The University of the State of New York

The State Education Department
State Review Officer
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No. 12-112

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Littman, Krooks, LLP, attorneys for petitioner, Lauren I. Mechaly, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana Eck, Esq., of counsel

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

At the time of the impartial hearing, the student was attending a district 6:1+1 special class while receiving ten hours per week of after-school special education itinerant teacher (SEIT) services pursuant to pendency (Interim IHO Decision at pp. 2-4; Tr. p 397).[1] The student's

[1] In the instant case, the IHO concluded that the parent acted inappropriately by withholding the student from the assigned public school site prepared to implement pendency (IHO Decision at p. 16). The nonpublic school listed on the May 2010 IEP did not have a seat available for the student at the beginning of the school year, and no nonpublic preschool was willing to accept the student for pendency purposes only (Tr. pp. 25-26, 58, 64). Furthermore, the pendency provisions of the Commissioner's Regulations do not require that a student who has been identified as a preschool student with a disability must remain in a preschool program for which he or she is no longer eligible pursuant to Education Law § 4410 (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]). [07-125] Counsel for the

eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (Tr. p. 110; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Although the student does not have a formal diagnosis of autism, a psychological evaluation conducted in September 2008 revealed that the student presented with behaviors and symptoms associated with a Pervasive Developmental Disorder – Not Otherwise Specified (PDD-NOS) (Parent Ex. E at pp. 3, 6-7).[2] Overall, the student exhibits cognitive abilities within the borderline range (Dist. Ex. 9 at p. 4). Additionally, the student also reportedly has difficulties with regard to his use of language, impulse control, play skills and sensory integration (Tr. p. 111). The student also exhibits difficulties engaging in conversations with his peers, and has a tendency to become overly frustrated at times, which can result in aggression (Tr. p. 112).

When the student was two years old, he received occupational therapy (OT) and speech-language therapy in conjunction with center-based special instruction through an Early Intervention Program (EIP) (Tr. pp. 367-68; Parent Exs. D at p. 1; E at p. 1). On April 21, 2009, the Committee on Preschool Special Education (CPSE) found the student eligible for special education and related services as a preschool student with a disability (Parent Ex. F). For the 2009-10 school year, the April 2009 CPSE recommended a 12-month placement in a 6:1+3 class combined with the provision of ten hours per week of SEIT services, in addition to related services, comprised of OT, physical therapy (PT) and speech-language therapy (id. at pp. 1-2, 18). In August 2009, the student aged out of the EIP (Parent Ex. N at p. 1). In September 2009, the student enrolled in a nonpublic preschool (Parent Exs. D at p. 1; H at p. 4).

On May 17, 2010, the CPSE met for the student's annual review and to develop his IEP for the 2010-11 school year (Parent Ex. A). The May 2010 CPSE proposed a 12-month placement in a 12:1+3 class in a nonpublic preschool, combined with the provision of ten hours per week of after-school SEIT services in addition to related services consisting of speech-language therapy, PT and OT, a recommendation to which the parent agreed (Tr. pp. 370-71; Parent Exs. A at pp. 1-2, 13; C). On December 8, 2010, per the parent's request, the CPSE reconvened and recommended placement of the student in a nonpublic preschool in an 8:1+2 classroom, and added the provision of a 1:1 crisis management paraprofessional (Tr. p. 373; Parent Ex. M at pp. 1-2, 17, 19). Additionally, the December 2010 CPSE continued the provision of the student's after-school SEIT services (Parent Ex. M at pp. 1, 17).

On February 17, 2011, the district sought the parent's consent to evaluate the student (Parent Ex. S). In a letter to the district dated February 28, 2011, the parent requested that the CSE "take responsibility for" the student's transition to kindergarten (Parent Ex. T). She further requested that the student be "completely and observed by a professional with knowledge and

district noted that the district could not force the nonpublic preschool to accept the student (Tr. p. 25). On September 28, 2011, for the purposes of pendency, the district offered placement to the student in a public school, which offered a substantially similar program; however, the parent rejected the district's offer, having deemed it inappropriate for the student's needs (Tr. pp. 58-59). In November 2011, for the purposes of pendency, the parent agreed to place the student in a 6:1+1 program with related services together with the provision of SEIT services, and explained that she agreed to the district's offer, because at that point in time, the student had been "out of school for a long time" (Tr. pp. 354-56, 397, 436; IHO Ex. II at p. 5).

[2] According to the parent, at age two, the student was given a diagnosis of a PDD-NOS (Tr. p. 367).

experience with [students] in the spectrum" (id.). By letter to the parent dated May 2, 2011, the district advised the parent that a CSE meeting was scheduled to take place on May 10, 2011 (Parent Ex. W). On May 6, 2011, in a letter to the district, the parent indicated that the student had not been evaluated since 2008, and that she deemed the existing evaluative data insufficient (Parent Ex. X). She requested that a complete evaluation of the student take place as soon as possible, and further asked that the district postpone the scheduled CSE meeting until the evaluations were completed (Parent Exs. X; Y). By letter to the parent dated May 24, 2011, the district informed her that the CSE meeting was postponed to May 31, 2011 (Parent Ex. Z).

On May 31, 2011, the CSE convened to develop the student's program for the 2011-12 school year (Dist. Ex. 3). For the 2011-12 school year, the May 2011 CSE deemed the student eligible for special education and related services as a student with autism and recommended a 12-month placement in a 6:1+1 special class in a specialized school, in conjunction with related services comprised of one weekly 30-minute session of counseling in a group of three, twice weekly 30-minute sessions of speech-language therapy in a group of three, one weekly 30-minute session of 1:1 speech-language therapy, one weekly 30-minute session of 1:1 OT, one weekly 30-minute session of OT in a group of three, and one weekly 30-minute session of 1:1 PT (id. at pp. 7-8, 11-12). Having determined that the student's behavior impeded his learning, the May 2011 CSE created a behavioral intervention plan (BIP) (Dist. Exs. 3 at p. 3; 4 at p. 3). The May 2011 IEP also contained 12 measurable annual goals related to reading, speech and language, OT, and PT (Dist. Ex. 3 at pp. 4-7). The May 2011 recommended the provision of accommodations and supports to address the student's cognitive, sensory, academic, motor, social/emotional, and language needs such as small group instruction with constant adult supervision throughout the day, the use of visual cues and manipulatives, sensory tools, visual/symbol cues, verbal modeling, the use of a multisensory approach to learning and scaffolding to ensure the acquisition of new skills (id. at p. 3).

By final notice of recommendation (FNR) to the parent, dated June 14, 2011, the district summarized its program recommendations, and notified the parent of the specific public school site to which the student was assigned (Dist. Ex. 11). Subsequently, in June 2011, the student's father visited the assigned public school site (Tr. p. 399).

A. Due Process Complaint Notice

By due process complaint notice dated July 27, 2011, the parent requested an impartial hearing (Parent Ex. D). In pertinent part, she alleged that the district denied the student a free appropriate public education (FAPE) during the 2011-12 school year for the following reasons, which included, among other things: (1) despite having obtained parental consent, the district did not conduct the necessary evaluations to determine the student's special education needs; (2) the district did not conduct evaluations within 60 days of receipt of parental consent; (3) the May 2011 CSE did not recommend the provision of a home-based applied behavioral analysis (ABA) program; (4) despite the parent's concerns regarding the student's behavior, the May 2011 CSE did not conduct a functional behavioral assessment (FBA) or prepare a BIP for the student; (5) the May 2011 IEP lacked measurable and meaningful goals; (6) the district did not afford the parent a meaningful opportunity to participate in the development of the student's IEP; (7) the district failed to provide the parent with a written copy of the student's IEP; and (8) the district created the

student's program recommendations, without the benefit of proper evaluations and assessments of the student's needs (Parent Ex. D at pp. 5-7).

Regarding the appropriateness of the assigned public school site, the parent further contended that it was inappropriate, in part, because the proposed classroom was not sufficiently structured for the student, and it did not offer the student an appropriate functional group (id. at p. 6). She also maintained that the staff at the assigned school lacked sufficient training to manage students with behavioral needs, and that the district-recommended classroom did not sufficiently address the student's academic, behavioral and/or social/emotional needs (id. at pp. 6-7).

As relief, the parent requested a order directing the district to provide the following: (1) independent evaluations with regard to the student's neuropsychological, central auditory processing, OT, speech-language, and PT needs; (2) an FBA of the student; (3) a CSE meeting to be held within ten days of the aforementioned evaluations to develop an appropriate IEP for the student; (4) ten hours of home-based services for the student; (5) 1:1 paraprofessional services; (6) related services for students with a diagnosis of autism in accordance with 8 NYCRR 200.13; (7) parent counseling and training; and (8) an appropriate placement for the student (id. at pp. 7-8).

On August 3, 2011, the district submitted a response to the due process complaint notice, in which it maintained, in part, it offered the student a program designed to provide him with meaningful educational benefits (Dist. Ex. 2 at p. 3).

B. Impartial Hearing Officer Decisions

On August 26, 2011, the parties proceeded to an impartial hearing, which concluded on January 31, 2012, following four days of testimony (Tr. pp. 1-438). During the course of the proceeding, the IHO rendered his decision with respect to the student's pendency placement on September 7, 2011 (Interim IHO Decision). The IHO found that the May 2010 IEP formed the basis for the student's pendency placement, which provided for a 12-month placement in a nonpublic 12:1+3 special preschool class, combined with ten hours per week of after-school SEIT services and related services (Interim IHO Decision at pp. 3-4; Tr. p. 5; Parent Ex. A at pp. 1-2, 11, 13).[3]

In a decision on the merits dated April 23, 2012, the IHO concluded that the district offered the student a FAPE during the 2011-12 school year, and ultimately, denied the parent's request for relief (IHO Decision at p. 16). In pertinent part, the IHO determined that a duly constituted CSE developed the May 2011 IEP, with full parent participation in addition to ample and appropriate evaluative information upon which to base its program recommendations (id. at p. 13). The IHO noted that the parent failed to raise any objections to the May 2011 CSE's program recommendations or to any of the reports presented at the May 2011 CSE meeting (id.). Regarding the parent's challenges to the evaluative data before the May 2011 CSE, the IHO determined that the evaluative material was timely, and that the parent failed to specify what objections she had to the evaluations (id. at p. 14). The IHO reasoned that, rather than accepting the reassurances of the

[3] In their petition, the parent alleges that during the impartial hearing, the parties stipulated that the December 17, 2010 IEP formed the basis for the student's pendency placement (Pet. ¶ 9). However, review of the hearing record shows that the parties agreed that the May 2010 IEP constituted the student's pendency placement (Tr. pp. 5-6).

district representative, the student's teachers and providers, the parent sought "new evaluations whatever and however unnecessary the public expense" (id.). Next, the IHO concluded that the hearing record failed to support the parent's request for the continued provision of the student's home-based ABA services, noting that the provision of a home-based program exceeded the guarantees of an appropriate education provided by the IDEA (id. at p. 15). Moreover, the IHO noted that the student had graduated to kindergarten, and the May 2011 CSE had determined that the student would better progress in a 6:1+1 special class in a specialized school, rather than with the continuation of an after-school program (id. at p. 14). Lastly, although the parent argued in the due process complaint notice that the May 2011 CSE improperly modified the student's related services recommendation, the IHO did not entertain this claim, because he determined that the parent failed to first address such concerns with the CSE (id. at p. 15).

With respect to the assigned public school site, the IHO did not consider the parent's claims regarding its appropriateness; however, he found that the parent's assertion that the student's father did not have an opportunity to visit the class to which the student was assigned, resulted from the student's father's mistake, and therefore, the student's father's error could not be attributed to the district (IHO Decision at p. 16). Accordingly, the IHO reasoned that the student's father's error did not negate "the validity of the placement" (id.). In light of the above, the IHO ordered that the district provided the student with a FAPE during the 2011-12 school year, and that the parent acted inappropriately, because she withheld the student from his pendency placement offered by the district (id.). He further directed that the district had not incurred any expenses to the parents for 2011-12 school year (id.).

IV. Appeal for State-Level Review

The parent appeals and requests a finding that the district denied the student a FAPE during the 2011-12 school year, and that she did not act inappropriately by withholding the student from the recommended pendency placement.[4] With respect to the provision of a FAPE, the parent argues, in part, that the district failed to conduct necessary evaluations of the student within a timely fashion, and it did not consider the recommendations of the student's related services providers. The parent also alleges that the district discounted the student's present levels of performance. She further contends that the May 2011 CSE failed to fully evaluate the student prior to his transition from the CPSE to the CSE. Next, the parent alleges that the district discontinued the student's home-based program, without a basis to support its determination to withdraw the student's home-based services. The parent also submits that the district failed to conduct an FBA and develop a BIP for the student. Additionally, the parent maintains that the district failed to recommend an appropriate placement for the student, and that the recommendation for the proposed 6:1+1 classroom was based solely on the student's classification, rather than on his needs. She also asserts that the students in the proposed class did not provide the student with an appropriate peer grouping. Regarding the assigned public school site, the

[4] For the first time in her memorandum of law, the parent asserts that in analyzing her claim, the IHO relied on an improper legal standard. The memorandum of law is not a substitute for either a pleading or a properly drafted petition for review (see 8 NYCRR 279.4, 279.6 [noting that State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petition to the answer"]; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031).

parent further argues that it could not meet the student's educational needs, and therefore, it was not appropriate. As a remedy, the parent requests reimbursement for expenses that she has incurred for the student's education during the 2011-12 school year.

The district submitted an answer and maintains that the IHO properly determined that the district offered the student a FAPE during the 2011-12 school year. As a threshold matter, the district argues that the petition should be dismissed, because the parent fails to articulate her reasons for challenging the decision, nor does she set forth what tangible relief, if any, she seeks on appeal in accordance with 8 NYCRR 279.4(a). Moreover, the district asserts that the petition must be dismissed, because it failed to include citations to the hearing record. In any event, the district maintains that the hearing record supports a finding that it provided the student with a FAPE during the 2011-12 school year, for the following reasons, which include, among other things: (1) the May 2011 CSE had before it sufficient evaluative data upon which to base the IEP, and the parent believed that all of the necessary evaluations had been completed at the time of the CSE meeting; (2) the May 2011 IEP was developed with meaningful parent participation; (3) the program set forth in the May 2011 IEP, was, on its own, reasonably calculated to enable the student to receive educational benefits, and therefore, despite the parent's request, an additional home-based program was not necessary in order to provide the student with a FAPE; (4) the recommended 6:1+1 program was appropriate for the student's educational needs in the least restrictive environment (LRE), and the hearing record fails to support the parent's assertion that the May 2011 CSE recommended placement in a 6:1+1 special class in a specialized school, because of the student's classification; and (5) an FBA and a BIP were appropriately developed at the May 2011 CSE meeting. Lastly, to the extent that the parent requests an independent educational evaluation (IEE), the district submits that the hearing record does not substantiate her claim, because there is no evidence to show that the parent disputed any of the district-obtained evaluations. Under the circumstances, the district requests that the petition be dismissed with prejudice.

The parent submitted a reply to the answer.[5] The parent maintains that the petition complies with State regulations in all respects, and that it clearly indicates the reasons for which it challenges the IHO's decision, and specifically articulates the requested relief.

V. Applicable Standards

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

[5] Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the district did not proffer any additional evidence in its answer. Accordingly, the allegations contained in the reply will be considered to the extent that they respond to procedural defenses (see 8 NYCRR 279.6).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8

NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Scope of Review

Initially, I must determine which issues are properly before me on appeal. On appeal, the parent challenges the accuracy of the present levels of performance as outlined in the May 2011 IEP; however, review of the her due process complaint reveals that this issue was not included among the allegations surrounding the provision of a FAPE to the student during the 2011-12

school year (Parent Ex. D). While the parent did not challenge the accuracy of the present levels of performance set forth in the May 2011 IEP in her due process complaint notice, as detailed below, a reading of the hearing record suggests that the district "opened the door" to consideration of the matter, and therefore, I will consider it on appeal.

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

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

preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

On appeal, the parent alleges that the district discounted the student's present levels of performance and failed to adequately assess the student's present levels of performance. Although the due process complaint notice may not be reasonably read to include a challenge to the accuracy of the student's present levels of performance detailed in the May 2011 IEP, to the extent that the Second Circuit recently held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 2012 WL 2477649, at *28-*29 [2d Cir. June 29, 2012]), a review of the hearing record shows that the district elicited testimony from the district representative regarding the student's present levels of academic and social/emotional performance, presumably in response to the parent's assertion in her due process complaint notice that the CSE made program recommendations without the benefit of proper evaluations (Tr. pp. 109-13, 117-18; Parent Ex. D at pp. 6-7). For this reason, I find that this issue is properly before me on appeal, and I will consider it.

B. Adequacy of the May 2011 IEP

1. Sufficiency of Evaluative Data and Accuracy of the Present Levels of Performance

Turning to the merits of the instant matter, although the parent challenges the sufficiency of the evaluative material that was before the May 2011 CSE, as explained in greater detail below, a review of the documents considered by the May 2011 CSE supports the conclusion that the CSE had sufficient information relative to the student's present levels of academic achievement and functional performance at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs and that a 6:1+1 special class constituted an appropriate educational setting for the student.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district

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

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). An IEP's present levels of academic performance and functional levels have been described as providing the relevant baselines for projecting annual performance and for developing meaningful measurable annual goals and short-term objectives (Application of the Bd. of Educ., Appeal No. 04-026; see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *25–*26 [S.D.N.Y. Sept. 29, 2009]). Although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come (see 8 NYCRR 200.4[d][2][i]; Application of a Student with a Disability, Appeal No. 11-043). 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]).

To develop program recommendations for the student, the May 2011 CSE considered a January 2011 Physical Therapy CSE Progress Report, a January 2011 CSE Educational Progress Report, a January 2011 CSE Speech and Language, a January 2011 CSE Occupational Therapy Annual Review, a May 2011 Turning 5 Evaluation/Psychological Evaluation (Turning 5 Evaluation), which included a classroom observation report, and a January 2011 Turning Five Report for SEIT Services (Tr. pp. 102-09; Dist. Exs. 5-10).[6] In order to prepare for the May 2011

[6] To the extent that the parent alleges that the district failed to conduct the student's evaluations in a timely manner, the hearing record reveals that on February 17, 2011, the district sought the parent's consent to reevaluate the student (Parent Ex. S). On March 22, 2011, the parent provided written consent to the district to evaluate the student, and the Turning 5 evaluation took place on May 1, 2011, in accordance with the 60-day timeframe set forth in State regulation that requires that an evaluation take place within 60 days of parental consent (compare Parent Ex. S, with Dist. Ex. 9 at p. 1; 8 NYCRR 200.4[b]). In any event, there is no showing in the hearing record that any perceived delay in conducting the student's evaluations impeded the student's right to a FAPE, significantly impeded the parent's meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2; Application of a Student with a Disability, Appeal No. 12-024; Application of the Dep't of Educ., Appeal No. 10-070).

CSE meeting, the district representative testified that prior to the meeting, she interviewed the parent, conducted a classroom observation, collected progress reports from the student's teacher and related services providers, and completed the Preschool Evaluation Scale (PES), which the district representative described as an interview with the student's special education teacher (Tr. p. 95). The district representative also noted that she conducted a psychological evaluation of the student prior to the meeting (id.). She added that copies of each of the documents reviewed by the May 2011 CSE were present during the time of the meeting (Tr. pp. 97, 104-08). Moreover, the hearing record is unequivocal that the district representative provided a copy of the May 2011 Turning 5 Evaluation to the parent in advance of the May 2011 CSE meeting for the parent's review (Tr. pp. 96, 403, 419-20, 422, 426-28). The hearing record reflects that during the May 2011 CSE meeting, participants discussed the information gleaned from the May 2011 Turning 5 evaluation report, and addressed information from the student's related services providers in regards to the student's strengths and weaknesses, as well as the outcome of the PES and the information that the parent provided during the social history update (Tr. pp. 96, 102-03). The student's classroom teacher, SEIT provider, and the SEIT supervisor also participated in the May 2011 CSE meeting (Tr. pp. 98-100, 332-33; Dist. Ex. 3 at p. 13). According to the district representative, no one in attendance at the May 2011 CSE raised any objections to the evaluation reports considered by the CSE at the time of the meeting (Tr. p. 108). Furthermore, regardless of the parent's claims that the May 2011 CSE developed the student's IEP without sufficient evaluative material, the district representative testified that the CSE had determined that there were no outstanding evaluations required to formulate the student's IEP (Tr. p. 109). Likewise, the parent testified that she did not advise the CSE that she was dissatisfied with the evaluations considered by the May 2011 CSE, and despite her testimony that she wanted the "proper evaluations done" for the student, the parent added that she did not have any specific evaluations in mind which the parent desired that the CSE had not yet completed (Tr. pp. 385-86).

Administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) to the student yielded a verbal IQ (percentile rank) of 72 (3), a performance IQ of 81 (10) and a full scale IQ of 70 (2) (Dist. Ex. 9 at p. 5). Overall, the student's cognitive abilities fell within the borderline range with low average skills in the performance domain (id. at p. 4). The school psychologist noted that there was significant inter-test scatter regarding the performance composite which may indicate it was an underestimate of his true perceptual reasoning abilities (id.). According to the student's classroom teacher, at the time of the May 2011 CSE meeting, the student could rote count from one to ten, and randomly identify numbers one to ten (Dist. Ex. 6 at p. 1). In addition, the student was able to recognize his name in writing and spell his first name (id.). He could also identify body parts via speech and gestures without prompts (id.). Additionally, the student was also beginning to work on sorting objects using the categories of clothing, animals and toys (id.). Although his teacher reported that the student struggled to accurately identify people such as staff and his peers, the student could do so when given a choice of two names (id.). The student's classroom teacher further reported that while the student exhibited difficulty engaging in play or conversation with his peers, the student could follow classroom routines, and appeared comfortable when presented with a change in his routines, despite a need for frequent redirection (id. at p. 2). According to the student's teacher, the student could become aggressive when frustrated (id.). The teacher also noted that during playground time, the student loved to run and play with other classmates, but he experienced a great deal of difficulty refraining from hurting others (id.). The teacher added that the student needed continuous support in order to share with peers and to participate in turn taking activities (id.).

"Teacher estimates" or "teacher observations" can be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]; see also E.A.M. v. New York City Dep't. of Educ., 2012 WL 4571794, at *9-*10 [S.D.N.Y. Sept. 29, 2012]).

The district representative testified that as a result of the updated testing that she conducted, she uncovered more information about the student's specific needs, strengths, and weaknesses (Tr. p. 96). For example, results of the PES revealed that the student's overall quotient of 70 (2nd percentile) fell within the borderline range (Dist. Ex. 9 at p. 5). The student demonstrated low average to extremely low functioning in all developmental areas (id.). Specifically, the student's gross motor skills were low average and his expressive language and self-help skills were in the extremely low range whereas he exhibited borderline skills in the areas of cognition, social/emotional skills, and fine motor skills (id.; see also Dist. Ex. 10 at p. 6). Similarly, the student's speech-language pathologist reported that the student presented with delays in the areas of receptive, expressive and pragmatic language (Dist. Ex. 7 at p. 2). The student's physical therapist added that the student could follow basic one to two-step directions or physical cues to a given task with redirection; however, the student continued to present with some deficits in age appropriate motor, including balance and coordination, locomotion and motor planning in addition to recreational skills (Dist. Ex. 5 at pp. 1-2). Lastly, the student's occupational therapist noted that the student presented with limited attention to tasks, in addition to delays with respect to his fine motor, self-help and visual perceptual skills (Dist. Ex. 8 at p. 2).

Contrary to the parent's claims that the May 2011 CSE discounted the student's present levels of performance, a review of the hearing record reflects that the information reviewed at the time of the May 2011 CSE meeting provided information to the CSE regarding the levels of services which the student was receiving and how the student was responding, and ultimately enabled the CSE to create an accurate portrait of the student's deficits with respect to cognition, academics, adaptive behavior, language processing, social/emotional functioning, and fine and gross motor skills (Tr. p. 96; Dist. Ex. 3). Under the circumstances, the evidence contained in the hearing record favors a finding that the student's needs and abilities described in the evaluative material before the May 2011 CSE was consistent with the present levels of performance in the student's May 2011 IEP (compare Dist. Ex. 5 at pp. 1-2, with Dist. Ex. 3 at p. 3; compare Dist. Ex. 6 at pp. 1-2, with Dist. Ex. 3 at p. 1; compare Dist. Ex. 7 at p. 2, with Dist. Ex. 3 at p. 2; compare Dist. Ex. 8 at pp. 1-2, with Dist. Ex. 3 at pp. 2-3; compare Dist. Ex. 9 at pp. 2, 4, 6, with Dist. Ex. 3 at pp. 2-3). Based on the above, I find that the evaluative data considered by the May 2011 CSE and the input from the participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see S.F., 2011 WL 5419847 at * 12; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

2. 6:1+1 Special Class in a Specialized School with Related Services

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]). In the instant case, the hearing record reflects that the May 2011 CSE recommended placement of the student in a 12-month 6:1+1 special class in a specialized school, and the district representative added that CSE participants believed at the time of the meeting that student's needs could be appropriately met in that setting (Tr. pp. 136, 139; Dist. Ex. 3). According to the hearing record, the May 2011 CSE recommended a 12-month program for the student, in order to prevent regression of the student's skills during the summer, because the CSE determined that the student would regress if he was not receiving services throughout the year (Tr. p. 136; Dist. Ex. 3 at p. 8). The May 2011 IEP indicated that the student's cognitive, language and communication delays warranted the support of a specialized therapeutic school to address his needs in these domains (Dist. Ex. 3 at pp. 3, 10, 12). The IEP further specified that the student had been identified with a PDD and that "he should benefit from being in a placement that utilizes strategies specifically and developed for working with children on the Autism Spectrum" (Dist. Ex. 3 at p. 12). Likewise, the district representative explained that the May 2011 CSE proposed placement in a 6:1+1 classroom, because it was a class that specialized in children who were on the autism spectrum (Tr. p. 137; Dist. Ex. 3 at p. 12). She added that the program recommendation was also made because, "it just really seemed to be a good match for [the student] at the time" (Tr. p. 137). Moreover, the May 2011 IEP reflected that the student presented with moderately delayed adaptive behavior, and the district representative explained that the program recommendation of a 6:1+1 special class was a direct result of the description of the student's adaptive behaviors, such as his sensory needs in the classroom, which the May 2011 IEP addressed through the use of sensory balls and squishy balls to provide sensory feedback (Tr. pp. 198-99; Dist. Ex. 3 at p. 3).

The district representative further testified that the May 2011 CSE discussed the student's program recommendation at great length, and there is information in the hearing record that indicates that the CSE considered other program options for the student (Tr. pp 138-39, 183). According to the May 2011 IEP, the CSE considered placement of the student in an integrated co-teaching (ICT) classroom, a special class placement combined with the provision of a 1:1 paraprofessional, in addition to placement in a specialized private school (Dist. Ex. 3 at p. 12).[7] The district representative testified that the May 2011 CSE opted against providing the student with 1:1 paraprofessional services, and found that it would be too restrictive, in light of the recommendation to place him in a 6:1+1 special class, the CSE determined that 1:1 support was not necessary, given the small student to teacher ratio in such a setting (Tr. p. 142). The CSE reasoned that although the student had 1:1 support in preschool, the student was undergoing developmental changes, and as he became older, the CSE wanted him to take what he could from the services provided to him through both the 6:1+1 special class and related services and take the skills he learned from there and generalize them into the classroom setting (Tr. p. 206). The May 2011 CSE also rejected placement of the student in a specialized private school, having concluded

[7] State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). State policy guidance issued in April 2008, entitled "Continuum of Special Education Services for School-Age Students with Disabilities," provides more information about these services (see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

that a specialized private school constituted an overly restrictive setting and that the student's needs could be appropriately met in the 6:1+1 special class (Tr. pp. 139, 185, 205; Dist. Ex. 3 at p. 12).

In addition, to develop related services recommendations for the student, the district representative testified that the May 2011 CSE reviewed the student's related services reports and looked at how the student was functioning in his then-current setting (Tr. pp. 199-200, 202). Contrary to the parent's contention that the May 2011 disregarded the recommendations of the student's related services providers in developing the student's program recommendation, an overall reading of the hearing record suggests that based on the evaluative information before the May 2011 CSE at the time of the meeting, the district tailored its related services recommendations for the student to suit his special education needs. The student's May 2011 IEP reduced the student's PT sessions from two individual 30-minute sessions per week to one individual 30-minute session per week (Dist. Ex. 3 at p. 8). The May 2011 CSE recommended the level of PT for the student based on the PT progress report, the evaluative data, parent report, and discussion at the CSE meeting (Tr. p. 134). However, the parent objected to the reduction of PT from two sessions per week to one session per week (id.). According to the district representative, based on information gleaned from the January 2011 progress report and her observations noted during the May 2011 classroom observation, the May 2011 CSE opted to decrease the student's weekly PT sessions, because the student could successfully navigate the school environment, exhibited a normal range of motion, as well as only mild gross motor delays (Tr. p. 135; see also Dist. Exs. 5; 9 at p. 3). The district representative explained that once the parent understood the district's rationale for the reduction in the level of PT, the parent appeared to agree with the May 2011 CSE's recommendation for the student's PT mandate (Tr. pp. 135-36).[8]

The May 2011 CSE also added one 30-minute session per week of counseling in a small group (3:1) to the student's IEP (Tr. p. 133; Dist. Ex. 3 at p. 8). Although the parent alleges that the CSE decreased the student's PT mandate in order to provide him with counseling, the hearing record reflects that the CSE proposed counseling for the student in light of his difficulties with behavior and social/emotional functioning (Tr. p. 133). The district representative further indicated that the May 2011 CSE recommended that the student's counseling services be delivered in a small group, because the student needed to work on skills such as initiating conversation and play with others his age, and the CSE reasoned that in a small group environment, the student could develop those skills (Tr. pp. 133-34; Dist. Ex. 3 at p. 2; see also Dist. Ex. 6 at p. 2). The hearing record does not indicate that any of the participants at the May 2011 CSE members objected to the student's proposed mandate for counseling (Tr. p. 134).

Finally, the May 2011 CSE recommended one 30-minute session per week of individual speech-language therapy in addition to two 30-minute sessions per week of speech-language therapy in a small group (3:1) instead of two individual sessions and one group session (Dist. Ex. 3 at p. 8). Based on its discussion during the meeting, the May 2011 CSE recommended an increase in the student's group speech-language mandate, to enable the student to take what he had learned from his individual speech-language therapy sessions and generalize that into the group setting and also allow the student to develop his pragmatic skills (Tr. pp. 132, 169). Additionally,

[8] Although the student's physical therapist did not participate in the May 2011 CSE meeting, as noted above, the CSE reviewed the PT progress report (Tr. pp. 165-66).

the May 2011 CSE continued to recommend one 30-minute session per week of individual OT and one 30-minute session per week of OT in a small group (3:1) (Dist. Ex. 3 at p. 8). The district representative testified that the May 2011 CSE based its recommendation for the student's OT mandate on her observations developed during the classroom observation, and also on the January 2011 CSE Occupational Therapy Annual Review report that was before the CSE during the meeting (Tr. pp. 132-33; see also Dist. Exs. 8; 9 at p. 3).

Based on the above information, the hearing record favors a conclusion that the May 2011 CSE's recommendation for placement of the student in a 6:1+1 special class in a specialized school combined with related services comprised of counseling, speech-language therapy, OT, and PT was designed to provide him with educational benefits in the LRE.

3. Need for Home-Based Services

Next, I will consider the parent's allegation the May 2011 IEP was deficient and denied the student a FAPE because it lacked a provision for home-based services. Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also Application of the Dep't. of Educ., Appeal No. 11-031). As explained below, there is no support in the hearing record for the parent's claim; rather, the evidence supports the district's position that that the May 2011 IEP was itself reasonably calculated to confer educational benefits on the student, without the need for a home-based program.

According to the information before the CSE at the time of the May 2011 CSE meeting, the student had progressed in several areas of need during the 2010-11 school year (Dist. Exs. 5-10). For example, the student's SEIT reported that the student had made steady progress regarding his IEP annual goals during the 2010-11 school year (Tr. p. 325; Dist. Ex. 10 at p. 6). His speech-language pathologist reported that the student identified several objects and pictures across content categories, comprehended part/whole relationships, followed one and two-step directions, and understood simple "wh-questions" (Dist. Ex. 7 at p. 1). Similarly, the student's SEIT wrote that the student expressed himself using two to three-word phrases and sometimes up to six-word phrases (Dist. Ex. 10 at p. 2). Regarding the student's expressive language, his speech-language pathologist observed that the student used language to request, comment, reject independently and with minimal prompts (Dist. Ex. 7 at p. 2). The student's SEIT also noted improvement in the student's play and conversational skills with peers (Dist. Ex. 10 at p. 4). Likewise, the student's speech-language pathologist found that the student's turn-taking skills had improved, and she reported that his imaginative and cooperative play skills continued to develop with varying levels of supports (Dist. Ex. 7 at p. 2). In addition, the classroom observation report revealed that the student maintained attention during lessons but was sometimes distracted (Dist. Ex. 9 at p. 3). The district representative further reported that the student exhibited the gross motor ability to navigate the school (id.). The parent also reported that the student had made "tremendous progress" during the 2010-11 school year including knowledge of the alphabet and demonstrating the ability to

count up to 100 (Dist. Ex. 9 at p. 1). Given this information before the May 2011 CSE, which reflected the student's educational gains during the prior school year, an overall reading of the hearing record suggests that the recommendation for placement in a 6:1+1 special class in a specialized school was likely to confer educational benefits without the need for a home-based component to the student's program.

Furthermore, the student's SEIT provider testified that during the 2010-11 school year, she worked with the student in furtherance of the goals and objectives outlined in his IEP and that the services that she provided to him duplicated those he received in the classroom (Tr. p. 330). The SEIT testified that the student required a home-based program, due to his continued difficulties with self-regulation and ability to maintain eye-contact; however, she also admitted that the student could learn these skills in a classroom (Tr. pp. 331, 341-42). The hearing record indicates that the May 2011 CSE considered the parent's request for the provision of a home-based program to the student (Tr. pp. 140-41, 333, 376). The district representative indicated that the May 2011 CSE determined that a home-based program was unnecessary in light of the program recommendation that the CSE was considering for him (Tr. p. 140). The district representative added that the May 2011 CSE determined that the student's program could meet his educational needs during the school day, and that she and other CSE meeting participants agreed that including the provision of SEIT services could result in "overservicing" the student and that the student could attain greater benefit by being part of the school and classroom as much as possible (Tr. p. 178). I note that 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). The IDEA 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, 873 F.2d at 567 [citations omitted]). Upon review of the hearing record, I find that the district offered the student an appropriate educational program that could address the student's needs during the school day and that the evidence does not suggest that the student required home-based programming in order to make progress during the in-school portion of his program or to receive educational benefits.

4. Special Factors and Interfering Behaviors

Turning next to the parent's contention that the FBA was conducted over the course of the May 2011 CSE meeting and that the BIP was not appropriate for the student, as set forth in greater detail below, I find that the May 2011 CSE properly considered special factors relating to the student's behavioral concerns that impeded his learning, and developed an appropriate BIP for the student in accordance with State regulations.

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. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a

Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. E. Ramapo Cent. 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 pp. 25-26, 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. at p. 25). 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, the failure to comply

with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234, at *2).[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]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

The parent challenges the FBA to the extent that it was developed during the May 2011 CSE meeting. However, to the extent that the parent alleges that the FBA was not appropriate, because it was developed at the time of the May 2011 CSE meeting, the evidence in the hearing record reflects a pattern of meaningful parent participation in development of the student's FBA thereby satisfying the procedural requirements of the IDEA (Cerra, 427 F.3d at 194). It is undisputed that in light of the parent's concerns regarding the student's behavior, the May 2011 CSE developed a "behavior plan," per the parent's request (Tr. pp. 207, 380-81, 404-05). The district representative confirmed that the May 2011 CSE created the student's FBA and BIP during

[9] 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 [Aug. 14, 2006]).

the May 2011 meeting (Tr. pp. 114, 187, 191-92; Dist. Ex. 4).[10] The FBA and BIP were derived from evaluative information before the May 2011 CSE and input from the CSE members, including the parent (Tr. pp. 114-17, 189). Furthermore, the district representative noted that the FBA was developed at the May 2011 CSE meeting in order to include input from the parent and the student's service providers (Tr. p. 187). The May 2011 CSE determined that the student's behavior required highly intensive supervision and that he required a BIP (Dist. Ex. 3 at p. 3). More specifically, the May 2011 CSE discussed the student's behaviors and social/emotional functioning including his aggressive behavior, play skills, and ability to follow a routine (Tr. pp. 112-13). In addition, the district representative testified that information gleaned from the April 2011 classroom observation was utilized to develop the FBA (Tr. pp. 187-89). The May 2011 CSE also reviewed the social history, psychological evaluation, teacher report, and service provider reports in order to formulate the FBA and BIP (Tr. pp. 188, 191). The district representative added that the May 2011 CSE walked through the development of the FBA "step by step" at the CSE meeting (Tr. p. 190). She further explained that the May 2011 CSE discussed the antecedents and setting events of the student's behavior, in addition to the student's behaviors and consequences of his actions (id.).

In the FBA dated June 1, 2011, based upon classroom observations, teacher reports, service provider reports, parent report, and assessment results, the May 2011 CSE described the student's behavior (Dist. Ex. 4 at p. 1).[11] The FBA noted that the student's "targeted inappropriate behavior" included aggressive behaviors such as tantrums, crying, yelling, kicking his feet, punching, pinching, and whipping his body around (id.). According to the FBA, the behaviors were not directed at an adult or peer; rather, they appeared to be the result of frustration and lack of sensory regulation (id.). The FBA reflected that the student's behaviors could take place in the classroom, "anywhere in school," hallways, and the playground (id.). The FBA also included triggers for the student's behaviors which included the student eating a non-preferred food item, sharing toys, non-preferred activities, transitions, and lack of body control (id.). In addition, the FBA set forth environmental conditions that might affect the targeted behaviors such as unstructured times and over-stimulating environments (id.). The May 2011 CSE determined that the purpose of the student's behavior was to resist an event or to escape a non-preferred activity (id.). The FBA directed that following the student's unwanted behavior, he would be removed from the class and the teacher would not address the behavior directly (id.). Previous interventions that had unproven unsuccessful with the student were also detailed in the FBA, such as the provision of an advanced warning prior to transitions and prior to beginning a non-preferred activity (id.). The FBA also identified strategies and positive reinforcements that would be employed to change the student's behavior including the use of visual cues to increase comprehension regarding transitions, the provision of an advance warning of transitions, quiet reminders, verbal praise, attention from a preferred adult, computer time, stickers, and allowing the student to be first in line (id. at pp. 1-2). The FBA outlined the expected behavior changes for the student, which included an increase in his ability to exhibit self-control and a decrease in the frequency of the behaviors to no more than one behavior per two weeks (id. at p. 2). The FBA further indicated that the student would express

[10] Although the FBA and BIP were developed at the May 2011 CSE meeting both the FBA and BIP were dated June 1, 2011 (Tr. pp. 114, 187, 191-92; Dist. Ex. 4).

[11] The district representative testified that the FBA and BIP were intended to be sent home to the parent with the IEP (Tr. pp. 192-93).

his frustrations in a more appropriate manner through the use of counseling and speech-language therapy (id.). It was further expected that the student would learn to verbalize his feelings and use strategies to cope regarding non-preferred activities and changes in routine (id.). The FBA also provided for outcome measurement, and directed that the student's behavior would be monitored and assessed using data collected from classroom observations, anecdotal information, and progress reports (id.). In addition, the FBA included a provision for formal parent-teacher meetings (id.). Lastly, the May 2011 included management needs for the student such as the provision of small group instruction, consistent adult supervision, sensory tools, visual and verbal cues, and a multisensory instructional approach (Dist. Ex. 3 at p. 3).

The district representative described an FBA as an analysis of behaviors and a BIP as a plan to increase the preferred behavior and target and decrease the non-preferred behavior (Tr. p. 191). In the student's BIP, the May 2011 CSE listed the personnel responsible for its implementation, which included the classroom teacher, service providers, and representative from the IEP school-based team (Dist. Ex. 4 at p. 3). The BIP further directed that the student's progress toward achieving the targeted behaviors must be communicated to the parent at least every ten weeks and during quarterly formal meetings (id.). The resultant BIP listed the student's targeted behaviors, such as kicking his feet, punching, pinching, whipping his body around, tantrums, crying, yelling "no" at his teacher or at his peers and further incorporated the expected behaviors for the student, such as increasing his ability to exhibit self-control in the classroom (id.). The BIP further indicated that the student's behavior would be monitored and assessed through the use of data collection during the assessment period, based on classroom observations, anecdotal information, and progress reports (id.).

Based upon the foregoing, the hearing record does not support a finding that the student was denied a FAPE, where the May 2011 CSE addressed the student's behavioral needs and formulated an FBA and a BIP based on information and documentation provided by the student's providers, designed to target the student's interfering behaviors (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]).

C. Assigned School

I will next address the parties' contentions regarding the district's choice of the assigned public school site. In this case, a meaningful analysis of the parents' claims with regard to the alleged deficiencies in functional grouping, and appropriateness of the assigned public school site would require me to determine what might have happened had the parent actually enrolled the student in the proposed classroom within the assigned public school instead of rejecting the proposed IEP, and if the district had been required to implement the student's May 2011 IEP.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also

K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement 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]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim., 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[12]

When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied

[12] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. 2010]). 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]). 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). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on her claims regarding implementation of the May 2011 IEP because a retrospective analysis of how the district would have implemented the student's IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273).

For the sake of completeness, I have nevertheless in the alternative discussed the available evidence, speculatively assuming for the sake of argument that the student had attended the district's recommended program, the speculative evidence in the hearing record suggests that the 6:1+1 special class at the assigned district school was capable of providing the student with suitable functional grouping, and appropriate services, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at * 14 [E.D.N.Y. Mar. 30, 2012]; D.D-S, 2011 WL 3919040, at *13; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

1. Ability of the Assigned Public School Site to Meet the Student's Special Education Needs

Although she does not further elaborate regarding the specific nature of her claim, the parent alleges that the assigned public school site would not have been able to provide for the student's educational needs. As detailed below, evidence in the hearing record belies the parent's contention and indicates that the district was capable of implementing the IEP.

According to the assistant principal of the assigned public school site (assistant principal), the assigned public school site could have met the student's academic needs and implemented the student's IEP, which he described was similar to most IEPs of the students who attended the assigned public school site, and he further opined that the student's IEP was "more easy" to implement (Tr. pp. 266, 277). The assistant principal testified that when a student arrived at the assigned public school site, the teacher administered the Assessment of Basic Language and Learning Skills (ABLLS) to assess a student's ability to acquire language and communication (Tr. p. 249). The assistant principal explained that the purpose of the ABLLS was to determine at what point on the spectrum of acquiring language communication skills the student was on, so that the school could develop an individualized program to enable that student to move forward (Tr. p. 250). He added that while the assigned public school site's 6:1+1 classes did not have a specific curriculum, the results of the ABLLS drove the curriculum in those classes (id.).

There is no indication in the hearing record that the assigned public school site would have deviated from the student's IEP in a material way to support a claim that the district could not implement the student's IEP; rather, the hearing record suggests that the assigned public school site offered a number of supports consistent with the student's IEP. The assistant principal testified that the student would have received his related services in accordance with his IEP mandates (Tr. pp. 256-57). He added that in the assigned kindergarten class, the room was set up to provide students with both whole group and 1:1 instruction (Tr. p. 242). The teacher of the proposed class

utilized a multisensory approach, prompting, modeling, cueing, repetition and redirection and scaffolding of instruction (compare Tr. pp.242-45 with, Dist. Ex. 3 at pp. 2-3). The assistant principal added that the proposed classroom also had a number of sensory toys, which the May 2011 CSE also recommended in the student's IEP (Tr. pp. 243-44; Dist. Ex. 3 at p. 3). In addition, upon review of the student's IEP, the assistant principal testified that the teacher of the proposed class could implement the student's goals as outlined in the IEP, and he described how a number of those goals could be implemented (Tr. pp. 258-66). Regarding the student's social/emotional needs, the assistant principal testified that the assigned public school site could implement the student's BIP (Tr. pp. 267-68). More specifically, to address the student's difficulty engaging with his peers, the assistant principal described individual and small group activities, where students practiced social skills, including making eye contact, greeting each other and playing together (Tr. p. 300). In addition, to address feelings of frustration, the assistant principal described the assigned public school's use of an emotional literacy program, which he labeled "the ruler approach," where school personnel try to help students recognize, understand, label, express and then regulate their emotions (Tr. p. 246). He also noted that the teacher of the proposed class used a tangible rewards system, or positive reinforcement, which was individualized based on what motivated a student (id.). Under the circumstances, there is no showing in the hearing record to substantiate the parent's argument that the assigned public school site could not have addressed the student's special education needs.

2. 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).

The parent argues that the student would have been inappropriately grouped for instructional purposes in the proposed classroom, because the students in the proposed classroom were not suitable peers, and that the recommended classroom was chosen based solely on the student's classification. According to the evidence presented, as an incoming kindergarten student, the student would have been placed in a new kindergarten class (Tr. p. 237).[13] According to the assistant principal, as of September 2011, there were two students ages four and five in the assigned class who had received autism classifications (Tr. p. 239). The student in the instant case was five years old and had also received a classification of autism (Dist. Ex. 3 at p. 1). Testimony by the assistant principal shows that the student's prekindergarten instructional reading level fell within the range of the prekindergarten instructional reading levels of the class, and that the student's approximate prekindergarten instructional math level fell within the range of the prekindergarten instructional math levels of the class (Tr. pp. 231, 237-39, 255-56). Moreover, the assistant principal testified that the student instructional levels were in the "middle of the group" in reading and a little above the average in math compared to the students in the assigned class (Tr. pp. 255-56). To the extent that the parent claims that she wanted the student to be placed with "higher peer models," the hearing record reflects that both of the students in the proposed class were verbal, and the assistant principal also stated that one of the students had "very good" receptive language skills (Tr. pp. 298-99). He surmised that the student in the instant case fell somewhere in the middle (Tr. p. 299). Accordingly, upon review of the hearing record, I find that the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned district school for the recommended program for the 2011-12 school year.

Based on the foregoing, assuming for the sake of argument that the student had attended the public school listed on the June 2011 FNR and that the district had the obligation to show that it implemented the IEP, the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see T.L., 2012 WL 1107652, at *14; D.D-S, 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502-03].

[13] To the extent that the parent claims that because the proposed class was a new classroom and was not available at the time of the student's father's visit, although the district offered the parents the opportunity to visit the assigned school, neither the IDEA or State regulations confer upon the parents a right to visit the recommended school and classroom. In general, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116, 300.327, 300.501[c]). The U.S. Department of Education's Office of Special Educational Programs (OPSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of the Dep't. of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013). Consequently, although the parent may have wished to visit the proposed class in the assigned school, the fact that the student's father was unable to do so did not result in the denial of a FAPE.

D. Independent Educational Evaluation

Finally, I must consider the parent's request for an IEE. Federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 CFR 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii];[14] 8 NYCRR 200.5[g][1][iv]; see, e.g., A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of the Bd. of Educ., Appeal No. 09-109; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

In this case, to the extent that the parent requests an IEE, the hearing record does not indicate that she disagreed with an evaluation obtained by the school district as required by federal and State regulations that govern when a parent is entitled to an IEE at public expense (34 CFR 300.502[a],[b]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35; Application of a Student with a Disability, Appeal No. 10-101; Application of a Student with a Disability, Appeal No. 10-033; Application of a Student with a Disability, Appeal No. 09-144). Here, although the parent requested a full battery of evaluations of the student prior to the May 2011 CSE meeting, the parent could not specify which particular evaluation she was seeking (Tr. p. 386). Similarly, the parent never advised the CSE that she was dissatisfied—that is disagreed with—the evaluative data that that the CSE had gathered (Tr. p. 396). Rather, the parent testified that she "wanted to make sure [the district] didn't miss anything" (Tr. p. 411). The parent further testified that she found the May 2011 district psychological evaluation was "accurate" (Tr. p. 426; see Dist. Ex. 9). Under the circumstances, to the extent that the parent seeks an IEE the evidence shows she is not entitled to one because she did not disagree with any of the evaluations conducted by the district.

[14] The Analysis of Comments accompanying the federal regulations implementing the provisions for an IEE state that "[a]lthough it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parents, a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency's cost containment criteria" (Independent Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

VII. Conclusion

In summary, I find that the IHO's determination that the district offered the student a FAPE for the 2011-12 school year must be upheld as it is supported by the hearing record. Additionally, the hearing record does not afford a basis for the parent's request for an IEE. I find that the hearing record demonstrates that the May 2011 CSE considered appropriate evaluative data in developing the student's 2011-12 IEP, and that the district's recommended program, consisting of an 6:1+1 special class in a specialized school, combined with 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 the student's privately-obtained home-based program was appropriate for the student or whether equitable considerations support the parent's 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.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
September 4, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER