The University of the State of New York

The State Education Department
State Review Officer
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No. 12-075

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, G. Christopher Harriss, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Sonia Mendez-Castro, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered the district to reimburse the parents for the student's tuition costs at the Aaron School for the 2011-12 school year. The parents' cross-appeal from the failure of the IHO to render determinations on several issues. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a 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 in this case has a history of speech and language delays, attending difficulties, and problems with auditory and sensory processing, as well as anxiety, and low frustration tolerance (Tr. pp. 236-39; Dist. Ex. 9 at p. 5; Parent Ex. E at pp. 1-2). He initially received services through the Committee on Preschool Special Education (CPSE) (Tr. pp. 240-41), and upon reaching age five, the student began kindergarten during the 2009-10 school year at the Aaron School (Parent Ex. E at p. 1; see Dist. Ex. 18 at p. 1). He has remained at the Aaron School since that time (Tr. pp. 190-96; see Dist. Exs. 13 at p. 1; 18 at p. 1; Parent Exs. A at p. 1; E at p. 1). On

February 3, 2011 the CSE convened to conduct the student's annual review and develop the student's IEP for the 2011-12 school year (Dist. Ex. 9 at p. 2). The CSE continued to find the student eligible for special education and related services as a student with a speech or language impairment and recommended that he be placed in a 12:1+1 special class in a community school, and receive speech-language therapy, counseling and occupational therapy (OT) (id. at pp. 1, 20).[1] During the February 2011 CSE meeting, the student's mother expressed concern that a 12:1+1 special class would not provide the student with enough support (Dist. Ex. 10 at p. 2).

The CSE sent a notice to the parents bearing the date February 3, 2010,[2] which indicated that the student had a right to immediate placement at a public school, but that the district recommended that the student be shifted from the Aaron School to the public school at the beginning of the student's program for the following school year in September 2011 (Dist. Ex. 11).[3] In a final notice of recommendation (FNR) dated July 12, 2011, the district summarized the recommendations in the February 2011 IEP and notified the parents of the public school site to which the student was assigned for the 2011-12 school year (Dist. Ex. 23).[4]

By letter dated August 23, 2011, the parents notified the district that, after visiting the public school site on July 20, 2011, they rejected the district's school site (Parent Ex. K). The parents noted that while they felt that [the staff] at the school would work with the student in every way possible to try and support him, the "most important" thing the student needed was a quiet classroom/building with minimal ambient noise distractions, which the assigned public school site could not provide (id. at p. 1). The parents noted that, between the elementary and high schools, students were in the courtyard most of the day, and the classroom windows faced the recess/playground courtyard, making the sound even louder (id.). The parents further noted that even in the winter months, the window in the classroom needs to be kept open to prevent overheating (id.). The parents also noted that the school could not guarantee that there will be two adults in the room at all times to make sure the student has enough support should he become dysregulated (id.). The parents also noted that the student had recently been diagnosed with a seizure disorder, and since there were six flights of stairs in the school building, this posed a safety issue for the student (id.). The parents also noted that while secondary to their concerns, the

[1] The student's eligibility for special education and related services as a student with a speech or language impairment are not in dispute in this proceeding (34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The February 3, 2010 date appears to contain an error in the year insofar as the remainder of the relevant dates in the document refer to the 2011 calendar year (Dist. Ex. 11).

[3] Although the details are unclear, it appears that there were previous settlement arrangements with regard to the student's attendance at Aaron School (Tr. p. 294).

[4] Subsequent to the February 2011 CSE meeting the student was diagnosed as having a seizure disorder (Parent Ex. E). The student's mother testified, and the hearing record shows, that she mentioned the student's seizure disorder in her August 2011 response to the district's placement offer in which she rejected the district's proposed placement (Tr. pp. 289-99; Parent Ex. K). In a letter dated September 12, 2011, the parents provided the district with further information regarding the student's seizure disorder (Tr. pp. 279-80; Parent Ex. J). The student's mother testified that in response to the parents' letter the CSE sent the parent medical forms which were being completed by the student's pediatrician; however, although an annual review with the CSE had been scheduled, the meeting had not yet occurred (Tr. p. 281).

principal who gave them the tour of the building on July 20, 2011 did not have a class profile of the students, their ages, classifications, behavior or functional levels (id. at p. 2).

In a second letter dated August 24, 2011, the parents indicated that they were rejecting the February 2011 IEP due to, among other things, inadequate parent participation at the CSE meeting and the CSE's refusal to consider the opinions of private experts, inadequate IEP goals, and inappropriate placement in a 12:1+1 special class (Dist. Ex. 24 at pp. 1-2). The parents indicated they would place the student at the Aaron School on September 8, 2011, and intended to seek funding for the placement from the district if it did not cure the "procedural and substantive errors" in the development of the student's IEP and offer him an appropriate program consistent with his needs (id.). The parents also reiterated their concerns with respect to the assigned public school site (id. at p. 2). In conclusion, the letter reflected the parents' belief that the student required a small private school setting to address his individualized needs (id.). The student remained enrolled at the Aaron School for the 2011-12 school year (Tr. pp. 190-96).

A. Due Process Complaint Notice and Response

The parents filed an amended due process complaint notice and request for an impartial hearing dated November 22, 2011 in which they asserted both procedural and substantive flaws with the February 2011 IEP and informed the district that they had unilaterally placed the student at the Aaron School (Dist. Ex. 3 at p. 1).[5] The parents asserted that the district failed to offer the student a FAPE for the 2011-12 school year because the CSE met several months prior to it making "sound educational sense" to do so (id. at p. 2). The parents asserted that holding the CSE meeting and developing an IEP seven months prior to the implementation of the IEP was inappropriate, as the student had only completed half of the then current school year (id.). The parents also asserted that it was an error to schedule the next CSE meeting a year and a half later on June 30, 2012 (id.). The parents also asserted that the February 2011 CSE lacked a general education teacher, denied the parents meaningful participation by failing to give due weight to parental and professional assessments of the student, and lacked sufficient evaluative data when creating the student's IEP (id. at pp. 2-5).

With respect to the February 2011 IEP, the parents asserted that since the CSE did not rely on "necessary" evaluations, the student's present skill levels were incorrect (Dist. Ex. 3 at p. 5). The parents contended that because the IEP did not contain a "grade level base line" in the student's goals and objectives, "several pages" of the goals and short-term objectives were flawed (id.). The parents asserted that the recommended 12:1+1 placement did not provide adequate support to the student, noting that the student required intensive individualized support to help him remain regulated and filter extraneous stimuli in order to make educational progress, and that the student requires a calm, orderly, highly supportive environment, and that his need for this is exacerbated by the March 2011 diagnosis of a seizure disorder (Dist. Ex. 3 at p. 4). The parents asserted that removal of physical therapy (PT) as a related service from the IEP in the absence of clinical data

[5] The parents previously filed their original due process complaint dated September 7, 2011 (Dist. Ex. 1).

constituted a significant change in the student's placement, and as such violated Section 504 of the Rehabilitation Act of 1973 (Dist. Ex. 3 at p. 5).[6]

The parents also asserted that the assigned public school site and classroom were inappropriate (Dist. Ex. 3 at p. 6). The parents asserted that the assigned classroom was too distracting for the student because the class created too much distractive auditory stimuli (id.). The parents noted that the classroom itself was unavoidably noisy because it faced the playground/courtyard that was in use throughout the day, the students in the class were broken down into smaller groups for instruction, and related services for all the students were provided on a push-in basis (id.). The parents contended that the distractions and noise from these internal and external sources would result in the student's deregulation (id.).

The parents also asserted that the assigned public school site could not guarantee the presence of two adults in the classroom at all times, resulting in insufficient support for the student if he became dysregulated (Dist. Ex. 3 at p. 6). The parents alleged deficiencies in the district program, such as the inexperience of the primary special education teacher, complexity of the student's needs and, given the student's seizure disorder, the lack of supervision and a barrier-free building (id.). The parents also asserted that the classroom was inappropriate because it was a new program at the school and the addition of a first grade student prompted the district to change from a kindergarten only class to a K-2 classroom (id.). As a result, the parents asserted that the district would not have functionally grouped the student for instructional and social/emotional purposes (id.).

The parents contended that the Aaron School was an appropriate placement for the student for the 2011-12 school year and asserted that there were no equitable considerations that would bar an award of tuition reimbursement (Dist. Ex. 3 at pp. 6-7). As a remedy, the parents proposed that the district provide tuition reimbursement to the parents for the 2011-12 school year at the Aaron School (id. at p. 7).

In a response to the parents' due process complaint notice, the district asserted among other things, that it offered the student a FAPE, and in doing so the CSE relied on a classroom observation conducted at Aaron School, related service progress reports/evaluations, and Aaron School teacher progress reports (Dist. Ex. 4 at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 31, 2012 and concluded on February 9, 2012 after two hearing days (Tr. pp. 1, 81). In a decision dated March 5, 2012, the IHO determined that the district failed to offer the student a FAPE (IHO Decision at pp. 12-14). The IHO found that the IEP failed to include any objective data regarding the student's current functioning levels so that his needs could be reasonably identified (id. at pp. 12-13). The IHO also found that the IEP

[6] I note that New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. NYC Dep't of Educ., 2012 WL 120052, at *7 n.17 [E.D.N.Y. Jan. 17, 2012]; Application of a Student Suspected of Having a Disability, Appeal No. 12-014; Application of the Bd. of Educ., Appeal No. 11-122; Application of a Student with a Disability, Appeal No. 11-098; see also Educ. Law § 4404[2]).

failed to indicate the student's off-task behavior and his significant need for redirection and sensory input (id.).

The IHO reasoned that despite the CSE's knowledge of the significance of the student's auditory processing disorder, the IEP failed to state the student's current level of functioning or describe his disorder (IHO Decision at p. 13). The IHO noted that the IEP failed to reflect the student's use of "Sonic Ears" while attending the Aaron School (id.).[7] The IHO also concluded that the IEP did not describe the student's need for a reduced noise environment or an adequate description of his auditory disorder (id.). With respect to the district's recommended 12:1+1 special class placement in a public school, the IHO determined that, due in part to the insufficiency of the IEP, the placement was not reasonably calculated to enable the student to receive educational benefit (id.).

With respect to the particular public school site assigned by the district, the IHO concluded that the student would not have a meaningful educational experience if grouped with the other students in the classroom because they had dissimilar academic and learning characteristics, and that the functional grouping within the classroom was too broad to meet the student's needs (IHO Decision at pp. 13-14). The IHO noted that placement of the student in a classroom that relied on small groupings and various activities conducted simultaneously within the same classroom, within a large school, was not appropriate for the student (id. at p. 13). The IHO found that the student in question required a greater level of sensory input, redirection, reminders, and adult intervention than the other students (id.).

With respect to whether the parents' unilateral placement of the student in the Aaron School program was appropriate, the IHO noted that the student received the special education services that he needed to make progress (IHO Decision at p. 14). The IHO noted that the teachers at the Aaron School utilized an FM unit that helped the students focus on the teachers' voices and minimized background noise (id.). The IHO also noted that, although the students were taught in small groups for reading and math, they were grouped according to skill and taught in separate quiet environs (id.). With regard to the student in this case, the IHO found that he had made progress in the academic and social/emotional realms (id.).

With respect to equitable considerations, the IHO found, among other things, that the parents cooperated at all times with the district and were therefore entitled to reimbursement (IHO Decision at p. 14). The IHO also found that to the extent that there was a delay in advising the CSE of the student's seizure diagnosis, the delay did not undermine the parents' cooperation in all other aspects, nor did it impede the IEP process (id.). To the extent that the parents had already become financially obligated to the Aaron School prior to visiting the assigned school, the IHO found that the parents' actions were necessary to ensure an appropriate placement, and that the parents had already rejected the IEP at the CSE meeting (id. at p. 15). The IHO also found that the parent testified credibly that she was impressed with the assigned school's program, but did not believe that the school was appropriate for the student due to his auditory, attention, and regulation issues (id.). As relief, the IHO ordered the district to reimburse the parents $47,950 for tuition at

[7] The Aaron School's 2010-11 fall report indicated that the student's classroom was "equipped with a Phonic Ear FM System to enhance auditory processing and attention" (Dist. Ex. 13 at p. 1).

the Aaron School for the 2011-12 school year, conditioned on the provision of proof of payment by the parents (id. at p. 15).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in her determination that it failed to offer the student a FAPE for the 2011-12 school year. The district first asserts that the IHO erred in rendering determinations concerning the sufficiency of the evaluative data. The district also asserts that the IHO erred in her determinations regarding 1) the sufficiency of the IEP with respect to the student's off task behavior and significant need for redirection and sensory input; 2) the IEP's failure to reflect the student's auditory processing disorder and need for a reduced noise environment; and 3) the lack of a recommendation for the usage of assistive technology because these three issues were not identified as issues for the impartial hearing in the due process complaint notice, and the complaint could not be reasonably read to include these issues.

With respect to the February 2011 CSE meeting and resultant IEP, the district also asserts that when the IEP was created the CSE took into account input from the student's then current service providers at the Aaron School, input from the parent, and current evaluative material including Aaron School reports. The district contends that, contrary to the IHO's determination that the IEP failed to account for the student's off-task behavior and significant need for redirection and sensory input, the IEP noted the student's off task behavior, distractibility, need for reminders to stay on task, need for breaks, need for repetition, manipulatives and sensory tools, and self regulation issues. The district also asserts that an IEP need not have information set forth in one section if the same information has already been noted in another section of the IEP. The district asserts that the IEP contained the student's present levels of performance based upon evaluative information and input provided by Aaron School staff and providers, and that the academic and social/emotional strategies developed by the CSE were also developed in large part upon information and input from the student's then teachers and providers.

The district challenges as clearly erroneous the IHO's determinations that the IEP failed to reflect or properly describe the student's auditory processing disorder or his need for a reduced noise environment, noting that the IEP contained strategies to assist with the student's difficulties with auditory processing and dysregulation. According to the district, the IEP contains notations regarding the student's need for preferential seating and listening breaks, his proclivity for auditory overstimulation, the student's significant processing and attention issues, and his need for support to address his dysregulation and auditory needs. Although the IHO determined that the IEP failed to reflect the student's use of "Sonic Ears" at the Aaron School, the district asserts that the district made the determination not to recommend the use of an assistive technology device based upon the recommendation of an audiologist who determined that the use of an FM unit would be more detrimental than beneficial to the student; however, the district also noted that conditions could change in a future school year that would require the use of an individual FM unit.

With respect to the IHO's determination that the CSE's recommended placement was inappropriate, the district asserts that the 12:1+1 special class placement in the IEP was appropriate and was the least restrictive environment (LRE) for the student.

The district next asserts that any determination by the IHO concerning the assigned public school site and classroom was purely speculative because the parents had rejected the district's placement; however, in the alternative, the district nevertheless asserts that it would have properly implemented the student's IEP at the assigned school site. First, the district asserts that the hearing record contains sufficient evidence to show that the student would have received sufficient adult support and that the student's IEP would have been properly implemented. The district also asserts that the hearing record demonstrates that the district's staff would have been able to address the student's auditory and sensory issues. The district also asserts that the evidence demonstrates that the student would have been functionally grouped, and that the use of small group instruction was appropriate for the student.

The district also asserts that the IHO's determination that the Aaron School was appropriate for the student was deficient as a matter of law because her one paragraph analysis lacked citation to the hearing record or reference to any legal authority, In the alternative, the district asserts that the hearing record fails to demonstrate that the Aaron School was appropriate because the Aaron School exclusively serves students with disabilities and the student here would be insufficiently mainstreamed or exposed to his non-disabled peers. The district also asserts that when the parents have emphasized that the lack of a general education teacher's attendance at the CSE rose to the level of a denial of FAPE, they cannot also prevail at the same time on the argument that a school limited to special education students is an appropriate educational setting for the student.

As a remedy, the district requests that the IHO's award of tuition reimbursement be reversed because the district offered the student a FAPE for the 2011-12 school year, or in the alternative, because the IHO's findings that the Aaron School was appropriate were deficient as a matter of law, and that the evidence does not demonstrate the appropriateness of the Aaron School.

In their answer, the parents assert arguments denying the district's claims on appeal, and they cross-appeal the IHO's failure to render findings with respect to their claims that: the CSE met too early in February 2011 to formulate an IEP for the 2011-12 school year; the CSE lacked a general education teacher; that the goals and short-term objectives in the IEP were inappropriate; and that a 12:1+1 special class was an inappropriate placement for the student. The parents assert, among other things, that the CSE's reliance on Aaron School reports, evaluations and staff input demonstrates the appropriateness of the Aaron School. The parents contend that because the district failed to include a general education teacher at the CSE meeting, and none testified as to the appropriateness of the district's program, the district's assertion that a 12:1+1 placement was the student's LRE is wholly disingenuous and unfounded. The parents also assert that, an individual FM unit would have been too cumbersome for the student and the district should have recommended a classroom FM unit or provided for a lower student-to-teacher ratio. As to functional grouping, the parents assert that the issue is not speculative because they visited the school and classroom prior to generating their due process complaint, and moreover, there was only one 12:1+1 class in the school, therefore functional grouping could have been determined. The parents allege that the student required pull-out related services in order to minimize noise and distraction. The parents request that the IHO's decision to award tuition reimbursement be upheld.

In an answer to the cross-appeal, the district denies the parents' claims of error in their cross-appeal and argues that the district offered the student a FAPE.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Procedural Issues

1. CSE Annual Review Meeting

Turning first to the parents' claim that it was inappropriate for the CSE to meet in February 2011 to revise the student's IEP, the IDEA provides that at the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). The IDEA and State Regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A] [emphasis added]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). Additionally State procedures contemplate changes to an IEP insofar as parents, teachers and administrators are all empowered to refer the student to the CSE if any of those individuals has reason to believe that the IEP is no longer appropriate (8 NYCRR 200.4[e][4]). Finally, the regulations provide that "as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP" (34 CFR 300.323 [c][2]; see 8 NYCRR 200.4[e][3], [7]). As the Second Circuit has explained, "'[a]s soon as possible' is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay" (D.D. v. New York City Bd. of Educ., 465 F.3d 503, 514 [2d. Cir. 2006]).[8]

In this case, it is undisputed that the CSE met and conducted an annual review of the student's IEP in February 2011 and therefore the CSE utilized the Fall 2010 Aaron School progress reports (Dist. Ex. 13), a December 2010 district classroom observation (Dist. Ex. 7), and teacher input (Dist. Ex. 9 at p. 2), when it recommended a program for the student's 2011-12 school year. The hearing record does not indicate when the CSE previously met to formulate the student's prior IEP or the time when it became necessary to conduct the annual review required by the IDEA. The hearing record also does not indicate that the parents voiced any objection to the CSE convening in February 2011 (see Dist. Ex. 10). The school psychologist who participated in the February 2011 CSE meeting testified that it was customary to hold CSE meetings several months in advance of the upcoming school year due to the volume of cases (Tr. p. 42). The psychologist explained that in the event that the CSE received a report with updated information after the IEP had been developed, the CSE would try to reconvene a meeting to make sure it had the most complete picture of the student, based on the information it was getting (Tr. pp. 43-44).

Although the parents maintain that conducting the annual review in February 2011 denied the student a FAPE, there is no evidence that the parents objected to the annual review at the time

[8] The Second Circuit also carefully cautioned that the flexibility in the requirement should not be interpreted to mean it lacks a breaking point (D.D., 465 F.3d at 514).

of the CSE meeting, requested reevaluation of the student, or requested to meet with the CSE again later in the school year to update the student's performance levels. Furthermore, there is no evidence in the hearing record that the district denied a request by the parents for another CSE meeting. The hearing record does show that during the CSE meeting the student's mother questioned whether some of the goals being developed by the February 3, 2011 CSE would be appropriate for the student in second grade (Tr. pp. 51-52, 253-57; Dist. Ex. 10). There is no evidence that shows that meeting in February 2011 violated the IDEA procedures, which require the CSE to convene and "review and, if appropriate, revise, [the IEP's] provisions periodically, but not less than annually" 20 U.S.C. § 1414[d][4][A], [5]; 34 CFR 300.324[b]).

As for the causes of the delay in this case, in a "Notice of Recommended Deferred Placement: Annual Review or Reevaluation," dated February 3, 2011, the district advised the parents that the student had a right to immediate placement, but that the CSE believed it may be in the best interest of the student to defer placement until September 2011 because the IEP was written for the 2011-12 school year (Dist. Ex. 11). The student's mother acknowledged that she received the notice either at the February 3, 2011 CSE meeting or a few days later (Tr. pp. 270-71). In view of the fact that the parents had chosen to send their son to the Aaron School in prior school years and were either litigating and/or had already settled some or all of their claims against the district for the 2010-11 school year (Tr. p. 294), it appears that at the time of the CSE meeting neither party was of the view that the student should switch from the Aaron School to the public school in spring 2011.

Based on the evidence in the hearing record, I am not convinced that the district violated any procedures by deciding to conduct the student's annual review in February 2011, and although the parents later, at the time of the hearing, conveyed their concern that the February 2011 CSE was conducted too early, I find no authority mandating that the CSE was required to wait until a later time to convene to conduct a review.[9] I find that convening the CSE in February 2011 did nothing to 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]).

2. CSE Composition

With regard to the parties contentions about the lack of a general education teacher at the February 2011 CSE meeting, the IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; see also 8 NYCRR 200.3[a][1][ii]). The hearing record demonstrates that no regular education teacher participated in the formulation of the student's IEP (Dist. Ex. 9 at p. 2). The district's school psychologist confirmed that although the February 3, 2011 CSE did not include a regular education teacher, the CSE considered placing the student in a general education setting with related services, general education with special education teacher support services (SETSS), and a class with integrated co-

[9] The question of whether the district was later required to and failed to reconvene the CSE after the annual review was completed is addressed below.

teaching (Tr. pp. 35-36, 70-71; Dist. Ex. 9 at p. 19).[10] According to the school psychologist, the CSE was able to consider and rule out placement in general education, without a regular education teacher being present, based on information in the school reports that indicated the student was dysregulated and overwhelmed by auditory stimulation, which was not congruent with a general education setting (Tr. p. 71; see also Tr. pp. 35-36). In this case, neither party asserted that the student would be appropriately placed in a general education setting, which is consistent with the CSE's recommendation for a special class setting, the parents placement of the student at the Aaron School, and the mother's admission that the student "can't really be in a general classroom" (Tr. p. 248; see Dist. Exs. 3; 9). Therefore, I find that a regular education teacher of the student was not required at the February 2011 CSE meeting because the evidence does not support the conclusion that there was a reasonable likelihood that the student would have been recommended to receive special education services in a regular education environment (34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 644-45 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ. of New York City, 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dept. of Educ., 700 F. Supp. 2d 356, 365-66 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *5-*6 [S.D.N.Y., July 3, 2008]; see also Application of the Bd. of Educ., Appeal No. 11-129; Application of a Student with a Disability, Appeal No. 08-035). Moreover, even if there was such a procedural violation, there is no evidence that such a procedural violation resulted in a loss of educational opportunity to the student (Application of a Student with a Disability, Appeal No. 10-095).

B. February 2011 IEP

1. Sufficiency of Evaluative Data/Present Levels of Performance

The district asserts that the IHO erred in her determination that the February 2011 IEP was deficient because it lacked sufficient evaluative data. The district asserts that the IEP contained the student's present levels of performance based upon evaluative information and input provided by Aaron School staff and providers, and that the academic and social/emotional strategies developed by the CSE were also developed in large part based upon information and input from the student's then teachers and providers. Regulations require that 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

[10] Although the term integrated co-teaching (ICT) was used in the hearing record, "collaborative team teaching" or CTT was used more often (Tr. pp. 242, 266, 308). However, for consistency with State regulations, in this decision, I refer to this type of class as an integrated co-teaching or ICT placement. ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

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., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). 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]). An IEP's present levels of academic performance and functional levels have been described as providing the relevant baselines for projecting annual performance and for developing meaningful measurable annual goals and short-term objectives (Application of the Bd. of Educ., Appeal No. 04-026; see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *25–*26 [S.D.N.Y. Sept. 29, 2009]). Although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come. 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]).

In this case, the hearing record reveals that the February 2011 CSE complied with federal and State regulations to accurately and properly report the student's present levels of academic achievement and functional performance by relying, in part, upon information contained in Aaron School reports generated in fall 2010, a December 2010 classroom observation, an audiological evaluation, and from the participation of the student's then-current teacher at the CSE meeting (8

NYCRR 200.4[d][2]; see 34 C.F.R. § 300.320 [a][1]; Tr. pp. 16-17, 247-49, 251-52, 292-93; Dist. Ex. 10 at p. 1; see Dist. Exs. 7; 13-17).[11]

A review of the student's present levels of performance in the February 2011 IEP shows that they accurately reflected information found in the November 2010 Aaron School fall report, as well as input provided by the student's mother and teacher (Tr. pp. 245-46; compare Dist. Ex. 9 at pp. 3-7 with Dist. Exs. 10, 13). Notably, the IEP included the Aaron School teacher's estimates of the student's instructional levels for reading, writing, spelling, and math (Tr. pp. 19-21; Dist. Ex. 9 at p. 3). The school psychologist testified that estimates of the student's functioning in various content areas, based on the Aaron School curriculum, was usually found at the end of the Aaron School educational reports (Tr. pp. 20-21). In this case, the 2010-11 Aaron School reports indicated that the student was working on reading and math skills ranging from a 1.8 to 2.2 grade level and writing skills at the first grade level (Dist. Exs. 7, 14, 15). These scores are generally consistent with the instructional levels reflected on the student's February 2011 IEP (compare Dist. Exs. 13 at p. 7; 14; 15 with Dist. Ex. 9 at p. 3).

Even assuming, for the sake of argument, that the parents had successfully asserted that the district violated the IDEA by conducting the student's annual review in February 2011 or that they had subsequently requested another CSE review prior to the beginning of the 2011-12 school year, I note that the instructional levels on the February 2011 IEP were nevertheless generally consistent with the student's instructional levels as reported by his teacher at the beginning of the 2011-12 school year, when the IEP was scheduled to be implemented (compare Tr. pp. 224-27 with Dist Ex. 9 at p. 3). According to his teacher's estimates, the February 2011 IEP indicated that: the student's instructional level for decoding, comprehension, and math was the end of first grade; his instructional level for writing was the middle of first grade; and, for spelling, the student's instructional level was the beginning to middle of first grade (Dist. Ex. 9 at p. 3). The student's Aaron School teacher testified that at the beginning of the 2011-12 school year: the student's instructional level for reading comprehension was the end of first grade (Tr. p. 224); for decoding, the "very, very beginning" of second grade (Tr. pp. 224-25); for math, the student "spent the beginning of the year reviewing late first and early second grade skills"; and, for writing, the student's instructional level was at an early first grade level (Tr. p. 227).

Additionally, contrary to the IHO's determination that the February 3, 2011 IEP failed to include the extent of the student's off-task behavior and significant need for redirection and sensory input, I find that the present levels of performance adequately reflected the student's needs in these areas. With respect to literacy, the IEP indicated that the student needed teacher reminders to stay on task and was distracted by internal and external stimuli (Dist. Ex. 9 at p. 3). It also noted that in math the student had difficulty completing his class work in a timely fashion due to his distractibility (id.). The IEP further stated that: the student had difficulty maintaining focus and on-task behavior; was overwhelmed by auditory overstimulation, resulting in a meltdown; and that he required frequent redirection and limit setting (id. at p. 5). Among numerous environmental modifications and human/material resources recommended by the CSE to address the student's academic management needs were teacher reminders to stay on task and repetition (id. at pp. 3-4). The February 2011 IEP also indicated that the student had "issues" with self-regulation that

[11] The audiological evaluation was not made a part of the hearing record.

impacted his academic and social skills, and the CSE identified sensory tools and listening breaks as additional environmental modifications and human/material resources required by the student to address his management needs (id. at pp. 4, 5).

With regard to the IHO's determination that the CSE failed to note that the student had an auditory processing disorder on the student's IEP, the IEP nevertheless described the student's needs by indicating that the student struggled with language processing, was overwhelmed by auditory stimulation, and presented with significant processing and attending issues that precluded him from participating in a general education environment (Dist. Ex. 9 at p. 5). Furthermore, the environmental modifications and human/material resources recommended by the CSE, such as pre-teaching, preferential seating, extra wait time for processing, and rephrasing of questions, are typical of those recommended for students with an auditory processing disorder (see id. at p. 3). Accordingly, the IHO's conclusion that the IEP failed to describe the student's level of functioning or his disorder anywhere on the IEP is not supported by the evidence.

Based on the above, I find that the evaluative data considered by the February 2011 CSE and the input from the 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 his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847 at * 12 [S.D.N.Y. Nov. 9, 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. Goals and Short-Term Objectives

Turning next to address the parents' assertion that the annual goals prepared for the student were flawed because they lacked grade-levels, the IDEA requires that 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]).

In this case, the evidence in the hearing record shows that the present levels of performance included teacher estimates of the student's instructional levels for academics, from which the CSE developed the student's IEP goals (Tr. pp. 19-21, 24-25; Dist. Ex. 9 at p. 3). As noted above, the instructional levels were based on information contained in the fall 2010 Aaron School reports and a draft of the present levels was reviewed during the February 2011 CSE meeting (Tr. pp. 19-21, 32-33, 65-66, 245-46; Dist. Ex. 10 at p.1; see Dist. Exs.13 at p. 7; 14; 15; 16; 17). Draft IEP goals were also reviewed (Tr. pp. 49-50, 52-53, 54-55, 65-67, 75-76, 245; Dist. Ex. 10). According to the CSE meeting minutes, the student's mother expressed her concern as to whether the proposed

math goals would be appropriate for the student for second grade (Tr. pp. 252-55; Dist. Ex. 3 at p. 5). During testimony, the student's mother explained that, despite his challenges, the student remained at or above grade level in math (Tr. p. 253). She recalled that during the CSE meeting she expressed her concern that the recommended math goals were first grade goals that the student had already achieved (Tr. pp. 253-54). She stated that in response to her complaint, she was told that the first grade goals were all the district had to go on and that they could be redone in the fall (Tr. p. 254). The student's mother testified that she did not agree with the math goals and that their presence on the student's IEP was one of the reasons she rejected it (Tr. p. 255). The hearing record shows that the recommended math goals were revised at the February 2011 CSE meeting based on input from the student's teacher and parent and that new math goals were added to the student's IEP (Tr. pp.75-77; 256-57; Dist. Exs. 9 at p. 8; 10 at p. 1). The revised goals targeted the student's ability to perform "'neighbors'" addition, subtract a number from itself, identify and understand fractions, use comparison symbols, identify and make congruent shapes, add 10 to a number, identify place value for tens and ones, draw tally marks, measure in inches, tell time to the minute, and understand key words in math problems (Dist. Ex. 9 at pp. 9, 10). The school psychologist opined that the math goals were in line with public school expectations for a second grade student (Tr. pp. 52-53). Additionally, he explained that if a parent or teacher felt a goal was unreasonable, the goal was discussed, that there were annual reviews, and that parents could request a reevaluation if they believed it was necessary (Tr. p. 57). The school psychologist also explained that IEP goals do not always specify grade levels (Tr. p. 56), and I note that the IDEA and State regulations neither mandate nor preclude a CSE from developing IEP goals that are expressed in terms of a specific "grade level" or a "baseline" (see Lathrop R-II School Dist. v. Gray, 611 F.3d 419, 424-25 [8th Cir. 2010] [noting that a school district cannot be compelled to put more in an IEP than is required by law]; Hailey M. v. Matayoshi, 2011 WL 3957206, at *23 [D.Hawaii Sept. 7, 2011] [rejecting the claim that goals are inadequate because they lack baseline levels or grade levels and are appropriate if they are capable of measurement and directly relate to student's areas of weakness identified in the present levels of educational performance]; D.G. v. Cooperstown Cent. Sch. Dist., 746 F.Supp.2d 435, 446-47 [N.D.N.Y. 2010] [noting that the CSE took into account baseline information located in the student's evaluations when developing the student's IEP]). While the student's mother did not agree with the district's recommended math goals, the hearing record shows that they were similar to numerous math goals proposed for the student by the Aaron School for the 2011-12 school year (compare Dist. Ex. 9 at pp. 8, 10 with Parent Ex. A at p. 9). Similar to the goals in the February IEP, the November 2011 Aaron School fall report indicated that measuring using feet and inches, telling time to the nearest five minutes, using comparison symbols, solving word problems by identifying key words, and identifying and creating congruent shapes were all part of the second grade math curriculum proposed for the student (Parent Ex. A at p. 9), which demonstrates that the goals in the IEP remained appropriate for the student.

Based on the foregoing, I find that the goals were measurable and aligned with the student's need and any alleged deficiency due to the lack of "baseline" data or grade levels did not preclude the student from the opportunity to receive educational benefits.

3. 12:1+1 Special Class Placement

Turning to the parents' assertion that the student would not be adequately supported in a 12:1+1 special class in a community school, the hearing record shows that, during the February

2011 CSE meeting, the student's mother expressed concern that placement in a 12:1+1 special class would not meet the student's needs as he required academic instruction to be provided "with one voice coming in" and would not be able to cope with a classroom environment that had "groups broken out into it" (Tr. pp. 266-67). She also testified that she believed that the student required more regulation than a teacher and a paraprofessional could address and that she had not received a promise from the district that there would always be those two people, or others, available to assist the student (Tr. p. 267).

The CSE's decision in this case to select a 12:1+1 special class placement is supported by the evidence. The CSE considered the November 2010 Aaron School fall report, completed by the student's teachers and therapists, which described the program that the student was currently receiving at the private school, as well as the student's educationally-related abilities and needs (Dist. Ex. 13). According to the report, during the 2010-11 school year the student was in a class with eleven students that was equipped with a Phonic Ear FM system to enhance auditory processing and attention (id. at p. 1). The student received instruction in language arts, writing, social studies, science, social skills, computer, art, movement, music, and library within this group, while reading and mathematics were taught in small skill-based groups (id.). The report indicated that to address the student's individual needs he was seen by an occupational therapist twice a week for thirty minutes, once individually and once with a peer, and was also seen by a speech therapist twice a week for thirty minutes with a peer (id.).

The student's reading instruction focused on improving his decoding, comprehension, and spelling skills (Dist. Ex. 13 at p. 1). The report outlined the reading skills on which the student would be working, including, among others, segmenting and blending words with up to six phonemes; identifying parts of words; reading controlled stories with fluency, expression, and understanding; and making predictions and inferences (id.). According to the report, in his reading group the student demonstrated a strong ability to learn and retain information regarding literacy rules and spelling (id. at p. 2). In addition, he had mastered diagraphs and "bonus" letters and was able to segment words into individual sounds in order to read and spell them (id.). The report stated that. while the student participated in both group and individual activities, at times he needed teacher reminders to stay on task (id.). In order to increase his ability to attend and follow teacher directions, the student was afforded listening breaks (id.).

The November 2010 Aaron School report indicated that the student participated in a small math group in which new material was presented and explored using manipulatives and teacher created activities (Dist. Ex. 13 at p. 2). According to the report, the math strands that the student would be learning focused on improving mathematical vocabulary, computation, geometry, money concepts, telling time, measurement, and pattern identification (id.). As with reading, the report indicated that the student was willing to participate in the group and engage with materials, but also demonstrated distractibility and required redirection (id.). It further noted that the student benefited from strategies to help him stay on track including verbal reminders, frequent body breaks, positive reinforcement, and sensory tools (id.). The report indicated that the student reversed the formation of certain numbers and benefited from using a highlighter to trace numbers, followed by writing the numbers in pencil (id.).

With respect to handwriting/writing, the November 2010 report stated that the student was practicing the formation of upper case letters and took great pride in always using his best effort

(Dist. Ex. 13 at p. 2). The report indicated that the student benefited from the multisensory approach to handwriting instruction (Handwriting Without Tears), as well as the use of a writing slate to practice the correct placement, order, and formation of his strokes; letter boxes to contain his letters; and verbal reminders to maintain appropriate sitting posture (id. at pp. 2, 4). The report stated that, among other things, the student's language arts instruction would target generating sentences with a noun, verb, and adjective; and using capitalization at the beginning of a sentence and punctuation at the end (id. at p. 4). According to the report, the student enjoyed language arts and writing activities and benefited from the repetition of skills and concepts in a variety of presentations (id.). The student was able to generate his own ideas and enjoyed using pictures to represent them (id.). The report noted that the student benefited from the use of sentence starters, visual prompts, and graphic organizers, as well as verbal reminders to help him increase attention, remain focused, and sustain a calm body (id. at p. 4).

In social studies, the report indicated that the student was exploring people and leaders in a community (Dist. Ex. 13 at p. 4). It noted that the student enjoyed role playing community jobs, an activity that supported his social and play skills within the classroom (id. at p. 3). In science, the report indicated that the student demonstrated enthusiasm for a unit on animal groups and "did a great job" sorting animals into their respective groups and identifying pertinent characteristics (id.).

With respect to social functioning, the report stated that the student thrived in a structured and predictable classroom environment (Dist. Ex. 13 at p. 3). It noted that he raised his hand for a speaking opportunity more frequently during group lessons and meetings and benefited from silent reminders and prompts to express his ideas (id.). According to the report, the student was able to follow group directions with support and, when he repeated the directions, was better able to follow through and complete the task (id.). In order to help the student self-regulate and stay focused, he was provided with a variety of breaks, including snacks and sensory breaks, throughout the day (id.). The report stated that the student had shown some interest in peers and had begun to establish a few friendships (id.). However, the report also noted that the student required reminders to use kind words and actions, especially when frustrated, and benefited from support in solving social conflicts (id.).

The November 2010 Aaron School report also included "Global Goals" for the first grade curriculum level (Dist. Ex. 13 at p. 7). The report indicated that as of November 2010 the student executed goals that had been introduced, such as communicating wants and needs effectively and forming letters correctly with proper spacing, with moderate support, and following directions and determining the main idea of a paragraph, with guidance and frequent support (id.). Separate documents outlined literacy goals for the student at a "[s]econd [g]rade [c]urriculum [l]evel (range 1.8-2.2) and math goals at a "1st [g]rade [c]urriculum [l]evel (1.8-2.2) (Dist. Exs. 14, 15). The documents indicated that as of fall 2010 the student was able, with guidance and frequent support, to perform literacy skills, such as segmenting and blending words with up to six phonemes, and reading controlled stories with fluency, expression, and understanding (Dist. Ex. 14). In math, the student was able to: recognize odd/even numbers and tell time to the hour and half-hour with minimal or no support; perform double-digit addition without regrouping; and subtract a number from itself with moderate support (Dist. Ex. 15). The student's speech-language therapy goals targeted his weaknesses in pragmatic language; language processing and ability to sustain attention; expressive language and verbal organization; and critical thinking, verbal reasoning, and

problem solving (Dist. Ex. 16). Also, the OT goals targeted the student's weaknesses in fine motor skills, graphomotor skills, and motor planning and body awareness (Dist. Ex. 17).

In her December 2010 report detailing her classroom observation of the student at the Aaron School, the district's social worker described the student's behavior during a class presentation on friendship, a science activity, and lunch (Dist. Ex. 7). In summary, the social worker reported that, during her observation: the student sat on a sensory ball with minimal on target behavior and required teacher intervention and a warning in order to stop jumping up and down on the ball; left the ball and roamed around the room, but responded to teacher redirection; engaged in minimal age appropriate peer interaction; and when focused volunteered information (id. at p. 2).

The evidence above, which was before the February 2011 CSE, describes the special education services that the student was receiving and how the student was performing at the Aaron School. The evidence shows: that the student's academic skills were near grade level, but that he was easily distractible and had difficulty with auditory processing; that, with support, the student was able to participate in group instruction; that the student was interested in developing relationships with peers but needed assistance to do so; and that the student participated in and made progress in a 11:1+1 class at the Aaron School during the 2010-11 school year. In order to address the student's identified needs, the CSE recommended that he be placed in a 12:1+1 special class in a community school (Dist. Ex. 9 at p. 20). State regulations provide that the "maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]). The evidence also shows that the district offered the student related services of individual speech-language therapy for two 30-minute sessions per week, speech-language therapy in a group of three for one 30-minute session per week, individual OT for two 30-minute sessions per week, and counseling in a group of three for one 30-minute session per week (Dist. Ex. 9 at p. 20). The IEP further provided that the student be afforded numerous environmental modifications and human/material resources to address his management needs, including pre-teaching, questions re-phrased, multisensory strategies, teacher reminders to stay on task, breaks as needed, chunking of information, role-playing, preferential seating, listening breaks, explicit teacher instruction of new material, repetition, teacher modeling, guided practice, manipulatives, highlighter to trace numbers, positive reinforcement, sensory tools, sentence starters, graphic organizers, extra wait time for processing, silent/visual reminders, verbal prompting, and a compass chair with lateral supports (Dist. Ex. 9 at pp. 3-5). Consistent with the student's needs, the IEP included annual goals related to his weaknesses in spelling and written expression, math, decoding, reading comprehension, dichotic listening skills, pragmatic language, language processing and sustained attention, expressive language and verbal organization, critical thinking and verbal reasoning, fine motor and graphomotor development, motor planning and body awareness, sensory processing, strength, endurance and postural control, self-help skills, peer relationships, play skills, and school behaviors (id. at pp. 8-17).

I find that the district's recommended placement of a 12:1+1 special class in a community school with related services, while not identical, was similar to the services provided by the Aaron

School, a program in which the student was demonstrating reasonable progress.[12] Past progress under a similar program "is not dispositive but, under the facts of this case, described above, it does "'strongly suggest that'" the February 2011 IEP which is modeled on or similar to a program that has "generated some progress was 'reasonably calculated to continue that trend'" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. 2011] [quoting Thompson R2–J School District v. Luke P., 540 F.3d 1143, 1153 (10th Cir. 2008)]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *12 [W.D.N.Y. Sept. 26, 2012]; Dzugas-Smith v. Southold Union Free Sch. Dist., 2012 WL 1655540, at *26 [E.D.N.Y., May 9, 2012]). Where, in this case, the February 2011 IEP addressed the student's identified needs, I find it was "likely to produce progress, not regression" (Cerra, 427 F.3d at 195), and was reasonably calculated to enable the student to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

C. 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), the parents in this case also raise a number 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; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at* 16 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made]; c.f. E.A.M. v. New York City Dept. of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. 2012] [holding that parents may

[12] The Second Circuit has recently noted the importance of considering a student's performance at a private setting in the previous school year when proposing a public school IEP for the student (E.S. v. Katonah-Lewisboro School Dist., 2012 WL 2615366, at *3 (2d Cir. July 6, 2012).

prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Even if a district has begun to make the classroom arrangements that will be used to implement a student's IEP, I do not believe that a denial of a FAPE due to improper provision of services to the student in conformity with the IEP can occur before the student actually receives (or fails to receive) some or all of the services (see Ganje, 2012 WL 5473491, at *15 [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]). 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 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 the Aaron School 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; 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]). Unlike the analysis of a student's IEP, which is now firmly established as a prospective analysis (R.E., 694 F.3d at 195), the assessment of claims regarding the provision of services in conformity with that IEP is in my view a retrospective analysis that must be grounded in evidence of events that have in fact occurred (see e.g., D.D.-S, 2011 WL 3919040, at *13).

1. Functional Grouping

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

According to the student's mother, because the student was assigned to a new class at the time she visited the assigned school in July 2011, the principal did not have a class profile of the students' classifications, ages, behaviors, and levels of academic functioning (Tr. p. 273; Parent Ex. K at p. 2). As a result, she could not figure out at that time if the classroom was appropriate for the student (Tr. p. 273). The hearing record shows that as of September 2011, when the February 2011 IEP was scheduled to be implemented, the student was seven and a half years old and, by teacher estimate, functioning academically between an early first grade and early second grade level (Tr. pp. 224-27; see Dist. Ex. 9 at p. 1).

According to the district's class profile, had the student attended the assigned school, he would have been placed in a 12:1+1 special class with five- and six-year-old students whose instructional levels for academics ranged from the readiness level to the .5-1.5 grade level (Parent Ex. L at 1). The majority of the students in the assigned class exhibited below average oral language and writing abilities and the students' levels of physical and social development ranged from the pre-kindergarten to second grade level (id. at pp. 1-2). The class profile listed the following environmental modifications as being needed by the students to meet their instructional goals: specialized seating, behavioral charts, sensory tools, and manipulatives (id.).

Based on a review of the student's IEP, the teacher of the proposed class testified that the student's needs were "quite" similar to "a lot" of the students in the class and the student would have been functionally grouped with other students in the class (Tr. pp. 90-2-93; see Tr. pp. 95-96, 104-05, 147). Moreover, the teacher testified that he conducted assessments at the beginning of the school year to ascertain the students' instructional levels and then grouped the students by ability for instruction (Tr. pp. 94-95, 125-26, 154-58).

Accordingly, I find that the hearing evidence indicates that, in the event the student had attended the public school, the district was capable of complying with State regulations requiring functional grouping in the proposed class as there were students who were functioning on or close to the same level as the student and who demonstrated similar academic and social/emotional needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133).

2. Quiet Environment

Next with regard to the parties' dispute over the auditory stimuli at the public school site, the student's mother testified that when she visited the assigned class she was concerned because the air conditioner was loud and the principal informed her that noise from the outside recess area could be heard in the classroom (Tr. pp. 274-75; see Parent Ex. K). The student's mother noted the student's auditory processing difficulties and indicated that the noise in the assigned classroom would be too much for the student (Tr. pp. 274-76). The student's mother also indicated that the student could not cope with "people being taught in the classroom at the same time" and inquired of the principal as to whether the student could be pulled out of the classroom for instruction (Tr. p. 275). According to the student's mother, the principal indicated that the student could not be "continually" pulled from the classroom, and even with SETSS, the teacher would be teaching one student while another student would be expected to sit and read (id.). The student's mother believed that this was not something that the student would be able to manage (id.). The parent testified that although she was impressed with the curriculum and all of the things the assigned school would have done, she believed the school could not address the noise level in the classroom (Tr. pp. 275-76). Accordingly, in her August 23, 2011 letter to the district, the student's mother articulated her concern regarding the assigned school's inability to provide the student with a quiet classroom/building with minimal ambient noise distractions, citing the student's auditory, attending and regulation difficulties (Parent Ex. K at p. 1).

The teacher of the assigned class testified that his classroom was on the second floor and faced the yard where recess took place (Tr. p. 149). In contrast, he stated that the noise from the yard was "surprisingly . . . pretty low" and that for the most part the students did not notice it (Tr. pp. 149-50). He confirmed that when the window was open it would be "more noisy" (Tr. p. 150). The teacher of the assigned class also confirmed that the class was broken up into small groups for reading and math instruction, that the instruction took place in the classroom and that all of the groups were going at the same time (Tr. pp. 153-54, 156-58). The teacher reported that he had the ability to work 1:1 with students (Tr. pp. 156-57). He explained that he provided breaks and special headphones for students who had problems with auditory over-stimulation and attending difficulties during music (Tr. p. 147). While the parents may be understandably concerned for the well being of the student related to noise level at the public school which may not provide optimal conditions at all times, the district is not required to provide an ideal setting, and the evidence above does not show that the district would materially fail to implement the student's IEP.

3. Insufficient Classroom Support

With regard to the parents' assertion that the public school site would not guarantee the presence of two adults in the classroom at all times and that this would result in insufficient support if the student became dysregulated, the student's mother expressed her concern during the impartial hearing with regard to the student's safety, as he had recently been diagnosed with a seizure disorder (Tr. p. 276). According to the student's mother, she told the principal that the student needed an extra level of support because he had "regulation issues" and could sometimes get up and walk out of the room because of a seizure or something else (id.). The evidence in the hearing record is extremely limited on this issue and provides only a brief statement of hearsay testimony offered by the student's mother that the public school personnel told her it would not provide the services in the IEP—that the principal informed her that he would do everything he could, but that he could not promise her that there would be two adults in the room at all times (Tr. pp. 276-77).[13] The district did not call the school principal to rebut or clarify these statements.[14] Thus the evidence does not show whether the district would implement the IEP. However, in light of recent case law on this issue adopting the snapshot approach to evaluating a student's educational program and the fact that the parents thereafter rejected the provision of services at the public school (see R.E., 694 F.3d at 195; Ganje, 2012 WL 5473491, at *15), I am not persuaded that the parent can prevail on this issue since it is unlikely that the district, once it has established that the IEP was appropriate, was required to go further under the circumstances of this case to produce evidence establishing the successful provision of services in conformity with the student's IEP.[15] Again, while I sympathize with the parents' concerns for the well being of their son, their anticipation that the public school site would fail to conform to the IEP is not a basis for finding a denial of a FAPE (R.E., 694 F.3d at 195).

Based on the foregoing, I find that had the student 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., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L., 812 F. Supp. 2d at 502 [S.D.N.Y. Aug. 19, 2011]).

VII. Conclusion

Having found that the district offered the student an IEP that was designed to provide FAPE, I need not reach the issue of whether the private educational services obtained by the parents were appropriate for the student and the necessary inquiry is at an end (Mrs. C. v.

[13] Relevant hearsay testimony is admissible in an administrative due process proceeding.

[14] It is impossible to tell from the state of the hearing record whether the principal was referring to not having two adults at "all times" as something as innocent as an occasional restroom break or as serious as an acknowledgement that the district would fail to provide a special education teacher or the required paraprofessional for the duration of the school year to the classroom even when the student's IEP required this ratio.

[15] Accordingly it is not necessary to remand this issue to the IHO for further development of the hearing record or to render a determination on this issue.

Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated March 5, 2012 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to pay for the costs of the student's attendance at the Aaron School.

Dated: **Albany, New York**
December 21, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER