September 2009, the parents unilaterally placed the student in Reach for the Stars Learning Center (RFTS), and he has remained there since that time (Tr. pp. 17, 520-21; Parent Exs. C at p. 12; I at p. 1; K at p. 1).[1]

On May 3, 2011, the CSE convened for an annual review and to develop the student's program for the 2011-12 school year (Dist. Ex. 3). The CSE recommended a 12-month placement

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

in a 6:1+1 special class in a specialized school, together with related services and the provision of a 1:1 health paraprofessional (id. at pp. 1, 5, 19).

In a final notice of recommendation (FNR) to the parents, dated June 8, 2011, the district summarized the May 2011 CSE's recommendations and notified them of the particular school to which the student was assigned for the 2011-12 school year (Parent Ex. G).

On June 23, 2011, the student's father and classroom teacher from RFTS visited the public school site identified in the June 2011 FNR (Tr. p. 541; Parent Exs. D; E). In a letter to the district dated June 23, 2011, the student's father advised that he did not accept the assigned public school site that the district offered, and outlined the reasons for his rejection (Parent Ex. E at p. 1). The parent further indicated that he planned to enroll the student in RFTS for the 2011-12 school year and seek from the district the costs of the student's tuition at RFTS and "additional ABA services" outside of school (id.).

In a decision dated September 6, 2011, an IHO directed the district to reimburse the parents for the cost of the student's tuition at RFTS for the 2010-11 school year (Parent Ex. C at p. 40).

A. Due Process Complaint Notice

By due process complaint notice dated October 18, 2011, the parents commenced an impartial hearing (Parent Ex. A). The parents alleged that the district failed to offer the student a free appropriate public education (FAPE) and, as relief, the parents requested, among other things, tuition reimbursement for the student's placement at RFTS for the 2011-12 school year, in addition to ten hours of private after-school ABA services to be provided at public expense (id. at p. 7). The parents also asserted that the student's pendency (stay put) placement was RFTS on the basis of the September 6, 2011 IHO determination for the 2010-11 school year (id. at p. 2). With respect to the parents' claim that the district deprived the student of a FAPE during the 2011-12 school year, the parents made the following allegations, which included, among other things: (1) the CSE's recommended 6:1+1 special class placement was not appropriate for the student, because it could not provide him with the level of intensive 1:1 instruction that the student required; (2) the district had predetermined the student's educational program; (3) the members of the May 2011 CSE lacked sufficient knowledge of the proposed 6:1+1 special class placement; (4) the May 2011 CSE did not include an individual to interpret the instructional implications of the student's evaluation results; (5) the district failed to adequately assess and evaluate the student; (6) despite the student's limited ability to verbalize, the district failed to assess the student's need for assistive technology; (7) the district failed to conduct a proper functional behavioral analysis (FBA); (8) the proposed behavioral intervention plan (BIP) was vague and insufficient, and lacked baseline data or any means of tracking the student's progress; (9) the goals listed in the May 2011 IEP were not sufficient to meet the student's needs; (10) some of the proposed goals and objectives were not measurable and some of the proposed goals were inappropriate for the student; (11) the May 2011 CSE failed to consider any "extended-day/weekend" services for the student; (12) the May 2011 IEP did not provide for parent counseling and training; (13) the May 2011 IEP did not offer the student sufficient supports and services, including related services; and (14) the May 2011 IEP could not meet the student's individual educational needs (id. at pp. 3-6).

Additionally, the parents argued that the assigned public school site was not appropriate for the student for the following reasons, which included, in pertinent part: (1) the assigned school did not offer the student the level of 1:1 instruction that he required; (2) the student could not learn in a group setting or work independently; (3) the assigned school did not offer sufficient staff training and supervision; (4) none of the students in the proposed class had individual BIPs, nor

were the teachers trained in behavior intervention; (4) the assigned school lacked individualized and sufficient behavioral supports for the student; (5) the assigned school would have grouped the student by age and not based on his needs; (6) the student would be required to eat with many children in a large space; and (7) the assigned school did not have a sensory gym and did not prepare sensory diets for the students (Parent Ex. A at pp. 7-8). The parents further maintained that RFTS was appropriate to meet the student's special education needs and that equitable considerations supported their request for relief (id. at pp. 1-2).

B. Impartial Hearing Officer Decisions

On November 9, 2011, the parties proceeded to an impartial hearing, which concluded on February 7, 2012, after five days of testimony (Tr. pp. 1-586). In an interim decision dated November 10, 2011, the IHO determined that RFTS constituted the student's pendency placement from the date of the parents' October 2011 due process complaint notice and directed the district to reimburse the parents for the cost of the student's tuition until the matter was "resolved by [a] final order" (Interim IHO Decision at p. 4).

In a decision dated March 2, 2012, the IHO rejected the parents' request for tuition reimbursement for the 2011-12 school year at RFTS, and their claim for ten hours per week of home-based ABA services (IHO Decision at p. 35). The IHO found that the May 2011 CSE, "to a large extent," based the resultant IEP on information provided to it from RFTS (id. at p. 30). Specifically, the IHO found that the district developed the student's FBA based on information from RFTS personnel (id.). The IHO further noted that the district requested a copy of the student's BIP from RFTS, but that the RFTS staff did not provide the BIP to the district (id.). However, the IHO concluded that the IEP sufficiently addressed the student's behavioral needs (id. at p. 31). Additionally, the IHO rejected the parents' claims that an afterschool program was necessary for the student in addition to the school-based program, because she reasoned that "a home-based program ha[d] to arise from a real need, not from a wish or desire to maxim[ize] the [s]tudent's services," and she concluded that while in this instance, the student had significant behaviors at home, he could nevertheless generalize the skills that he learned at school and she declined to consider time constraints due to the needs of other children in the home as a relevant factor (id. at p. 32). The IHO also noted her belief that intensive ABA services in the home was not appropriate in addition to the student's school-based program (id.).

Regarding the appropriateness of the CSE's recommendation for a 6:1+1 special class, the IHO noted testimony that the parents did not object to the recommended program during the CSE meeting, and notwithstanding their concerns that the 6:1+1 special class was not the same as a 1:1 teacher-to-student ratio, she concluded that it was appropriate for the student (IHO Decision at pp. 6, 31). Although the IHO acknowledged that the student had behavioral needs common to children on the autism spectrum, she did not find that served as a reason to continue to place him in a program that was "isolating and controlled" (id. at p. 31). Moreover, the IHO found that the district's recommended IEP provided for seven hours per week of 1:1 instruction (id.).

Regarding the assigned public school site, the IHO found that the children in the proposed classroom were similar to the student in the instant matter, and that the assigned school would have used similar methods to transition the student that were employed at RFTS (id.). In addition, the IHO found that the assigned school could fulfill the student's related services mandates (id.). Next, the IHO did not find any evidence to support the parents' claims that the student could not be taught the same way as the other children in the proposed class, respond to verbal requests, and that he needed a quiet space to eat (id.). Based on the foregoing, the IHO determined that the district offered the student a FAPE during the 2011-12 school year (id. at p. 32). In the alternative, the

IHO described the reasons why she found that the parents did not demonstrate that RFTS was an appropriate unilateral placement for the student (id. at pp. 32, 35).

IV. Appeal for State-Level Review

The parents appeal and allege that the IHO incorrectly found that the district offered the student a FAPE and request reversal of the IHO's March 2012 decision. As relief, they request tuition reimbursement for RFTS for the 2011-12 school year and summer 2012, as well as the cost of ten hours per week of home-based ABA services to be provided at public expense. Specifically, the parents assert that the May 2011 IEP was inappropriate for the student, in part, because the district representative lacked sufficient familiarity with the student and his individual educational needs to make appropriate recommendations for him. The parents also maintain that the district predetermined the student's program, and that their requests were not included in the May 2011 IEP. In addition, the parents claim that the district failed to adequately assess the student's needs. Next, the parents contend that the district failed to assess the student's assistive technology needs and provide the student with assistive technology services, although the district identified the student as "functionally non-verbal." They further contend that the proposed 6:1+1 special class placement was not appropriate for the student, in part, because the student required an intense ABA program on a 1:1 basis. Moreover, the parents assert that the district deprived the student of a FAPE, because it failed to provide him with extended-day programming. They further contend that the May 2011 IEP failed to include a provision for parent counseling and training. The parents also argue that the May 2011 CSE failed to review the student's FBA and develop an appropriate BIP for the student. They further maintain that the district's FBA did not include any data. Additionally, the parents challenge the appropriateness of the goals included in the May 2011 IEP, and argue that the district did not include goals recommended by RFTS personnel and that the student had already achieved a number of the proposed goals.

Additionally, the parents allege that the assigned public school site was not appropriate for the student because, among other things: (1) the assigned school could not suitably group the student for instructional purposes; (2) the student required 1:1 instruction throughout the day due to his maladaptive behaviors; (3) the student's behavioral needs would not be addressed individually; and (4) the assigned school lacked a sensory gym. The parents also argue that RFTS was an appropriate placement for the student and that supplemental home-based ABA services are also an appropriate component of the student's program. Lastly, the parents allege that equitable considerations favor their request for relief.

The district submitted an answer and requests that the IHO's decision be affirmed in its entirety. To the extent that the parents seek an award of reimbursement for summer 2012, the district claims that the parents' request is not ripe for review and should be dismissed. Regarding the parents' allegations that they are entitled to an award of relief for the 2011-12 school year, the district maintains that it offered the student a FAPE. Specifically, with regard to the provision of a FAPE to the student, the district submits the following: (1) the proposed 6:1+1 special class placement with related services and the provision of a 1:1 paraprofessional would provide the student with adequate support to receive meaningful educational benefit in the least restrictive environment (LRE); (2) there was no evidence that the district predetermined the student's program recommendation; (3) the omission of parent counseling and training from the student's IEP did not result in a denial of a FAPE to the student; (4) the failure to provide the student with assistive technology did not result in the denial of a FAPE to the student; (5) the BIP created for the student was sufficient and was based on an FBA that described the student's behaviors that interfered with his learning, in addition to strategies and supports to address the student's behaviors; and (6) the goals contained in the May 2011 IEP were appropriate because they included specific evaluative

criteria, evaluative procedures, and an evaluation schedule. Furthermore, the district argues that the assigned public school site was appropriate for the student, in part, because the student would have been functionally grouped for instruction. The district further alleges that the IHO properly rejected the parents' claims that the staff at the assigned school lacked the appropriate experience and credentials to implement the student's IEP. Next, the district contends that the assigned school could address the student's sensory needs. Lastly, the district maintains that because the assigned school could implement the student's May 2011 IEP, an extended-day program was not necessary for the student in order for the student to receive a FAPE. In addition to its contention that it offered the student a FAPE, the district further alleges that RFTS was not an appropriate placement for the student, and that equitable considerations should bar the parents' request for relief.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity

greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

1. Claim Raised on Appeal

Before reaching the merits of the instant matter, I must discuss which claims were properly preserved for review. On appeal, the parents have alleged that the district representative at the May 2011 CSE meeting lacked sufficient familiarity with the student and his educational needs to make appropriate program recommendations for him. As expressed in greater detail below, a review of the hearing record reflects that the parents failed to include this claim in the due process complaint notice, and, accordingly, it will not be considered on appeal.

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

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, this contention is raised for the first time on appeal and is outside the scope of my review and therefore, I will not consider it (see M.P.G., 2010 WL 3398256, at *8; Snyder, 2009 WL 3246579, at *7; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).[2]

[2] The Second Circuit has recently explained that "[t]he parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit them to add a new claim after the resolution period has expired would allow them to sandbag the school district. Accordingly, substantive amendments to the parents' claims are not permitted" (R.E. v. New York City Dept. of Educ., 694 F.3d 167 at 188 at n.4 [2d Cir. Sept. 20, 2012]). To the extent that the Second Circuit recently held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 2012 WL 2477649, at *28-*29 [2d Cir. June 29, 2012]), I note that the issue regarding the district representative's familiarity with the student was first raised by the

2. Premature Claims – Request for Relief for July 2012-August 2012

The hearing record reflects that the parents requested relief for the 2011-12 school year "including the summer;" however, it is unclear if they are seeking an award for summer 2011 or summer 2012 (Parent Ex. A at p. 1).[3] As a matter of State law, a school year runs from July 1 through June 30 (Educ. Law § 2[15]). In the instant case, the parents asserted no particular deficiencies or claims regarding summer 2011 services on the student's IEP other than their general claim that is addressed below regarding the adequacy of the special class placement offered for the entire school year, and at the time of the impartial hearing in this matter, the CSE had not yet completed its annual review for the student's educational program for the 2012-13 school year and had yet to develop the student's IEP. Because the 2012-13 school year did not start until July 1, 2012 (Educ. Law § 2[15]), long after the submission of the parents' October 2011 due process complaint notice, the district still had time to prepare an appropriate IEP for the student for the upcoming school year. In light of the above, to the extent that the parents raise claims with respect to summer 2012, and seek relief for that period of time, such claims are therefore premature, and will not be further considered in this appeal (see Application of a Student with a Disability, Appeal No. 10-051; Application of a Student with a Disability, Appeal No. 10-011; Application of a Student with a Disability, Appeal No. 09-066; Application of a Child with a Disability, Appeal No. 07-050; Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 00-006).

B. CSE Process

1. Predetermination /Meaningful Parent Participation

Turning to the procedural challenges, I will first consider the parties' dispute regarding whether the May 2011 CSE engaged in impermissible predetermination when formulating the student's IEP and whether the district failed to afford the parents a meaningful opportunity to participate in the development of the student's IEP. As set forth in greater detail below, I find that the hearing record does not include sufficient evidence to find in favor of the parents' claims. The consideration by district personnel 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

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impartial hearing representative for the district on cross-examination of district witnesses when she questioned the district representative about the classroom observation she conducted and her discussion with the student's classroom teacher (Tr. pp. 44-47). Additionally, the impartial hearing representative for the district asked the district representative if this was the first instance when she participated in a CSE meeting for the student, to which she replied, "no," but later explained that her familiarity with the student resulted from her observations of him and the CSE meetings (Tr. pp. 56-57). In any event, the district representative's lack of familiarity with the student and his special education needs did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]). The parents and the student's teacher, speech-language therapist and the assistant director from RFTS participated in the May 2011 CSE meeting (Dist. Ex. 2 at p. 2). Furthermore, the student's teacher provided the May 2011 CSE with information regarding the student's instructional levels and the hearing record reflects that RFTS personnel contributed to the student's FBA upon which the CSE based the BIP (Tr. pp. 51-54). Based on the foregoing, any alleged unfamiliarity of the student on the part of the district representative did not result in a denial of a FAPE to the student.

[3] The hearing record indicates that the May 2011 CSE meeting participants agreed to defer the student's placement until September 2011; however, the district representative testified that she made a mistake when she was drafting the meeting minutes and that it should have indicated that placement was deferred until July 2011 (Tr. pp. 75-76; Dist. Ex. 5). Under the circumstances, during closing remarks, counsel for the parents stated that the parents requested tuition reimbursement for the school year, in accordance with the district's program recommendation for the 2011-12 school year (Tr. p. 559).

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]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; 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 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Participants at the CSE meeting included the parents, a district special education teacher who also acted as the district representative, a district school psychologist, a district social worker, an additional parent member and by telephone, the RFTS educational director, the student's speech therapist, and his classroom teacher (Tr. p. 233; Dist. Ex. 3 at p. 2). The hearing record shows that the May 2011 CSE reviewed and discussed the student's academic present levels of performance and goals with the participants (Tr. pp. 66-67, 111, 323; Dist. Ex. 5).

Contrary to the parents' claim that the CSE predetermined the student's program, the hearing record reflects meaningful and active parental participation in the development of the student's May 2011 IEP, and willingness among the CSE members to consider different program options for the student. In this case, both parents participated in the CSE meeting accompanied by the assistant director of RFTS, the student's RFTS speech-language therapist, and his RFTS teacher (Dist. Ex. 3 at p. 2). According to the student's father, he requested that the district continue the student's program at RFTS for the upcoming school year (Tr. pp. 77, 524-25; Dist. Exs. 3 at p. 1; 5). Similarly, the student's providers at RFTS requested that the district provide him with a 1:1 program (Tr. pp. 70, 323). Although the district's obligation to permit parental participation in the development of the student's IEP should not be trivialized, the IDEA does not require districts to accede to the parents' program demands (Blackmon v. Springfield Bd. of Educ., 198 F.3d 648 at 657-58 [8th Cir. 1999]; citing Rowley, 458 U.S. at 205-06). In this case, while the May 2011 CSE considered the parents' request for placement in a 1:1 setting, the CSE rejected this program option because it determined that such a program could be detrimental for the student, given his need for socialization (Tr. pp. 55-56). The hearing record further suggests that the May 2011 CSE sought the parents' input to formulate program recommendations for the student. For example, according to the district representative, in preparation for the meeting, the district representative testified that she notified RFTS and the parents, and requested the student's progress reports and participation from the student's teacher by telephone (Tr. p. 58). There is also no evidence to suggest that anyone on the May 2011 CSE precluded the parents from participating fully in the meeting (M.W. v. New York City Dep't. of Educ., 2012 WL 2149549 at * 11 [E.D.N.Y., 2012]). The district representative testified that she shared the contact sheet with the meeting participants, and as the CSE drafted the May 2011 IEP, she "vocalized" it, to ensure that everyone was aware of what was being written (Tr. p. 72).[4] The Second Circuit has explained that district's have "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective, we cannot simply assume that the decision to rely heavily on a single method or style of instruction is necessarily inappropriate" and the evidence in this case does not support the conclusion that the

[4] According to the district representative, the contact sheet constituted the meeting minutes (Tr. p. 37; see Dist. Ex. 5).

district refused to consider the parents' input regarding the need for a 1:1 placement (M.H., 685 F.3d at 257). Based on the foregoing, I find that the evidence in the hearing record does not support a finding that the district predetermined the student's program for the 2011-12 school year, but instead shows that the parents meaningfully participated and contributed to the development of the student's IEP during the May 2011 CSE meeting.

2. Development of Annual Goals and Short-Term Objectives

As described in their due process complaint notice, the parents alleged that "some" of proposed goals and objectives were not objectively measurable, and that "some" goals were also inappropriate for the student (Parent Ex. A at p. 5). They also contended that the May 2011 IEP did not contain sufficient goals and objectives for the student's needs (id.).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

On appeal, the parents now argue that the May 2011 IEP did not include the goals recommended by RFTS personnel, and that some of the goals had been developed subsequent to the CSE meeting, and included targets that the student had already met – markedly different claims than those raised below (id.). However, assuming without deciding that the parents have properly raised their claims regarding the propriety of the goals in this appeal, to the extent that they are dissatisfied with the goals contained in the May 2011 IEP, the hearing record reflects the student's OT and speech-language therapy providers from RTFS provided the CSE with the student's speech-language and OT goals (Tr. pp. 64-65). Additionally, although the May 2011 CSE did not incorporate all of the proposed academic goals from RFTS into the resultant IEP, the hearing record demonstrates that all of the goals and short-term objectives were reviewed with the committee members, including the parents, during the May 2011 meeting (Tr. pp. 67, 111, 323). With respect to the academic goals, the district representative who participated in the CSE meeting explained that the May 2011 CSE determined that the goals recommended by RFTS personnel did not constitute academic goals, and opted not to incorporate all of the proposed goals from RFTS into the resultant IEP (Tr. pp. 66-67). Instead, the May 2011 CSE added academic goals into the resultant IEP, which it deemed to be "more appropriate" for the student (Tr. p. 67). Notwithstanding the parents' objection to the goals to the extent that the CSE did not adopt the proposed goals from RFTS in their entirety, while a CSE must consider parents' suggestions or input offered from privately retained experts, the CSE is not required to merely adopt such recommendations for different programming (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]). The IDEA does not require the district to offer the student what some may view as the "best opportunities" for the student (Watson, 325 F. Supp. 2d at 144) or "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132).

In addition, although the hearing record reflects that the student's annual goals and short-term objectives were discussed during the May 2011 CSE meeting, the director from RFTS testified that she believed some of the academic goals were drafted subsequent to the CSE meeting (Tr. p. 325). Where, as here, the hearing record reflects a pattern of meaningful parent participation, given that several of the student's annual goals and short-term objectives were gleaned from RFTS reports, the evidence weighs against a finding of a denial of a FAPE based on the parents' claim that RFTS personnel were not present for the entire discussion of the proposed goals (see Bougades v. Pine Plains Cent. Sch. Dist., 2009 WL 2603110, at *6 [S.D.N.Y. Aug. 25, 2009] rev'd on other grounds 2010 WL 1838710 [2d Cir. 2010]); E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388-89 [S.D.N.Y. 2009][explaining that proposed IEP goals do not have to be finalized during a CSE meeting]; see also Cerra 427 F.3d at 194).

Further, although the director from RFTS maintained that the academic goals in the IEP were inappropriate for the student because he had already accomplished them, and that some of the goals lacked specificity, a review of the remaining goals included in the May 2011 IEP reflects that the student's speech-language and OT goals derived from RFTS reports were specific and measurable (Tr. p. 326; Dist. Ex. 3 at pp. 7-13). I also find that for the reasons stated above, the district's inclusion of academic goals that lacked evaluative criteria or schedules did not result in a denial of FAPE to the student for the 2011-12 school year (see T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 419 [2d Cir. 2009] [holding that the inadequacies present in the student's IEP did not render it substantively deficient as a whole and could be corrected]; Karl v. Bd. of Educ. of the Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ. of Albuquerque Pub. Schs., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S., 454 F. Supp. 2d at 146-47 [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).

C. Adequacy of May 2011 IEP

1. Evaluative Data

I will next address the parents' claim that the district should have evaluated the student in order to adequately understand his needs. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in

addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

Information available at the time of the May 2011 CSE meeting included a September 2009 district bilingual psychological evaluation report; December 2010 RFTS progress reports in the areas of OT, speech-language, and education; and a January 2011 classroom observation report (Dist. Ex. 4; Parent Exs. K; AA; BB; GG). According to the psychological evaluation report, the student exhibited very significant delays in cognitive, adaptive, and interpersonal behavior skills (Parent Ex. K). The December 2010 RFTS progress reports indicated that the student exhibited maladaptive behaviors such as aggression, vocal protests, body tensing, non-contextual speech, and "flopping" when denied access to a desirable item, when a transition occurred, and during the interruption of an enjoyable event (Parent Exs. BB at p. 1; GG at p. 1). RFTS used visual schedules, immediate redirection to complete the activity, and frequent reinforcement of desired behaviors to reduce noncompliant behaviors (id.). In the area of communication, the RFTS speech-language progress report indicated that the student exhibited severe delays in receptive, expressive and pragmatic language skills, as well as speech production skills (Parent Ex. BB at p. 2). At the time the progress reports were prepared, the student communicated by using gestures, pointing, single word approximations, and communication boards (Parent Ex. AA at p. 1; BB at p. 1; GG at p. 2). He responded to his name and attention-getting commands with prompting, attended to 1:1 and group language tasks, and followed rote one-step directions with moderate prompting (Parent Ex. BB at p. 1). Socially, the student reportedly engaged in appropriate play with a toy for one to three minutes, with a peer for three minutes with verbal reminders, and enjoyed small group activities (Parent Ex. BB at p. 2; GG at p. 2). In the area of motor skills, the RFTS OT progress report indicated that the student demonstrated difficulties with sensory processing skills and exhibited frequent internal distractibility, low tone, and deficits in upper body, lower body, and core strength that affected his endurance and decreased his ability to perform many age appropriate gross and fine motor activities (Parent Ex. AA). RFTS staff also employed the use of sensory materials and equipment to address the student's sensory needs and self-stimulatory behaviors (Parent Exs. AA at pp. 1-3; GG at p. 1). According to the December 2010 educational progress report, the student was working on imitating gross motor movements, and exhibited an understanding of static vs. kinetic gross and fine motor movements; however, the student required

support to complete self-help activities such as washing his hands, toileting, and getting dressed (Parent Exs. AA at p. 5-6; GG at p. 2-3).

While the hearing record does not specifically identify the RFTS documents the May 2011 CSE reviewed, the present levels of academic and social/emotional performance in the May 2011 IEP reflected information provided in the December 2010 RFTS educational progress report (compare Dist. Ex. 3 at pp. 3-4, with Parent Ex. GG at pp. 1-2; see Tr. pp. 43, 64-66, 320-21). A review of the information available at the time of the May 2011 CSE meeting shows that it did not significantly differ from the information contained in the May 2011 IEP, and I note that the present levels of academic and social performance in the IEP were derived from verbal and written information provided by RFTS personnel prior to or during the May 2011 CSE meeting (Tr. pp. 51, 64-66, 320-21, 328; Dist. Exs. 3 at pp. 3-4; 5).[5] Therefore, the evidence in the hearing record supports the conclusion that the May 2011 CSE had sufficient evaluative information in order to identify the student's educational needs, and was not required to complete additional evaluations of the student prior to developing the May 2011 IEP.

Based on the evidence above, I find that the evaluative data considered by the May 2011 CSE and the input from the CSE participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop an appropriate IEP (see E.A.M. v. New York City Dep't. of Educ., 2012 WL 4571794, at *9-*10 [S.D.N.Y. Sept. 29, 2012]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

2. Appropriateness of 6:1+1 Special Class in a Specialized School

The parents next contend that the proposed 6:1+1 special class placement was not appropriate for the student. 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 State regulation, the district representative testified that the May 2011 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school, composed of up to six students, one teacher and one paraprofessional (Tr. pp. 34-35, 40). The district representative described the 6:1+1 special class placement as a "therapeutic" program, which provided the services of a psychologist, a social worker, and a nurse in a "close knit" environment (Tr. p. 35). The district representative further testified that within the 6:1+1 special class, students were provided with group work and instruction "carefully individualized because every child [wa]s working on specific goals and specific things that they need[ed] to improve or change" (Tr. p. 40). Related services provided in the 6:1+1 special class could be "intensive" with students receiving speech-language therapy, OT and/or PT services (Tr. p. 41). She further stated that the related service providers of students in the 6:1+1 special class worked in conjunction and consulted with the special class teachers (id.). The district representative testified that students in 6:1+1 special class placements received both 1:1 and group "experiences" (Tr. p. 42). According to the district representative, the district provided "very complete" services to students in the 6:1+1

[5] The hearing record reflects that the student was scheduled to undergo a triennial evaluation in September 2012 (Tr. pp. 43-44).

special class placement during the school day, including related services, academic, and daily living skills (e.g., toileting) instruction (Tr. p. 54).[6]

Furthermore, notwithstanding the parents' concerns that the student could not learn in a group setting, evidence in the hearing record does not suggest that he required an intense ABA program on a 1:1 basis in order to receive educational benefits.[7] Here, the hearing record showed that RFTS participants at the CSE meeting expressed their viewpoint that the student required a 1:1 instructional program (Tr. p. 70, 322-23). The district representative testified that although the student may require 1:1 instruction in certain circumstances, overall, he also required socialization opportunities such as those available in a 6:1+1 special class placement (Tr. pp. 55, 108-09). She further stated that during her January 2011 observation of the student at RFTS, he appeared to be "able to learn" in that he demonstrated skills such as identifying pictures and body parts, and understanding the need to complete a task to receive a reward (Tr. pp. 90, 116-17; see Dist. Ex. 4). The May 2011 IEP indicated that the student exhibited academic readiness skills at a beginning preschool level, communicated using a variety of methods, played with peers with adult support, enjoyed small group activities, and at RFTS, worked on activities to improve his independence to complete leisure activities (Dist. Ex. 3 at pp. 3-4). Additionally, the May 2011 IEP provided all of the student's 12 related service sessions on an individual basis, which afforded the student approximately seven hours of 1:1 services per week, in addition to the provision of full-time 1:1 paraprofessional services designed to assist him with daily living skills and behavior management needs (Tr. p. 42; Dist. Ex. 3 at p. 4).

Given the information that RFTS provided about the student's skill levels and behaviors, I find that the hearing record supports the IHO's conclusion that the May 2011 IEP provided appropriate supports and services to the student including placement in a 6:1+1 special class which offered the opportunity for individualized programming, some 1:1 instruction, full-time paraprofessional services, daily related services on an individual basis, and as detailed below, a

[6] To the extent that the parents maintain that the district's recommended program was not appropriate for the student, because it lacked an after-school, home-based component, several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Application of the Dep't. of Educ., Appeal No. 11-031; Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). In this case, the educational director from RFTS testified that the student required extended day programming, because despite the gains that the student made in school, he was not generalizing the skills learned in school across settings (Tr. p. 353). Likewise, the parents' expert witness at the impartial hearing recommended the provision of extended day programming for the student, because without that program component, the student could not generalize skills across environments (Tr. pp. 409-10). According to the student's father, the parents requested home-based services because when the student returned home from school each day, he was "really doing nothing," and the parents believed that they were wasting that time, where the student could continue to learn and work on certain behaviors at home (Tr. p. 535). The parents' expert added that she recommended that the student's program include a home-based component, not only to generalize skills across settings and to develop the student's self-care skills, but also to develop his leisure skills and assist the parents in addressing behaviors that needed to be generalized to the home setting (Tr. p. 410). For example, the parents' expert noted that home-based programming could help the student better tolerate a haircut or work on safety concerns, such as crossing the street (Tr. pp. 422, 544). Accordingly, the hearing record does not suggest that the student required home-based programming in order to make progress during the in-school portion of his program, and I agree with the IHO that home-based services were not a necessary component of a FAPE for the student (IHO Decision at p. 32).

[7] While I can certainly appreciate the parents view that intense 1:1 ABA services to be their preferred option for educating the student, it does not necessarily follow that the parents may select one particular method to the exclusion of other approaches (see F.L. v. New York City Dept. of Educ., 2012 WL 4891748, * 9 [S.D.N.Y. Oct. 16, 2012]).

BIP, such that placement in a full-time 1:1 educational setting was not warranted in order for the student to receive a FAPE. Accordingly, I see no reason to disturb the IHO's finding that the hearing record establishes that the proposed program was appropriate (IHO Decision at p. 31).

3. Assistive Technology

Next, I will consider the parents' contention that the May 2011 IEP was inappropriate because it did not call for the provision of assistive technology services as part of the student's recommended program for the 2011-12 school year. According to the present levels of performance included in the May 2011 IEP, the student's RFTS teachers estimated his reading, writing, and mathematics skills to be at a beginning preschool level (Tr. pp. 51-52; Dist. Ex. 3 at p. 3). At the time that the IEP was formulated, the student was working on completing five-piece square-edged, non-interlocking puzzles, matching associated objects, and imitating block formations and gross motor movements (Dist. Ex. 3 at p. 3).

Regarding the student's communication skills, the May 2011 IEP indicated that the student receptively demonstrated an understanding of categories such as toys, clothing and animals, and was working toward showing an understanding of simple instructions such as "clap hands," and "come here," body parts, shapes and animal sounds (Dist. Ex. 3 at p. 3). According to the IEP, due to the student's limited ability to verbalize, he communicated by pointing, and by using single-word approximations as well as communication boards (id.). When the student did not spontaneously request an item, the May 2011 IEP reflected that he was prompted to use his communication boards, and that he was also working on chaining the "'I want'" icon with the icon representing the desired item (id.). The May 2011 IEP further indicated that the student demonstrated the ability to independently comment "'all done'" using his communication boards, and that he was working toward using the communication board to indicate "'yes'" and "'no'" (id.). The May 2011 IEP also indicated that even when the student engaged in non-contextual speech, he could make his needs clearly known using the communication boards (id.).

Annual goals in the area of communication contained in the May 2011 IEP included improving the student's ability to attend to language, demonstrated by turning his head to locate the source of a sound/responding to his name and making eye contact; responding to attention-getting commands; attending to 1:1 and group language-based tasks; and exchanging eye contact (Dist. Ex. 3 at p. 8). The May 2011 IEP also provided annual goals designed to improve the student's social communication skills by increasing his response to others, improving his requesting skills by establishing eye contact while indicating wants and needs, and communicating the beginning and end of an activity using pointing, gesturing or vocalizations (id. at p. 9). Annual goals to improve the student's speech production and oral-motor feeding skills were also provided in the IEP (id. at p. 10).

In the area of expressive language, the May 2011 IEP provided annual goals to improve the student's ability to use carrier phrases (e.g., "I want") to request desired items, request various actions during structured activities, respond to functional "yes/no" questions, and label curriculum-related vocabulary words (Dist. Ex. 3 at p. 8). The student's expressive language annual goals were to be accomplished using "vocalizations/VOCA/static boards," or word approximations (id.).[8] The educational director at RFTS testified that the student communicated by using verbalizations and an augmentative communication "flip book," that contained symbolic representations of categories of items such as food, toys, and activities (Tr. pp. 233, 309-10). The

[8] The district representative testified that VOCA was an acronym for "voice output communication aides" (Tr. p. 49).

educational director who participated in the May 2011 CSE meeting testified that expressive language was the "first choice" of communication for the student, and only when the student exhibited a communication breakdown, would he be redirected to the communication boards (Tr. p. 310). Although the May 2011 IEP revealed that the student did not require assistive technology "devices" and "services," as previously stated, the IEP acknowledged his use of static communication boards in conjunction with verbalizations, gestures, and word approximations to communicate (Dist. Ex. 3 at p. 3). I further note that the hearing record provided no reason to speculate that the district would have deviated from implementing the student's annual goals in the IEP specifying in part, the use of "static boards."

Review of the evidence in the hearing record does not overall indicate that RFTS believed an assistive technology evaluation of the student was necessary in order for personnel to provide him with appropriate speech-language and educational services, nor does it suggest that the student's level of communication skills was such that a formal assistive technology evaluation was required for the student to receive a FAPE.[9] The district representative testified that the student's speech-language therapist at RFTS, who also participated in the May 2011 CSE meeting, did not recommend that an augmentative communication evaluation of the student be conducted (Tr. pp. 49-50). Had such a request been made, the district representative testified that the speech-language therapist would have filled out an assistive technology form indicating why the student would benefit from such services prior to the district conducting the assistive technology evaluation (id.). She further testified that the assistive technology evaluation "absolutely" would have been conducted if RFTS personnel had made that recommendation (Tr. pp. 50-51). In light of the foregoing, I do not find a sufficient basis in the hearing record to support a finding that the lack of assistive technology services on the May 2011 IEP resulted in a denial of a FAPE to the student.

4. Special Factors and Interfering Behaviors

With regard to the student's behaviors, I am also not persuaded by the parents' assertion that the district failed to prepare an appropriate BIP for the student. 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. Board 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

[9] The hearing record does not indicate that the student utilized a VOCA at RFTS prior to or at the time of the May 2011 CSE meeting (see e.g., Dist. Exs. 4; Parent Exs. AA at p. 1; BB; GG at pp. 1-2).

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.).[10] 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 (A.H., 2010 WL 3242234). Nevertheless, the Second Circuit has explained that when required "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all (R.E., 2012 WL 4125833). The Court also noted that when required "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors (id.).

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

[10] 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 [2d Cir. Oct. 27, 2006]).

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]).[11] 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 Education [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]).

On January 3, 2011, the district representative conducted a classroom observation of the student at RFTS to gather information about the student prior to the May 2011 CSE meeting (Tr. p. 58; Dist. Ex. 4). During her observation, the district representative reported that the student exhibited behaviors that interfered with his learning such as verbal protesting, tensing his body to resist movement, and grabbing a teacher's item of clothing (Dist. Ex. 4). The educational director at RFTS testified that she developed and provided to the CSE the social/emotional present levels of performance contained in the May 2011 IEP (Tr. pp. 328, 331). The social/emotional present levels of performance section of the May 2011 IEP indicated that the student engaged in several maladaptive behaviors such as aggression, vocal protests, body tensing, non-contextual speech, and flopping (Dist. Ex. 3 at p. 4). According to the May 2011 IEP, these behaviors occurred when the student was unable to gain access to someone's attention or communicate his needs, when he was denied access to a desirable item, when a transition occurred, and during an interruption of an enjoyable event (id.). The May 2011 IEP also indicated that immediate redirection to continue and complete an activity and frequent reinforcement of desired behaviors was required to "overcome" the student's maladaptive behaviors (id.). At the time the May 2011 IEP was created, the student was learning to accept "no," transition when interrupted from a current activity, and make requests appropriately to decrease the instances of maladaptive behaviors (id.). Socially, the May 2011 IEP indicated that the student worked on appropriate play and task completion skills on a daily basis to increase his play repertoire (id.). According to the May 2011 IEP, with verbal reminders, the student played with peers appropriately for three minutes, and enjoyed daily small group yoga, story, art, and cooking activities (id.). Moreover, at the time the May 2011 IEP was developed, the student was working on building cooperatively with a peer, and participating in an activity schedule to improve his independence in completing leisure activities (id.). The May 2011 IEP also indicated that the RFTS personnel described the student's behaviors as "'inconsistent;'"

[11] 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]).

and they added that he reportedly experienced "'good days,"' and days where he engaged in "'frequent"' maladaptive behaviors (id.).

During the May 2011 CSE meeting, the district's school psychologist prepared an FBA based upon information contained in the January 2011 classroom observation report, and the RFTS therapists' progress reports, information verbally provided by the student's RFTS teacher, speech-language provider, and educational director at the meeting (Tr. pp. 53-54; Dist. Ex. 3 at p. 21). The FBA report referenced the student having received a diagnosis of autism, and that he exhibited severe speech and developmental delays (Dist. Ex. 3 at p. 21). Immediate antecedents to the student's maladaptive behaviors identified in the FBA report included the following: (1) when the student was transitioning between activities; (2) when he was denied access to a desirable activity; (3) when he was unable to communicate his needs; and (4) when he was interrupted from a current activity (id.). The problematic behaviors occurred in the classroom and therapy room, and were described as body tensing, flopping, crying, vocal protesting, and biting his clothing (id.). Continuation of the undesirable activity and redirection were used as consequences of the behaviors, and the FBA identified the functions of the behaviors as the student seeking attention, immediate gratification of needs, avoidance of transition and change, sensory stimulation, and to communicate his needs (id.).

The May 2011 CSE determined that the student's behavior required highly intensive supervision and he required a BIP, which district staff developed from information provided in the FBA report (Tr. pp. 52-53; Dist. Ex. 3 at pp. 4, 20). The resultant BIP described the student's behaviors which interfered with learning as his difficulty transitioning from one activity to another, becoming easily frustrated, and demonstrating vocal protests, body tensing, flopping, crying, screaming, and biting his clothing (Dist. Ex. 3 at p. 20). The BIP identified the expected behavior changes such as the student seeking adult assistance when frustrated, using gestures and/or short requests, preparing for changes in routine to improve transitions, and using a "tension ball" to replace biting his clothing (id.). The BIP also identified strategies that would be employed to change the student's behavior including redirecting his attention, providing positive and immediate reinforcement of appropriate behavior using tangible reinforcers and enjoyable activities, and providing short, high-interest activities, picture schedules and opportunities for structured socialization (id.). Supports built into the May 2011 IEP included the provision of a small, structured academic environment, predictable routine, speech-language therapy, small group activities, positive reinforcement, modeling and encouragement (id. at pp. 4, 20). The May 2011 IEP also identified the student's teachers, related service providers, and 1:1 paraprofessional as the individuals responsible for providing him with behavioral supports (id.).

Regarding the parents' assertion that the district's FBA did not include any data,[12] I note that the student was attending RFTS at the time of the May 2011 CSE meeting, and conducting an FBA to determine how the student's behavior related to that environment has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at RFTS and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; see also Cabouli, 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [stating that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and

[12] On appeal, the parents also assert that the May 2011 CSE failed to review either the BIP or the FBA during the meeting, and cite testimony from the RFTS educational director to support this claim. However, the hearing record indicates that the educational director did not recall whether the FBA was reviewed during the time she participated in the meeting, although she did testify that the CSE discussed the student's behaviors (Tr. pp. 327-29). Additionally, the district representative testified that the FBA was discussed and developed during the CSE meeting (Tr. pp. 53-54).

BIP will be developed after a student is enrolled at the proposed district placement]). The RFTS educational director's testimony supports this principle, as she explained at length why "the FBA should be conducted within the environment that the behavior plan is going to be implemented" (Tr. pp. 329-30, 370-72). Additionally, during testimony, she identified the student's problematic behaviors as aggression toward others, non-contextual speech, flopping during transitions, self-stimulatory movements, body tensing and vocal protests; behaviors that the district's FBA and May 2011 IEP's present levels of performance identified (compare Tr. pp. 249-50, with Dist. Ex. 3 at pp. 4, 21). Under the circumstances of this case, where the student was currently in a private educational setting and not the recommended public placement, and the results of the FBA were commensurate with the information about the student's behaviors provided to the CSE, I cannot conclude that the lack of "data" in the FBA in this instance rose to the level of a denial of a FAPE (compare Tr. pp. 101-02, 328, 331, 373-75, and Dist. Ex. 3 at p. 4, and Dist. Ex. 4, with Dist. Ex. 3 at p. 21).

Additionally, to the extent that the parents' claim that the May 2011 BIP was inappropriate because it was "vague," the IEP, including the BIP, shows that the May 2011 CSE identified and described the student's behaviors, expected behavior changes, strategies employed to try to change the behavior, and the supports to be provided (Dist. Ex. 3 at pp. 4, 20-21). The May 2011 IEP further identified the antecedents to the behaviors, the settings in which the behaviors took place, the consequences of the behaviors as well as the possible functions of the behaviors (id. at p. 21). The RFTS educational director, who had known the student since he began attending RFTS, testified that she provided the May 2011 CSE with the information "crucial" to identifying the student's behaviors and the interventions used with him at RFTS; however, she did not provide the CSE with the BIP for the student used at RFTS, and the district's BIP reflected some of the information provided by RFTS (Tr. pp. 249, 330-31, 356-57, 362, 366-67). Considering that the student had been attending RFTS since September 2009, and the hearing record showed RFTS did not share its BIP with the district, I find that the May 2011 IEP and BIP otherwise provided sufficient information to advise district staff about the student's problematic behaviors and strategies to manage them (Tr. pp. 100-01, 329-30, 356-57, 521; Dist. Ex. 3 at pp. 4, 20-21). Under the circumstances presented above, the hearing record does not substantiate the parents' claim that the district failed to incorporate appropriate behavioral supports in the May 2011 IEP.[13]

5. Parent Counseling and Training

The parents also maintain that the district's omission of the provision of parent counseling and training from the May 2011 IEP contributed to a denial of a FAPE to the student. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). 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

[13] Although I conclude that the district did not fail to offer the student a FAPE in this instance, I emphasize the Second Circuit's point in R.E. that it is important for districts to appropriately address the procedural process for developing an IEP and BIP in a manner consistent with State regulations. In circumstances like Cabouli in which conducting an FBA in the public school environment was not possible at the time the IEP was first developed due to a parental placement (2006 WL 3102463, at *3), a CSE may need to document the efforts made to gain insight into the student's interfering behaviors at the time of the CSE meeting and make arrangements in the IEP for a procedurally compliant FBA to be conducted and a BIP developed at the first reasonable opportunity. Depending on the results of the FBA, it may be become necessary to revise the student's IEP.

development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see M.W. v. New York City Dep't of Educ., 2012 WL 2149549, at *13 [E.D.N.Y. June 13, 2012]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 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 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011], adopted at, 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]). Recently, the Second Circuit explained that "because school districts are required by [State regulation][14] 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., 2012 WL 4125833). 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.).

Here, the hearing record shows that the assigned public school site was capable of providing parent counseling and training required in State regulations insofar as the district employed a parent coordinator who conducted workshops on various topics, such as transportation and IEPs (Tr. pp. 136-37). According to the lead teacher from the assigned school, although the parent coordinator did not work on-site, the parent coordinator visited the assigned school two or three times per month and was involved in parent counseling and training (Tr. p. 167). She added that the parent coordinator sent out flyers regarding upcoming workshops and information sessions (Tr. p. 169). The lead teacher further testified that the related services providers employed at the assigned school also provided parent counseling and training, based on the needs of the students and their parents, including a workshop on PECS that had taken place earlier in the school year (Tr. pp. 168-69).[15]

I find under the circumstances of this case that the district's failure to incorporate parent counseling and training into the May 2011 IEP, while such was a violation of State regulation, did not rise to the level of a denial of a FAPE to the student (see R.E., 694 F.3d at 191; C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509; M.W., 2012 WL 2149549, at *13). Additionally, I note that the district was capable of providing the service and, as stated by the Second Circuit, the district "remain[s] accountable for its failure to [provide parent counseling and training] no matter the contents of the IEP" as required by State regulations (R.E., 2012 WL 4125833).

D. Assigned School

While 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; Tarlowe, 2008 WL 2736027, at *6),

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[14] 8 NYCRR 200.13[d].

[15] PECS is an acronym for Picture Exchange Communication System.

the parents in this case also raise a numbers of allegations regarding the appropriateness of the assigned public school site. Here, a meaningful analysis of the parents' claim with regard to the student's particular public school assignment would require me to speculate to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). 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, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a 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 [N.D.N.Y. Aug. 21, 2008], aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]).

In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement (R.E., 694 F.3d at 195; see F.L., 2012 WL 4891748, at *15-*16). Thus, in a case such as this one when it became clear that the student was not going to be educated under the proposed IEP, there can be no denial of a FAPE due to the to the speculation that there would be a failure to implement the IEP (see R.E v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]; 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]).

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 and thereby precludes the student from the opportunity to receive educational benefits (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 parents rejected the IEP and enrolled the student at RFTS prior to the time that the district became obligated to implement the student's IEP (Parent Ex. E at p. 1). Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record 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 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 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]).

1. Functional Grouping

With regard to the parents' claim related to grouping the student at the public school site, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

Students in the special class the lead teacher from the assigned public school site testified the student may have been placed in had he attended the school exhibited a range of communication skills; some students were verbal, one was nonverbal, and one student used one to two words to communicate (Tr. pp. 143, 155-56, 178-79).[16] Students in the class used various augmentative communication devices and picture communication systems (Tr. pp. 156-57, 199). Although the lead teacher did not know the specific reading and math levels of each student in the special class, she stated that some students were "nonreaders," some students were "readers," and some but not all students performed single-digit addition and subtraction (Tr. pp. 143-44, 180-81). Students in the proposed class exhibited sensory needs (Tr. p. 198). Following a review of the social/emotional present levels of performance contained in the May 2011 IEP that described the student's maladaptive behaviors, the lead teacher indicated that students in the special class also

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[16] According to the lead teacher at the assigned school, the three 6:1+1 special classes at the school were composed of six students and one teacher and one classroom paraprofessional, with additional individual paraprofessionals depending on the needs of the students in the class (Tr. pp. 129, 137-38). The hearing record does not indicate which of the three 6:1+1 special classes the student would have been assigned had he attended the assigned school (Tr. pp. 140-41, 169-72, 203-04; Dist. Ex. 2). The lead teacher stated that there was "not really" a distinction between the three special classes, in that all were composed of students in grades kindergarten through second grade and that the school attempted to group the students by age and ability (Tr. pp. 135, 141). During the impartial hearing, the lead teacher provided testimony about a particular 6:1+1 special class where the majority of students were born the same year as the student (Tr. pp. 141-42). As of September 2011, that particular special class was composed of five students, one special education teacher, one classroom paraprofessional, and one individual paraprofessional (Tr. pp. 141, 144-45).

exhibited the same behaviors as the student (Tr. pp. 146, 190-92). The lead teacher further indicated that based upon the information in the May 2011 IEP, she could meet the student's needs, because he "looked" like students at the assigned school (Tr. p. 161).

In view of the foregoing, the hearing record shows that the assigned public school site had a seat available in a 6:1+1 special class with students who exhibited similar academic, behavioral and communication needs as the student, and it further suggests that the assigned school was capable of suitably grouping the student for instructional purposes in compliance with State regulations.

2. Quantity of 1:1 Instruction at the Public School Site

The parents also claim that the student requires 1:1 services throughout the entire day as a result of his maladaptive behaviors and learning needs. Here, the hearing record demonstrates that RFTS provided the student with 1:1 instruction and group instruction with 1:1 support (Dist. Ex. 3 at p. 4; Parent Ex. AA at p. 1; BB; GG at p. 2-3). Insofar as the parents' claim, at its heart, goes to the adequacy of the special education instruction called for in the student's IEP, I have nevertheless reviewed the evidence offered by the parties related to the public school site. The special education teacher of the proposed special class at the assigned school testified that she provided students with individual and group instruction on a daily basis (Tr. pp. 182-84). To the extent that the paraprofessionals in the class held an instructional role, the lead teacher testified that paraprofessionals received their directives from the special education teacher, and carried out those tasks (Tr. pp. 178, 185-86). Students did not initially work independently (Tr. p. 185). Once students mastered a task, they were encouraged to work independently but provided with constant supervision (Tr. p. 186). The assigned school offered paraprofessional services and the related services of speech-language therapy, OT, PT and vision therapy (Tr. p. 138). Following a review of the May 2011 IEP, the lead teacher at the assigned school testified that the school could implement the paraprofessional and related services recommended for the student on his IEP, which as previously stated, included all individual sessions including one 45-minute speech-language therapy session per day (Tr. pp. 138-40, 176; Dist. Ex. 3 at p. 19).

The lead teacher also stated that the special education teacher of the proposed special class provided differentiated instruction in "everything" according to students' individual plans (Tr. p. 144; see Tr. p. 189). Lessons were provided by "meet[ing] each child where they are," and modified depending on their prior knowledge and support requirements (Tr. pp. 145, 188-89, 209-10). Instruction was also provided using methods including ABA and "TEACCH" strategies, and a variety of curricula (Tr. pp. 147, 179-80, 209).[17] The lead teacher stated that the student would have received instruction at a pre-kindergarten level according to the present levels of performance in the May 2011 IEP (Tr. pp. 214, 221).

Assuming that the parents had enrolled the student in the public school, I find the evidence in the hearing record supports the conclusion that the assigned school site had the ability to provide the student with 1:1 instruction in the proposed 6:1+1 special class, as well as multiple sessions per week of individual related services. As detailed above, the hearing record further reflects that the 1:1 paraprofessional could have furnished the student with instructional and behavioral support under the direction of the special education teacher. These services, in combination with the student's ability to participate in group activities with adult assistance, support a finding that the

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[17] Although not elaborated on in the hearing record, TEACCH is presumed to be an acronym for Treatment and Education of Autistic and Communication related handicapped Children.

assigned school could have accommodated some of the parents' desire for 1:1 instruction and support, albeit not all of what that they wished.

3. Staff Training to Implement the Student's BIP

The parents' claim that the assigned school would not train staff to implement the student's BIP. Assuming for the sake of argument that the student had been enrolled in and attended the public school, the available evidence would not support such a claim. Although the lead teacher from the assigned school could not specifically describe the educational background of the special education teacher from the proposed class, the lead teacher testified that the teacher from the proposed class was a certified special education teacher and had training in ABA instruction (Tr. pp. 142, 174-75). Similarly, although the lead teacher did not provide specific details regarding the training and background of the classroom paraprofessional, she noted that the classroom paraprofessional had many years of experience (Tr. pp. 173-74). Furthermore, the lead teacher explained that staff at the assigned school were required to undergo mandated training each year (Tr. p. 174). She further described "staff development days," which involved professional development for teachers and paraprofessionals, and the lead teacher cited a workshop completed by assigned school personnel on positive behavior intervention (Tr. pp. 204-06). While the lead teacher admitted that staff at the assigned school would not receive training on implementing the student's specific BIP, she testified that staff would review it together in order to implement it (Tr. pp. 194-95). Furthermore, notwithstanding the parents' claims that staff at the assigned school lacked the experience and training to address the student's behavioral needs, the hearing record contains evidence to the contrary. For example, the lead teacher testified that the assigned school employed a positive behavior support plan to address students' behavioral needs (Tr. p. 147). She described strategies included in the behavior support plan, such as puppets and the use of a reward system, and further explained that such strategies effectively decreased aggressive behavior in students (Tr. pp. 147, 151-52 192-93). She also noted that staff at the assigned school had experience in developing behavior plans and that the teacher of the proposed class knew how to implement a behavior plan (Tr. pp. 207-08). In light of the foregoing, the evidence does not support a conclusion that staff at the assigned school lacked the necessary experience and training to address the student's behavioral needs and would have deviated from the student's IEP in a material or substantial way.

4. Behavioral Support

Regarding the parents' claim that the assigned school would not address the student's behavior needs individually, the hearing record supports a contrary conclusion. The May 2011 IEP provided the student with full-time individual paraprofessional services, designed in part to provide support for the student's behavior needs (Dist. Ex. 3 at pp. 4, 19). For students whose behavior needs required highly intensive supervision, the lead teacher at the assigned school stated that they were "never alone" and that an adult was always present to help the student de-escalate (Tr. pp. 147-48). Classroom staff sat with and "talk[ed] [students] through" episodes of aggression and anxiety (Tr. p. 149). For students who exhibited difficulty with transitions, personnel sang "warning songs" to provide students with a cue that the activity was coming to an end (Tr. pp. 153-54). Special education teachers also assessed the students and determined the frequency with which they required reinforcement (e.g., immediately or at the end of the day) and by what method (e.g., token board) (Tr. pp. 193-94). The lead teacher testified that some students received reinforcement more than others, depending on their needs, and that teachers were able to reinforce behaviors "right on the spot" if necessary (id.). When students were "caught" doing something positive, they were provided with "gotcha bucks" which they could use to purchase items from the school store (Tr. p. 193). The lead teacher further indicated that whoever was with the student,

including the related services providers, the paraprofessional or the teacher, could provide the student with the immediate redirection recommended in his BIP (Tr. p. 194). Furthermore, the lead teacher added that there was a student in the proposed class with a BIP, and that there were other students in the proposed class who exhibited behaviors similar to those exhibited by the student in the instant case (Tr. pp. 190-91). Based on the evidence above, I find that the assigned school provided a variety of behavioral supports to students on an individual basis, and was capable of addressing the student's specific behavioral needs.

5. Sensory Equipment

Lastly, a review of the hearing record indicates that the assigned school could have met the student's sensory needs. Although the assigned school did not have "various suspended equipment," as prescribed by the student's IEP, the lead teacher testified that the assigned school had obstacle courses located in the gym, in addition to beans, a trampoline, roller skates, and a swing (Tr. pp. 196-98).[18] However, she also explained that if the student's occupational therapist determined that the student required certain equipment, the assigned public school site could obtain that material for him (Tr. pp. 211-12). According to the lead teacher, the assigned school site "cater[ed] to the children" and "g[ot] what … they need[ed] to improve their outcomes" (Tr. pp. 212-13). Lastly, although the hearing record suggests that none of the students attending the assigned school required sensory diets, the lead teacher testified that students enrolled there had sensory needs (Tr. p. 198). Under the circumstances, the hearing record reflects that the assigned school could address the student's sensory needs.

Based on the circumstances described above, I find that had the parents enrolled the student in the public school and triggered the district's responsibility to provide the student special education services in conformity with the student's IEP, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way.

VII. Conclusion

Having determined that the IHO properly found that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of RFTS, or whether the equities support the parents' claim for tuition reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
October 26, 2012

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JUSTYN P. BATES
STATE REVIEW OFFICER

[18] The lead teacher also explained that a swing could constitute "various suspended equipment" (Tr. pp. 211-12).