The University of the State of New York

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

No. 12-091

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, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Law Offices of Regina Skyer & Associates, attorneys for respondents, Gregory Cangiano, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's unilateral placement for the 2011-12 school year. The parents cross-appeal from that portion of the IHO's decision which found that the alleged procedural violations did not rise to the level of a denial of a free appropriate public education (FAPE) for the 2011-12 school year. The appeal must be sustained. The cross-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 Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

In this case, the student has continuously attended the Aaron School since kindergarten (2009-10 school year) (see Tr. p. 266).[1] Prior to convening the CSE to conduct the student's annual

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

review for the 2011-12 school year, the parents executed a reenrollment contract on January 27, 2011 with the Aaron School for the student's attendance during the 2011-12 school year, and enclosed payment of an $8,000.00 nonrefundable deposit that was due by February 1, 2011 (see Parent Ex. F at pp. 1-2).[2]

On February 3, 2011, the CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 2 at pp. 1-2).[3] Finding that the student remained eligible for special education and related services as a student with autism, the CSE recommended placing the student in a 12:1 integrated co-teaching (ICT) classroom with the following related services: three 30-minute sessions per week of speech-language therapy in a small group (3:1); two 30-minute sessions per week of individual occupational therapy (OT); one 30-minute session per week of counseling in a small group (3:1); two 30-minute sessions per week of individual physical therapy (PT); and the services of a full-time, 1:1 crisis management paraprofessional (id. at pp. 1, 17-19; see Dist. Ex. 3 at pp. 1-2).[4, 5] The CSE also created annual goals to address the student's needs (see Dist. Ex. 2 at pp. 7-16).[6]

In a final notice of recommendation (FNR) dated July 19, 2011, the district summarized the special education and related services recommended for the student during the 2011-12 school year, and identified the particular school site to which the district assigned the student to attend (see Dist. 4). The parents received the FNR on July 25, 2011, and in a letter to the district dated July 26, 2011, they requested an opportunity to meet with the individual responsible for the recommendation in the FNR, or alternatively, to receive a description of the public school site and the proposed classroom (see Parent Ex. A). The parents indicated in the letter that since the particular school site did not offer tours until September, they would "respond" to the FNR after they visited the school site (id.).

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[2] According to the reenrollment contract, the remaining tuition payments for the 2011-12 school year were due on May 15, August 31, and December 1, 2011 (see Parent Ex. F at p. 2).

[3] The hearing record does not indicate that the parents advised the February 2011 CSE at the meeting about the execution of the reenrollment contract with the Aaron School for the upcoming school year (see Tr. pp. 1-442; Dist. Exs. 1-8; Parent Exs. A-I; IHO Exs. I-II).

[4] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]; Parent Ex. G at pp. 1-7).

[5] For the sake of clarity, this decision will refer to the student's recommended placement on the continuum of services as an ICT classroom even though the hearing record, at times, refers to the recommended placement as a "collaborative team teaching" or "CTT" classroom (see, e.g., Dist. Ex. 2 at p. 1). State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). State policy guidance issued in April 2008, entitled "Continuum of Special Education Services for School-Age Students with Disabilities," provides more information about these services (see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

[6] The parents acknowledged receiving the students' 2011-12 IEP on February 15 or 16, 2011 (see Tr. p. 289; Dist. Ex. 2 at p. 2).

In a letter dated August 24, 2011, the parents rejected the student's 2011-12 IEP, and notified the district of their intention to unilaterally place the student at the Aaron School for the 2011-12 school year at public expense if the "procedural and substantive violations of the IEP and placement [were] not cured in an appropriate time" (Dist. Ex. 7 at p. 1). The parents indicated that the 2011-12 IEP failed to offer the student a FAPE, alleging that the CSE was not validly composed, the goals and management needs were "vague and not appropriate," the IEP was not "individualized" to the student's needs, and the parents were deprived of the opportunity to meaningfully participate in the development of the IEP (id. at pp. 1-2). In addition, the parents noted that the ICT classroom was too large, "unstructured," and could not provide "suitable and functional peer grouping" for the student (id. at p. 2).

On September 19, 2011, the parents visited the assigned school identified in the FNR (see Dist. Ex. 8). In a letter dated September 27, 2011, the parents advised the district that the "program" was not appropriate for the student because the "school and class" were "way too large," which would cause the student to "shut down and be unavailable for learning" (id.). In particular, the parents indicated that the "hallways, lunchroom, gym, and large classroom" would overwhelm the student (id.). The parents further indicated that the student required a "small, structured and supportive special education placement," the assigned school could not provide "appropriate peers with regard to functional levels and age" for the student, and the observed curriculum would frustrate the student because it would not challenge him academically (id.). Therefore, the parents did not "accept the placement" and "welcome[d] any alternate placements" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated October 17, 2011, the parents asserted that the district failed to offer the student a FAPE for the 2011-12 school year (Parent Ex. G at pp. 1-2). The parents alleged that the timing of the CSE meeting to develop the student's IEP for the 2011-12 school year was not consistent with "sound educational sense," and resulted in a failure to assess the student's needs (id. at p. 2). In addition, the parents asserted that the February 2011 CSE failed to include the participation of an additional parent member at the meeting, the February 2011 CSE did not provide the CSE members who participated via teleconference with copies of documents relied upon to develop the student's IEP, and the February 2011 CSE did not allow the student's then-current teacher at the Aaron School (Aaron School teacher) to participate throughout the entire CSE meeting (id. at pp. 2-3). Next, the parents alleged that the February 2011 IEP failed to contain appropriate academic, social/emotional, and health management needs; the February 2011 IEP did not rely upon "necessary evaluations to properly gauge [the student's] current academic skills," and instead, improperly relied upon teacher estimates; the annual goals were "generic and vague and [did] not accurately reflect" the student's educational needs; the February 2011 IEP did not contain any short-term objectives; the annual goals failed to contain a "grade level baseline" in order to sufficiently measure progress; the February 2011 IEP did not include a recommendation for adapted physical education (APE); the February 2011 IEP did not include a recommendation for parent counseling and training; the recommendation for a 1:1 crisis management paraprofessional was not appropriate; and the "program recommendation" was not based upon the student's unique needs, but rather, was based upon the programs available in the district (id. at pp. 3-5). Based upon the foregoing, the parents also asserted that they were denied a meaningful opportunity to participate in the development of the student's 2011-12 IEP, and further, that the February 2011 CSE's recommendation to place the student in an ICT setting ignored the opinions

of the student's Aaron School providers who opined that he required a small, structured setting (id. at pp. 5-6).

In addition, the parents contended that the failure to receive the FNR in a timely manner deprived them of an opportunity to visit the recommended public school site while classes were still in session (see Parent Ex. G at p. 6). Upon visiting the assigned school when the 2011-12 school year resumed, however, the parents found it was not appropriate because the academic curriculum would not challenge the student, causing frustration; the ICT classroom was too large; the student would be "overwhelmed by the sensory overload" in the hallways, lunchroom, and gym; and the ICT classroom could not offer the student a "suitable and functional peer group for instructional and social/emotional purposes" (id. at p. 6).

Finally, the parents maintained that the student's unilateral placement at the Aaron School was appropriate to meet his needs and that no equitable considerations barred an award of tuition reimbursement (see Parent Ex. G p. 6).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on December 20, 2011, and concluded on March 5, 2012 after six days of proceedings (Tr. pp. 1, 387).[7] In a decision dated March 19, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 school year, the Aaron School was appropriate, and equitable considerations did not preclude an award of tuition reimbursement (see IHO Decision at pp. 18-28). Initially, the IHO considered and rejected the "[p]rocedural [v]iolations" as alleged by the parents—such as the timing of the February 2011 CSE to develop the student's IEP, the failure to allow the student's Aaron School teacher to participate for the entire February 2011 CSE meeting, the February 2011 CSE's failure to consider "formal testing" to prepare the student's IEP, and the district's failure to provide a "timely" notice of placement—as either individually, or collectively, rising to the level of a denial of a FAPE (id. at pp. 19-21).

Turning to the IEP inadequacies alleged by the parents, the IHO concluded that although the student's 2011-12 IEP recommended "sufficient special education services, interventions and supports to address his identified special educational needs," the district failed to demonstrate that the assigned school could implement "all the interventions . . . specified in his IEP"—noting in particular that the student could only "manage in a general education environment . . . if the academic management and social/emotional management interventions specified on his IEP [were] implemented in the classroom" (IHO Decision at pp. 21-24). Without the implementation of all of the management needs identified in the IEP, the IHO opined that the student's sensory-seeking behaviors might "negatively impact his classmates," and that this weighed against finding that the recommended placement was consistent with principles of placing the student in the least

[7] In the decision, the IHO explained that the impartial hearing had been delayed due to the recusal of three IHOs prior to her appointment on December 13, 2011 (see IHO Decision at p. 3). On the first date, December 20, 2011, the parties held a prehearing conference to organize the proceedings, to schedule hearing dates, and to address any issues raised by the parties (see Tr. pp. 1-18). It should also be noted that due to an equipment malfunction on February 15, 2011, the parties had to reconvene on March 5, 2012 to recover lost testimony from that hearing date (Tr. pp. 3-4; see Tr. pp. 172-73, 389-93). The IHO documented the extensions granted to the compliance date, as well as the reasons for the extensions, in her decision (see IHO Decision at pp. 3-4).

restrictive environment (LRE) (see id. at pp. 23-24). With respect to parent counseling and training, the IHO determined that although the February 2011 CSE did not recommend it as a related service on the IEP and the hearing record did not otherwise indicate that it would have been available at the public school site to which the student had been assigned, this failure did not result in a denial of a FAPE (id. at pp. 24-26).

Next, the IHO addressed the unilateral placement selected by the parents, and found that the Aaron School was appropriate to meet the student's needs (see IHO Decision at pp. 26-28). The IHO concluded that the Aaron School provided the student with an environment that addressed his sensory needs, distractibility, impulsivity, language needs, and frustration difficulties, as well as his academic needs (id.). Finally, the IHO found that equitable considerations did not preclude an award of tuition reimbursement, and consequently, she directed the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2011-12 school year (id. at p. 28).

IV. Appeal for State-Level Review

The district appeals, and argues that the IHO erred in concluding the district failed to offer the student a FAPE for the 2011-12 school year. Specifically, the district asserts that it was error for the IHO to solely rely upon the speculative conclusion that the assigned school classroom was not able to fully implement all of the student's academic and social/emotional management needs in the IEP as a basis to determine that the district failed to offer the student a FAPE. In addition, the district contends that even if the student had attended the assigned school, the hearing record does not support the IHO's conclusion. The district also contends that the IHO erred in concluding that the Aaron School was appropriate to meet the student's needs and that equitable considerations did not preclude an award of tuition reimbursement. The district seeks to reverse the IHO's decision on these grounds.

In an answer, the parents respond to the district's allegations in the petition. In a cross-appeal, the parents assert that the IHO erred in concluding that the district's numerous "procedural" violations—indicating specifically the February 2011 CSE's failure to allow the student's Aaron School teacher participate throughout the entire meeting, the insufficiency of the evaluative materials available to the February 2011 CSE to develop the IEP and the corresponding failure to conduct further evaluations of the student, the February 2011 CSE's failure to recommend parent counseling and training, the timing of the student's annual review in February 2011, and the recommendation to place the student in an ICT classroom—did not rise to the level of a denial of a FAPE. The parents also cross-appeal the IHO's failure to address the following issues in her decision: the February 2011 CSE's failure to include an additional parent member and failure to conduct a functional behavioral analysis (FBA) or develop a behavioral intervention plan (BIP), issues which the parents claim they raised in their due process complaint notice.[8]

As relief, the parents seek to uphold those portions of the IHO's decision supporting an award of tuition reimbursement, but otherwise seek to reverse or vacate the IHO's conclusions that

[8] The IHO explained in a footnote in the decision that she would not address the issue of whether the February 2011 CSE failed to conduct an FBA or develop a BIP because the issue was not raised in the due process complaint notice (see IHO Decision at p. 20 n.3).

the student's IEP was reasonably calculated to enable the student to make meaningful educational progress and that the procedural violations did not rise to a level of a denial of a FAPE. The district responds to the parents' cross-appeal in an answer, and seeks to dismiss the cross-appeal.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some

'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling 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]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Impartial Hearing and Review

Turning first to their cross-appeal, the parents' argument that the IHO erred in not addressing the February 2011 CSE's failure to conduct an FBA or to develop a BIP must be rejected

since, as noted in the district's answer and in the IHO's decision, the parents did not raise these issues in the October 2011 due process complaint notice; consequently, these issues were not properly before the IHO for resolution at the impartial hearing, and the parents cannot, now, raise these issues for the first time on appeal (see Parent Ex. G at pp. 7).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include claims that the district failed to offer the student a FAPE for the 2011-12 school year because the February 2011 CSE failed to conduct an FBA, develop a BIP (see Parent Ex. G at pp. 1-7).[9] A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to amend their due process complaint notice (see Tr. pp. 1-420; Dist. Exs. 1-6; Parent Exs. A-J; L-N).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see

[9] To the extent that the parents' attorney stated in a closing statement at the impartial hearing that the district failed to conduct evaluations of the student in OT, PT, and speech-language therapy, such references during a closing statement are not sufficient to expand the scope of the impartial hearing. Raising claims in the closing brief after the hearing has ended that should reasonably have been known at the time of the demand for due process has been rejected by at least one court (M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13).

20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at *4-*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Moreover, the IHO properly did not reach these issues in her decision; accordingly, I find that the parents' allegations that the February 2011 CSE failed to conduct an FBA, develop a BIP, or further evaluate the student, as well as the underlying rationales, have been raised for the first time on appeal and are, therefore, outside the scope of my review and I decline to consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also IHO Decision at pp. 1-28; Application of a Student with a Disability, Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

In any event and as more fully discussed below, an independent review of the entire hearing supports the IHO's conclusion that the procedural violations alleged by the parents—and as addressed by the IHO in the decision—did not result in a denial of a FAPE either individually or collectively, and therefore, I find no reason to disturb the IHO's decision on these grounds.

B. February 2011 IEP

1. Annual Review

In this case, the IHO properly concluded that the timing of the student's annual review in February 2011 did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The IEP must include a projected date for the beginning of services and modifications listed in the IEP (34 CFR 300.320[a][7]). At the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a

parent's demand (Cerra, 427 F.3d at 194) and there is no indication that the timing of the CSE meeting to conduct the student's annual review in the instant case resulted in a loss of educational opportunity for the student. I also note that the hearing record does not reflect that at the time of the CSE meeting, the parents objected to the timing of the CSE meeting, requested to meet later in the school year, that the district thereafter denied a request by the parents for another CSE meeting, or that the parents subsequently requested another CSE meeting to update the student's performance levels or to otherwise update the student's IEP or the annual goals (see Tr. pp. 1-442; Dist. Exs. 1-8; Parent Exs. A-I; IHO Exs. I-II).[10, 11] Accordingly, I decline to find under the circumstances of this case that the district denied the student a FAPE for the 2011-12 school year based solely upon the timing of the student's annual review to develop his IEP.

2. February 2011 CSE Participants

a. Additional Parent Member

The parents argue that the IHO erred by failing to address the absence of an additional parent member at the February 2011 CSE meeting and by finding that the student's Aaron School teacher's participation for only a portion of the February 2011 CSE meeting did not constitute a denial of a FAPE. The district maintains that the IHO properly declined to address the issue of the additional parent member because the parents abandoned this claim by not raising it during closing arguments or during the impartial hearing. Alternatively, the district contends that the February 2011 annual review was conducted by a subcommittee of the CSE, which does not require the attendance of an additional parent member, and that the parents had previous experience participating in CSE meetings and were not prejudiced by the absence of an additional parent member. In addition, the district contends that the IHO properly determined that although the student's Aaron School teacher did not remain on the telephone for the entire length of the 2011 CSE meeting, the Aaron School teacher actively engaged in the discussions—as did the parents—and she provided information about the student's current academic levels used to develop the 2011-12 IEP.

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321), in some circumstances, New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11,

[10] In certain instances, State regulations also allow amendments to a student's IEP without convening a formal CSE meeting (see 8 NYCRR 200.4[g]).

[11] The district's obligation to annually review, and if necessary, to revise a student's IEP continues during the pendency of a challenge to a prior IEP (see Town of Burlington v. Dep't of Educ., 736 F.2d 773, 794 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985] ["pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law"]; Lopez v. District of Columbia, 355 F. Supp. 2d 392, 400-01 [D.D.C. 2005]; Grant v. Indep. Sch. Dist. No. 11, 2005 WL 1539805, at *8 [D. Minn. June 30, 2005]; Norma P. v. Pelham Sch. Dist., 19 IDELR 938 [D.N.H. Mar. 15, 1993]).

2005]; Application of the Dep't of Educ., Appeal No. 11-136; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042). Under New York State law, CSE subcommittees have the authority to perform the same functions as the CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

In this case, it is undisputed that the student's annual review in February 2011 did not include the attendance of an additional parent member. While the district correctly argues that legally a CSE subcommittee could have conducted the annual review because the student was not being considered for initial placement in a special class, a school for students with disabilities, or a school outside of the district, the evidence does not support the conclusion that the district intentionally convened a CSE subcommittee to conduct the student's annual review (see Tr. pp. 1-442; Dist. Exs. 1-8; Parent Exs. A-I; IHO Exs. I-II). The district's argument is strained by the presence of a district school psychologist at the February 2011 annual review, as the attendance of a school psychologist is only required at a CSE subcommittee meeting "whenever a new psychological evaluation is reviewed" or when considering a "change to a program option with a more intension staff/student ratio" (see Dist. Ex. 2 at p. 2; 8 NYCRR 200.3[c][2][v]). Thus, I am not persuaded that the district was not required to include an additional parent member while conducting the student's February 2011annual review. Under the circumstances of this case.

Notwithstanding this finding, however, the hearing record also does not support a conclusion that the failure to include an additional parent member at the otherwise properly composed February 2011 CSE meeting constituted a procedural violation that impeded the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419). Here, the parents were familiar with the CSE and IEP process, having participated in prior CSE meetings, and the evidence demonstrates that the parents actively participated throughout the discussions at the February 2011 CSE meeting and in the development of the student's 2011-12 IEP (see Tr. pp. 275-89; Dist. Ex. 3 at pp. 1-2). Consequently, although the absence of an additional parent member constituted a procedural violation, under the circumstances of this case it did not rise to the level of a denial of a FAPE.

b. Private School Teacher

Next, while it is undisputed that the student's Aaron School teacher participated via telephone at the February 2011 CSE meeting, the parents assert that the district failed to include her participation throughout the entirety of the meeting and therefore denied the student a FAPE. A review of the hearing record reveals conflicting evidence regarding the actual length of time that

the Aaron School teacher remained on the telephone during the meeting. According to the district social worker who attended the February 2011 CSE meeting, the Aaron School teacher participated for the full length of the meeting; the parents testified, however, that the Aaron School teacher only participated for approximately 30 minutes of the nearly 90-minute meeting (compare Tr. pp. 55-56, with Tr. pp. 276-77; see also Dist. Ex. 3 at pp. 1-2). However, even assuming that the Aaron School teacher did not remain on the telephone for the full length of the meeting and constituted a procedural violation, the hearing record supports the IHO's conclusion that this violation did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419). As noted above, the hearing record demonstrates that the parents actively participated in the February 2011 CSE meeting, and provided testimony at the impartial hearing about the information provided by the student's Aaron School teacher while she was participating at the meeting (see Tr. pp. 275-89; Dist. Ex. 3 at pp. 1-2). Specifically, the parents testified that the student's Aaron School teacher provided the February 2011 CSE with information about the student's "current academic progress" and his "academic performance and his functioning in the classroom" (Tr. p. 276). According to the parents' testimony, the Aaron School teacher was not, however, on the telephone when the February 2011 CSE made its ultimate recommendation for the student and the Aaron School teacher did not provide a recommendation to the CSE (see Tr. pp. 277-78). Based upon the foregoing, I find no reason to disturb the IHO's conclusion that although the Aaron School teacher may not have remained on the telephone throughout the entire length of the February 2011 CSE meeting, such procedural violation did not rise to the level of a denial of a FAPE in this case.

3. Sufficiency of Evaluative Information and Teacher Estimates

In the cross-appeal, the parents argue that the IHO erred in finding that the unavailability of standardized testing at the February 2011 CSE meeting did not constitute a denial of a FAPE, arguing that the materials available to the February 2011 CSE were not sufficient, the February 2011 CSE had knowledge that the materials were not sufficient, and the February 2011 CSE failed to further evaluate the student despite knowing that the materials were not sufficient (see Answer and Cross Appeal ¶¶ 12, 51). As noted above, 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, 2008 WL 2736027, at *6 [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]). A review of the hearing record supports the IHO's conclusion that, contrary to the parents' arguments, the February 2011 CSE considered and reviewed sufficient evaluative data to develop the student's 2011-12 IEP, and the parents' arguments must be dismissed.

The February 2011 CSE relied upon several sources at the meeting to develop the student's 2011-12 IEP: a November 2010 Aaron School Fall Report, which included, respectively, an October 2010 Aaron School speech-language therapy plan, counseling plan, and OT plan; a

December 2010 classroom observation report;[12] the student's 2010-11 IEP; and input from the student's Aaron School teacher (see Tr. pp. 33-34, 276-78; Dist. Exs. 1 at pp. 1-16; 3 at pp. 1-2; 5-6).

In the 2010-11 Aaron School Fall report (fall report), the student's teachers described his then-current academic functioning, social functioning, and progress (see Dist. Ex. 5 at pp. 1-8). During the 2010-11 school year, the student attended an 11:1 homeroom classroom where he received small group instruction in reading and mathematics (id. at p. 1). To further address his needs, the student also received related services of OT, counseling, and speech-language therapy (id.). The fall report described the student's academic strengths in the areas of literacy and spelling, and further noted that the student was an active participant in mathematics with strong mathematics skills when provided with independent projects (id.). At that time, the student worked on forming uppercase letters in handwriting skills, and he demonstrated an ability to write letters with "accuracy and independence" (id.). The fall report indicated that the student enjoyed activities in the areas of language arts and writing and that he benefited from repetition of concepts and skills (id. at pp. 2-3).

With respect to social skills, the fall report indicated that the student actively engaged in group activities and reacted well to structure and predictability (see Dist. Ex. 5 at p. 4). In addition, the student also benefited from the use of visual prompts and positive reinforcement to follow directions (id.). The fall report noted that although the student enjoyed interacting with peers and benefited from cues to collaboratively engage with other students, he would at times yell, hit, kick, or bite when "something happen[ed] that he d[id] not like" (id.). Among other things, the fall report also contained goals for the student in the areas of reading, mathematics, language arts, and social skills (id. at pp. 6-8).

As noted above, the student also received related services of speech-language therapy, counseling, and OT at the Aaron School to address his needs. According to the speech-language therapy plan, the student's goals in this area related to pragmatic language, social cognition, play skills, attention, auditory processing, language processing, and expressive language (Dist. Ex. 5 at p. 9). At that time, the student received two 30-minute sessions per week of speech-language therapy in a group of two, and one 30-minute whole group social skills session per week in the classroom setting (id.). According to the counseling plan, the student received one 30-minute session per week of counseling on an individual or group basis (see Dist. Ex. 5 at p. 10). The counseling plan indicated that the student demonstrated difficulties with impulsivity, anxiety, cognitive flexibility, and social skills, including the interpretation of nonverbal cues and social processing, and incorporated goals in the following areas: self-awareness, impulsivity, cognitive flexibility, social reciprocity, and group social skills (id. at pp. 10-11). According to the OT plan, the student received one 30-minute session per week of OT in a group of two with goals to improve his motor skills, graphomotor skills, motor planning, sensory regulation, body awareness, and self-help skills, as well as his strength, endurance, and postural control (id. at pp. 12-13).

[12] The parents testified that the February 2011 CSE reviewed the December 2010 classroom observation report, as well as the student's 2010-11 IEP, at the meeting; they had a chance to review the classroom observation report; and they believed that the classroom observation report was an "accurate snapshot" of the student (see Tr. pp. 278-79).

In addition to the Aaron School fall report, the February 2011 CSE also had a classroom observation report available for review and consideration, which had been conducted by the district social worker who attended the February 2011 CSE meeting (see Tr. pp. 33-34, 276-78; compare Dist. Ex. 2 at p. 2, with Dist. Ex. 6 at pp. 1-2). As described in the report, the student followed directions and participated in the lesson, but at times, he "roamed" around the classroom (Dist. Ex. 6 at p. 1). On two occasions, the student left the room and when he returned, he continued to roam around the room (see id. at pp. 1-2). The district social worker noted that overall the student demonstrated difficulty with attention, required frequent redirection, and at times, he could become over stimulated and would flap his hands and jump on his chair (id. at p. 2).

Moreover, the February 2011 CSE meeting minutes also demonstrated that the February 2011 CSE reviewed and discussed the student's 2011-12 IEP in a page-by-page manner, allowing the parents and the student's Aaron School teacher to express concerns or add or modify the information presented (see Dist. Ex. 3 at pp. 1-2). In particular, the parents stated at the meeting that the student was beginning to exhibit symptoms of an attention deficit hyperactivity disorder (ADHD), but that the student had not received a diagnosis of an ADHD (id. at p. 1). The parents also stated at the meeting, however, that the student had recently received a diagnosis of pervasive developmental disorder, not otherwise specified (PDD-NOS), further noting that the student was "firmly on the spectrum" and that they were "looking into medication" (id.).

In addition, the February 2011 CSE meeting minutes indicated that at the meeting the student's Aaron School teacher described the student's attention; provided an estimate of the student's current grade-level functioning in the areas of decoding, comprehension, writing, computation, and problem solving; and offered additional academic management needs to further address the student's needs (see Dist. Ex. 3 at p. 1). The student's Aaron School teacher also provided additional modifications to the recommended social/emotional management needs (id.). Upon discussing the classroom observation report, the district social worker recommended that the student have the support of an additional teacher and added more social/emotional management needs to the student's IEP (id.).

At the impartial hearing, the parents recalled that the February 2011 CSE discussed the student's annual goals and behaviors, but did not recall discussing the student's sensory integration issues (see Tr. pp. 279-81). In addition, the parents testified about the discussion at the February 2011 CSE meeting regarding the student's placement, noting their belief that the student was "hard to place," and that academically, the student was "bright," but also noting they had previously looked at an ICT class recommended for the student for the 2010-11 school year and that they were not "happy" with what they saw (see Tr. pp. 281-86; Dist. Exs. 1 at p. 1; 3 at p. 2). The parents also testified that the February 2011 CSE discussed the recommendation for the 1:1 crisis management paraprofessional and that the parents also expressed concerns about the recommendation at the meeting (see Tr. pp. 286-88). Ultimately, the parents disagreed with the February 2011 CSE's recommendation to place the student in an ICT classroom with the services of a full-time, 1:1 crisis management paraprofessional (see Tr. pp. 288-89; Dist. Ex. 3 at p. 2).

Based upon the foregoing, I find that the February 2011 CSE had sufficient evaluative information relative to the student's present levels of academic achievement and functional performance, including the teacher estimates of the student's current academic skill levels, at the time of the February 2011 CSE meeting to develop an IEP that accurately identified the student's

special education needs (compare Dist. Ex. 2 at pp. 3-6, with Dist. Exs. 1; 5-6). Although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see 8 NYCRR 200.4[d][2][i]; Application of a Student with a Disability, Appeal No. 12-045; Application of a Student with a Disability, Appeal No. 11-043). Nor is there any support for the proposition that "teacher estimates" or "teacher observations" cannot be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). Moreover, the information reviewed by the February 2011 CSE provided information related to the student's areas of need in sensory regulation, language processing, behavior, social/emotional functioning, motor skills, attention, and academics, which the February 2011 CSE accurately reflected on the student's IEP in the present levels of performance and used thereafter to create the annual goals to further address these needs (id.).

4. Parent Counseling and Training

In the cross-appeal, the parents argue that the IHO erred in finding that the absence of parent counseling and training on the student's 2011-12 IEP did not constitute a failure to offer the student a FAPE. The district maintains that the IHO correctly found that the failure to recommend parent counseling and training, as a individual deficiency, did not deny the student a FAPE because, as a whole, the 2011-12 IEP provided a "'variety of necessary related services and special education interventions'" to address the student's needs. The district also asserts that contrary to the IHO's decision, the hearing record establishes that this related service was offered through the assigned school, which the parents could have accessed had the student attended the assigned school. For reasons discussed below, I find no reason to disturb the IHO's conclusion.

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 C.F.R. § 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F., 2011 WL 5130101, at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011], adopted at, 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).

Here, it is undisputed—and the IHO correctly noted in the decision—that the February 2011 CSE did not recommend parent counseling and training on the student's 2011-12 IEP in

violation of State regulation. However, the parents' argument offers little, if any, rationale regarding how the failure to recommend parent counseling and training on the student's IEP rose to the level of a denial of a FAPE, other than seeking to invoke such violation as a per se, automatic denial of a FAPE, which ignores, to date, that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y. Oct. 30, 2008]). I also decline to adopt the application of such a broad rule, and consequently, the parents' argument must be dismissed.

However, I am also not persuaded by the district's arguments that no relief is warranted. First, contrary to the district's assertion, the IHO also correctly found that the evidence in the hearing record was not sufficient to conclude that the assigned school provided parent counseling and training as a related service. In this case, the hearing record contains little, if any, evidence regarding the assigned school's ability to provide parent counseling and training. In particular, the district/s special education teacher at the assigned school testified that she had not provided this service to parents during the school year, but if parents had "difficulty with a skill," they could ask the teachers about it (see Tr. p. 140). For example, the special education teacher explained that in mathematics, sometimes the teachers would "review some of the skills or send home documents that help assist [the parents] in helping their student with their homework" (id.). The district's special education teacher also testified that she was "not sure" if the district's city-wide program made parent counseling and training available, but that she, herself, "usually" handled situations with the parents (see Tr. pp. 140-41). This evidence is not sufficient to establish that the district provided a "comprehensive parent training component" that otherwise satisfied the requirements of the State regulation and this portion of the district's argument must be dismissed.

Second, I am not persuaded by the district's argument, or the IHO's rationale in the decision, that the February 2011 CSE's failure to recommend parent counseling and training—a service provided to the parents of a student with a disability—could somehow be rectified by services provided to the student and the implementation of the students' IEP (see 8 NYCRR 200.1[kk], 200.13[d]).

However, even acknowledging that the February 2011 CSE's failure to recommend parent counseling and training violated State regulation, the hearing record ultimately supports the IHO's conclusion that this violation, alone, did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419). While I find the parents' argument on this issue unavailing in this case in terms of a denial of a FAPE, I continue to be troubled with what appears to be a repeated failure of this particular district to comply with federal and State regulations requiring a district to set forth needed parent counseling and training as a related service on students' IEPs (see, e.g., Application of a Student with a Disability, Appeal No. 12-047; Application of the Bd. of Educ., Appeal No. 12-035; Application of the Bd. of Educ., Appeal No. 12-034; Application of a Student with a Disability, Appeal No. 12-032; Application of a Student with a Disability, Appeal No. 12-024;

Application of a Student with a Disability, Appeal No. 11-145; Application of the Bd. of Educ., Appeal No. 11-137; Application of the Bd. of Educ., Appeal No. 11-136; Application of the Bd. of Educ., Appeal No. 11-133; Application of the Bd. of Educ., Appeal No. 11-118; Application of a Student with a Disability, Appeal No. 11-110; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-070; Application of a Student with a Disability, Appeal No. 11-068; Application of a Student with a Disability, Appeal No. 11-032; see also 34 CFR 300.34[a], [c][8]; 8 NYCRR 200.1[kk], [qq] [defining parent counseling and training as a related service within the meaning of the IDEA]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][b][5] [noting that a statement of related services must be described on a student's IEP]; 34 CFR 300.320[a][7] [stating that an IEP must describe the anticipated frequency, duration, and location of special education and related services]). Notwithstanding the requirements regarding related to findings of FAPE (see 34 CFR 300.513[a][1]-[2]) an administrative hearing officer may order a district to comply with the procedural safeguards contained in the IDEA (34 CFR 300.513[a][3]). In light of the district's failure in this case to identify parent counseling and training on the student IEP as required by the IDEA and State regulations, I will order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on a form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).[13]

5. Integrated Co-Teaching Services

Finally, the parents' contend in the cross-appeal that the IHO erred in finding that the "program recommended on the IEP" was sufficient to meet the student's needs, because the student required a small, structured and supportive special education environment to address his attention and sensory issues. Specifically, the parents contend that "even with supplemental supports," the student could not "function" in a classroom with 30 students due to his sensory issues. The district maintains that the IHO properly concluded that the student's 2011-12 IEP provided "'sufficient special education services, interventions and supports to address [the student's] identified special education needs,'" that together with the related services and the services of a full-time, 1:1 crisis management paraprofessional in the recommended ICT classroom was appropriate to meet the student's needs.[14] In addition, the district asserts that the CSE's recommendation to place the student in an ICT classroom with a 1:1 paraprofessional and related services was consistent with, among other things, his ability to function academically at or above grade-level; his difficulties

[13] The State's model prior written notice form and guidance materials are located at http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html.

[14] The IHO also noted in the decision that the students in the assigned classroom were grouped for instructional purposes based upon functional levels; the special education teacher of the assigned classroom differentiated instruction for the students and used small group instruction, multisensory instruction, manipulatives and graphic organizers with the students; and the special education teacher of the assigned classroom provided 1:1 support, and worked on socialization and social skills development with the students (see IHO Decision at pp. 21-22). Since neither party appeals these determinations, they are final and binding upon the parties.

with transitions; his need for adult redirection to assist with attention, impulsivity, and sensory seeking behaviors; and his need for a structured and predictable environment. A review of the hearing record supports both the district's arguments and the IHO's conclusion.

According to the information presented at the February 2011 CSE meeting, the student exhibited strengths in many academic skills, including strong performances in both literacy and spelling, and overall, he functioned academically at or above grade-level in many skill areas based upon the teacher estimates provided by the student's Aaron School teacher at that time (see Tr. pp. 42-43; Dist. Exs. 2 at pp. 3-4; 3 at p. 1; 5 at p. 2). In addition, the student actively participated in mathematics and displayed strong mathematics skills on independent projects (see Dist. Exs. 2 at pp. 3-4; 5 at p. 2). Socially, the student actively engaged in group activities and reacted well to structure and predictability (see Dist. Exs. 2 at p. 5; 5 at p. 4). In addition, the student exhibited difficulties with attention and sensory regulation, and at times, displayed aggressive behaviors when "something happens that he does not like" (a peer not sharing a marker) (see Dist. Exs. 2 at p. 5; 5 at p. 4; 6 at p. 2). The February 2011 CSE also discussed the student's needs in the areas of sensory regulation, language processing, behavior, social/emotional functioning, motor skills, attention, and academics based on the information presented from the parents and the student's Aaron school teacher (see Tr. pp. 33-48; Dist. Exs. 1-3; 5-6).

To address the student's identified academic and social/emotional needs, the February 2011 CSE—with modifications and additions suggested by the parents and the student's Aaron School teacher—recommended a significant level of management needs and strategies specific to the student, including the following: multisensory instruction; whole body activities; use of manipulatives; preferential seating; frequent breaks; explicit directions; repetition and review; breaking down instructions; frequent visual and verbal prompts; teacher modeling and check-ins; use of graphic organizers; sensory breaks and sensory tools; problem-solving strategies; role playing; teacher redirection; and teacher modeling of appropriate words, phrases, and play skills (see Dist. Exs. 2 at pp. 4-6; 3 at pp. 1-2; see also Tr. pp. 40, 44-45). In addition, the February 2011 CSE recommended related services of speech-language therapy, counseling, OT, and PT to address the student's identified needs (see Dist. Exs. 2 at pp. 1-2, 19; 3 at pp. 1-2). To specifically address the student's behavior needs, the February 2011 CSE recommended the services of a full-time, 1:1 crisis management paraprofessional as additional adult support (see Tr. pp. 48-49, 51; Dist. Ex. 2 at pp. 1, 5-6, 17-19). The February 2011 CSE also created an annual goal directly related to the student's work with the 1:1 crisis management paraprofessional to address his needs in the following areas: attention, transitions, behavior, and verbal communication skills (see Dist. Ex. 2 at p. 16). To address the student's sensory regulation needs, the February 2011 CSE recommended, among other things, sensory breaks and the use of sensory tools for the student (see Dist. Ex. 2 at pp. 4-5; see also Tr. pp. 36-37, 44-46). And finally, the February 2011 CSE discussed the student's motor and sensory regulation needs, and recommended both OT and PT for the student, as well as frequent breaks, to further address these needs (see Tr. pp. 47-49; Dist. Ex. 2 at pp. 6, 19).

In reaching the decision to recommend placing the student in an ICT classroom, the February 2011 CSE considered the student's academic strengths and the benefit derived from interacting with his nondisabled peers, as well as the concerns voiced by his parents arising from their experience observing a recommended ICT classroom for the previous school year and their perception that, given the student's presentation, he was "difficult to place" (see Tr. pp. 51-52, 60-64; Dist. Ex. 3 at p. 2). Prior to reaching this conclusion, the February 2011 CSE considered and

rejected placing the student in a general education setting with related services, a general education setting with special education teacher support services (SETSS) and related services, and an ICT classroom with related services because these placements lacked the support the February 2011 CSE believed the student required (see Dist. Exs. 2 at p. 18; 3 at p. 2; see also Tr. pp. 51-52). In addition, the February 2011 CSE considered placing the student in a 12:1 special class in a community school, but rejected this placement because the student functioned at or above grade level academically (id.).

In summary, given the amount of educational supports incorporated into the student's 2011-12 IEP, I find that the February 2011 CSE's recommendation to place the student in an ICT classroom, together with the support of a full-time, 1:1 crisis management paraprofessional, related services, and management needs and strategies was consistent with the student's strengths and identified special education needs. Although the parents may have preferred a smaller classroom setting for the student similar to the Aaron School, I find that the hearing record does not support a conclusion that the student required a smaller classroom setting in order to receive educational benefits and make progress. Consequently, the parents' cross-appeal must be dismissed except to the extent described above with respect to parent counseling and training, and I now turn to the issues raised in the district's appeal.

C. Assigned School

The district argues that the IHO erred in concluding that it failed to offer the student a FAPE solely based upon the speculative conclusion that the public school site to which the student had been assigned would not be able to fully implement "specific interventions" in the student's 2011-12 IEP.[15] Specifically, the district contends that since the student did not attend the assigned school and was not educated under the proposed IEP, there can be no denial of a FAPE based upon a failure to implement the IEP. Alternatively, the district asserts that even if the IHO properly addressed the issues raised by the parents regarding the assigned school, the hearing record does not support the IHO's conclusions. The parents maintain that the IHO properly concluded that the assigned school could not implement the student's IEP and that this conclusion was not speculative. As set forth in greater detail below, neither the legal standards applicable to the implementation of IEPs nor the facts of this case support the IHO's conclusions.

1. Implementation of the IEP

The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency

[15] Although not raised by the district in its appeal, an argument could be made that the IHO—in reaching this particular conclusion—exceeded the scope of her jurisdiction by sua sponte raising and addressing an issue that was not raised, even if broadly construed, in the parents' due process complaint notice (see Parent Ex. G at pp. 1-7). In any event, I will review this issue out of an abundance of caution.

of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

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 (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southhold Union Free Sch. Dist., 2011 WL 3919040, * 13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 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]).[16]

Initially, the district correctly argues that the IHO erred in reaching the issue regarding whether the assigned school would be able to fully implement "specific interventions" in the student's 2011-12 IEP, or alternatively, any of the parents' contentions related to the assigned school, because such analysis would require the IHO—and an SRO—to determine what might have happened had the district been required to implement the student's February 2011 IEP. As noted above, generally challenges to an assigned school involve implementation claims, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed.Appx. 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). In this case, the parents rejected the February 2011 IEP and enrolled the student at the Aaron School by letter dated August 24, 2011—prior to the time that the district became obligated to implement the student's February 2011 IEP

[16] In order to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063). The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see A.L., 2011 WL 4001074, at *11; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 2011 WL 4001074, at *11).

in September 2011 (see Dist. Ex. 7 at pp. 1-2). Thus, the district in this case was not required to establish that the assigned school was appropriate or that the student would have been grouped appropriately upon the implementation of his IEP in the proposed classroom. Therefore, it was error for the IHO to conclude that there had been a denial of a FAPE to the student based upon the parents' contentions with respect to the assigned school, and specifically, whether specific interventions—here, the academic and social/emotional management needs—in the student's February 2011 IEP were made "available" to the student at the assigned school or how the assigned school would have been implemented these interventions in the assigned classroom.

However, even assuming for the sake of argument that the student had attended the district's recommended ICT placement at the assigned school, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S., 2011 WL 3919040, at *13; A.L., 2011 WL 4001074, at *9).

In the decision, the IHO relied heavily upon the testimony provided by the district special education teacher of the assigned classroom (special education teacher) and LRE principles in order to draw the conclusion that the district failed to offer the student a FAPE (see IHO Decision at pp. 22-24, 26). After noting several of the academic and social/emotional management needs recommended in the student's IEP to address, among other things, his sensory integration needs, the IHO found that based upon the special education teacher's testimony that she did not provide "sensory breaks" or use "sensory tools" in her classroom at that time, the student's IEP could not be "delivered" to him at the assigned school (id. at p. 22). In addition, the IHO found that the hearing record also did not "indicate that the remaining interventions (whole body activities, explicit directions, breaking down directions, repetition and review, and teacher prompting and modeling) would have been available" to the student at the assigned school (id. at pp. 22-23). Thereafter, the IHO opined that without the availability of these specific interventions, the student would not be available for learning or make meaningful progress, he could not "manage in a general education environment," and thus, "his presence (as a result of his sensory-seeking behaviors without the opportunity for sensory breaks and use of sensory tools) might negatively impact his classmates" (id. at p. 24).

But the IHO's analysis is flawed for two reasons: first, the IHO mischaracterized the special education teacher's testimony regarding sensory breaks and the use of sensory tools in her classroom; and second, the IHO mistakenly applied an LRE analysis to a general education class setting determine whether the district's alleged failure to implement specific interventions in conformity with the student's IEP resulted in a denial of a FAPE.[17] Notably, the special education

[17] The standard for adjudicating implementation failures is set forth in the discussion above. Although unclear, it appears that the IHO did not find fatal flaws with the IEP developed by the CSE to address the student's needs, (IHO Decision at p. 21), but found that district would have thereafter violated LRE principles when the time came to for the district to implement the student's IEP at the public school site (IHO Decision at pp. 23-24). However, in such circumstances, the remedy for failing to provide services in the LRE in conformity with a student's IEP would not be modification of such an IEP to provide services in a more restrictive setting with less access to nondisabled peers, but should include ordering the district to provide the services in the IEP as designed by the CSE.

teacher's complete testimony indicates that although none of the other special education students in her classroom during the 2011-12 school year required the use of these two specific interventions, she nevertheless had experience working with students in the past who did require these interventions (see Tr. p. 143). However, as the special education teacher testified about the assessments used in her classroom, she indicated that the classroom incorporated the use of multisensory instruction, the use of manipulatives, and the use of graphic organizers with the students, all of which were among the recommended academic and social/emotional management needs and strategies on the student's IEP (compare Tr. pp. 93-96, 114-15, with Dist. Ex. 2 at p. 4). The special education teacher also testified about her ability to work on the annual goals in the student's IEP, her past experience working with a student who had a 1:1 crisis management paraprofessional for assistance, and that her classroom had "sensory equipment" within the "listening center" of the classroom, as well as "different manipulatives" and "computers" for the students to use (see Tr. pp. 114-15, 131, 143). Significantly, the special education teacher also testified that her classroom incorporated the use of "problem solving strategies," "teacher modeling," "roleplaying (sic)," and "teacher redirection"—all of which were among the recommended academic and social/emotional management needs and strategies on the student's IEP (compare Tr. pp. 145-48, with Dist. Ex. 2 at pp. 4-5).

Therefore, to the extent that neither party elicited testimony or other evidence regarding the unavailability of the "remaining interventions (whole body activities, explicit directions, breaking down directions, repetition and review, and teacher prompting . . .)"—as noted by the IHO in the decision—the IHO presumptively concluded that these specific interventions in the student's IEP were not available at the assigned school without evidence to support this conclusion (compare Tr. pp. 83-151, with IHO Decision at pp. 22-23). As such, and in light of the evidence above, the IHO's conclusion that the district failed to offer the student a FAPE is not supported by the weight of the evidence and must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at the Aaron School was an appropriate placement or whether equitable considerations support the parents' claims (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 19, 2012 is modified by reversing that portions that concluded that the district failed to establish that it offered the student a FAPE in the LRE and ordered the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2011-12 school year; and

IT IS FURTHER ORDERED that at the next CSE meeting regarding the student's special education programming, the district shall consider whether it is appropriate to include parent

counseling and training on the student's IEP and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision.

Dated: **Albany, New York**
July 16, 2012

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JUSTYN P. BATES
STATE REVIEW OFFICER