The University of the State of New York

The State Education Department
State Review Officer
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No. 12-083

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for petitioner, Jessica C. Darpino, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondent, Neal H. Rosenberg, 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 which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund the student's tuition costs at the Child School for the 2011-12 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record reflects that the student has a history of academic difficulties, speech-language delays, and profound hearing loss in his left ear (Tr. pp. 240-42, 246; Dist. Ex. 3 at pp. 3, 7; Parent Ex. A at pp. 3, 6). According to the hearing record, the student received early intervention services and participated in a preschool special education program (Tr. p. 244). The student attended general education classes at the district from kindergarten through third grades and also received related services, including hearing services (Tr. pp. 238, 243, 294-95). The student reportedly failed third grade and the parent was advised that he needed to repeat that grade (Tr. pp. 241-42). For the 2010-11 school year, subsequent to a district evaluation, the district reportedly recommended that the student enroll in a 12:1 special class at the district community school the student was then attending (Tr. pp. 240, 297-98). The district, however, was not able to implement that recommendation and it issued a "Nickerson letter" to the parent which authorized

the student to attend a State-approved private school at the district's expense (Tr. pp. 264, 265-66, 297-98; see Dist. Ex. 14).[1] The parent enrolled the student in the Child School, which is a nonpublic school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities, in September 2010 (Tr. pp. 162-63, 237, 298, see 8 NYCRR 200.1[d], 200.7). The student attended the Child School for both the 2010-11 and 2011-12 school years (Tr. pp. 237; 262, 293; see Parent Ex. B).

In March 2011, the student was referred to a licensed psychologist with whom the district contracted for a psychoeducational reevaluation to ascertain his current level of cognitive and emotional functioning and to determine his current academic needs (Tr. p. 94; see Dist. Ex. 5). In view of an upcoming annual review meeting, among other things, the CSE received current information from the Child School relative to the student including an update from his teacher, a social-emotional update, the student's "present level of academic performance" from his teacher for the draft IEP, a speech-language progress report from his speech-language provider, and draft goals from the student's teacher and his speech-language provider at the Child School (Tr. pp. 73-74, 79, 83, 115, 116-17; see also Dist. Ex. 8).[2] A district school psychologist also conducted an observation of the student (Tr. pp. 73, 95-97).[3]

The CSE convened on April 27, 2011 to conduct an annual review and to develop an IEP for the 2011-12 school year (fourth grade) (Tr. pp. 72-73, 247; Dist. Ex. 3 at pp. 1, 2). The CSE determined to continue the student's eligibility for special education and related services as a student with a speech or language impairment (Dist. Exs. 4 at p. 2; 12 at p. 4; see also Dist. Ex. 3 at p. 1; Parent Ex. A at p. 1). To address the student's hearing loss, the April 2011 IEP provided for the use of an FM system (Dist. Ex. 3 at pp. 1, 3). The April 2011 CSE also recommended testing accommodations relating to extended time, the rereading of directions, test taking in a separate location, reading aloud questions other than reading comprehension, and "auditory amplification" (Dist. Ex. 3 at p. 18). The April 2011 CSE also recommended that the student be placed in a 12:1 special class in a community school (Tr. pp. 86-87, 78, 105, 253; see Dist. Ex. 3 at pp. 1, 16). The CSE alternatively considered providing the student with a 12:1+1 special class placement in a district specialized school as well as continued placement at a nonpublic day school, the Child School (Tr. p. 85; Dist. Ex. 3 at p. 17). However, the April 2011 CSE concluded that the alternative placements considered were too restrictive for the student in light of the student's deficits and that the student did not require two adults in his classroom (Tr. pp. 85-87, 106; Dist.

[1] A "Nickerson letter" is a letter from this particular district, which authorizes a parent to place a student in a New York State approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). A "Nickerson letter" relates to a District Court consent decree intended to address the situation in which the district did not evaluate or place plaintiff class members in a timely manner (see F.L. v. New York City Dept. of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012]; M.S. v. New York City Dept. of Educ., 734 F.Supp.2d 271, 279 [E.D.N.Y., 2010]; Application of the Bd. of Educ., Appeal No. 12-039; Application of the Dep't of Educ., Appeal No. 09-114; Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

[2] I note that the speech-language progress report was not offered as evidence in the hearing record (Tr. pp. 115, 116, 117). Draft goals prepared by the student's speech-language therapy provider are also not in the hearing record (see Dist. Exs. 1-5, 8-12; Parent Exs. A-B).

[3] I note that the school psychologist's observation of the student was not offered as evidence in hearing record (see Tr. p. 95).

Ex. 3 at pp. 17-18). The parent and the attendees at the CSE meeting from the Child School disagreed with the CSE's placement recommendation and expressed their opinion that the student should continue his current placement at the Child School (Tr. pp. 103-104, 106, 111, 116, 252, 253, 267). The April 2011 CSE also recommended that the student continue to receive speech-language therapy and hearing education services (Tr. p. 87; see Dist. Ex. 3 at p. 18). The CSE also recommended the initiation of group counseling (Tr. p. 87; see Dist. Ex. 3 at pp. 2, 18).

In a letter to the CSE chairperson dated May 25, 2011, the parent, among other things, restated her disagreement with the April 2011 CSE's recommendation that the student be placed in a 12:1 special class in a district community school instead of continuing his enrollment at the Child School (Dist. Ex. 9). According to the parent, the student would not receive the appropriate level of support in a 12:1 special class setting and he required the support of an additional adult in the classroom in order to make progress (id.). The parent further indicated that the student would not receive "the full time small group and individualized support" he required, that he "would be placed with large groups during the day without special education support, which would be inappropriate for him," and that the student "requires consistent support to work on his social skills, which he would not receive in the [recommend] program" (id.). The parent also set forth that in order to make progress, the student required "a small structured class setting in a specialized school" where he could receive "full time special education support with similarly functioning peers" (id.). The parent stated that she would be "willing to discuss this type of setting with the CSE if necessary" (id.). The parent further stated that she did not believe that the April 2011 CSE adequately considered her concerns or the statements of the persons who had been working with the student (id.). The parent stated that she intended to place the student at the Child School for the 2011-12 school year and that she would "exercise her due process rights to pursue funding" (id.).

In a final notice of recommendation (FNR) dated July 22, 2011, the district reiterated the 12:1 special class placement recommendation made by the April 2011 CSE and identified the particular school to which the district assigned the student for the 2011-12 school year, which appears to have been the same school that the student attended in kindergarten (Dist. Ex. 10; see Tr. p. 238).

In a letter to the CSE chairperson dated July 28, 2011, the parent acknowledged receipt of the July 2011 FNR (Dist. Ex. 11). Among other things, the parent again noted her disagreement with the recommended 12:1 special class placement and her willingness to discuss placing the student at the Child School (id.). The parent stated that she had not received a response to her May 25, 2011 letter and that she "would still be willing" to meet (id.). With respect to the particular public school site, the parent advised the CSE chairperson that she was rejecting it because she did not believe it would meet the student's needs (id.). She indicated that the student had previously attended the school, that he did not do well there, and that she had removed the student from the school because its partitioned, "open classroom" setting had been "very distracting" to him (id.). The parent also restated her intention to place the student at the Child School and exercise her due process rights to pursue funding (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 2, 2011, the parent requested an impartial hearing, alleging that the district denied the student a FAPE (Dist. Ex. 1 at p. 1). The

parent asserted that the April 2011 CSE lacked required CSE members and that it did not adequately consider the evaluations and documents before it (id.). The parent also alleged that the annual goals and short-term objectives in the April 2011 IEP were inappropriate for the student (id.). The parent further asserted that the April 2011 CSE failed to consider the opinions of the professionals who knew the student and further, that the CSE did not adequately consider the parent's request that placement deferred to the district's central based support team (CBST) for placement in a nonpublic school, namely, the Child School (id.). The parent asserted that a 12:1 special class placement was inappropriate to address the student's needs and that the student benefits from "an additional adult/teacher" in the classroom that this program did not provide (id.).

With regard to the particular public school site to which the district assigned the student, the parent alleged that the district would not appropriately group the student by age, grade, academic ability, classification, and functional ability (Dist. Ex. 1 at p. 1). Additionally, the parent asserted that the recommended school's setting would be too distracting for the student because "a lot" of the student's classes would be in a barrier free environment (id.) The parent also contended that the district denied the student a FAPE because it failed to respond to the parent's May 2011 letter request for a new CSE meeting (id.). The parent further contended that in order to make progress, the student required a program that provided small structured classes in a small nurturing environment with full-time special education with similarly functioning peers and asserted that the Child School was appropriately meeting the student's needs (Dist. Ex. 1 at pp. 1-2).

As relief, the parent requested pendency (stay put) continuing the student's placement at the Child School, a Nickerson letter, a deferral to the district's CBST for placement of the student at the Child School, or reimbursement/funding for the tuition costs of the student's education for the 2011-12 school year (id. at p. 2).

B. Impartial Hearing Officer Decision

The impartial hearing began on November 29, 2011 and concluded on January 13, 2012, after four days of proceedings (Tr. pp. 1, 25, 57, 130, 299). On the first day of the impartial hearing, the parties agreed that the student's pendency placement was the Child School based on a January 6, 2011 IEP (Tr. pp. 18-20). In an interim decision dated December 1, 2011, the IHO ordered the district to continue funding the student's placement at the Child School as the student's pendency until a final resolution of the matter (IHO Interim Decision at p. 2).

After the hearing concluded, the IHO reached a final decision dated March 12, 2012 in which she ordered the District to fund the student's tuition at the Child School for the 2011-12 school year (IHO Decision at p. 12). The IHO found that the district had engaged in procedural and substantive violations and that based on their totality the district had failed to provide the student with FAPE (id.). The IHO found that the student was going to be mainstreamed for "non-core" subjects but that April 2011 CSE did not include a regular education teacher (id. at p. 12). The IHO found that the a 12:1 special class setting was not appropriate for the student on the basis that the student was fragile and struggled academically at the Child School, but that he had made meaningful progress there (id. at p. 11). The IHO determined that the student required significant amounts of 1:1 instruction to make any progress (id. at p.11). The IHO concluded that a 12:1 special class does not afford any real opportunity for individualized instruction, and that the student could not work independently for any length of time (id. at pp. 11-12). Additionally, the IHO also found that the district "was not able to confirm that there was a seat available for the student at the

beginning of the [2011-12] school year" and that the district "was not able to provide a profile of the [recommended] class" (id.).

With regard to the unilateral placement, the IHO stated only that the Child School met the student's academic, emotional, and social needs and was an appropriate placement (id.). Finally, the IHO stated that equitable considerations weighed in favor of the parent (id.).[4]

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE, that the Child School was an appropriate placement for the student, and that equitable considerations favored the parent. The district asserts that the IHO erred in considering whether a regular education teacher was absent from the April 2011 CSE meeting because the parent failed to raise this issue in her due process complaint notice. Alternatively, the district contends that a regular education teacher was not required to attend the April 2011 CSE meeting. The district argues that the April 2011 CSE had access to, considered, and/or circulated relevant evaluations and updates and that the evaluative information was sufficient to formulate an IEP that addressed the student's needs. The district alleges that the speech-language goals in the April 2011 IEP addressed the student's critical thinking and his language skills, as well as his sequencing skills. The district notes that the IEP also included goals on decoding, understanding, critical thinking, language skills, multiplication, and division that the "IEP included numerous other annual goals and short-term objectives." Regarding the parent's allegation in her due process complaint notice that the April 2011 CSE did not consider the opinions of the parent and the professionals who knew the student and who had advocated that the April 2011 CSE place the student at the Child School for the 2011-12 school year, the district asserts, among other things, that the April 2011 CSE considered and properly rejected the Child School. The district contends that the Child School was "too restrictive" a placement in light of the student's needs, that the hearing record did not establish that a small class size was needed to provide the student a FAPE, and that the hearing record showed that the district representative at the April 2011 properly recommended that the Child School was not an appropriate placement for the student. Regarding the April 2011 CSE's recommended 12:1 special class placement, the district disagrees with the IHO's finding that this placement was inappropriate. The district contends that in light of the information available to the CSE and the student's needs, the recommended 12:1 special class placement was appropriate for the student and would provide him with appropriate opportunities for 1:1 instruction. Further, the district asserts that the IHO should not have considered the issue of whether there was a seat available for the student at the beginning of the school year on the basis that the parent had not raised this issue in her due process complaint notice. In any event, the district also alleges that as of the date of the district's FNR, a seat at the assigned school was

[4] I note that the IHO did not address a number of the contentions set forth in the parent's due process complaint notice. In particular, the IHO did not address the parent's allegations that the April 2011 CSE did not adequately consider the evaluations and documents at the April 2011 CSE meeting, that the April 2011 CSE did not consider the opinions of the professionals who knew the student and that it also did not adequately consider the request by the parent and staff from the Child School that the student's placement for the 2011-12 school year be deferred to the district's CBST for placement at the Child School, that the annual goals and short-term objectives in the April 2011 IEP did not appropriately address the student's special education needs, that the setting in the assigned school was too distracting for the student, and that the district denied the student a FAPE because it did not respond to the parent's May 2011 letter (see IHO Decision at pp. 8-12; Dist. Ex. 1 at p. 1).

available. Regarding this issue, the district also contends that it should not be required to provide testimony regarding the specifics of the district's placement because the parent had rejected the district's recommended placement prior to her receipt of the FNR and also because the parent had determined not to enroll the student in the assigned placement.[5]

The district also alleges that the parent failed to demonstrate that the Child School was appropriate for the student. In particular, it contends that the IHO's finding that the Child School was an appropriate placement did not reference any law or fact and therefore should not be accorded any deference. The district further asserts that the Child School is not able to provide the student with the hearing services required by the April 2011 IEP, that the private school is too restrictive an environment for the student, and that the student has made only limited progress. Finally, the district contends that equitable considerations preclude awarding relief to the parent and, additionally, that the IHO's finding that equitable considerations weigh in favor of the parent were without citation to law or fact and should not be accorded any deference. Among other things, the district further asserts that the parent was not entitled to direct payment of tuition costs because she had no legal obligation to pay tuition to the Child School for the 2011-12 school year and there was no evidence that she lacked the financial resources to front the costs of the student's tuition at the Child School.

In her answer, the parent requests that the district's appeal be dismissed and that the IHO's decision be affirmed in its entirety. In support of the IHO's determination regarding the composition of the April 2011 CSE, the parent asserts that her due process complaint notice may reasonably be read to challenge the absence of a regular education teacher. The parent also asserts, among other things, that the district provided no evidence regarding the qualifications or classroom experience of the special education teacher member of the CSE; and further, that the April 2011 CSE failed to include a speech-language therapist. The parent denies and disagrees with the district's contentions related to the April 2011 CSE's consideration of the documents and evaluations at the April 2011 CSE meeting. Regarding the annual goals and short-term objectives of the April 2011 IEP, the parent contends that the annual goals were not appropriate and insufficiently measurable, that the speech-language goals were drafted without appropriate "input and oversight," and denies the district's allegations regarding the number and subject area of the annual goals. Regarding the April 2011 CSE's consideration of the recommendation by the parent and the Child School staff that the student be placed at that nonpublic school, the parent denies and disagrees with the district's contention that the CSE had considered and rejected such a placement as being too restrictive in light of the student's needs. Regarding the April 2011 CSE's recommended 12:1 special class placement, the parent agrees with the IHO that this placement is not appropriate for the student. Among other things, the parent asserts that the district misstated the student's deficits; that the IHO correctly determined that the student was fragile; that in light of the student's needs as set forth in the IEP, the student required tremendous amounts of 1:1 support; and that the recommended placement would not provide appropriate opportunities for necessary small group and 1:1 instruction because there was only one adult in the recommended

[5] I note that although not specifically mentioned in the district's petition for review, the district's assertion that it should not be required to provide testimony regarding the specifics of the assigned school would appear to include the IHO's finding that the district had not been able to provide a profile of the class and to the parent's contention in her due process complaint notice, which the IHO did not address, that the setting in the school assigned to the student by the July 2011 FNR was "too distracting" for the student (see IHO Decision at p. 12; Dist. Ex. 1 at p. 1).

classroom. The parent contends that the IHO was not precluded from considering whether there was a seat available for the student at the recommended school because the district had raised this issue in the first instance. Among other things, the parent further alleges that the district cannot be excused from defending against a failure to have a seat available for the student at the beginning of the school year on the basis that a parent rejects the placement before the receipt of a district FNR. Moreover, the parent further alleges that the hearing testimony did not show that a seat was available for the student at the beginning of the school year. With respect to the district's assertion that issues relating to the specifics of the district's proposed placement should not be considered in circumstances where the parent had rejected the proposed placement prior to the issuance of the FNR and/or where the student did not attend the recommended district placement, the parent alleges that a district cannot be excused from defending its placement and satisfying its burden of proof on such a basis. The parent further asserts that such considerations are not relevant because in this case the parent did not enroll the student in a unilateral placement but rather sought pendency at the Child School. The parent also restates the contention in her September 2011 due process complaint notice that the district did not respond to her May 2011 letter.[6]

Regarding the IHO's finding that the Child School was an appropriate placement, the parent alleges that the IHO was not required to address the appropriateness of the Child School in greater detail because the case was a pendency case. Notwithstanding that, the parent also contends that she has demonstrated that the Child School was suitable and appropriate for the student. The parent further asserts that under the circumstances of the case and in light of the proof provided, it is not dispositive that the Child School does not provide hearing services to the student. The parent denies the district's contention that the Child School is too restrictive and environment for the student. The parent also asserts that the student has made appropriate progress.

The parent also alleges that it was proper for the IHO not to address equitable considerations in greater detail and asserts that consideration of this issue does not apply in pendency cases. The parent further sets forth that, in any event, as the IHO found, equitable considerations would not bar her claim. The parent denies the district's contention that she had no intention of, and did not genuinely consider, placing the student in a public school. The parent also disputes that she was not entitled to direct payment and/or tuition reimbursement on the basis that the parent had no legal obligation to pay tuition to the Child School for the 2011-12 school year and that the Child School and not the parent had incurred the financial risk from the student's

[6] In addition to addressing parts of the IHO's decision and also restating or addressing allegations in her September 2011 due process complaint notice, the parent's answer sets forth a host of other allegations against the district including the following: the parent and the staff from the Child School on the April 2011 CSE were not provided with a meaningful opportunity to participate in the decision making process; the April 2011 CSE did not propose or conduct testing to evaluate the extent of the student's hearing impairment; the April 2011 CSE did not seek the consent of the parent to conduct the March 2011 psychoeducational evaluation until the day of that evaluation; the district's observation of the student at the Child School was limited to 30 minutes; the April 2011 CSE considered only a speech-language progress report and not a speech-language evaluation; the student required a full-time special education program and any degree of mainstreaming is inappropriate; the April 2011 CSE did not develop the April 2011 IEP, and instead, the school psychologist more or less did so on her own; the April 2011 CSE and/or district school psychologist did not have sufficient information to develop the April 2011 IEP; the April 2011 IEP's section relating to the student's social and emotional needs was inadequate; the April 2011 IEP did not adequately address the student's social and emotional needs; the district's July 2011 FNR failed to mention the right to request a CSE meeting; the July 2011 FNR did not include the student's related services; and the District did not demonstrate that the student would be provided with the support of certified special education teachers in his science, art, or music classes.

unilateral placement. The parent does not address the district's contention that even if the district had a legal obligation to the parent, the parent failed to present evidence that she lacked the financial resources to pay the student's tuition at the Child School.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought

desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing and Review

1. Claims Not Addressed by the IHO

I note initially with respect to the scope of this appeal that the parent has set out substantive and procedural contentions in her answer relating to a number of the claims set forth in her September 2011 due process complaint notice which were not ruled on by the impartial hearing officer. As indicated above, these claims included the parent's allegations that 1) the April 2011 CSE did not adequately consider the evaluations and documents at the April 2011 CSE meeting; 2) that the April 2011 CSE did not consider the opinions of the professionals who knew the student and that it also did not adequately consider the request by the parent and staff from the Child School that the student's placement for the 2011-12 school year be deferred to the district's CBST for placement at the Child School; 3) that the annual goals and short-term objectives in the April 2011 IEP did not appropriately address the student's special education needs; 4) that the setting in the assigned public school site was too distracting for the student, and 5) that the district denied the student a FAPE because it did not respond to the parent's May 2011 letter (see IHO Decision at pp. 8-12; Dist. Ex. 1 at p. 1). The IHO erred in failing to address the parents' claims; however, at this juncture I am loath to remand the matter for the IHO to render a decision to review. These claims are addressed for the first time in this decision.

2. New Claims on Appeal

The following additional assertions in the parent's answer are raised as new claims on appeal: 1) that the parent and the staff from the Child School on the April 2011 CSE were not provided with a meaningful opportunity to participate in the decision making process; 2) that the April 2011 CSE did not propose or conduct testing to evaluate the extent of the student's hearing impairment; 3) that the April 2011 CSE did not seek the consent of the parent for the March 2011 psychoeducational evaluation until the day of that evaluation; 4) that the district's observation of the student at the Child School was limited to 30 minutes; 5) that the April 2011 CSE considered a speech-language progress report and not a speech-language evaluation; 6) that the student requires a full-time special education program and that any degree of mainstreaming is inappropriate; 7) that the school psychologist developed the April 2011 IEP rather than the CSE; 8) that the April 2011 CSE lacked sufficient information to develop the April 2011 IEP; 9) that the April 2011 IEP's section relating to the student's social and emotional needs is inadequate; 10) that the April 2011 IEP did not adequately address the student's social and emotional needs; 11) that the district's July 22, 2011 FNR fails to mention the right to request a CSE meeting; 12) that the July 22, 2011 FNR does not include the student's related services; and 13) that the district did not demonstrate that the student would be provided with the support of certified special education teachers in his science, art, or music classes.

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is

amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). In this case, the parent's September 2011 due process complaint notice does not assert any claims that may be reasonably read to set forth any of the above assertions. Additionally, while the hearing record contains some testimony relating to these issues, it was elicited either only briefly as background, and largely elicited by the parents attorney, not the district (Tr. pp. 79, 94-97, 110-11), and the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include these issues. Further, the hearing record does not reflect that the parent submitted, or that the impartial hearing officer authorized, an amendment of the parent's September 2011 due process complaint notice to include these issues. Based on the foregoing, I decline to review these issues.

I will next address the IHO's finding that the district was not able to confirm that there was a seat available for the student at the beginning of the 2011-12 school year (see IHO Decision at p. 12). There is nothing in the September 2011 due process complaint notice that can be reasonably read to raise this issue. Further, while the hearing record contains some testimony relating to this issue, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include this issue, and in fact affirmatively took the position that they were not obligated to defend the seat at the assigned school because the parent rejected the public placement in the IEP and returned the student to the Child School before the public school location assignment had been made (Tr. pp. 118-126). Further, the hearing record does not reflect that the parent submitted, or that the impartial hearing officer authorized, an amendment of the parent's September 2011 due process complaint notice to include this issue. As a consequence, I find that the IHO erred in reaching this issue and I will reverse her finding with respect to it (Application of a Student with a Disability, 11-154; Application of the Bd. of Educ., Appeal No. 11-143; Application of a Student with a Disability, Appeal No. 11-073; see also Dep't of Educ v. C.B., 2012 WL 1537454, at *8 [D. Haw. May 1, 2012]).

B. Composition of the April 2011 CSE

I will now address the IHO's finding that the district failed to have a regular education teacher member at the April 2011 CSE and that this was a violation of the IDEA that denied the student a FAPE (see IHO Decision at p. 12).[7] The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]; Application of a Student with a Disability, Appeal No. 11-154; Application of a Student with a Disability, Appeal No. 11-008; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 9-137). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of

[7] I note that the district asserts on appeal that the IHO should not have considered this contention on the basis that this issue was not raised by the parent's September 2011 due process complaint notice. The district is incorrect as the claim can be reasonably read as raised in the due process complaint notice (see Dist. Ex. 1 at p. 2). I therefore find that the IHO properly considered this issue at the impartial hearing (Application of a Student with a Disability, Appeal No. 11-144; Application of a Student with a Disability, Appeal No. 11-065; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 11-002).

appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

The district concedes that the April 2011 CSE did not have a regular education teacher member (Pet ¶ 11; see also Tr. pp. 74-75, 97-98, 111). The hearing record reflects that the April 2011 CSE recommended that the student participate in physical education with general education students (see Tr. p. 110; see also Dist. Ex. 3 at p. 18), and therefore, the April 2011 CSE should have included a regular education teacher, which in this case is a procedural violation (E.A.M, 2012 W.L. 4571794, at *6-*7; Application of a Student with a Disability, Appeal No. 11-002; Application of a Child with a Disability, Appeal No. 06-132; Application of the Bd. of Educ., 06-040; Application of a Child with a Disability, Appeal No. 05-008; Application of a Child with as Disability, Appeal No. 02-100; see also IEP Team, 71 Fed. Reg. 46670, 46675 [Aug. 14, 2006]). However, I find that the hearing record does not provide a basis upon which to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2 -*3 [2d Cir. June 3, 2011]; see also 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[2]; 8 NYCRR 200.5[j][4][ii]). In this case, there is no dispute with respect to whether the student should be placed in a regular education class as opposed to a special education class. Nor is there any contention that the absence of a regular education teacher member of the April 2011 CSE in any way prevented or significantly impeded the parent's ability to participate in the April 2011 CSE meeting. No issues were raised in this proceeding relating to how or whether the student's disabilities affected the student's participation in his general education physical education class. There is no indication that the either party seriously sought additional strategies to have the student mainstreamed with regular education peers to a greater extent. Accordingly, the IHO erred in determining that the absence of the required regular education teacher member from the April 2011 CSE resulted in a denial of a FAPE.

C. Annual Goals

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]).

The parent's due process complaint notice had raised the issue generally that the annual goals on the student's 2011-12 IEP failed to meet his special education needs (Dist. Ex. 1). The IEP contains multiple annual goals for the student, addressing his academic, social, emotional and management needs (Dist. Ex. 3 pp. 8-15). I note that the parties do not dispute the accuracy of the academic, social, emotional, or management needs set forth in the April 2011 IEP. The IEP's goals addressed the student's speech and language skills, reading, written language, math, attending in class, and the student's use of his FM unit (id.). As noted by the IHO, the student's teacher at the

Child School testified at the impartial hearing that she felt the annual goals for the student were appropriate (IHO Decision at pp. 6-7; Tr. pp. 229-34; Dist. Ex. 3). Upon review of the IEP and the annual goals, and consideration of the testimony from the student's Child School teacher, I find that the goals appropriately addressed the student's areas of need.

D. Placement – 12:1 Special Class

Next, I turn to the district's contention that the IHO erred when she concluded that the proposed 12:1 special class in a community school was not an appropriate placement for the student. I find that the IHO's conclusion is supported by the hearing record. In particular, for the reasons discussed below, I find that the 12:1 special class as described by the school psychologist would not have addressed the student's significant need for consistent support by an adult in a small classroom in order for the student to focus and complete academic tasks and to perform socially.

The student receives special education and related services as a student with a speech or language impairment (see Dist. Ex. 3 as p. 1). The student is diagnosed with a sensorineural hearing loss and a cochlear malformation in the left ear, for which he requires an FM unit to amplify sounds during instruction (Parent Ex. A at p. 6; Dist. Ex. 3 at p. 3; see also Tr. p. 246). The March 2011 psychoeducational evaluation reported, among other things, that testing suggested factors which might adversely affect the student's overall academic functioning and adjustment, including difficulties with processing speed, auditory processing, and his hearing deficit (Dist. Ex. 5 at p. 4). The psychoeducational evaluation report also indicated that "repetition and clarification of instructions were frequently required," that the student "tended to tune out," and that he "seemed not to be listening" (id. at p. 1).

In regard to the student's need for academic support, the April 2011 IEP indicated that the student benefited from 1:1 or small group reading instruction and that he also needed individual pacing so that he could keep up, visual and kinesthetic teaching approaches, repetition, and continuous review (Dist. Ex. 3 at p. 3). The April 2011 IEP further noted that the student had difficulty focusing during direct instruction and required "continuous redirection and prompting to focus" (id.). Moreover, the April 2011 IEP indicated that when the student felt he was falling behind, he tended to stop attending to the lesson and that "much teacher support" was "required" to keep him engaged in instruction (id.).

In regard to the student's ability to maintain focus to task during mathematics instruction, the April 2011 IEP indicated that the student sometimes required prompting to pay attention to the addition or subtraction operation required to calculate the problem (Dist. Ex. 3 at p. 3). The April 2011 IEP also noted that when working with word problems, the student required assistance to pay attention to key words and phrases (id.). In addition, the April 2011 IEP indicated that the student benefited from frequent repetition of math concepts and skills previously learned to help build his independence and confidence, solidify previously learned skills, and to build on future math skills (id.). Regarding the student's social, emotional, and coping skills, the April 2011 IEP indicated that the student received redirection from teachers in an effort to help him take responsibility for actions of his which interfered with his learning and that of his peers (id. at pp. 3, 5).

To address the student's academic needs, the April 2011 IEP recommended individualized strategies for the student, and in particular using concrete models before moving to abstract

problem solving, visual cues and reminders for problem solving steps, frequent repetition, small group or 1:1 instruction, full teacher support in the beginning of a new skill which is faded as he gains confidence and independence, connection to real-world situations where the math skill could be useful, and continuous positive reinforcement (Dist. Ex. 3 at p. 4). To address the student's social/emotional needs, the April 2011 IEP advised that the student required frequent encouragement to complete classwork, to participate in class, and to improve his self-confidence (id. at p. 5).

I note that the parties do not dispute the accuracy of the descriptive information in the April 2011 IEP relating to the student's present levels of academic performance and learning characteristics or of his social/emotional performance. Further, I note that the information relative to the student's present levels of performance was provided by the student's teachers at the Child School in preparation for the April 2011 CSE meeting (Tr. pp. 73-74; see Dist. Ex. 3 at pp. 3-5). I also note that prior to the April 2011 CSE meeting, the school psychologist, who was also the district's representative at the April 2011 CSE meeting, visited the student's classroom at the Child School and prepared an observation report relative to the student (Tr. pp. 72-73, 95-97; Dist. Ex. 3 at p. 2).[8] I also note that the parties do not dispute the accuracy of the academic and the social/emotional management needs set forth in the April 2011 IEP.

Regarding the parent's claims relating to the CSE's failure to appropriately consider the evaluations, documents and opinions of professionals, I note that there is no claim that sufficient evaluative data was not available to the CSE (Dist. Ex. 1). In fact, as noted herein, it is not disputed that the IEP in question accurately described the student's levels of performance and needs in all relevant areas (Dist. Ex. 3). The extent to which the CSE considered and discussed all the data before it is not clear from the hearing record, although it appears that all relevant materials were apparently before the CSE, despite not all being part of the hearing record (Tr. pp. 95, 106, 111-12, 115-16). I find that the CSE's failure to take into account the evaluative and other data before it resulted in the recommendation of the 12:1 special class for the student, despite information concerning the student's needs accurately set forth in the IEP itself that would weigh against such a recommendation.

Upon review of the hearing record, I find that the 12:1 special class placement recommended by the April 2011 CSE would not address the student's significant need for consistent teacher support in a small classroom, which is reflected in the April 2011 IEP and which the student requires in order to perform academically and socially. Regarding this, the school psychologist testified that students in the recommended 12:1 special class "work independent(ly) in classrooms, and most of the time, teachers kind of walk around and assist students on a 1:1 basis" (Tr. p. 108). While she testified that at times the student would be receiving 1:1 or small group support in the proposed classroom, the school psychologist also affirmed that in the recommended 12:1 special class setting, the students were expected at times to work without the assistance of a teacher (id.). The school psychologist testified that "[w]e would hope that [the student] would be independent most of the time" and also that "[w]e want the student to be independent" (id.). Moreover, I note that while the student would have received 12:1 support for that part of the school day in which he received instruction in his "core subject areas" of English language arts (ELA), math, social studies, and science (Tr. pp. 109-10), the hearing record does

[8] As indicated above, the report of the school psychologist's observation of the student at the Child School is not a part of the hearing record (see Tr. p. 95).

not show what, if any, degree of support the student would have received during his participation in mainstream school activities such as gym, lunch, or field trips, which took place in a large group setting (see Tr. pp. 110, 178; see also Dist. Ex. 3 at p. 18).

In light of the above, I find that the hearing record does not show that the recommended 12:1 special class in a community school would have addressed the student's need for specially designed instruction to permit him to achieve meaningful educational benefit by advancing appropriately toward attaining his annual goals, by accessing and progressing in the general education curriculum, and by participating with other students with disabilities as well as with nondisabled students in relevant educational activities (Rowley, 458 U.S. at 188-89, 192, 201, 203; Mrs. B., 103 F.3d at 1120; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]). I therefore find that the district has failed to offer the student a FAPE for the 2011-12 school year.

I note that the parent also claims that the student was denied a FAPE also by the CSE's subsequent failure to respond to the parent's May 25, 2011 letter requesting a new CSE meeting (Dist. Ex. 1). In fact, the letter does not request a new CSE meeting, although it does indicate that the parent is willing to meet with the CSE again "if necessary" (Dist. Ex. 9). The letter first notes the parent's disagreement with the 12:1 class recommended on the IEP (id.). It then goes on to note the parent's belief that a small, structured class in a specialized school is required for the student and specifically indicates the parent's willingness "to discuss this type of setting with the CSE again if necessary" (id.). Under these circumstances, I do not find that the CSE's failure to respond to this letter constituted a denial of FAPE for the student.

E. Assigned School

I next turn to the issue on appeal regarding the implementation of the student's IEP at the classroom in the assigned school to which the student was assigned. First, I note the IHO's finding that the district failed to provide the student with a FAPE in part because the district was not able to provide a profile of the class (see IHO Decision at p. 12). Regarding this, the parent's September 2011 due process complaint notice had asserted that the student would not be appropriately grouped by age, grade, academic ability, classification, and functional ability (Dist. Ex. 1 at p. 1). Next, I note that the parent argues in the due process complaint notice that the particular school's setting would be too distracting for the student (id.).

I note that a meaningful analysis of the parent's claims with regard to the assigned school and its appropriateness and ability to meet the student's needs, would require me to determine what might have happened had the district been required to implement the student's IEP.

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 Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000].

Challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the

recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that 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. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 - *16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, *15 [W.D.N.Y. Sept. 26, 2012][finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore missed placed], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 12, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement the school district may not rely on evidence that a child would have had a specific teacher or specific aid to support otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continue to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11 - *16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in a school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally place the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[9]

[9] The Second Circuit has also made clear that just because the district is not required to place implementation

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because '[t]he appropriate inquiry is into the nature of the program actually offered in the written plan']). In view of the foregoing, the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

In this case, the parent rejected the IEP prior to the time that the district became obligated to implement the student's IEP (Dist. Ex. 9). The district was not required to establish that the assigned school would have been appropriate upon the implementation of his IEP. The district was not required to establish that the student had been grouped appropriately in the recommended 12:1 special class in the assigned school, or that the school would not be too distracting for the student. The issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have executed student's IEP at the assigned public school site is not an appropriate inquiry (see K.L., 2013 WL 3814669 at *6). I therefore agree with the district on appeal and find that the IHO erred in finding that the district failed to offer the student a FAPE based upon a consideration of whether the district provided a profile of the class.

VII. Appropriateness of the Nonpublic School Placement

A. The Child School

The parent requested, among other things, that the district place the student at the Child School for the 2011-12 school year (see Dist. Ex. 1 at p. 2).[10] In view of the facts of this case, I

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details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

[10] As alternative possibilities, the parent requested a "Nickerson letter" or "tuition reimbursement/prospective funding" for the cost of the student's education at the Child School (Dist. Ex. 1 at p. 2). The parent's September 2011 due process complaint notice does not assert that the student has not been evaluated or placed in a timely manner (see Dist. Ex. 1). Additionally, since, as discussed in the body of this decision, I am directing relief in accordance with the parent's request that the district be ordered to provide a placement at the Child School, it is not necessary to address the parent's alternative theories that the student is entitled to tuition reimbursement or direct tuition payment.

cannot conclude that the parent's requested relief to have the district place the student at the Child School should remain unexamined. In particular, the district's CSE approved the student's placement at this school pursuant to a "Nickerson letter" in January 2011 and the hearing record reflects that the student continued to attend the school at the time of the hearing. I will consider the Child School as a placement for the student for the 2011-12 school year.

The Child School is a State-approved nonpublic school (Tr. pp. 85, 162-63; see 8 NYCRR 200.1[d], 200.7). I note that under State law, the Commissioner of Education may approve the provision of "special services or programs" to students with disabilities through a variety of methods, including contracts entered into by boards of education of public schools and "private non-residential schools . . . which are within the state" (Educ. Law §§ 4401[2][e], 4402[2][a]; see 8 NYCRR 200.1[d], 200.7). Although a particular private school may meet the Commissioner's criteria for approval to provide special education programs and services to students with a disability, it is the individualized needs of a student with a disability that will ultimately "determine which of such of services shall be rendered" by an approved private provider (Educ. Law § 4402[2][a]). Thus, while the Child School may be approved to provide special education and related services to students with disabilities, the district may only be directed to contract with the Child School if such direction would be consistent with the student's individualized needs.

Based on a careful review of the hearing record, for the reasons set forth below, I find that the evidence supports a finding that the placement of the student at the Child School for the 2011-12 school year is an appropriate educational placement for the student.

The director of the elementary division of the Child School testified that the Child School is a State-approved non-public school for students with disabilities (Tr. pp. 85, 147, 151, 162-63). The school is ungraded and educates children between the ages of kindergarten through twelfth grade (Tr. pp. 85, 150-51, 162-63, 169). Its enrollment includes students with a speech or language impairment, an emotional disturbance, autism, or an other health-impairment (Tr. p. 151). All of the school's teachers are certified to teach special education by New York State (Tr. p 152). Likewise, the school's related services providers are all licensed and certified (Tr. p. 156).

The student is enrolled in the Child School's elementary school, which is composed of students from kindergarten through fifth grade (Tr. pp. 150). At the time of the impartial hearing, 82 students attended the elementary school (Tr. p. 151). In addition to a certified special education teacher, each elementary school class includes a State certified teacher assistant (Tr. pp. 152-53). At the time of the impartial hearing, the student was attending an ungraded 8:1+1 classroom, whose teacher was teaching a fourth grade curriculum, based on national and state standards and which is adapted for each student's ability (Tr. pp. 151, 153, 161-64, 167, 169, 199).[11] The student was placed in his class, which the elementary director described as "language rich," according to his math and reading abilities, as well as his social skills (Tr. pp. 154, 172). The self-contained classroom consists of three other students eligible to receive special education and related services as students with a speech or language impairment, two students with an emotional disturbance,

[11] While the student's classroom was officially an 8:1+1 class, the class contained nine students during the 2011-12 school year as a result of a State-approved variance (Tr. pp. 170, 209). In addition to the classroom's certified teaching assistant, the hearing record indicates that one of the students in the class had an assigned individual aide as provided for in that student's IEP (Tr. pp. 174-75).

two students with other health impairments (OHI), and one student with a learning disability (Tr. pp. 169, 171-73, 214; see 34 CFR 300.8[c][1][4], [9], [10], [11]; 8 NYCRR 200.1[zz][4], [6], [10], [11]). The classroom's special education teacher testified that the students were all ten years old (Tr. p. 170).

The Child School provides the student with the speech-language therapy and counseling related services recommended in the April 2011 IEP (Tr. pp. 155-56). As explained below, to address his hearing loss, the student has an FM unit in his classroom (Tr. pp. 181-82). The student also receives the hearing services provided for by the April 2011 IEP through a related service provider sent to the school by the district (Tr. pp. 155-56, 164). The Child School staff has formal and informal meetings on a "constant" basis and team meetings occur regarding each student (Tr. pp. 159, 186). As a result, the school's teachers are in regular contact with the student's counselor and speech-language pathologist (Tr. p. 159). The student's special education teacher for the 2011-12 school year indicated that she communicates with the student's counseling related service provider about the student during the school day through e-mail or face-to-face communications (Tr. pp. 180-81). She also testified that if the student needed immediate support the counselor was available (Tr. pp. 180-81). The student's speech-language therapy consists of both pull-out and push-in services. The student's special education teacher testified that she has been in close contact with his speech-language therapist via e-mail and by face-to-face conversation in her office and/or in the classroom regarding the student's academic performance, his difficulties with reading, and his verbal and written responses related to reading (Tr. pp. 185-86).

The student's special education teacher testified that she teaches all subjects of the core curriculum daily, throughout the school day (Tr. p. 169).[12] She groups the students in her classroom based on their reading, math, and social levels (Tr. pp. 169, 171-73, 198, 214). The teacher approximated the oral reading levels of her students at the time of the impartial hearing to be at the third grade level, and their reading comprehension levels at between the second and the third grade levels; levels that she indicated were very similar to those of the student (Tr. p. 173). The math levels of the students in the class at the time of the impartial hearing, ranged from about 1.5 to fourth grade, a range that the special education teacher testified the student "fit into" (Tr. pp. 173-74).[13] The special education teacher testified that the student was grouped with students of comparable overall academic needs (Tr. pp. 212-13).

As discussed below, the hearing testimony establishes that the student has a significant need for consistent adult support in his classroom. Further, as discussed below, the hearing testimony also establishes that the student's classroom placement at the Child School addresses his classroom needs. It is notable here that the student's need for consistent adult support in his classroom is not adequately addressed by the district's recommended 12:1 special class placement (see Berger v. Medina, 348 F.3d 513, 523 [6th Cir. 2003]).

[12] Testimony by the student's special education teacher indicated that the student was instructed in social studies two times per week by a New York State certified special education teacher, who had been the student's special education teacher during the 2010-11 school year (Tr. p. 199).

[13] The special education teacher approximated the student's oral reading skills to be on an upper second grade level (Tr. p. 176). She noted that the student struggled with reading comprehension specific to abstract questions, inferencing, and making predictions (Tr. p. 176). In math, the teacher indicated that the student "varie[d] from a second grad(e) level to an early third grade level" (Tr. p. 175).

The student's special education teacher testified that the student requires constant support during his academic classes (see e.g., Tr. pp. 175-76, 179, 194-95, 203-205, 216). For example, during math lessons, the student needs "constant review and support, within the classroom, to remain on task" (Tr. pp. 175-76). The special education teacher positions her teaching assistant to sit with the student during group lessons in math, to have directions and word problems revisited (id.). In order to address issues relating to adherence to classroom expectations and following routines and directions, the special education teacher "often" has the teaching assistant sit with the student during reading instruction to remind him of strategies to use to follow along with the lesson (Tr. pp. 176, 191). The special education teacher testified that ELA instruction targeted to the student's needs has also worked to help the student stay focused and on task (Tr. p. 192).[14] The special education teacher pointed out that the student's "signals" for not paying attention during academics are not vocal (Tr. p. 194). Instead, the student tends to be quiet when not paying attention, which, the teacher pointed out would be difficult to notice without constant monitoring and attention (id.). The special education teacher helps the student to focus during academic periods by walking by his desk and pointing to the word the class is on (Tr. p. 193). The teacher noted that the student needs reminders, a timer, graphic organizers and visual reminders, constant reinforcement, and the "check system," described below, in order to attend to math, reading, and/or other academic tasks (Tr. pp. 194-95, 216). In regard to the student's oral responses to questions, the teacher allows the student a latency of response time of approximately 30 seconds for the student to gather his thoughts, answer completely, and remain on topic (Tr. pp. 196-97).

To help manage the classroom, the teacher has implemented a "check system" for use during each academic subject. Students receive checkmarks depending on whether they follow directions, remain on task, and complete their work (Tr. p. 177). The "check system" includes "reminders" to facilitate the students' progress (id.). If a student reaches his or her personal goal for the day, that student receives a ten-minute "free choice" at the end of the day (id.). The special education teacher testified that the student relies on the "check system" during his daily instruction, takes advantage of the "reminders" built into it and which are facilitated by the small size of the class, and that the system "work[s] well" for him (Tr. pp. 177-78; Parent Ex. B at p. 4).

Socially, the special education teacher testified that the student typically has a smile on his face and enjoys group activities (Tr. p. 179). However, when the student becomes frustrated, either within a group setting or with an academic activity, it is often difficult for him to release his feelings and move on (id.). At such times, the student tends to "shut down," where he will not speak, displays a "pouty face," and/or where he could have an outburst of yelling at other students and would either push with his body or act like he was going to push someone (id.). To address this, the special education teacher uses the classroom's teaching assistant to assist with watching the student's facial expressions (id.). This allows the special education teacher and the teaching assistant to be alert to when such a situation was developing and to take action to refocus the student and avoid the occurrence of an outburst by providing the student with specific compliments focusing on the positive aspects of what he was doing academically (Tr. pp. 179-80).

The special education teacher also indicated that the size of her class allows the student to be constantly monitored so that he will not become "lost," and "self-conscious" and to prevent the student from shutting down and regressing (Tr. pp. 203, 208). According to the special education

[14] This instruction focused on finding the correct answer within a passage and highlighting information (Tr. p. 192).

teacher, her teaching assistant enables the student's participation in small group activities (Tr. p. 204). She also helps the student to master skills, to learn to realize when he is not attending, to learn to attend, and to remain on task (id.). According to the special education teacher, if the student were in a 12:1 special class he would not progress because he would not be receiving the support he needs to do so (Tr. pp. 204-205). If put in such a class, she testified that the student "would become lost," socially "begin to shut down," and not progress (id.).

As indicated above, to address his hearing loss, the student has an FM unit (Tr. p. 181-82). The FM unit consists of a microphone which is worn by the teacher to transmit and amplify her voice to earphones worn by the student (id.). The student has been self-conscious about the FM unit (Tr. p. 182). However, the special education teacher uses the classroom management "check system" to encourage the student to use the FM system (Tr. p. 182). Further, as discussed below, the student's use of that system has improved considerably during the 2011-12 school year (Tr. pp. 182-84). The special education teacher also supports the student in the use of the FM system by letting him know that other students are not watching him and are not really noticing that he is wearing the FM system as well as by "counseling" and talking to the student about it (Tr. pp. 182-83).

The special education teacher uses appropriate technology in the classroom including an interactive white board (Tr. p. 181). This allows the use of videos and interactive activities, which enable the student to visualize instruction, to participate in related multisensory instruction, and facilitates his note taking (id.).

The Child School also provides the student with support during educational activities outside of his regular special education classroom. The student's daily schedule includes a 40-minute lunch and gym period as well as either a 40-minute art period or a 40-minute technology period (Tr. p. 178). During these periods, the classroom's teaching assistant accompanies the class and support the student as needed (Tr. p. 180).[15] Support is provided for transitioning to these other classes and activities, including prompting the student to follow directions and walking in line (Tr. p. 201). During activities such as gym and lunch, the teaching assistant and/or the gym teacher closely monitor the student for frustration so that timely intervention can occur to avoid the student shutting down or yelling at other students (id.). When transitioning back to the classroom from these other classes and activities, the teacher reviews the checkmarks the students have received in the just concluded activity or class, discusses difficulties that may have arisen during that activity or class, provide appropriate compliments for appropriate behavior during the just-concluded activity or class, and provide appropriate checkmarks to the students (Tr. p. 202). If the student has encountered difficulty outside of the classroom or seems frustrated upon his return, the teacher addresses that away from the class in a 1:1 conversation with the student so that he will calm down and be able to return to his academic instruction (id.).

[15] The special education teacher testified that throughout the school day the student was with at least eight other students and two adults (Tr. pp. 202-203). According to the teacher's testimony, her class attended music and art as a group, accompanied by the teacher assistant (Tr. pp. 200-201). When her class went to gym accompanied by the teaching assistant, they were with another class that was also accompanied by a teaching assistant (Tr. p. 201). Lunch occurred with two other classes in a small eating area; each class was accompanied by its teaching assistant as well as by 1:1 aides assigned to specific students (id.).

The Child School has also implemented significant portions of the student's April 2011 IEP. In particular, the school has provided the student with a full time special class setting (Tr. pp. 150-53, 163, 167-68, 169, 188; see Dist. Ex. 3 at p. 16). Additionally, the special education teacher testified that she provides the student with the small group or 1:1 academic instruction recommended in the IEP (Tr. p. 187; see Dist. Ex. 3 at p. 4). She further testified that she has "absolutely" implemented the academic management strategies provided for in the IEP (Tr. p. 187; see Dist. Ex. 3 at p. 4). The special education teacher has also worked on the April 2011 IEP's annual goals, which she described as appropriate for the student (Tr. pp. 187-88, 231-34; see Dist. Ex. 3 at pp. 8-12). She additionally indicated that her class takes informal or formal assessments and that the test accommodations on the student's IEP are provided for him (Tr. p. 188; see Dist. Ex. 3 at p. 18).

The elementary director indicated that the student was appropriate for the Child School (Tr. p. 158). Among other things, she testified that the school's 8:1+1 classes were "perfect" for the student because he receives attention when he needs it, including 1:1 attention; instruction is broken down for the student; and the student is appropriately grouped with other students (Tr. pp. 158-59; see also Tr. pp. 153-54). Further, the student's special education teacher testified that she is "able to address [the student's] special education needs," that the student is appropriately placed in her class, and that her class is "definitely an appropriate setting" for the student (Tr. pp. 167-68, 206).

B. Hearing Services

I will turn next to the district's contention that the student's placement at the Child School must be found inappropriate because the Child School is not able to provide the student with hearing services. As indicated above, the student has a history of hearing loss and a hearing loss (Tr. pp. 240-42, 246, Dist. Exs. 3 at p. 3; 5 at p. 1; Parent Ex. H at p. 6). The April 2011 IEP indicated that he required an FM unit to amplify sounds during instruction and also provided that the student receive hearing education services twice per week for 30 minutes in a group of three (Dist. Ex. 3 at pp. 3, 18). The hearing record shows that while the student receives hearing services at the Child School, those services are not able to be provided by the Child School and are provided by the district (Tr. pp. 155-56, 164).

Upon a review of the hearing record, and for the reasons set out below, I find that this is not a determinative consideration. While, as the parent indicated, the student's hearing loss would be a barrier to the student's success in school, as discussed above, the student's special education teacher and the classroom's teaching assistant constantly monitor the student's attention and focus; intervene when appropriate to facilitate the student's instruction; and consistently deliver instruction to the student in a small group or on a 1:1 basis, making use of instructional materials, classroom modifications, accommodations, and a classroom management system, all appropriate for the student (Tr. pp. 174-76, 177-78, 179-80, 181-85, 187, 191, 192, 193-97, 203-205, 216). Further, as described above, the student's special education teacher also facilitates and encourages the student's use of the FM unit (see Tr. pp. 182-84, 205). Moreover, as discussed below, the hearing record shows that the student is making educational progress at the Child School. I also note that the hearing record does not include detailed information from the district relative to the purpose or focus of the district's hearing services. However, the parent's testimony – which was not rebutted – was that the student's hearing services were geared predominantly toward facilitating the student's integration in large group settings that were noisy and disruptive, an environment that

is unlike the student's classroom setting at the Child School (Tr. p. 291). I also note that the district did not dispute the parent's testimony that the district would provide the student with hearing services wherever the student attended school (Tr. pp. 289-90). I further note that the district has provided the student with hearing services during the 2011-12 school year (Tr. pp. 155-56). Moreover, I note that the district authorized the student to attend the Child School in accordance with the parent's receipt of a "Nickerson letter," which provided that the district would pay all tuition and transportation costs for the student to attend "an appropriate special education program" in a State-approved private school, notwithstanding that the Child School, a State-approved private school, did not provide the student with hearing services (see Dist. Ex. 15; Parent Ex. A at p. 1). In light of these factors and considerations, which are documented in the hearing record, I agree with the parent that the fact that the Child School has not provided the student with the hearing services recommended by the April 2011 IEP has not resulted in an inappropriate placement for the student for the 2011-12 school year, especially when the district itself agreed to provide these services.

For the reasons discussed above, I find that the hearing record establishes that the educational program provided to the student at the Child School during the 2011-12 school year was specially designed to address the student's unique needs.

C. Progress at the Child School

I now turn to the district's contention that the student has made only limited progress at the Child School and that for this reason the student's placement at that school is not an appropriate placement. I note initially that under the IDEA, a student's progress, or lack thereof, should be evaluated in light of the abilities of the particular student and that there is no "one size fits all" yardstick relating to a student's educational progress (see Rowley, 458 U.S. at 202; Mrs. B., 103 F.3d at 1121).

The special education teacher's testimony indicated that in January 2012, the student was decoding a third grade passage, that his reading comprehension was at a second grade level, that a writing sample yielded an instructional level of between 2.8 and 3.0, and that his spelling was at an early third grade level (Tr. pp. 215-16, 232). In the area of math, the student was at a third grade level in multiplication; he was being taught at a late second grade level in adding, subtracting, and regrouping; and he was about at a 2.5 instructional level in word problems (Tr. pp. 216-17). Regarding the student's progress during the 2011-12 school year, the student's special education teacher testified that the student was making academic progress in each of his subjects (Tr. p. 205). I note that the teacher ascribed this progress to the amount of time and support that the Child School staff were providing to the student, as well as to the constant reinforcement and to the "tools" needed to progress in each subject that were being provided to the student by the special education teacher and her teaching assistant (id.). The special education teacher also testified that when the student began the 2011-12 school year, his writing responses were "often off-topic" and composed of short paragraphs of three sentences (Tr. p. 196). At the time of her January 2012 testimony, the student had improved as the special education teacher testified that the student was trying to write paragraphs of five sentences (id.). At that time, the special education teacher testified that the student was also doing better getting to the main idea and in sequencing (Tr. pp. 196-97). In math, the special education teacher indicated that the student had

shown growth in multiplication and that, with assistance, he had been able to maintain his skills in adding, subtracting, and regrouping (Tr. pp. 197-98).[16]

The special education teacher also testified that the student was making social and emotional progress (Tr. pp. 205-206). She reported that the student has "learned how to talk his frustrations out rather than yelling at other students" (Tr. p. 206). Further, the student was "not pouting or crying, as often" (id.). In gym, the student had learned to accept help from adults in his social interactions if he became angry during a game (id.).

Additionally, the hearing record shows that the student has made significant progress in the use of the FM system and in his level of comfort with his hearing services. At the beginning of the 2011-12 school year the student would "sneak" and not put the FM system on (Tr. p. 183). Or, he would curl up in his desk to hide it or yell at other students that they were looking at him (id.). The hearing record shows, however, that while the student remains very self-conscious about the FM system, with the support of the special education teacher, the student is getting better about using it (Tr. pp. 182-83, 205). Regarding hearing services, at the time of the special education teacher's testimony in January 2012, the student displayed less resistance than he had in the beginning of the year (Tr. p. 184). He was accepting of the service provider and was willingly leaving his desk to go with her for services (id.). The student was also more tolerant of her presence when the provider assisted the student in his classroom (Tr. pp. 184-85).

Further, the parent testified that since attending the Child School, the student has initiated his homework without immediate assistance or encouragement from the parent (Tr. p. 245). She also indicated that the student was being more communicative about what was going on in school; what he was or was not working on, and what he was reading (id.). The parent also indicated that the student had begun to seek out books, and that when he did not understand something, he would ask someone to help him (Tr. pp. 260-61). The parent also felt that the student had made social and emotional growth. She testified that the student spoke more freely and expressed himself more (Tr. p. 261).

D. LRE Considerations

I turn next to the district's contention that the Child School is too restrictive a placement for the student and, that for this reason, the Child School is not an appropriate placement. I note that there is no dispute that the Child School is a school for special education students (Tr. p. 151). As a consequence, the student is not educated with non-disabled peers or other students without disabilities (Tr. pp. 227-28). However, under the circumstances of this case, in light of the student's social and emotional and attentional needs, and the required level of supports needed by the student to obtain meaningful educational benefit, I find that LRE considerations do not preclude a finding

[16] The hearing record contains certain reading, writing, and math achievement test scores dating from March 2011 (see Dist. Ex. 3 at p. 3). This information, however, does not lend itself to conclusions regarding the extent to which the student made progress during the 2011-12 school year as the scores are not measuring the student's achievement at any point during the 2011-12 school year.

that this placement is an appropriate placement (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826,836-37 [2d Cir. 2014]).[17]

Accordingly, for the reasons discussed above, I find that the hearing record contains sufficient evidence to conclude that the parent has met her burden to show that the Child School is an appropriate placement for the student for the 2011-12 school year.

VIII. Conclusion

In summary, I find that the IHO erred in finding that the district failed to offer the student a FAPE on the basis that (1) the April 2011 CSE did not have a general education teacher member, (2) the district was not able to confirm that there was a seat available for the student at the beginning of the 2011-12 school year, and (3) the district did not provide a profile of the class recommended for the student for the 2011-12 school year. However, I also find that the hearing record supports the finding that the recommended 12:1 special class placement in the April 2011 IEP was not an appropriate placement for the student. Further, the hearing record establishes that the parent has met her burden to show that the Child School was an appropriate placement for the student for the 2011-12 school year. Moreover, because I am directing relief in accordance with the parent's request that the district be ordered to provide a placement at the Child School, it is not necessary to address the parent's alternative theories that the student is entitled to tuition reimbursement or direct tuition payment. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 12, 2012 is modified by reversing those portions which determined that the district failed to provide the student with a FAPE on the basis that the April 2011 CSE did not have a general education teacher member, that the district was not able to confirm that there was a seat available for the student at the beginning of the 2011-12 school year, and that the district did not provide a profile of the class recommended for the student for the 2011-12 school year.

Dated: **Albany, New York**
June 11, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[17] This should not, however, be construed as a finding that the student's needs are such that he requires a placement at a nonpublic school limited to educating students with disabilities. I note that a district's CSE is required to recommend an appropriate educational placement in the LRE on an annual basis (see 34 CFR 300.116[b], 300.320[a][4], 300.324[b][i], [ii]; 8 NYCRR 200.4[d][2][v], [4][ii], [f]).