



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-092

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, Jessica C. Darpino, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq. and Maria C. McGinley, 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 their son's tuition costs at the McCarton School (McCarton) for the 2011-12 school year. The parents cross-appeal, and seek modifications to the IHO's decision. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

In this case, the student exhibits cognitive deficits, as well as difficulties with academics, social/emotional functioning, self-regulation, behavior, language processing, and motor skills (Tr. pp. 120, 425-28, 430-32, 450-51, 455, 461, 466-68, 471-72, 520-23, 560-67, 597-98; Dist. Exs. 4-7; 9). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (Tr. p. 129; Dist. Ex. 1 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On June 2, 2011, the CSE convened for the student's annual review to develop his IEP for the 2011-12 school year (Dist. Exs. 1-2). The June 20 11 CSE recommended a 12-month special education program consisting of, among other things: a 6:1+1 special class in a specialized school; a full time 1:1 behavior management paraprofessional; related services consisting of occupational therapy (OT), four times per week for 45 minutes per session in an individual setting and once per

week for 45 minutes per session in a group of 4, physical therapy (PT), twice per week for 45 minutes per session in an individual setting, and speech-language therapy, 5 times per week for 45 minutes per session in an individual setting; and program modifications to accommodate the student's academic, social/emotional, and health needs (Dist. Ex. 1 at pp. 1, 4-6, 18, 20-21). The June 2011 CSE also determined that the student's behaviors seriously interfered with instruction and required additional adult support, and developed a behavior intervention plan (BIP) for the student (*id.* at pp. 5, 21). The June 2011 CSE also found the student eligible to participate in New York State alternate assessment (*id.* at p. 20).

By final notice of recommendation (FNR) dated June 10, 2011, the district summarized the June 2011 CSE's recommendations and notified the parents of the particular public school site to which the district had assigned the student for the 2011-12 school year (Dist. Ex. 3).

By letter to the district dated June 15, 2011, the parents advised the district that they had received neither a copy of the student's June 2011 IEP, nor an FNR advising them of the public school site to which the district had assigned their son (Parent Ex. M at p. 1). The parents further advised that if the district did not provide the student with an appropriate educational program and placement, the student would attend McCarton for the 2011-12 school year, and that they would seek public funding for their son's tuition at the school, as well as for 4 hours per week of home-based applied behavioral analysis (ABA) sessions in an individual setting, twice weekly PT sessions in an individual setting, and round trip transportation services (*id.*).

By letter dated June 24, 2011, the parents advised the district that they had visited the assigned school on June 22, 2011 and based upon their review, they were rejecting the district's recommended program and assigned school (Parent Ex. O). In their letter, the parents stated a number of concerns about the assigned school, including, among other things, that they observed students engaging in self-stimulatory behaviors and the classroom teacher failing to redirect them; that the students were not suitably grouped for instructional purposes; and that the curriculum and academic programs were inappropriate for the student (*id.* at pp. 1-2). The parents reiterated that until the district offered an appropriate educational program, they would continue the student's enrollment at McCarton for the 2011-12 school year at public expense (Parent Ex. O at p. 2; *see* Tr. pp. 633-44, 669-71).

On July 5, 2011, the student began the 2011-12 school year at McCarton; the parents subsequently paid a deposit on the student's tuition and executed an enrollment contract with the school (Tr. pp. 645-46; Parent Exs. T; V-W).¹ For the 2011-12 school year, the student was enrolled in a special class at McCarton with three other students, in which he received 1:1 support throughout the school day, and OT and speech-language therapy, both 5 times per week in individual settings, for 45-minute and 1-hour sessions, respectively (Tr. pp. 460-61, 470-71; Dist. Exs. 4 at p. 1; 5 at p. 1; 6 at p. 1).

A. Due Process Complaint Notice

By amended due process complaint notice dated September 9, 2011, the parents asserted that the district failed to offer the student a FAPE for the 2011-12 school year, alleging 71

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

procedural and substantive violations (Parent Ex. A).^{2, 3} The parents alleged, among other things, that: (1) the June 2011 CSE failed to meaningfully consider appropriate evaluative information in developing the student's IEP; (2) the district engaged in impermissible "predetermination" in developing the student's IEP; (3) the district failed to discuss, develop, or recommend a transition plan for the student, despite the student's need for consistency in his program; (4) the district failed to include the provision of parent counseling and training on the student's IEP; (5) the district failed to conduct a functional behavioral assessment (FBA) of the student and the BIP developed by the district was inappropriate; (6) the district failed to address and accommodate the student's need for 1:1 support; (7) the district failed to provide the student with consistent 1:1 teaching support throughout the school day; (8) the June 2011 IEP lacked any reference to a particular educational methodology to be used with the student and the CSE failed to meaningfully consider and identify what methodology would be appropriate for the student; (9) the IEP lacked a recommendation for extended school day services; and (10) the recommended levels of related services were insufficient to address the student's needs (id. at pp. 2-7). The parents also alleged: (1) improper training and supervision of assigned school staff, including the 1:1 behavior management paraprofessional; (2) that assigned school staff would have been unable to implement the student's June 2011 IEP; (3) that the assigned school's building and personnel would have changed in September 2011, thereby forcing the student into an allegedly inappropriate transition during the 2011-12 school year; and (4) that students in the assigned 6:1+1 special class were inappropriately grouped on the basis of age only, without consideration of functional levels or classifications (id. at pp. 6-8). The parents also alleged that the district failed to hold a "placement meeting" in accordance with the stipulation in a federal class action suit, Jose P. v. Ambach (669 F.2d 865 [2d Cir. 1982]), and that this failure denied the parents the opportunity to meaningfully participate in the development of the student's IEP and deprived the student of a FAPE for the 2011-12 school year (id. at pp. 6-7).

The parents also asserted that McCarton was an appropriate placement for the student for the 2011-12 school year because it offered a special education program that was reasonably calculated to provide the student with meaningful educational benefits, and that equitable considerations favored the parents because they cooperated with the district during the review process (Parent Ex. A at p. 8).

The parents sought an order from an IHO awarding them the costs of the student's tuition at McCarton, including the costs of 4 hours per week of home and community-based ABA therapy

² In addition to the September 9, 2011 amended due process complaint notice, the hearing record contains three prior due process complaint notices relative to this appeal, dated June 30, 2011 (Dist. Ex. 11), July 13, 2011 (Dist. Ex. 12), and July 27, 2011 (Dist. Ex. 13).

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

and 90 minutes per week of home and community-based PT, and the provision of transportation (Parent Ex. A at p. 9).⁴

B. Impartial Hearing Officer Decision

On September 14, 2011, an impartial hearing convened in this matter, and concluded on February 1, 2012, after five days of proceedings (Tr. pp. 1-684). The student remained at McCarton during these proceedings pursuant to an interim order on pendency issued by the IHO on September 20, 2011 (IHO Interim Order at p. 3). On March 19, 2012, the IHO issued a final decision, finding, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that McCarton was an appropriate placement for the student for the 2011-12 school year, and that equitable considerations supported the parents' claims (IHO Decision at pp. 16-31).

Specifically, the IHO determined that the district failed to perform any updated formal testing of the student prior to the June 2, 2011 CSE meeting other than a classroom observation, and that this failure, in and of itself, constituted a denial of a FAPE (IHO Decision at pp. 17-19). The IHO further concluded that the parents were denied the opportunity to meaningfully participate in the development of the student's June 2011 IEP because neither the special education teacher nor the district representative in attendance at the CSE meeting had prior experience teaching students with autism or students in a 6:1+1 setting, and failed to "adequately [explain to the parents] how special education services would be provided to [the student] in the less restrictive program that was being recommended" (*id.* at pp. 21-22).

Regarding the June 2011 IEP, the IHO found that the district's recommendation of a 6:1+1 special class in a specialized school with a full-time 1:1 behavior management paraprofessional and related services was not tailored to address the student's unique needs and, at the time the June 2011 IEP was developed, it was not reasonably calculated to enable the student to receive educational benefits because the CSE had no evidence that the student no longer required the 1:1 instruction he was receiving at McCarton, given the magnitude of his interfering behaviors (IHO Decision at pp. 20-22). The IHO determined that, notwithstanding the lack of an FBA, the district possessed sufficient information relative to the student's social/emotional functioning to develop the student's BIP at the June 2011 CSE meeting (*id.* at pp. 19-20). However, the IHO also concluded that the hearing record lacked evidence indicating that the student could be successfully educated in a setting less restrictive than the student's 1:1 ABA-based program at McCarton, or that a 1:1 paraprofessional was "capable of instructing [the student]" (*id.* at pp. 20-21, 28). The IHO also determined that the student's June 2011 IEP lacked transitional support services to assist the student in his transition to a less restrictive public educational setting, and that the CSE "should have considered the need for ... a consultant teacher to assist instructing [the student] in the 6:1:1 setting at least for a time" (*id.* at p. 21). The IHO further determined that the June 2011 IEP was deficient because it did not reference ABA methodology or include the provision of parent

⁴ The parents' due process complaint notice originally included a claim for "a compensatory education award for any and all pendency services" to which the student was entitled but did not receive (Parent Ex. A at p. 9); however, the parent ultimately withdrew this claim during the impartial hearing (Tr. pp. 657-58). The parent also indicated during the impartial hearing that, contrary to the representation set forth in the due process complaint notice, the student did not receive "4 hours per week of 1:1 ABA home- and community-based therapy" or "two 45-minute sessions per week of 1:1 home- and community-based [PT]" (compare Parent Ex. A at pp. 8-9, with Tr. pp. 655-57).

counseling and training, but that the latter omission did not deny the student a FAPE, because the parents did not object during the CSE meeting and because parent counseling and training was available at the assigned school (*id.* at pp. 22-23). Additionally, while acknowledging that "there is no federal law requirement that an IEP designate the particular school the student will attend," the IHO also found that the CSE erred by failing to hold a placement meeting with the parents; however, the IHO concluded that this procedural violation did not rise to the level of a denial of a FAPE because the parents were familiar with the assigned school, having previously visited and rejected it for the student's 2009-10 school year (*id.* at pp. 24-26; *see* Parent Ex. C at p. 20). The IHO also found that the hearing record lacked evidence demonstrating that the student required extended school day services and home-based related services in order to receive a FAPE for the 2011-12 school year, and denied their request for reimbursement for transportation expenses for the 2011-12 school year, finding that such relief was not warranted (IHO Decision at pp. 26, 28-29, 31).

The IHO further found that McCarton was an appropriate placement for the student for the 2011-12 school year, because it provided instruction using ABA methodology, a structured learning environment, and an intensive behavior reduction plan to address the student's behavior, social/emotional, and learning needs, and because the student was progressing at McCarton (IHO Decision at pp. 27-28). The IHO also concluded that equitable considerations supported the parents, because, among other things, they cooperated with the CSE during the review process (*id.* at pp. 29-31). The IHO awarded the parents the costs of the student's tuition at McCarton for the 2011-12 school year (*id.* at p. 31).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision, arguing, among other things, that the IHO erred in determining that the district failed to offer the student a FAPE for the 2011-12 school year and that equitable considerations supported the parents' claims for relief. Specifically, the district asserts that: the June 2011 CSE considered sufficient evaluative information in developing the student's IEP; the program recommendation of a 6:1+1 special class in a specialized school was appropriate for the student; the lack of a transition plan did not render the June 2011 IEP deficient because the district was not required to include a transition plan in the student's IEP—however, assuming that the district had been required to do so, the recommended 1:1 behavior management paraprofessional could have addressed the student's needs as he transferred from McCarton to a public school; the June 2011 IEP was not deficient because it lacked reference to ABA methodology and a recommendation for parent counseling and training; and, relative to the assigned public school, the district contends that any finding as to the appropriateness of the assigned school to address the student's needs was speculative in nature, insofar as the student did not attend the assigned school. The district also asserts that the IHO erred to the extent he determined that the parents' reliance on the Jose P. stipulation was not "wholly irrelevant."

Regarding equities, the district maintains that equitable considerations precluded an award of relief to the parents, because, among other things, the parents' letter rejecting the district's program failed to state specific concerns regarding the June 2011 IEP. The district seeks reversal of those portions of the IHO decision determining that the district failed to provide the student with a FAPE for the 2011-12 school year and that equitable considerations favored the parents, and awarding the parents the costs of the student's tuition at McCarton.

The parents answer the district's petition, admitting and denying the allegations raised by the district.⁵ The parents contend that the IHO correctly found that the district denied the student a FAPE for the 2011-12 school year, and that equitable considerations supported the parents' claims. The parents ultimately seek to uphold the IHO decision, but request five modifications to the IHO's findings, which they characterize as a "cross-appeal" in their "wherefore" clause of their pleading. In addition, the parents assert six "additional responses."

Specifically, the parents request the following modifications to the IHO's findings: (1) the district's failure to conduct an FBA denied the student a FAPE; (2) the assigned school was inappropriate; (3) the student required "additional services;" (4) the omission of parent counseling and training in the IEP denied the student a FAPE; and (5) the exclusion of the parents from "placement selection process" resulted in a denial of a FAPE to the student (see Answer ¶ 5).

The parents also argue in their answer, among other things, that the June 2011 CSE impermissibly predetermined its recommendation of a 6:1+1 special class in a special school; the June 2011 CSE failed to consider sufficient evaluative information in developing the student's 2011-12 IEP and failed to perform any formal testing or evaluations other than a March 14, 2011 classroom observation; the district's program recommendation was not reasonably calculated to enable the student to receive educational benefits because it lacked sufficient individual support to address the student's needs; the district's failure to specify an ABA-based methodology in the June 2011 IEP or to assess which methodologies were appropriate for the student prior to developing the student's IEP rendered the student's IEP deficient and rose to the level of denying him a FAPE, and the BIP developed by the June 2011 CSE was inappropriate. In addition, the parents contend that the assigned school was inappropriate for the student because: he would have been required to transition to a new school building and staff in September 2011, after the conclusion of the 2011 summer program; the assigned school staff lacked proper qualifications to implement the student's IEP; the student would not have received the ABA-based instruction methodology he required; and he would not have been suitably grouped for instructional purposes in the assigned 6:1+1 special class.

As additional responses, the parents aver: (1) the sufficiency of the IEP should be determined from within the four corners of the IEP; (2) the district has appealed to an SRO an "unprecedented number" of cases; (3) the district is precluded from raising any defenses—particularly with respect to the appropriateness of McCarton for the student for the 2011-12 school

⁵ The parents have requested that I recuse myself as the State Review Officer reviewing this case "on the grounds of demonstrable bias, lack of standing and qualifications to serve as an SRO, and lack of impartiality" (Answer ¶ 45, n. 4). According to the parents, upon judicial review, federal district courts have from time to time disagreed with and reversed the merits of several decisions issued by another adjudicator; however, assuming for the sake of argument that such decisions had been issued by me, this would still not be a basis on which to find bias or a need for recusal, as specifically held in several of the district court cases cited by the parents (see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 39-40 [S.D.N.Y. 2011], rev'd on different grounds, 694 F.3d 167 [2d Cir. 2012]; P.K. v. New York City Dep't of Educ., 2011 WL 3625317, at *7 n.7 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *12-*13 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *3-*4 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; see also B.J.S. v. State Educ. Dep't, 2011 WL 4368545, at *10 [W.D.N.Y. Sept. 19, 2011]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *6 [S.D.N.Y. Mar. 30, 2011]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 435 [S.D.N.Y. 2010]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 285-86 [S.D.N.Y. 2010]). I have considered the parents' request and find that I am able to impartially render a decision and that there is no basis for recusal in this instance (see 20 U.S.C. § 1415[g][2]; 8 NYCRR 279.1[c]).

year and whether equitable considerations supported the parents' claims—that were not raised in its response to its due process complaint notice (see Dist. Ex. 15); (4) the "IEP documents were missing mandatory federal and state regulatory provisions" (Answer ¶ 61); (5) that the district should not be permitted to remedy a defective IEP through "revisionist testimony" adduced at the impartial hearing (Answer ¶ 62); and (6) that by unilaterally selecting the assigned school for the student, the district violated a stipulation reached in the Jose P. class action suit. The parents also attach two documents to the answer.

As its "answer to the cross-appeal," the district responds to the six additional responses. The district contends that the parents impermissibly raise these additional responses for the first time on appeal to an SRO, and that they should not be addressed because these issues were not included in the parents' due process complaint notice. The district also contends that none of the issues asserted as additional responses include any citations to the hearing record, facts involving the parties' dispute, or reference to the student. In addition, the district denies the allegations set forth as additional responses, and asserts that each of them is without merit. As to the parents' requested modifications to the IHO's findings, the district argues that the parents are raising for the first time on appeal that the lack of an FBA and the omission of parent counseling and training from the June 2011 IEP denied the student a FAPE for the 2011-12 school year, and as an alternative argument, the district contends that the IHO correctly determined that these issues did not result in a denial of a FAPE.⁶ As to the parents' other three requested modifications, the district contends that they are either vague or have already been addressed by the district. In a reply, the district objects to the parents' submission of a special education field advisory issued by the New York State Education Department dated January 2012 as additional documentary evidence.⁷

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., 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

⁶ The hearing record reflects that the parents did in fact include allegations in their due process complaint notice that the district failed to conduct an FBA prior to developing the student's BIP and the student's IEP lacked a recommendation for parent counseling and training (see Parent Ex. A at pp. 4, 6).

⁷ Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, the proffered additional evidence—a copy of the IHO's March 19, 2012 decision and the January 2012 special education field advisory—are either already included in the hearing record or constitutes a published guidance document that I may take notice of, and therefore, it is unnecessary to admit them as additional evidence.

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]; see 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 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; 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 Review

1. Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's findings that McCarton was appropriate for the student for the 2011-12 school year, that the hearing record lacked evidence demonstrating that the student required extended school day services and home-based related services⁸ in order to receive a FAPE for the 2011-12 school year, or that the parents were not entitled to reimbursement for transportation expenses incurred in connection with the student's 2011-12 school year at McCarton (IHO Decision at pp. 26-29). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

⁸ In their answer, the parents request that the IHO's decision be modified to include a finding that the student "requires additional services" (see Answer ¶ 5). A party must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" (see 8 NYCRR 279.4). State regulations also require pleadings to set forth citations to the hearing record (8 NYCRR 279.8[b]). Here, I find that the parents' request for a finding that the student requires additional services, without any citation to the hearing record or further explanation in the answer, is insufficient to assert a claim that the IHO erred to the extent he found that the student did not require home-based related services.

2. Waiver of Claims

I will next address the parties' dispute regarding whether the district waived any claims relating to the equities because it failed to assert them in its response to the due process complaint notice. Here, the district submitted a response to the due process complaint notice that comported with federal and State regulations, and there is no indication in the hearing record that its failure to include an affirmative defense below resulted in a denial of a FAPE to the student (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]; see also Application of a Student with a Disability, Appeal No. 12-032; Application of a Student with a Disability, Appeal No. 08-151). Moreover, State regulation does not require the insertion of affirmative defenses in the response to the due process complaint notice, nor does it suggest that unasserted defenses will be waived (R.B. v. Dep't of Educ., 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011]). Accordingly, in this case, the district is not precluded from arguing whether the equities bar the parents' claims for relief.

B. June 2011 CSE Process—Predetermination and Meaningful Participation

Regarding the parents' contention that the June 2011 CSE engaged in predetermination, I note that the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34; [E.D.N.Y. June 13, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see M.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

Here, the district formulated an IEP for the student that specifically identified a placement on the continuum of placement options, a 6:1+1 special class in a specialized school (see 8 NYCRR

200.6[h][4]). According to the hearing record, the student's mother and an additional parent member attended the June 2011 CSE meeting; the student's classroom teacher, ABA therapist, occupational therapist, and speech-language therapist from McCarton participated in the meeting telephonically (Tr. pp. 124-25; Dist. Exs. 1 at p. 2; 2 at p. 1). The special education teacher who served on the June 2011 CSE meeting and the student's mother both testified that the CSE discussed and developed the student's annual goals and short-term objectives during the annual review meeting, and that McCarton staff modified several of the annual goals during the meeting to better reflect the student's instructional levels (Tr. pp. 149, 153-54, 162-65; see Tr. pp. 204-05; Dist. Exs. 1 at pp. 7-17; 2 at p. 2). The CSE meeting minutes contained in the hearing record noted the parent's concerns, including that "six students in a room may be overwhelming to [him]," and the student's mother testified that during the CSE meeting, she affirmatively raised concerns about the 6:1+1 staffing ratio of the assigned special class and inquired about smaller alternative settings (Tr. pp. 603-05; Dist. Ex. 2 at p. 2). The hearing record further reflects that the June 2011 CSE considered recommending a special class in a community school with a 1:1 behavior management paraprofessional for the student, but ultimately rejected this option, determining that the student required a small, structured class to support his educational and social/emotional needs (Tr. pp. 139-40, 193-94; Dist. Ex. 1 at p. 19). Based upon the foregoing, I find that the parent was afforded an opportunity to participate and express her concerns during the June 2011 CSE meeting, and although the parent disagreed with the CSE's placement recommendation, I decline to find that it indicates that the district engaged in impermissible predetermination (T.P., 554 F.3d at 253; see M.W., 869 F. Supp. 2d at 333-34; M.R., 615 F. Supp. 2d at 294; P.K., 569 F. Supp. 2d at 383).

Next, I will address the assertion by the parents that they were denied input or discussion as to the selection of the assigned school. Generally, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116, 300.327, 300.501[c]; 501[b][1][i]). 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. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; 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 R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; 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., 812 F. Supp. 2d at 504). Additionally, the United States Department of Education (USDOE) has also clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign

the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

In T.Y., the student's IEP did not "name the school [the student] would attend," but rather, the parents received notice "in the mail that recommended a specific school placement" (T.Y., 584 F.3d at 416). The parents visited the recommended site, but thereafter rejected it; the district recommended a second site, which the parents "called" but did not visit, and thereafter unilaterally placed the student in a nonpublic school (T.Y., 584 F.3d at 416). Pointing to the IDEA and its implementing regulations, the parents argued in T.Y. that "'procedural safeguards make clear that parents are to be afforded meaningful participation in the decision-making process as to the location and placement of their child's school and classroom'" (T.Y., 584 F.3d at 419). The T.Y. Court, however, relied upon precedent establishing that the "the term 'educational placement'" did not refer to the specific school, and expressly rejected the parents' argument (T.Y., 584 F.3d at 419-20; see also R.E., 694 F.3d at 191). Moreover, the R.E. Court found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and that "[t]he [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (694 F.3d at 191-92; see S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *5 [N.D.N.Y. Feb. 28, 2013]; J.L., 2013 WL 625064, at *10; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *12 [S.D.N.Y. Oct. 16, 2012]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. Nov. 18, 2011]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12, *14 [S.D.N.Y. Nov. 9, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9 [S.D.N.Y. Oct. 28, 2011]; A.L., 812 F. Supp. 2d at 504).

For the same reasons, the parents' argument on appeal must also be rejected because the parents' right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school building or classroom, which is the crux of the parents' arguments in this case (T.Y., 584 F.3d at 416, 419-20; J.L., 2013 WL 625064, at *10).

To the extent the parents argue that the district violated a stipulation reached in the Jose P. class action suit, I note that the remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see also 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). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]). Therefore, I lack the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K., 2011 WL 1131492, *17 n.29 [E.D.N.Y. Jan.

21, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. Apr. 15, 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. Aug. 25, 2010] [addressing the applicability and parents' rights to enforce the Jose P. consent order]).

C. June 2011 IEP

Next, I will address each of the district's challenges to the IHO's decision regarding the adequacy of the June 2011 IEP. The parents argue that the IEP is deficient and urge that review of the IEP must be limited to the "four corners" of the document, contending that the district cannot be permitted to present testimony at a due process hearing in an attempt to subsequently cure deficiencies in the IEP. As the Second Circuit recently articulated, the determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis and includes the consideration of only the information known at the time the IEP was developed (R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). However, the Second Circuit rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 185-89). Applying a prospective analysis, an independent review of the entire hearing record supports the district's contention that the recommended 6:1+1 special class program with related services and a 1:1 behavior management paraprofessional set forth in the June 2011 IEP was reasonably calculated to provide the student with educational benefits in the least restrictive setting.

1. Sufficiency of Evaluative Information

I will now consider the parties' arguments regarding whether the June 2011 CSE considered sufficient evaluative information to develop the student's IEP for the 2011-12 school year. The IHO found that the district failed to perform any updated formal testing of the student prior to the June 2, 2011 CSE meeting other than a classroom observation, and that this failure, in and of itself, constituted a denial of a FAPE to the student (IHO Decision at pp. 17-19). An independent review of the information considered by the June 2011 CSE, as detailed below, reflects that the June 2011 CSE had before it adequate and current evaluative information with respect to the student, which the CSE utilized in the development of the student's June 2011 IEP.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see E.A.M., 2012 WL 4571794, at *9-*10; S.F., 2011 WL 5419847, at *12; Letter to Clarke, 48 IDELR 77 [OSEP 2007]).

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

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

In this case, the hearing record reflects that, in developing the student's 2011-12 IEP, the June 2011 CSE reviewed four documents from McCarton, namely, a December 20, 2010 educational progress report (Dist. Ex. 4), a December 2010 speech-language progress report (Dist. Ex. 6), a January 15, 2011 OT report (Dist. Ex. 5), and a 2010-11 behavior reduction plan (Dist. Ex. 9) (see Tr. pp. 113-15, 122-23, 182-84). In addition, the CSE reviewed a March 14, 2011 classroom observation report, (Dist. Ex. 7), and the student's 2010-11 IEP⁹ (see Tr. pp. 113-115, 117-18).

According to the December 2010 educational progress report, completed by the student's McCarton ABA therapist, the private school provided the student with an interdisciplinary model of instruction in a 1:1 ratio for forty hours per week (Dist. Ex. 4 at p. 1). As of the date of the report, the student was placed in a classroom with three peers (id.). The ABA therapist began her report by providing a description of the student's learning style and noting that due to the student's high level of interfering behaviors he required a stringently planned and executed behavior plan, which she detailed (id. at pp. 1-2). According to the ABA therapist, the student exhibited delays in play skills, cognition, social skills, adaptive behavior, and communication and also demonstrated difficulties with attention and impulsivity, which impacted all areas of his learning (id.) The ABA therapist stated that the student required a structured, 1:1 teacher-student ratio with continuous reinforcement, redirection, and adult prompting to remain focused and on task (id. at p. 2). She indicated that the student had responded very favorably to the "structured, nurturing and predictable learning environment" characterized by the principles of ABA (id. at pp. 2-3).

The student's ABA therapist indicated that the student exhibited delays in receptive and expressive language, noting that the student's receptive vocabulary was larger than his expressive vocabulary (id. at p. 3). She reported that the student made requests using an average of five-word

⁹ The student's 2010-11 IEP is not included in the hearing record.

utterances and that the PECS icons that comprised the student's visual schedule were used to assist him in making requests (*id.*). In addition, she reported that the student's visual schedule was used to reduce perseveration of specific requests (*id.*). The ABA therapist indicated that the student's eye contact was sporadic and highlighted the importance of reestablishing the student's eye contact in order to maintain his interest in an activity (*id.*). The ABA therapist stated that at times the student showed interest in initiating interaction but had difficulty knowing what to say, saying "Hi" or becoming physically active (*id.*). According to the ABA therapist, with respect to communication skills, the student was working on following three-step directions, selecting single items with two specific characteristics, and answering "what" questions for items found at home, among other things (*id.* at pp. 3-4). In addition to communication delays, the ABA therapist noted that the student demonstrated delays in cognition and often required structured support, adaptation of materials, and a high level of repetition when developing independent responses (*id.* at p. 4). She further noted that, although the student exhibited progress in reading, this area remained "very difficult" for him, and historically had been associated with maladaptive behaviors (*id.*). As a result, the student's reading instruction continued to be paired with highly preferred reinforcers to increase motivation and the success rate of his responses (*id.*). According to the ABA therapist, the student was learning to produce all letter sounds upon request, labeled 14 sounds expressively, read 17 sight words, and was learning to read two-to-three word phrases comprised of mastered sight words (*id.*). The student demonstrated comprehension by matching words to pictures (*id.*). In math, the ABA therapist indicated that the student counted up to 20 objects using 1:1 correspondence, receptively identified all numbers 1 through 20, and expressively identified numbers 1-19 (*id.*). Relative to social and play skills, the ABA therapist reported that this continued to be an area of weakness for the student (*id.* at p. 5). She indicated that the student required staff assistance to attend to a peer, identify his turn, and stay on task during a game of catch (*id.*). In addition, the ABA therapist stated that the student had exhibited difficulty playing with toys for their designed purpose, but indicated that the student was able to play bowling and build with blocks for up to three minutes (*id.*). According to the ABA therapist, the student sat in groups of up to three other peers for a maximum of 15 minutes without engaging in disruptive behaviors; however, he did not attend to the teacher for more than one minute (*id.*). The ABA therapist noted that the student followed teacher instructions during his adaptive gym class with two peers, exhibited difficulties with respect to some activities of daily living (ADLs), but demonstrated independent toileting skills and was learning to wash/dry his face, brush his hair, eat with a napkin, and brush his teeth (*id.* at p. 6). She noted improvement in the student's ability to transition (*id.* at pp. 6-7). The ABA therapist recommended that the student continue to receive 1:1 support to increase his abilities and to develop attention skills and behavioral controls (*id.* at p. 7).

According to the December 2010 speech-language progress report, completed by the student's speech-language pathologist at McCarton, the student received five 60-minute sessions of individual speech-language therapy per week, conducted within the classroom (Dist. Ex. 6 at p. 1). The speech-language pathologist reported that during therapy the student exhibited several maladaptive behaviors that impeded his progress including: engaging in self-stimulatory behaviors such as tapping objects and eye gazing; as well as other behaviors such as such as impulsive movements; vocal protests; making "non-contextual" sounds; kicking; and stomping his feet; and hitting himself, others, and objects (*id.*). The speech-language pathologist attributed these behaviors to a need for excessive attention, to escape tasks, and for sensory regulation (*id.*). She indicated that to increase the student's attention to tasks during work times, the student worked for

15 minutes, followed by a 2 minute break and that during group activities, he remained engaged for 5 minutes, followed by a 1 minute break to maintain his attention (id.).

According to the speech-language pathologist, the student was able to attend to structured activities on a 1:1 basis for approximately 45 seconds when provided with frequent movement breaks, highly motivating reinforcers, and repeated visual and verbal cues (Dist. Ex. 6 at p. 2). Relative to receptive language, the speech-language pathologist indicated that the student was able to follow ten two-step related directions, demonstrated an emerging understanding of spatial and temporal concepts, and identified a variety of vocabulary words and actions (id.). Relative to expressive language, the speech-language pathologist reported that the student's primary mode of communication was verbal (id.). She noted that the student used one and two word phrases spontaneously and up to six word phrases with prompts to communicate his wants and needs (id.). The speech-language pathologist further reported that the student responded to simple "wh" questions with some verbal prompting, utilized picture icons to answer factual yes/no questions appropriately, and used descriptive concepts with prompts (id.). Relative to pragmatic language, the speech-language pathologist reported that the student requested help using the clinician's name and "help me", commented on his environment using carrier phrases with some prompting, and initiated interactive greetings (id. at pp. 2-3). Relative to oral motor skills, the speech-language pathologist stated that the student presented with decreased vocal volume, periodic clenching of the jaw, grinding of his teeth, and oral motor weakness, demonstrated by his difficulties with producing syllables appropriately (id. at p. 3). According to the speech-language pathologist, oral motor exercises designed to improve the student's oral motor strength, range of motion and volitional air flow for speech were carried out on a daily basis (id.). She noted that therapy sessions focused on improving the student's oral motor planning skills through improvement of oral-sensory-motor development (id. at p. 3). Relative to play skills, the speech-language pathologist reported that the student was working on expanding play skills and schemas during isolated and interactive play, that he engaged in two-step related play schemas with visual prompting, but played with toys in a "scripted, rote manner" in the absence of prompts (id.). The speech-language pathologist also reported that the student exhibited an understanding of the rules for five games involving interactive play with his therapist (id. at p. 4). During interactive play with a peer, the student required frequent prompts to attend to the peer and the task (id.). The speech-language pathologist indicated that the student demonstrated progress across all areas of speech and language, but noted that he continued to exhibit difficulties with oral-sensory-motor skills, speech production skills, and play skills, as well as with receptive, expressive, and pragmatic language (id.). She recommended maintaining the student's current level of speech-language therapy, and further recommended that the student receive oral motor therapy, to improve his sensory motor function and speech sound production (id.).

In the January 15, 2011 OT report, the student's occupational therapists at McCarton indicated that administration of the Bruininks-Oseretsky Test of Motor Proficiency-Second Edition (BOT-2) yielded a total motor composite percentile rank of 1 (Dist. Ex. 5 at p. 2). The therapist noted that assessment results were "mixed," that the OT evaluation occurred over a two week period, and that unspecified additional support was provided to the student beyond typical standardized procedures (id. at p. 3). According to the therapists, the student's diminished ability to sustain attention, lack of motivation, and compulsiveness negatively affected the student's scores (id.). As a result, the student underperformed on the subtests that required fine motor coordination, attention to detail, and rhythmic, but fast movements (id.). However, the therapists reported that the student demonstrated improvement with respect to the remaining four subtests that involved

active, large body movements (id.). The OT report included progress notes relative to the student's performance on sensory processing, motor planning, visual and fine motor skills, and self-care goals (id. at pp. 3-7). According to the therapists, the student continued to demonstrate improvements in his ability to negotiate sensory information and his overall emotional and behavioral responses had become less disruptive and more predictable since the beginning of the year (id. at pp. 3-4). However, the therapists reported that while the student had decreased behaviors such as producing strange noises and engaging in physical aggressiveness, his distractibility, compulsivity, and visual stimulations had intensified and at times impeded participation in therapy sessions (id. at p. 4). . According to the therapists, the student continued to make improvements in motor planning, trunk control, body awareness, and balance (id.). The student also demonstrated notable improvements in fine motor and graphomotor skills, but his progress was limited by his visual distractibility, persistent abstraction, and self-stimulatory behaviors (id. at p. 6). The therapists reported that the student continued to work diligently to become independent with several self-care skills and noted slight improvement in the student's ability to tie shoelaces (id. at p.7). The student's occupational therapists recommended the continuation of his current level of OT, which consisted of five weekly 45-minute sessions in an individual setting (id.).

The McCarton behavior reduction plan for the student's 2010-11 school year identified increasing the student's social behavior skills as its objective, to be achieved through reductions in targeted behaviors, including dropping/running, personal assaults, non-contextual vocalizations (defined as "scripting" or "singing"), and non-contextual hand movements (Dist. Ex. 9 at p. 1). The behavior reduction plan also proposed several preventative strategies targeting the student's negative behaviors, including fast-paced item presentation with high rate of reinforcement, task variation every few minutes, a specified ratio of mastered and acquisition targets, predictability of events through a picture schedule and reinforcement, use of a token economy throughout the day, use of a sensory diet, short breaks every 15 minutes during work sessions, deep breathing techniques, quick and efficient transitions, functional communication alternatives, and acknowledgment of the absence of negative behaviors (id. at pp. 1-2). The behavior reduction plan also proposed specific interventions to be employed upon the student's demonstration of each targeted behavior (id. at pp. 2-3).

In addition to the documents produced by McCarton, the CSE reviewed the report of a March 14, 2011 classroom observation conducted by the district (Dist. Ex. 7). According to the classroom observation report, the district initially observed the student for an unspecified period of time in a group with three other students during gym class and later observed the student in his classroom (id.). The district observer indicated that during the gym class the student successfully completed an obstacle course with a little prompting, but not much guidance; followed directions and threw a ball to his partner; and engaged in a cheer performed by the group, but subsequently wandered off (id.). The observer reported, however, that the student followed the teacher's directive to rejoin the group (id.). The observer noted that in the classroom, the student followed directions and with prompting ate his snack, then read a book with his teacher, and when prompted to look at the book, did so (id.). Overall, the classroom observation report indicated that the student followed directions and routines, required some prompting but completed many tasks independently, and used a Picture Exchange Communication System (PECS) book to aid in communication, but was observed, at times, to say single words (id.).

The hearing record reflects that the district did not reevaluate the student using formal testing in preparation for the June 2010 annual review meeting; however, as noted above, the district conducted a classroom observation on March 14, 2011 (Tr. pp. 112-13, 182-83). During the impartial hearing, the district's special education teacher who served on the June 2011 CSE testified that the CSE considered input provided by McCarton staff together with the evaluative reports discussed above in order to ascertain the student's functional levels, strengths, and areas of delay (Tr. pp. 113-15, 118-20, 155, 157, 182-84; see Tr. pp. 195-98; Dist. Exs. 4-7; 9). A review of the CSE meeting minutes also reflects that the McCarton staff provided input about the student's present levels of performance during the June 2011 CSE meeting (see Dist. Ex. 2 at p. 2).

According to the special education teacher, the June 2011 CSE had sufficient evaluative information to develop the student's IEP (Tr. pp. 119, 121-22, 147). She testified that the district did not conduct its own formal testing of the student because the CSE determined that it had adequate updated information from McCarton (Tr. pp. 112-13, 119-20). In addition, the district did not conduct an updated psychoeducational evaluation¹⁰ of the student because the school psychologist who served on the June 2011 CSE reported that no formal testing was completed during the 2006 psychoeducational evaluation and the June 2011 CSE did not believe the student was "testable" (Tr. pp. 119-20; see Dist. Ex. 8 at p. 4).

Moreover, while permissible, there is no requirement under federal or State regulations that an IEP contain specific references to criterion referenced testing, achievement testing or diagnostic testing. Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). 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 Application of the Dep't of Educ., Appeal No. 11-137; Application of a Student with a Disability, Appeal No. 11-043). Furthermore, a CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student (Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]). As noted above, the hearing record demonstrates appreciable input from the student's head teacher and related services providers from McCarton during the development of the student's 2011-12 IEP relative to the student's needs in reading, math, writing, language processing, motor skills, and social/emotional functioning (see Tr. pp. 127, 135-36), and Courts have found that such input may be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at *10).

Based on the foregoing, I find that the evidence contained in the hearing record does not support the IHO's conclusion that the lack of updated formal testing of the student prior to the June 2011 CSE annual review meeting denied the student a FAPE for the 2011-12 school year. The hearing record reflects that the evaluative data considered by the June 2011 CSE and the direct input from the student's head teacher and related service providers from McCarton provided the CSE with sufficient functional, developmental, and academic information about the student and

¹⁰ The hearing record indicates that the March/April 2006 psychoeducational evaluation was not among the documents reviewed by the June 2011 CSE in developing the student's 2011-12 IEP (see Tr. pp. 113-115, 122-23, 182-84; Dist. Ex. 8).

his individual needs to enable it to develop his 2011-12 IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of the Dep't of Educ., Appeal No. 12-055; Application of the Dep't of Educ., Appeal No. 11-147; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

Moreover, assuming for the sake of argument that the evaluative information available to the CSE was insufficient, the procedural deficiency of failing to consider evaluative data during a CSE meeting does not constitute a per se denial of a FAPE, but instead it must be established that the deficiency also impeded the parent's participation in the IEP's development or denied the student educational benefits (see Luo v. Baldwin Union Free Sch. Dist., 2012 WL 728173, at *4-*5 [E.D.N.Y. Mar. 5, 2012]; Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2 [2d Cir. 2011]). Here, given the evidence discussed above that the parents had the opportunity to meaningfully participate in the development of the student's IEP, and because the adequacy of the student's present levels of performance as described in the June 2011 IEP are not at issue in this appeal, I decline to find that any procedural deficiencies regarding the extent to which the CSE considered the evaluative information impeded the student's right to a FAPE, impeded the parents' ability to participate in the decision making process, or deprived the student of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

2. Appropriateness of 6:1+1 Special Class with 1:1 Paraprofessional Services

The district argues that the IHO erred in finding that its recommendation of a 6:1+1 special class in a specialized school with a full-time 1:1 behavior management paraprofessional was not tailored to address the student's unique needs, and that that the district failed to establish that the student could be successfully educated in a less restrictive setting than the student's 1:1 ABA-based program at McCarton (see IHO Decision at pp. 20-21, 28). An independent review of the hearing record compels a conclusion that the June 2011 CSE's recommendation of a 6:1+1 special class and a full time 1:1 behavior management paraprofessional was appropriately designed to address the student's special education needs.

The district's special education teacher testified and the CSE meeting minutes indicated that the parent and the student's McCarton teacher, ABA therapist, and related services providers participated in the June 2011 CSE meeting (Tr. pp. 118-19, 124-27; Dist. Ex. 2 at pp. 1-3). The June 2011 CSE discussed the student's needs related to reading, math, writing, language processing, social/emotional functioning, and motor skill development (Tr. pp. 127, 135-36). In addition, the June 2011 CSE gathered information regarding the student's academic and social/emotional needs based on teacher input and the evaluative documents discussed above (Tr. pp. 147, 155, 157).

The present levels of performance of the June 2011 IEP described the student's academic abilities with regard to reading, writing and math, as well as identified the student's difficulties in these areas (Dist. Ex. 1 at p. 3). The IEP also described the student's social/emotional performance (id. at p. 5). In addition to the student's academic and social/emotional needs, the June 2011 IEP detailed the student's abilities and weaknesses with respect to speech-language skills and health and physical development (id. at pp. 3, 6).

The June 2011 IEP identified the student's academic management needs, which included the need for a highly structured, predictable learning environment; a consistent positive reinforcement schedule; systematic prompting; tasks broken down; chunking; frequent variation of work tasks and materials; repetition, including drill and review; emphasis on the functional application of skills; systematic generalization of skills; frequent breaks; a 1:1 behavior management paraprofessional; and speech-language and occupational therapies (Dist. Ex. 1 at p. 5). The June 2011 IEP also identified the student's social/emotional management needs, noting that the student would benefit from clearly stated classroom rules and routines; visual and verbal supports; positive reinforcement; physical, verbal, and visual prompts and redirection; rewards for positive behavior; and a full time behavior management paraprofessional (id. at p. 5). The IEP indicated that the student's health and physical management needs included the need for occupational therapy and allergy precautions (id. at p. 6).

With respect to the student's identified academic needs, the June 2011 CSE developed annual goals and short-term objectives related to improving the student's basic reading skills, such as following written directions, reading c-v-c words, and answering "what" and "where" comprehension questions; and math skills including matching numerals with the same amount of objects, receptively identifying coins, and identifying the numbers and hour and minute hands on an analog clock (Dist. Ex. 1 at pp.11, 12). The CSE also developed annual goals and short term objectives targeting the student's deficits in social/emotional functioning (id. at pp. 7, 8). More specifically, the CSE developed goals related to improving the student's behavior in the classroom including reducing off-task, self-stimulatory, and maladaptive behaviors; and improving the student's social and play skills, including his ability to approach a peer in an appropriate manner, engage in 3-5 verbal exchanges with a staff member or peer, and engage in imaginative play (id. at pp. 7, 8).

To address the student's academic and social/emotional needs, the CSE recommended that the student be placed in a 6:1+1 special class in a specialized school and provided with a full time 1:1 behavior management paraprofessional (Dist. Ex. 1 at pp. 1, 19, 20). The June 2011 CSE also developed a BIP to address the student's behaviors which included a description of the student's behaviors, and behavioral goals as well as behavioral strategies and supports (id. at p. 21). The June 2011 CSE also recommended a 12-month program for the student to prevent substantial regression (Tr. pp. 133-34; Dist. Ex. 1 at p. 1).

To address the student's speech-language deficits, the CSE recommended that he receive speech-language therapy individually for five 45-minute sessions per week (Dist. Ex. 1 at p. 20). The June 2011 developed annual goals and short term objectives related to improving the student's expressive, receptive, and pragmatic language skills, as well as his articulation (id. at pp. 13-16). The expressive language goal developed by the CSE included short-term objectives related to improving the student's ability to label actions in pictures, use of possessives to indicate ownership, and ability to respond to factual "wh" questions (id. at p. 14). The receptive language goal included short-term objectives related to identifying pronouns by identifying the correct person referred to by the pronoun, demonstrating an understanding of prepositional terms, and following three-step related and unrelated directions (id. at p. 13). The CSE also developed short-term objectives related to the annual goal of improving the student's speech pragmatics and social communication skills (id. at p. 15). The objectives targeted the student's ability to comment or request using a carrier phrase, take turns, and spontaneously greet a peer (id.). An annual goal developed to target

the student's articulation skills included short term objectives related to producing specific sounds and participating in chewing exercises (id. at p. 16).

To address the student's sensory processing and motor weaknesses, the CSE recommended that the student receive individual occupational therapy for four 45-minute sessions per week and group occupational therapy for one 45-minute session per week, along with individual physical therapy for two 45-minute sessions per week (Dist. Ex. 1 at p. 20). The CSE also recommended that the student participate in adaptive physical education (id. at p. 6). With respect to the student's health and physical development, the June 2011 CSE developed annual goals and short term objectives related to the student's fine motor, visual motor, sensory processing, strength, and self-care needs (id. at pp. 7, 8, 17). The visual motor/fine motor goals included short term objectives related to cutting simple geometric shapes, forming upper case letters and numbers, imitating block designs, and identifying which object has the same spatial orientation as a presented model, while the sensory processing goal included short term objectives related to completing an obstacle course and continuously engaging in an activity in a group setting (id. at pp. 7, 8). The June 2011 CSE also developed short term objectives related to improving the student's strength by engaging in specific teacher led aerobic activities and the ADL goal developed by the CSE included short term objectives targeting the student's ability to independently serve himself food, manipulate clothing fasteners, and blow his nose (id. at pp. 8, 17).

The CSE considered a special class in a community school with a behavior management paraprofessional for the student but ultimately rejected this option because the student required a small structured class to support his educational and social/emotional needs (Tr. p. 139; Dist. Ex. 1 at p. 19). The special education teacher testified that the 6:1+1 special class was an appropriate placement for the student (Tr. pp. 222, 224-25). According to the special education teacher, the recommended program offered the student "a very small nurturing environment with a lot of support, both from within the classroom and without the classroom," adding that "I believe that it's a program that probably might not look too unlike the program that he's currently in [at McCarton]" (Tr. pp. 135-36, 138).

State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with the student's needs as described in detail above and State regulations, the June 2011 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with a 1:1 behavior management paraprofessional together with related services to address the student's needs in the area of academics, language processing, social/emotional/behavioral functioning, and motor skills (Dist. Ex. 1 at pp. 1, 20).¹¹

¹¹ I also note a guidance document by the Office of Special Education in January 2012 entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," indicates that with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented (see <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (id.).

The hearing record shows that at the time the IEP was developed, the student possessed skills that would allow him to function with respect to academics and socialization within a 6:1+1 special class (Dist. Exs. 4-7). As indicated in the evaluative reports before the June 2011 CSE, the student labeled 14 sounds expressively, read 17 words, and was learning to read two-three word phrases (Dist. Ex. 4 at p. 4). In addition, the student counted objects up to 20 with 1:1 correspondence, and receptively identified all numbers 1 through 20, and expressively identified numbers 1 through 19 (*id.*). The hearing record indicates that the student followed directions and routines (Dist. Ex. 7). In addition, the student required some prompting but completed many tasks independently (*id.*). The student responded to redirection within group activities (*id.*). The student requested assistance when needed, commented on his environment, and initiated greetings in a social manner (Dist. Ex. 6 at pp. 2-3). The student maintained his attention for 15 minutes followed by a 2 minute break (*id.* at p. 1). During group activities the student engaged for five minutes followed by a one minute break (*id.*).

Based on the foregoing, the hearing record demonstrates that the student exhibited highly intensive management needs that required a high degree of individualized attention and intervention, such that the CSE's recommendation to place the student in a 6:1+1 special class in conjunction with a 1:1 behavior management paraprofessional and related services was designed to address the student's academic, social and behavioral needs, and accordingly, was reasonably calculated to enable him to receive educational benefits. While I understand the parents' and McCarton staff's viewpoints that the student should receive instruction solely on a 1:1 basis, this amounts to conflicting viewpoints among educators over the best manner in which to deliver special education instruction and services to the student (see, e.g., J.A. v. New York City Dep't of Educ., 2012 WL 1075843, *9-*10 [S.D.N.Y. Mar. 28, 2012] [resolving conflicting views over the quality and extent of adult support services that must provided to a student]; D.S. v. Hawaii, 2011 WL 6819060, at *10 [D.Haw., Dec. 27, 2011] [commenting that the IDEA does not set forth with specificity the level of adult support services to be provided to particular students]). The IEP in this case was individualized to address the student's needs, and the district was not required to guarantee a specific level of benefit to the student and instead was required to offer an IEP that was designed to offer the opportunity for greater than trivial advancement (A.C., 553 F.3d at 173; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 130; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *5-*6 [S.D.N.Y. 2009]). Accordingly, I decline to find that the lack of 1:1 teaching support in the IEP rose to the level of a denial of a FAPE, given the CSE's recommendation of a 6:1+1 special class with a 1:1 behavior management paraprofessional, in conjunction with the recommended related services and the program accommodations and strategies described above.

3. Transitional Support Services

In this case, the IHO found that the district failed to offer the student a FAPE based in part upon the district's failure to "[consider] the need for transitional support services ... to facilitate the [student's] transition to a less restrictive setting ..." (IHO Decision at p. 21). The IHO did not

address the parents' allegation regarding the lack of a "transition plan" in the student's June 2011 IEP to facilitate his transfer from a nonpublic school to a district school.¹²

State regulations require that, in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

While it is undisputed that the June 2011 CSE did not recommend transitional support services in the student's IEP, neither the law or the weight of the evidence supports the IHO's conclusion. The hearing record indicates that had the student attended the proposed classroom in the assigned school beginning in July 2011, he would have been placed in a 6:1+1 special class in a specialized school with other students classified as students with autism, which does not trigger the district's obligation to include a recommendation for transitional support services under 8 NYCRR 200.13(a)(6) in the student's IEP (Tr. pp. 237, 241-242). Although the IHO concluded that the June 2011 CSE recommended a less restrictive setting than the student had at McCarton (IHO Decision at p. 21), the hearing record contains little, if any, evidence regarding the extent to which the student interacted with nondisabled peers at McCarton, but it indicates that the student was in a class at McCarton with three other autistic students (Tr. pp. 477, 489, 460). Accordingly, to the extent that a change in restrictiveness, if any, existed between McCarton and the public school program, such change is also minimal, which further diminishes a need to recommend transitional support services on the student's IEP (8 NYCRR 200.1[ddd]).

Notwithstanding the above, the June 2011 CSE recommended supports in the student's IEP to aid the student's transition to a new environment, including the provision of a 1:1 behavior management paraprofessional; a highly structured and predictable learning environment; consistent positive reinforcement; systematic visual, verbal, and physical prompting; and

¹² Distinct from the "transition plan" at issue in this case, the IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student has not yet attained the age of 15 (see Dist. Ex. 1 at p. 1).

repetition, drill, and review (Tr. pp. 133, 209-10; Dist. Ex. 1 at pp. 3-4).¹³ Additionally, the student's BIP provided strategies for addressing the student's needs related to social/emotional/behavioral functioning, and, according to the hearing record, the student had recently exhibited improvement in transitions and redirection had proven effective with the student in the classroom setting (Dist. Exs. 1 at p. 21; 4 at pp. 6-7; 7). Consequently, based upon the foregoing, I find that although the June 2011 IEP did not include transitional support services for the special education teacher pursuant to State regulations governing the provision of educational services to students with autism, the IEP was designed with services in mind to address the student's needs relating to transitioning to a new environment and any such deficiency alone, in light of the array of other services provided on the IEP, is not sufficient to conclude that the IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]). Based on the foregoing, I decline to find under the circumstances of this case a denial of a FAPE on the basis of a lack of transitional support services.

4. Special Factors, Interfering Behaviors, an FBA, and a BIP

As set forth in greater detail below, I find that although the March 2011 CSE did not conduct its own formal FBA of the student, it nonetheless properly considered the special factors related to the student's behavior that impeded his learning, and the June 2011 IEP and BIP otherwise appropriately addressed the student's behavioral needs.

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

¹³ The IDEA does not specifically require a school district to formulate a transition plan as part of a student's IEP when a student transfers from one school to another (see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y., Oct. 16, 2012]). Moreover, assuming for the sake of argument that the district was required to provide a transition plan in this case to facilitate the student's transfer from a nonpublic school to a district school, the parents have not articulated why the absence of a transition plan in his June 2011 IEP rose to the level of a denial of a FAPE to the student (see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 195 [2d Cir. 2012]; F.L., 2012 WL 4891748, at *9). Accordingly, I am not persuaded by the parents' argument that the student was denied a FAPE based on a lack of a transition plan in the June 2011 IEP.

appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP (see S.M., 2013 WL 773098, at *6), the failure to comply with this procedure does not automatically render a BIP deficient (R.E., 694 F.3d at 190; A.H., 2010 WL 3242234, at *4; see FB and EB v. New York City Dep't of Educ., 2013 WL 592664, at *8-*11 [S.D.N.Y. Feb. 14, 2013]; F.L., 2012 WL 4891748, at *8; K.L., 2012 WL 4017822, at *11; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796, at *9 [S.D.N.Y. Sept. 26, 2012]; M.W., 869 F. Supp. 2d at 333; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8-*9 [S.D.N.Y. Dec. 8, 2011]; C.F., 2011 WL 5130101, at *9).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the

student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student, "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹⁴ Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the parties do not dispute that the June 2011 CSE did not conduct a formal FBA prior to developing the June 2011 IEP and BIP. However, as noted above, the district's failure to conduct an FBA prior to developing the student's 2011-12 BIP did not, by itself, automatically render the June 2011 IEP so deficient as to deny the student a FAPE (A.H., 2010 WL 3242234, at *4). While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at **3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

An independent review of the hearing record reflects that although the June 2011 CSE did not complete a formal FBA of the student prior to developing the June 2011 IEP and BIP, the CSE considered information sufficient to identify the student's interfering behaviors.¹⁵ The special

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

¹⁵ I note at the outset of this discussion that the student was attending McCarton at the time of the June 2011 CSE meeting and conducting an FBA to determine how the student's behavior related to that environment has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at McCarton and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]).

education teacher who participated at the June 2011 CSE meeting testified that the CSE considered evaluative data describing the student's behaviors as well as input provided by the student's head teacher and related service providers from McCarton (Tr. pp. 195-98; Dist. Exs. 4-7; 9). According to the special education teacher, the CSE discussed the student's behaviors and related annual goals, reviewed the student's 2010-11 behavior reduction plan currently in place at McCarton, and McCarton staff offered input into the development of the student's BIP, including identification of those methods that had proven successful in ameliorating the student's behaviors at McCarton; she also testified that the June 2011 CSE believed that the resultant BIP appropriately addressed the student's interfering behaviors (Tr. pp. 113-15, 118-19, 165-68, 220-21, 231-32, 463-66, 513-14, 516, 560-67, 585-86, 591-93; Dist. Ex. 1 at p. 21, with Dist. Ex. 9).

The BIP developed by the June 2011 CSE described the behaviors that interfere with the student's learning, the behavior changes expected through the implementation of the BIP, the strategies to be used to change the student's behaviors, and the supports to be used to help the student change the behaviors (see Dist. Ex. 1 at p. 21). The BIP described the student's interfering behaviors, including dropping to the floor, hitting adult staff members, and experiencing difficulty focusing in class (id.). The BIP enumerated expected behavior changes, including increasing the student's focusing, reducing the number of incidents of dropping to the floor, refraining from aggressive behaviors, learning effective and appropriate ways to secure attention or communicate frustration, and increasing frustration tolerance (id.). Among the strategies identified in the BIP to address the student's interfering behaviors were positive reinforcement, encouragement to convey feelings, verbal prompts, relaxation techniques, breaks, movement activities, repetition and 1:1 prompts, small class size, related services, token economy, collaboration between home and school, and the services of a full time 1:1 behavior management paraprofessional (id.). Notably, the information contained in the BIP developed by the June 2011 CSE is consistent with the information provided by McCarton staff, the information set forth in the section of the June 2011 IEP describing the student's present levels of social/emotional performance, and the student's 2010-11 McCarton School behavior reduction plan (Dist. Exs. 1 at pp. 5, 21; 9).

In addition to developing a BIP to address the student's behavior needs, the June 2011 recommended a 1:1 behavior management paraprofessional for the student (Dist. Ex. 1 at pp. 4, 20). The June 2011 CSE also recommended environmental modifications and human or material resources (social/emotional management needs) such as clearly stated classroom routines and rules, visual and verbal supports, positive reinforcement, redirection, and rewards when positive behavior is observed—to address the student's behavior needs. Academic management needs reflected in the June 2011 IEP also provided strategies directed at improving the student's ability to attend to tasks, including visual, verbal and physical prompting; frequent breaks; frequent variation of work tasks and materials; a consistent positive reinforcement schedule; and a highly structured, predictable learning environment (id. at p. 4).

Thus, the evidence in the hearing record supports a conclusion that although the June 2011 CSE did not conduct a formal FBA prior to developing the student's June 2011 IEP or the accompanying BIP consistent with regulations, the June 2011 CSE had sufficient information to accurately identify the student's behaviors that seriously interfered with his ability to engage in instruction and as detailed above, recommended sufficient supports and services to address these needs. Therefore, I decline to disturb the IHO's finding that the district's failure to conduct a formal FBA of the student did not result in a denial of a FAPE, especially where here the June 2011 CSE accurately identified the student's behavior needs in the June 2011 IEP and attached BIP, the June

2011 CSE addressed the student's behavioral needs and formulated a BIP based on information and documentation provided by the student's providers, and the June 2011 CSE developed management needs designed to target the student's interfering behaviors (see R.E., 694 F.3d at 190-92; C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

5. Parent Counseling and Training

Next I consider the parents' argument that that the IHO erred in finding that, although the lack of a recommendation for parent counseling and training in the June 2011 IEP constitutes a procedural violation, it did not rise to the level of denying the student a FAPE for the 2011-12 school year (IHO Decision at p. 23). For the 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 counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, 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 R.E., 694 F.3d at 191; M.W., 869 F. Supp. 2d at 335; 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]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [2008]). Recently, the Second Circuit explained that "because school districts are required by [State regulation]¹⁶ to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191). The Court further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (id.; see FB and EB, 2013 WL 592664, at *11-*13; F.L., 2012 WL 4891748, at *10; K.L., 2012 WL 4017822, at *14).

In this case, although the hearing record contains conflicting testimony as to whether parent counseling and training were in fact discussed during the June 2011 CSE meeting (compare Tr. pp. 133, with Tr. pp. 205-06, 618), the IHO correctly noted in the decision that the June 2011 CSE did not recommend parent counseling and training on the student's 2011-12 IEP, which is a violation of State regulation (IHO Decision at p. 23; see Dist. Ex. 1). However, neither the parents' claim by itself nor the evidence adduced in the hearing record offer much in the way of insight or rationale regarding how the failure to specify parent counseling and training on the student's IEP

¹⁶ 8 NYCRR 200.13[d].

in this instance rose to the level of a denial of a FAPE, and as stated above, the Second Circuit does not appear to support application of such a broad rule when the principal defect in the student's IEP is failure to set forth parent training and counseling services (R.E., 694 F.3d at 191, 195; see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y. Oct. 30, 2008]).

Moreover, the hearing record indicates that had the student attended the particular school to which the district had assigned the student during the 2011-12 school year, the parents would have had access to parent counseling and training. Both the assistant principal of the assigned school and the classroom teacher testified that the parent coordinator of the assigned school advised parents through flyers and mailings about workshops and other parent counseling and training opportunities offered at the assigned school (Tr. pp. 133, 292-93, 357-58, 387-88).

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

6. Educational Methodology

Next I will address the district's contention that the IHO erred in finding a denial of a FAPE based on the June 2011 CSE's failure to consider ABA methodology for the student (IHO Decision at pp. 22-23).

Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L., 2012 WL 4891748, at *9; K.L., 2012 WL 4017822, at *12; Ganje, 2012 WL 5473491, at *11-*12; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

Moreover, I note that while a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), neither the IDEA nor federal nor State regulations require a district to evaluate a student with a disability relative to the potential efficacy of a particular teaching methodology. For these reasons, although the June 2011 IEP did not specify an instructional methodology that the student required, I decline to find under the circumstances of this case that it resulted in a denial of a FAPE, and the IHO's findings must be reversed.

D. Assigned School

I will next address the parties' contentions regarding the district's choice of assigned school. 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, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]),¹⁷ and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L., 2012 WL 4891748, at *15-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *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 misplaced]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; c.f. E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). 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 appropriate, but the parents chose not to avail themselves of the public school program]).

In this case, the parents rejected the proposed IEP for the 2011-12 school year and enrolled the student at McCarton prior to the time that the district became obligated to implement the proposed IEP (Tr. pp. 645-46; Parent Exs. O at p. 1; V). Thus, while the district was required to establish that the IEP was appropriate during the impartial hearing, the district was not required to establish that the IEP was actually implemented in accordance with State and Federal law in the

¹⁷ 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. Mar. 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 at 349 [5th Cir. 2000]).

proposed classrooms.¹⁸ Even assuming for the sake of argument that the student had attended the district's recommended program, as further discussed below, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L., 812 F. Supp. 2d at 502; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at *3 [S.D.Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6). The IDEA and State regulations also 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 at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). 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).

1. Teacher Qualifications

The parents allege that the 1:1 classroom paraprofessional and other staff at the assigned school were "not adequately trained or supervised, and [were] not ready, willing and able to properly fulfill the IEP mandates" (Parent Ex. A at p. 8). I note that a State has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *18 [W.D.N.Y. Sept. 26, 2012]; S.H., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K., 2011 WL 127063, at *11), and that the purposes of the IDEA may nevertheless be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is provided by personnel who are not certified (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]; Carter, 510 U.S. at 14 [noting that in a tuition reimbursement case, the lack of services by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE, but rather the issue is a fact-specific inquiry. I also note, however,

¹⁸ In New York State, policy guidance offers an explanation of the steps that must be taken to ensure the implementation of an IEP ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 60-61, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

that the precise extent to which each distinct state requirement is adopted for purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 821 F. Supp. 2d 1197, 1201 n.3 [S.D.Cal. 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730 [2d Cir.2007]]).

In this case, the hearing record shows that the teaching staff at the assigned school was certified in their respective content areas and capable of implementing the student's IEP (Tr. pp. 261-81, 340-55, 366-70, 390). The assistant principal testified that she possessed a master's degree in special education and a postgraduate certificate in autism studies, supervision, and administration, and had been employed by the district for 15 years in various capacities, including as a special education classroom teacher in a 6:1+1 setting, as an "autism coach," and, in July 2011, as the "autism specialist or behavior specialist and unit coordinator" for one of the assigned school's buildings (Tr. pp. 334-37). The classroom teacher testified that she received dual master's degrees in general and special education and had been employed by the district for five years (Tr. pp. 234-36). The classroom teacher also testified that the paraprofessional assigned to her classroom for the 2011-12 school year had worked in 6:1+1 special classrooms for four of the paraprofessional's five years of employment with the district, had worked with students with autism for five years, and described the classroom paraprofessional as "effective" within the classroom environment motivating and interacting with students "under my direction" (Tr. pp. 243-44); the assistant principal testified that the classroom paraprofessional "does meet the requirements for a [district] paraprofessional" (Tr. pp. 342, 380). The assistant principal also testified that district paraprofessionals received certification training in the areas of developmental delays, violence prevention, and child abuse prevention, and were also offered "professional development both at our school as well as at the district level ..." (Tr. pp. 342-43). Based on the aforementioned evidence, I find that the parents' assertion is without merit and that the district's staff was sufficiently qualified to implement the student's 2011-12 school year IEP in the event that the student had attended the assigned school (Ganje, 2012 WL 5473491, at *18; S.H., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]).

2. ABA Methodology

The parents allege that the assigned school could not have successfully addressed the student's special education needs because the student allegedly would not have received instruction using ABA methodology at the assigned school, which the parents maintain he required in order to receive educational benefits. As previously mentioned in this decision, although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]).

In this case, although the hearing record suggests that the student demonstrated progress when instructed using ABA, it did not establish that the student could only make progress when instructed using ABA (Dist. Exs. 4-7; 9). Moreover, the hearing record indicates that had the student attended the assigned school, ABA methodology could have been used to instruct the

student had it been found effective (Tr. pp. 146, 207-08).¹⁹ The hearing record indicates that teachers at the assigned school were trained in ABA methodology as well as additional methodologies (Tr. pp. 131, 145). Moreover, the special education teachers of the assigned 6:1+1 special classes were trained in multiple methodologies and would offer the student instruction in the methodology that appropriately addressed the student's needs (Tr. pp. 129-131, 145-46, 222, 224-25). Thus, the hearing record shows that the teachers at the assigned school were capable of offering a variety of instructional techniques individualized to meet the student's needs, including ABA instruction, had the parents elected to enroll the student in the public school program.

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

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, the classroom teacher testified that as of July 2011, the assigned 6:1+1 special class consisted of 5 students, ages 9 through 11, all of whom were classified as students with autism, and 4 adults, namely, herself, a classroom paraprofessional, and 2 other 1:1 paraprofessionals (1 health management paraprofessional and 1 behavior management

¹⁹ Although in their due process complaint notice the parents alleged that the assigned school was inappropriate for the student because it "in whole or in part utilizes [a] TEACCH based program" which, they alleged, "is not appropriate to this student" (Parent Ex. A at p. 4) (emphasis in original), the hearing record lacks sufficient evidence indicating that the district utilized the TEACCH methodology exclusively at the assigned school.

paraprofessional) assigned to two individual students (Tr. pp. 237, 241, 245).²⁰ She further testified that the English language arts (ELA) instructional levels of the students ranged from pre-kindergarten through third grade, and that their math instructional levels ranged from pre-kindergarten through first grade (Tr. p. 241). Although the hearing record reflects that the student's instructional levels in reading, writing, and math were at the pre-kindergarten level, the classroom teacher testified that, had the student attended the assigned 6:1+1 special class, his functional levels would have placed him at the bottom of the assigned 6:1+1 special class for reading and math; however, she denied that the student's lower functioning levels would have prevented her from accommodating the student within her classroom (Tr. pp. 301-02, 313-14; Dist. Ex. 1 at p. 4). The classroom teacher also testified that four of the students in the assigned 6:1+1 special class were verbal, one possessed limited verbal skills, two had BIPs, and that none had a sensory diet, although she testified that, because the assigned school possessed sensory equipment, such a diet could have been provided for the student if appropriate (Tr. pp. 289-90, 309). She described two students in the assigned 6:1+1 special class as having "behavior problems," one of which was "severe," but denied that either student's behaviors interfered with classroom instruction, due to the intervention of their 1:1 paraprofessionals and an "autism coach"²¹ (Tr. pp. 312-13). The classroom teacher testified that, based upon her review of the student's June 2011 IEP, the student's social/emotional needs were similar to those students currently enrolled in the assigned 6:1+1 special class (Tr. pp. 252, 266-67). She also testified that she provided the students with differentiated instruction in the classroom, based on individual student needs, to address each student's annual IEP goals (Tr. pp. 235, 238-40). In consideration of the foregoing, I find that the hearing record demonstrates that had the parents elected to place the student in the assigned 6:1+1 special class for the 2011-12 school year, the district was capable of grouping the student with other students of similar needs and abilities.

VII. Conclusion

In summary, I find that the hearing record demonstrates that the June 2011 CSE considered appropriate evaluative data in developing the student's 2011-12 IEP, and that the district's recommended program, consisting of a 6:1+1 special class in a specialized school, a full-time 1:1 behavior management paraprofessional, and related services, was reasonably calculated to enable the student to receive educational benefits, and thus, the district has offered the student a FAPE in the LRE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). It is therefore unnecessary to reach the issue of whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

²⁰ In July 2011, the student was 10 years of age (Dist. Ex. 1 at p. 1).

²¹ The classroom teacher testified that one of the assigned school staff served as an "autism coach" during summer 2011, and that the autism coach visited her classroom once per week and advised her on the handling of the maladaptive behaviors of one of her students, which included "[s]elf-injurious behavior, biting himself, dropping to the floor, work avoidance, inappropriate behaviors" (Tr. pp. 293-94, 297, 309-11).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated March 19, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year, and directing the district to reimburse the parents for the student's tuition at McCarton for the 2011-12 school year and to directly fund the remainder of the student's tuition at McCarton for the 2011-12 school year.

Dated: **Albany, New York**
 March 08, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER