The University of the State of New York

The State Education Department
State Review Officer
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No. 12-162

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:
Mayerson & Associates, attorneys for petitioners, Tracey Spencer Walsh, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Children's Academy for the 2011-12 school year. Respondent (the district) cross-appeals from those portions of the IHO's decision which found that the Children's Academy was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parents' requested relief. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a 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

During the 2010-11 school year, the student attended a district integrated co-teaching (ICT) preschool program, and received special education and related services as a preschool student with a disability pursuant to IEPs developed by the Committee on Preschool Special Education (CPSE) (see Tr. pp. 53-55, 112, 137, 218-19, 485-86; see also Dist. Ex. 1 at pp. 1-14; Parent Ex. AA at pp. 1-14). The student's ICT preschool program consisted of 18 students (12 regular education students and 6 special education students), a regular education teacher, a special education teacher, and 2 paraprofessionals; in addition, the student received related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy (see Tr. pp. 53-54, 218-19, 571-72; Dist. Ex. 1 at pp. 1, 14; Parent Ex. AA at pp. 1, 14).

Shortly after the student began attending the district's ICT preschool program in September 2010, the parents completed and submitted an "ASD Nest Program Inquiry Form," dated

September 24, 2010 (see Tr. pp. 112-13, 486-88, 552-56; Dist. Ex. 12-13).[1] The parents indicated on the form that the student currently attended an "integrated classroom" with 18 students (12 regular education students, 6 special education students) (Dist. Ex. 12). In addition, the parents noted that based upon the student's "progress and his current level of development," the "program and ratio such as the A[utism] S[pectrum] D[isorder] Nest may be ideal" for the student and for his development (id.). The parents indicated that they learned about the Nest program from the student's current "site school" as well as from a district administrator (id.; compare Dist. Ex. 12, with Dist. Ex. 13 at p. 1).[2]

In December 2010, the CPSE convened and changed the student's recommended services (see Parent Ex. AA at pp. 1-2, 13-14). The December 2010 CPSE terminated a recommendation for special education itinerant teacher (SEIT) services during summer 2011, and instead, recommended an "integrated program" with related services for summer 2011 and recommended additional OT services by an "outside provider" (id.; see Tr. pp. 492-500; Dist. Ex. 21).

By a letter dated January 31, 2011, the Children's Academy notified the parents of the student's admission for the 2011-12 school year, and provided the parents with an enrollment contract to complete for the student's attendance from September 2011 through August 2012 (see Parent Ex. K at pp. 1-4).[3]

In March 2011, the CPSE reconvened to discuss the student's OT services and to develop an IEP for the remainder of the 2010-11 school year, as well as for July and August 2011 (see Tr. pp. 247-50, 500-01; Dist. Ex. 1 at pp. 1-2, 14). The March 2011 CPSE modified the student's

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[1] A social worker assigned to the district's Nest program (district social worker) described it as a "collaborative team teaching program" for "high-functioning autism" students located within a small number of the district's "community" schools (Tr. pp. 112-13). The district social worker further testified that the Nest program kindergarten classroom consisted of one regular education teacher, one special education teacher, eight regular education students, and four special education students (see Tr. p. 113; see also Dist. Ex. 13 at pp. 1-2). According to the district social worker, students are admitted into the Nest program through a "pretty long process," which started with the completion of the inquiry form, and then proceeded to a classroom observation, evaluations, and the administration of the Autism Diagnostic Observation Schedule (ADOS) to students (Tr. pp. 113-16; see Dist. Ex. 10 at p. 1). The district social worker testified that throughout the admissions' process, "conference[s]" continually occurred to make sure that the student remained appropriate for the Nest program (Tr. p. 114). For the 2011-12 school year, the Nest program located in the district social worker's public school site had a total of "eight seats available"—with four seats in two different classes—for special education students (Tr. pp. 114-15). In this case, the student's Nest program admission's process was completed—and the parents were notified of the student's acceptance into the Nest program—prior to the June 2011 CSE meeting (see Tr. pp. 114-18). The district social worker also testified that the district held an open house for all students and their families accepted into the Nest program (see Tr. pp. 118-20). After the open house, the "next step" in the process was conducting a "home visit" to allow the district social worker and the "teachers" to get a sense of the students in their "most natural and comfortable environment" (Tr. pp. 120-21). The district only scheduled home visits for students accepted into the Nest program (see Tr. p. 121; see also Dist. Exs. 14; 15 at pp. 1-2).

[2] The parents testified that they also learned about the Nest program through conversations with friends and through informal observations of the Nest program students by the student's father, which took place when he was "student teaching" for four months at the same district public school site where the student attended his ICT preschool program and which also housed a Nest program (see Tr. pp. 485-86, 517-18, 549-50; see also Tr. p. 553).

[3] The educational director of the Children's Academy testified that as part of the admissions process, the parents submitted an application during "winter" 2010, and the student's interview took place in either December 2010 or January 2011 (Tr. pp. 448, 473-75).

recommended services by initiating five 60-minute sessions per week of individual speech-language therapy, four 60-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and eight hours per week of SEIT services beginning July 1, 2011 (compare Dist. Ex. 1 at pp. 1-2, 14, with Parent Ex. AA at pp. 1-2, 14).[4]

On June 7, 2011, the CSE convened to conduct the student's "[t]urning 5" conference and to develop an IEP for the 2011-12 school year, which would be implemented beginning September 2011 (see Dist. Ex. 4 at pp. 1, 10; see also Tr. pp. 40-42).[5] Finding the student eligible for special education and related services as a student with autism, the June 2011 CSE recommended a 12-month school year program, integrated co-teaching (ICT) services,[6] and the following related services: one 30-minute session per week of individual speech-language therapy, five 45-minute sessions per week of speech-language therapy in a small group, two 30-minute sessions per week of individual OT, and one 45-minute session per week of OT in a small group (id. at pp. 1, 7-8, 10).[7] The June 2011 CSE developed annual goals to address the student's needs, and recommended adapted physical education and special transportation services for the student (id. at pp. 3-7, 9-10).[8]

By final notice of recommendation (FNR) dated June 9, 2011, the district summarized the special education and related services recommended in the June 2011 IEP, and identified the student's then-current district public school site as the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 5; see also Tr. pp. 518-20).[9]

On June 21, 2011, the parents attended the open house for students accepted into the Nest program, which the district held at the assigned public school site identified in the June 2011 FNR

[4] On March 21, 2011, the parents consented to the provision of the 12-month school year services, which included a handwritten list of services "as of 7/1/11" (see Dist. Exs. 2; 22).

[5] The district special education teacher who attended the June 2011 CSE meeting described the "[t]urning 5" students as transitioning from the "CPSE" to the "CSE" (see Tr. pp. 39-42; Dist. Ex. 4 at p. 13; see also Application of a Student with a Disability, Appeal No. 13-052).

[6] Although not raised as an issue in this proceeding, the June 2011 CSE did not identify a maximum class size related to the recommended ICT services in the June 2011 IEP (see Dist. Ex. 4 at pp. 1-13). According to State regulations, an IEP "shall indicate the recommended special education program and services" and "as appropriate, indicate" the class size (8 NYCRR 200.4[d][2][v][b][2]). State regulations define "class size" as the "maximum number of students who can receive instruction together in a special class or resource room program and the number of teachers and supplementary school personnel assigned to the class" (8 NYCRR 200.1[i]).

[7] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[8] The June 2011 IEP identified the Nest "integrated program" as the "most appropriate classroom setting" for the student (Dist. Ex. 4 at p. 11). At the meeting, the June 2011 CSE "verbally told [the parents] to visit" the student's then-current district public school site as the student's "recommended placement" (Parent Ex. E at p. 1).

[9] The parents testified that they did not receive an FNR "listing the Nest program" prior to the June 2011 CSE meeting, they never received the June 2011 FNR, and the June 2011 FNR listed an incorrect address for the parents (see Tr. pp. 518-19, 523-26, 574, 588-89). However, the parents also testified that the June 2011 CSE "talked about the Nest program at [the assigned public school site] in the IEP meeting" (Tr. pp. 585-86).

(see Parent Ex. E at p. 1; see also Tr. pp. 118-20, 132-33, 519-22, 557-58; compare Parent Ex. E at p. 1, with Dist. Ex. 5).

By letter dated June 24, 2011, the parents notified the district that based upon their visit on June 21, 2011, the "placement and program" were not appropriate for the student because the "proposed placement" did not offer "adequate 1:1 teaching opportunities," the "proposed placement" did not provide "1:1" speech-language therapy or OT, and the staff lacked adequate training to provide the student with the instructional support he required (Parent Ex. E at p. 1). Consequently, the parents notified the district of their intentions to place the student in an "appropriate educational placement" for the 2011-12 school year at district expense (id.). In addition, the parents indicated that they would seek prospective funding for the costs of the student's related services listed in the letter (id.).

On June 30, 2011, the district social worker sent an e-mail to the parents to schedule a home visit with the student on July 19, 2011 (see Dist. Ex. 15 at p. 2). In a follow-up e-mail sent on July 11, 2011, the district social worker asked the parents to confirm the student's home visit rescheduled for July 21, 2011 (see Dist. Ex. 14). Responding via e-mail on the same day, the parents advised the district social worker that, "after much thought," the Nest program was not the "most suitable one" for the student at this time (Dist. Ex. 14). On July 18, 2011, the parents sent an e-mail to the district social worker indicating that they would contact her "this week" (see Dist. Ex. 15 at p. 1).

By a letter dated August 15, 2011, the parents indicated that in a July 24, 2011 letter they previously advised the district that the "proposed IEP" was not appropriate for the student (see Parent Ex. F at p. 2). The parents further indicated that, to date, the district had not "reconvened" a CSE meeting for the student, and they had not received an FNR (id.). Absent an appropriate "placement [and] program" for the student, the parents notified the district that the student would attend the Children's Academy for the 2011-12 "twelve month" school year (id.). The parents advised the district that they intended to seek prospective funding for the costs of the related services listed in the letter, and they intended to seek reimbursement for the costs of the student's tuition expenses from the district (id.).

On August 30, 2011, the district social worker sent an e-mail to the parents and requested that they send an e-mail to formally withdraw the student from the Nest program if the student would not be attending the program (see Dist. Ex. 15 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated September 1, 2011, the parents alleged that the district failed to offer the student a FAPE for the 2011-12 school year, and enumerated approximately 77 allegations in support of their claim (see Parent Ex. A at pp. 1-10). More specifically, the parents asserted that the June 2011 CSE was not properly composed because the June 2011 CSE did not include a regular education teacher or an additional parent member (id. at pp. 3, 7). The parents also asserted that the June 2011 CSE impermissibly engaged in predetermination in the "IEP development process," which deprived the parents of the opportunity to meaningfully participate (id. at p. 3). In addition, the parents alleged that the June 2011 CSE failed to "timely develop critical assessment reports" to determine the student's present levels of performance, and the CSE failed to consider the parents' privately obtained evaluations (id. at pp. 2-3 [emphasis in orginal]). Turning to the annual goals, the parents asserted that the June 2011

CSE did not develop the annual goals at the CSE meeting with the parents' participation, the annual goals did not include objective and appropriate "[m]ethods of [m]easurement," the annual goals did not include short-term objectives, and the annual goals were generic (id. at pp. 3-4).

Next, the parents asserted that the June 2011 CSE failed to conduct a functional behavioral assessment (FBA), develop a behavioral intervention plan (BIP), and generate annual goals to address the student's interfering behaviors (see Parent Ex. A at p. 3). In addition, the parents alleged that the June 2011 CSE failed to recommend parent counseling and training in the June 2011 IEP (id.). The parents alleged that the June 2011 CSE failed to adequately address the student's need for "1:1 support," the CSE failed to provide the student with "consistent 1:1 teaching support throughout the school day;" and the CSE failed to discuss, recommend, or develop a transition plan in light of the student's difficulties with "transition and generalization" (id. at pp. 4-5 [emphasis in original]). The parents further asserted that the June 2011 CSE failed to recommend extended-day services for the student to generalize skills, and the CSE failed to recommend any special education transportation for the student (id. at pp. 6-7).

Turning to the assigned public school site, the parents alleged that they did not receive an FNR, and upon information and belief, the assigned public school site could not implement the June 2011 IEP (see Parent Ex. A at pp. 5, 7-8).

With respect to the student's unilateral placement the Children's Academy, the parents alleged that it was appropriate and reasonably calculated to enable the student to receive educational benefits (see Parent Ex. A at p. 8). With regard to equitable considerations, the parents alleged that they cooperated in good faith and provided appropriate notice, and thus, equitable considerations did not preclude relief (id.). As relief, the parents requested reimbursement or prospective funding for the costs of the student's tuition at the Children's Academy, as well as the identified related services, monthly interdisciplinary provider meetings, applied behavioral analysis (ABA) services, and transportation services (id. at p. 9).

B. Impartial Hearing Officer Decision

On December 5, 2011, the parties proceeded to the impartial hearing, which concluded on February 10, 2012 after four days of proceedings (see Tr. pp. 1-603). By decision dated July 12, 2012, the IHO concluded that the district offered the student a FAPE for the 2011-12 school year, and thus, the IHO denied the parents' request for reimbursement of the costs of the student's tuition at the Children's Academy for the 2011-12 school year (see IHO Decision at pp. 23-28, 30-31). Initially, the IHO rejected the parents' argument that the district failed to offer a "placement" to the student due to the parents' alleged nonreceipt of the FNR (id. pp. 24-25). The IHO found the parents' "actions, and the content of their letters, clearly demonstrate[d] their understanding of the program and placement offered" to the student (id. at p. 25). As for the parents' concerns about the student's transition from a preschool setting to a kindergarten setting, the IHO noted that had the student attended the Nest program for kindergarten at the assigned public school site, the student would have remained at the "same" public school site with some of the "same students" from the 2010-11 school year, as well as "familiar staff," and the student's Nest program kindergarten classroom was "located across the hall from his pre-school classroom" (id. at pp. 25-26). Next, the IHO noted that the although the parents' initial inquiry into the Nest program in September 2010 did not "bind" them to enroll the student if accepted, or to Hope for the appropriateness of the program," the evidence in the hearing record depicted a collaborative process between the district and the parents and an agreement among all involved with respect to

the following: the Nest program was appropriate, the parents "wanted" the student to attend the Nest program, the student was "accepted" into the Nest program, the district held an open house for those students "accepted" into the Nest program, and the parents "accepted the placement" of the Nest program (id. at pp. 26-27).

With respect to the parents' contention that the district failed to offer the student a FAPE for the summer 2011 portion of the 2011-12 school year because the June 2011 CSE did not recommend a school-based program, the IHO found that the parents agreed to the March 2011 CPSE's recommendations for the student to only receive SEIT services and related services in summer 2011 based upon their signature, which confirmed their understanding of and their consent to the services listed for summer 2011 (see IHO Decision at p. 27). Additionally, the IHO found no evidence in the hearing record demonstrating how or why the student required a school-based program for summer 2011 (id.). Similarly, the IHO concluded that the hearing record did not contain any evidence to support the parents' assertion that the student required "additional after-school services" (id. at pp. 27-28).

As a result of the foregoing, the IHO concluded that the "IEP, the program recommendation, and placement offered" were reasonably calculated to enable the student to receive educational benefits in the LRE and were appropriate to meet the student's "individual special education needs" (IHO Decision at p. 28).

Having determined that the district offered the student a FAPE in the LRE for the 2011-12 school year, the IHO nonetheless addressed the appropriateness of the parent's unilateral placement of the student at the Children's Academy and equitable considerations (see IHO Decision at pp. 28-31). With regard to the unilateral placement, the IHO found that although the student received "extra intensive attention to address his special education needs," the evaluative information did not demonstrate that the student required a program as "intensive and restrictive" as provided at the Children's Academy (id. at pp. 28-29). However, aside from the "highly restrictive setting," the IHO found that the Children's Academy addressed the student's special education needs in an "individually tailored manner" and the student made progress (id. at pp. 29-30).[10] Finally, the IHO found no evidence that equitable considerations would either preclude or diminish an award of tuition reimbursement in this case (id. at pp. 30-31).[11]

[10] Although the IHO considered the restrictiveness of the Children's Academy as a factor in determining whether it was an appropriate unilateral placement, the Second Circuit recently held that while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836-37 [2d Cir. 2014]; Frank G v. Bd. of Educ. ., 459 F.3d 356, 364 [2d Cir. 2006]; Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000] [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 552 [S.D.N.Y. 2010]; W.S., 454 F. Supp. 2d at 138; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]).

[11] The IHO also noted in the decision that although the district delayed the provision of transportation services at the "beginning of the school year," the parents were not seeking "any transportation costs from the [district]" (IHO Decision at p. 23).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. Generally, the parents argue that the IHO ignored or "glossed over" evidence in the hearing record, and did not conduct a "careful and thorough review." More specifically, the parents assert that the district admitted it did not conduct any "formal assessments or evaluations" of the student prior to the June 2011 CSE meeting. The parents argue that the June 2011 CSE impermissibly predetermined the duration of the recommended related services, and further, the June 2011 CSE changed the student's related services' recommendations without the participation of the student's related services providers at the June 2011 CSE meeting, and thus, the CSE was not properly composed. Next, the parents contend that the June 2011 CSE failed to conduct an FBA and develop a BIP despite evidence of the student's interfering behaviors. The parents also contend that the IHO ignored—and failed to analyze—the recommendations in the parents' privately obtained evaluation report, which mentioned additional after-school services for the student. The parents argue that the June 2011 CSE failed to consider or recommend a 12-month school year program that included a school-based component for summer 2011. The parents also object to the IHO's conclusion that the evidence in the hearing record did not support a finding that the student required a school-based program for summer 2011.

Next, the parents contend that the IHO "overlooked the myriad failures" at the June 2011 CSE meeting, including the failure to discuss SEIT services, extended-day services, parent counseling and training, the student's transition from "one program to another," an FBA and the development of a BIP, transportation services, and no opportunity to meet with a "placement officer."[12] The parents allege that the district admitted that the annual goals in the June 2011 IEP did not include short-term objectives. The parents also allege that they did not receive an FNR, and they "contest" the IHO's determination rejecting their argument that the district failed to offer the student a timely placement. Moreover, the parents assert that the district failed to provide prior written notice and that the district was required to provide written notice of the student's placement. The parents argue that, contrary to the IHO's findings, a second FNR received by the parents was relevant and constituted an admission by the district that the "initial placement" was not appropriate. The parents also argue that the district failed to timely provide special education transportation, and the June 2011 IEP did not include a recommendation for parent counseling and training. With respect to the assigned public school site, the parents assert that the student would not receive sufficient "1:1" attention from the teacher to support his needs, and the student was not capable of working independently for the length of time expected within the classroom. Finally, the parents argue that the IHO failed to address additional allegations in the due process complaint notice, including that the June 2011 CSE predetermined the related services' recommendations, the June 2011 CSE was not properly composed, and the June 2011 CSE failed to consider the

[12] Other than baldly asserting that the June 2011 CSE failed to discuss transportation services and the district delayed in providing such services, the parents do not advance any arguments regarding how either constituted a procedural inadequacy that would result in finding that the district failed to offer the student a FAPE for the 2011-12 school year, as the parents do not allege that the failure to discuss or timely provide the student with special education transportation impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). This is especially true when the June 2011 CSE recommended specialized transportation services for the student (Dist. Ex. 4 at pp. 10-11).

parents' privately obtained evaluations. The parents also argue that either alone, or cumulatively, the noted violations resulted in the district's failure to offer the student a FAPE.[13, 14]

Turning to the IHO's conclusions regarding the student's unilateral placement at the Children's Academy, the parents take issue with the IHO's "statement" that based upon the evidence the student did not require a "'program and placement as intensive and restrictive'" as the Children's Academy for the 2011-12 school year. The parents agree with the IHO's ultimate finding, however, that the Children's Academy was appropriate, and also with the IHO's determinations with regard to equitable considerations.

In an answer, the district responds to the parents' allegations and argues to uphold the IHO's finding that the district offered the student a FAPE for the 2011-12 school year.[15] As a cross-appeal, the district alleges that the IHO erred in finding that the Children's Academy was an appropriate unilateral placement, and the IHO erred in finding that equitable considerations weighed in favor of the parents' requested relief. The district also contends that the parents were not entitled to prospective or direct funding of the costs of the student's tuition. In a reply and answer to the district's cross-appeal, the parents generally reject the district's assertions.[16]

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[13] The parents submitted a memorandum of law with the petition for review (see Parent Mem. of Law at pp. 1-20). To the extent that the parents or their attorney incorporated or argued additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year solely within the memorandum of law, the parents and their attorney are reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Dep't of Educ., Appeal No. 12-131). State regulation directs 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 petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In this instance, the parents' allegations in the petition are not a model of clarity and come dangerously close to failing to comply with practice regulations that require the petition to "clearly indicate the reasons for challenging the [IHO's] decision" and to identify the "findings, conclusions and orders to which exceptions are taken" (see 8 NYCRR 279.4[a]). While not generally the practice of SROs on appeal, the circumstances of this case required—at times and as noted below—guidance from the parents' memorandum of law in order to clarify the parents' position on several issues. The parents and their attorney are cautioned that filing similarly deficient pleadings in the future may result in a dismissal for failure to comply with practice regulations.

[14] As noted above, the parents' due process complaint notice enumerated approximately 77 allegations in support of their assertion that the district failed to offer the student a FAPE for the 2011-12 school year; however, even a brief review of the IHO's decision reveals that the IHO did not address all 77 allegations in the due process complaint notice within the decision (compare IHO Decision at pp. 1-31, with Parent Ex. A at pp. 1-10). Thus, to the extent that the parents took the time to affirmatively assert in the petition for review that the IHO failed to address three particular issues—but did not otherwise affirmatively assert with the same particularity that the IHO failed to any other remaining issues in the due process complaint notice—as additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year, these issues have been deemed abandoned and will not be considered in this decision.

[15] As further evidence of the lack of clarity in the parents' petition, the district formulated its answer in direct response to the arguments set forth in the parents' memorandum of law as opposed to the petition itself (compare Ans. ¶¶ 36, 40-70, with Parent Mem. of Law at pp. 4-16).

[16] To the extent that the parents' reply exceeds the permissible scope, it will not be considered (see 8 NYCRR 279.6 [limiting a reply to any "procedural defenses interposed by respondent or to any additional documentary evidence served with the answer"]).

V. Applicable Standards

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

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

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

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

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

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

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

VI. Discussion

A. CSE Process

1. June 2011 CSE Composition

The parents assert that the June 2011 CSE was not properly composed due to the absence of the student's related services' providers. The district rejects the parents' contentions, and argues that the June 2011 CSE was properly composed. A review of the evidence in the hearing record does not support the parents' assertion.

At the time of the June 2011 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]).[17] The IDEA and State and federal regulations also provided that in addition to the required special education teacher or, where appropriate, special education provider of the student, the CSE may include "other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate" (8 NYCRR 200.3[a][1][ix]; see 20 U.S.C § 1414[d][1][B][vi]; 34 CFR 300.321[a][6]). As noted above, 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]).

In this case, the hearing record indicates that the following individuals attended the June 2011 CSE meeting: a district school psychologist (who also served as the district representative), a district special education teacher, the student's then-current preschool special education teacher (preschool special education teacher), the student's then-current preschool regular education teacher, the student's then-current physical therapist, an additional parent member, and the parents (see Dist. Ex. 4 at p. 13; see also Tr. pp. 42-43, 216-20, 505-06, 571).[18] Here, the attendance of

[17] The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

[18] The student's then-current preschool teacher, regular education preschool teacher, and physical therapist all attended the June 2011 CSE meeting via telephone (see Dist. Ex. 4 at p. 13).

the student's then-current physical therapist, alone, significantly weakens the parents' assertion regarding the composition of the June 2011 CSE.

Nevertheless, the parents argue that the June 2011 CSE was not properly composed because the CSE changed the recommendations for the student's speech-language therapy services and OT services without having any individuals at the CSE meeting properly credentialed in either of these related services' areas. Initially, the parents do not cite to any legal authority requiring the presence of specific related services' providers at a CSE meeting in order to modify related services' recommendations in a student's IEP. In addition, the May 2011 meeting notice inviting the parents to the June 2011 CSE meeting advised that the parents could bring "other individuals" with "knowledge or special expertise" about the student to the meeting, and the hearing record does not indicate that the parents availed themselves of this provision (see Dist. Ex. 3 at p. 1; see also Tr. pp. 1-603; Dist. Exs. 1-26; Parent Exs. A-K; O; V-Z; AA-DD; IHO Exs. I-II).

Next, even if such authority existed, the district special education teacher who attended the June 2011 CSE meeting testified that the June 2011 CSE modified the student's speech-language therapy services and OT services based upon information obtained from progress reports provided by the student's then-current occupational therapist and speech-language therapist, and in direct response to the parents' requests and concerns (see Tr. pp. 45-47, 56-58; Dist. Exs. 7 at pp. 1-4; 9 at pp. 1-5). The district special education teacher testified that although the parents were "concerned" about the recommended speech-language therapy services, the April 2011 speech-language progress report revealed that the student's language skills fell within the average range—and therefore, the June 2011 CSE only recommended one additional 30-minute session per week of individual speech-language therapy—in addition to the speech-language therapy the student offered through the Nest program (four 45-minute sessions per week in a small group) (see Tr. pp. 57-58, 75-78; Dist. Ex. 7 at pp. 1-4).[19] When the parents raised concerns about the recommended speech-language therapy services, the June 2011 CSE attempted to call the student's then-current speech-language provider, but the provider was not available (see Tr. pp. 78-79). Additionally, the district special education teacher testified that the June 2011 CSE recommended two 30-minute sessions per week of individual OT services—in addition to the OT services offered through the Nest program (one 45-minute session per week of OT in a small group)—based upon the parents' concerns and the information provided in the January 2011 OT progress report (see Tr. pp. 56-57, 79; Dist. Ex. 9 at pp. 1-5).[20]

Thus, based upon the evidence in the hearing record, it is unclear how, if at all, the absence of either a speech-language provider or an OT provider at the June 2011 CSE meeting constituted a procedural violation, or moreover, constituted a procedural violation that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415 [f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5 [j][4]). Rather, the evidence demonstrates that even if the

[19] The April 2011 speech-language progress report recommended the following as continued speech-language therapy services for the student in order to "progress to his highest potential:" one 60-minute session per week of individual speech-language therapy and two 60-minute sessions per week of speech-language therapy in a small group (see Dist. Ex. 4 at p. 3).

[20] The January 2011 OT progress report recommended the following as continued OT services in order for the student to improve his ability to "be calm and alert and attend in the class:" three 60-minute sessions per week of individual OT (see Dist. Ex. 9 at p. 5).

June 2011 CSE was not properly composed due to the absence of these specific related services' providers, their absence was mitigated because the June 2011 CSE had sufficient access to specific information about the student's speech-language and OT needs through the April 2011 speech-language progress report and the January 2011 OT progress report in order to make reasonable recommendations in these areas (see R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *6 [S.D.N.Y. Mar. 26, 2014]).

2. Predetermination/ Parental Participation

The parents assert that the June 2011 CSE impermissibly predetermined the duration and frequency of the related services recommended in the June 2011 IEP. In the memorandum of law, the parents expanded this argument to assert that staff discussions held prior to the June 2011 CSE constituted impermissible predetermination of the student's program recommendation and the finalization of the June 2011 IEP after the CSE meeting impeded the student's right to a FAPE and significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE. The district rejects the parents' contentions. A review of the evidence in the hearing record does not support the parents' assertions.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 210 Fed. App'x 1, 2006 WL 3697318, *1 [D.C. Cir. Dec. 6, 2006]).[21]

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] [noting that "predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent.

[21] "'[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F v. New York City Dep't of Educ.., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [noting that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506-07 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

A review of the hearing record indicates that the district special education teacher met with the district school psychologist prior to the June 2011 CSE meeting to discuss the student; to review reports, including the district school psychologist's classroom observation of the student; and to discuss the "possible recommendation" for the 2011-12 school year (see Tr. pp. 41, 84).[22] In reaching the decision to recommend the ICT/Nest program, the hearing record indicates that the June 2011 CSE also considered a general education setting with related services as a placement for the student, but rejected it because it did not address all of the student's needs and was not "restrictive enough" (Tr. pp. 59-60; see Dist. Ex. 4 at p. 11). In addition, the June 2011 CSE also considered a special class placement, but rejected this option as overly restrictive (id.). At the June 2011 CSE meeting, the district school psychologist proposed an "integrated class" for the student, but because the ICT setting could include "up to 25 students," the June 2011 CSE rejected this option as "too large" for the student (Tr. p. 60). The district special education teacher testified that as a result of the discussions regarding a placement option, the June 2011 CSE agreed that the "mini inclusion class" offered through the ICT/Nest program "would be ideal for [the student]" (Tr. pp. 59-61).

With respect to a "placement" discussion at the June 2011 CSE meeting, the parents' testimony confirmed that the June 2011 CSE proposed "settings and programs that might be appropriate" for the student (Tr. p. 513). In addition, the parents admitted that they had the "opportunity to voice [their] opinion with regards to what type of program [they] thought would be appropriate" for the student, and the student's teachers discussed his "deficits and needs" (Tr. pp. 570-72). The parents further testified that they expressed their concern that the student required a "small, structured environment" at the June 2011 CSE meeting because the parents were concerned about the size of the student's class "going forward" given that he was currently attending a classroom with 18 students (Tr. pp. 572-73). In addition, the parents testified that

[22] To the extent that the district social worker testified that she spoke with the district school psychologist before the June 2011 CSE meeting with an eye toward making the student's "IEP fit, somewhat fit the Nest program," the district is reminded that an IEP is typically "developed in a particular sequence" so that "information considered and discussed in each step provides the basis for the next step" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 9, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf; see also Tr. p. 118).

"everybody admitted that he needed a small classroom setting" at the June 2011 CSE meeting (Tr. p. 574).

With regard to finalizing or formalizing the student's IEP after the conclusion of the June 2011 CSE meeting, the hearing record indicates that the district school psychologist and the district special education teacher relied upon meeting "minutes" taken by the district school psychologist, "conversation[s] with the parent[s] and the teachers," and "reports" in order to complete the June 2011 IEP (Tr. pp. 43, 69-71).

Next, with respect to the related services recommendations, the evidence in the hearing record indicates that in addition to the speech-language therapy and OT services programmatically offered through the ICT/Nest program, the June 2011 CSE added one 30-minute session per week of individual speech-language therapy services to the IEP, as well as two 30-minute sessions per week of individual OT services to the IEP to directly address concerns expressed by the parents at the June 2011 CSE meeting (see Tr. pp. 52-53, 56-58).

Based upon the foregoing, the evidence in the hearing record supports a finding that although the district special education teacher and the district school psychologist discussed the student's possible placement recommendation prior to the June 2011 CSE meeting—and may have arrived at the meeting with a pre-formed opinion regarding the best course of action for the student—the June 2011 CSE did not merely determine that the ICT/Nest program was appropriate for the student and abruptly end the discussion. Rather, the evidence reveals that the June 2011 CSE maintained the requisite open mind by discussing other program options and listening to the parents' concerns, as well as reconsidering related services recommendations (see Tr. pp. 60-61). In addition, the evidence reflects that the parents had the opportunity to express their concerns regarding the placement recommendation and did not express any disagreement with the June 2011 CSE's recommendation for the ICT/Nest program at that time.

3. Evaluative Information and Present Levels of Performance

The parents assert that the June 2011 CSE failed to conduct any formal assessments or evaluations of the student prior to the June 2011 CSE meeting, and as a result, the June 2011 CSE could not develop the present levels of performance or an appropriate IEP for the student. The district rejects the parents' contentions. A review of the evidence in the hearing record does not support the parents' assertion.

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]). However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 295 F. Supp. 2d 570, 578-82 [S.D.N.Y. 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to

exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *7-*9 [S.D.N.Y. Oct. 12, 2011]).

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 Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the district special education teacher testified that prior to the June 2011 CSE meeting she collected the following evaluative information pertaining to the student: a November 2010 neurodevelopmental evaluation report (November 2010 evaluation), a January 2011 OT progress report, an April 2011 speech-language progress report, a May 2011 ADOS administration report (May 2011 ADOS), a June 2011 PT annual review plan, and undated progress notes created by the preschool special education teacher (see Tr. pp. 38-39, 45-47; Dist. Exs. 6-11).

In November 2010, the parents privately obtained a neurodevelopmental evaluation of the student, which assessed his physical and neurological status, cognitive functioning, visual motor functioning, academic readiness skills, adaptive functioning, and social/emotional functioning (see Dist. Ex. 11 at pp. 2-6). Generally, evaluator noted that the student made direct eye contact, was socially appropriate, and demonstrated fine and gross motor skills—including tone—that fell within normal limits (id. at pp. 2-3). With respect to communication, the evaluator characterized the student's speech as "normal" in tone, rate, and volume; however, he demonstrated "poor" expressive organization, pragmatic skills, and articulation (id. at p. 3). Socially, the student did not use spontaneous language, but he did use language to talk to himself while working and to make requests (id.). According to the November 2010 evaluation, the student benefitted from simplified instructions in order to understand "more complex language" (id. at p. 3). With regard to socialization and play skills, the student's eye contact was variable, he demonstrated a clear desire to please, and responded positively to verbal praise and "'high fives'" for his efforts (id.).

During a break, the student played briefly (id.). The evaluator described the student's attention as "good" initially, but after about an hour, the student's attention "waned" (id.). Similarly, upon returning to the table after his break, the student became fidgety, grabbed at test items, stood beside the table, and rubbed his arms on the wall (id.).

As part of the November 2010 evaluation, an administration of the Stanford Binet Intelligence Scales—Fifth Edition (SB-5) to the student revealed that his overall cognitive functioning fell within the average range (see Dist. Ex. 11 at p. 3). In particular, the student achieved the following standard scores: verbal IQ, 83 (low average); nonverbal IQ, 101 (average); and full-scale IQ, 92 (average) (id. at pp. 3, 8). According to the evaluator, the student's "score was not a good statistical representation of his skills" (id. at p. 3). In addition, the evaluator indicated that the student's nonverbal IQ was "significantly stronger" than his verbal IQ, and testing results revealed "significant scatter" among the student's individual subtest scores in both domains that ranged from the low average range to the high average range (id. at pp. 3-4, 8). For example, the student achieved a scaled score in the "high average" range on the nonverbal fluid reasoning subtest, while his performance on the verbal fluid reasoning subtest yielded a scaled score within the "very low" range (id. at pp. 4, 8). Both the student's nonverbal and verbal knowledge subtest scores fell within the "average" range (id.).[23] On the quantitative reasoning subtest, the student achieved scaled scores in the "high average" range on both the nonverbal and verbal measures (id.). Regarding the visual-spatial processing subtest, the student achieved scaled scores in the "low average" range on both the nonverbal and verbal measures, while on the nonverbal and verbal working memory subtests, the student's scaled scores fell within the "average" range (id.).

In addition to the SB-5, the evaluator administered the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to the student to assess his academic skills (see Dist. Ex. 11 at pp. 5, 9). Testing results yielded the following standard scores: math problem solving, 111 (high average); listening comprehension, 80 (low average); and oral expression, 94 (average) (id. at p. 9). Given the student's age at that time, "normative data" for reading skills was not available; however, the student easily recognized a number of words, including "'don't,' 'shop,' and 'other'" (id. at p. 5). Next, an administration of the Beery-Buktenica Developmental Test of Visual Motor Integration, Fifth Edition (VMI-V) to the student yielded a standard score that fell within the "high average" range on the visual perception subtest, while his standard score on the motor coordination subtest fell within the "low average" range (id. at pp. 5, 10). In addition, the student's graphomotor integration skills fell within the "average" range (id.).

To assess the student's adaptive behavior skills as part of the November 2010 evaluation, the evaluator administered the Vineland Adaptive Behavior Scales, Second Edition (VABS) with the parents serving as informants (see Dist. Ex. 11 at pp. 5-6, 10). Based upon the parents' responses, the student's overall adaptive behavior skills fell within the "[m]oderately low" range (id. at pp. 5-6, 10). With respect to communication skills, the evaluator reported the student's receptive and expressive language skills as "low," and the student's written communication skills as "high" (id. pp. 5, 10). The evaluator reported the student's personal skills as "moderately low"

[23] The evaluator also administered a supplemental assessment of language skills to the student, which yielded standard scores that fell within the "average" range for both the receptive and expressive one-word picture vocabulary tests; however, the evaluator described the student's "pattern of passes and failures" on this task as "erratic" (Dist. Ex. 11 at pp. 4, 9).

and his interpersonal relationship skills as "low" (id.). Similarly, the evaluator characterized the student's play and leisure time skills as "low" and his fine motor skills as "moderately low" (id.).

Overall, the November 2010 evaluation report indicated that the student presented with "variable cognitive skills, strong math and reading skills, expressive and receptive language difficulties, moderately low adaptive behaviors and low average fine motor coordination" (Dist. Ex. 11 at p. 6). At that time, the evaluator recommended the following: a 12-month school year program; enrollment in a "small, highly structured classroom" for students with "language-learning disabilities" with a "low student-to-teacher ratio;" five 60-minute sessions per week of speech-language therapy services; one 45-minute session per week of social skills training or play therapy; two 30-minute sessions per week of school-based OT services and three 60-minute sessions per week of home-based OT services; two 30-minute sessions per week of PT services; five hours per week of SEIT services; monthly interdisciplinary meetings for providers and parents; and follow-up within one year or at the parents' request to include a speech-language evaluation (id. at p. 7).

Reviewing the June 2011 IEP reveals that the June 2011 CSE incorporated information directly obtained from the November 2010 evaluation—namely, the testing results from the SB-5 and the VABS—within the present levels of performance and individual needs section of the IEP (compare Dist. Ex. 4 at pp. 1-2, with Dist. Ex. 11 at pp. 8, 10).

According to the January 2011 OT progress report, the student exhibited challenges with processing and integrating sensory information, attention span, distractibility, muscle tone, upper body and trunk strength, fine motor skills, and hand dominance (see Dist. Ex. 9 at p. 5). The evaluator indicated that the student made "good gains" with regard to "regulation and his ability to follow directions and transitions between activities in OT sessions" (id.). In addition, the evaluator noted that the student could build a block tower and copy three shapes (id.). The evaluator recommended three 60-minute sessions per week of school-based OT services to improve the student's ability to "be calm and alert and attend in class" (id.). The January 2011 OT progress report also included annual goals to address the student's needs (id.).

A review of the June 2011 IEP indicates that the June 2011 CSE included information from the January 2011 OT progress report concerning the student's challenges with sensory processing and fine motor skills in the present levels of physical development section of the IEP (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 9 at p. 5). Additionally, the annual goals in the June 2011 IEP addressed the student's needs identified in the January 2011 OT progress report, including graphomotor skills, attention, regulating sensory input, and core and upper body strength (compare Dist. Ex. 4 at pp. 4-5, with Dist. Ex. 9 at pp. 1-5).

According to the April 2011 speech-language progress report, the student exhibited "significant delays in social skills, focus and attention span, variable eye contact," and "fair speech intelligibility in connected speech" (see Dist. Ex. 7 at p. 1). The April 2011 speech-language progress report also noted that, at times, the student demonstrated "jargon, echolalia, and 'learned phrase[s],' which he produced in an appropriate context (id.). An administration of the Preschool Language Scale Fourth Edition (PLS-4) to the student yielded standard scores in auditory comprehension and expression communication that fell "within the mean" (id. at pp. 1-2). However, notwithstanding these scores, the evaluator noted that the student demonstrated "scattered weaknesses in receptive as well as expressive language development" (id. at p. 2). The evaluator also described the student's progress in both receptive and expressive language skills (id. at p. 3). According to the April 2011 speech-language progress report, the student demonstrated

difficulty with pragmatic and social skills, such as greeting strangers too closely, maintaining an appropriate distance when socializing with peers or adults, attending to pretend objects, and demonstrating appropriate play with toys (id.). Overall, the evaluator noted that while the student demonstrated "many solid skills," he continued to demonstrate difficulty with "understanding and processing longer utterances, processing complex language structures, following multistep directives, and responding to complex 'Wh' question forms" (id. at p. 3).

A review of the June 2011 IEP reflects—consistent with the information in the April 2011 speech-language progress note—the student's difficulties with receptive and expressive language, social interactions, and communication within the present levels of performance and individual needs section of the IEP, as well as within the annual goals in the IEP (compare Dist. Ex. 4 at pp. 1-2, with Dist. Ex. 7 at pp. 1-4).

In May 2011, the district school psychologist who attended the June 2011 CSE meeting administered the ADOS to the student to assess his "communication and reciprocal social interaction skills," noting that his parents "applied for him to be considered" for the Nest program (Dist. Ex. 10 at p. 1). With respect to communication, the student spoke in sentences and used an appropriate volume and intonation, but he did not exhibit any "[i]mmediate and delayed echolalia" (id.). The student "spontaneously" offered "some information" to the evaluator; however, he did not ask the evaluator about her "ideas, experience or reactions" and only asked her fact-based questions (id.). At that time, the student exhibited difficulty with abstract verbal tasks, describing events outside the immediate environment when provided specific probes, and reciprocity in conversation (id.). During the evaluation, the student used "some gestures in a communicative manner" (id.). With regard to reciprocal social interaction, the student demonstrated "relatively appropriate eye contact" and sporadic facial expressions directed at the evaluator (id. at p. 2). Further, although the student could connect language and nonverbal communication, his actions appeared "somewhat awkward" when, for example, he requested out-of-reach test items from the evaluator (id.). As a result, the evaluator opined that the student's use of delayed eye contact to "modulate the social interaction" reflected the student's difficulty with joint attention (id.).

Next, the evaluator indicated that the student remained content to play by himself without responding to "many" of the evaluator's "social overtures" (Dist. Ex. 10 at p. 2). The student also demonstrated difficulty communicating his "understanding of emotions and social relationships," and he could not describe "abstract concepts," such as friendship and feelings, and exhibited "limited insight in to his role in relationships with others" (id.). Further, the student could not demonstrate an understanding of or an interpretation of facial expressions depicted in books and "appeared unaware of how to interpret these non-verbal cues" (id.).

As part of the May 2011 ADOS, the district school psychologist found that the student exhibited "limited imagination and creativity" (see Dist. Ex. 10 at p. 2). For example, the student used toys in a "very concrete manner," and could not create a story with the toys (id.). In addition, the student did not evidence any "unusual sensory interests or restricted topics of interests," "self-stimulatory behaviors, compulsions, or rituals" during the evaluation (id.). However, the student did exhibit difficulty "sitting still" and he "often" got up from his chair, walked around the room, and looked out the window (id.). According to the evaluator, the student required "considerable cues and prompts" to attend to tasks presented (id.). The district school psychologist concluded the student's performance during the assessment was consistent with "children diagnosed with [a]utism" (id.).

A review of the June 2011 IEP reflects—consistent with the information in the May 2011 ADOS—the student's difficulties with limited imagination and creativity, using toys in a very concrete manner, and inability to create a story with the toys (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 10 at p. 2). Consistent with the May 2011 ADOS, the June 2011 IEP reflected the student's "active" and at times, distracting behaviors, as well as the absence of any unusual sensory interests or restricted topics of interest, self-stimulatory behaviors, compulsions, or rituals during the evaluation (compare Dist. Ex. 4 at pp. 1-2, with Dist. Ex. 10 at p. 2). The June 2011 IEP also indicated that the student required considerable cues and prompts to attend to tasks presented (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 10 at p. 2).

According to the June 2011 PT annual review plan, the student ascended and descended stairs using alternating feet; he could run, gallop, skip, and hop, as well as catch, throw, and kick a ball; and he met all of his annual goals related to PT (see Dist. Ex. 8 at pp. 1-2; see also Tr. pp. 56-57, 94). In the June 2011 PT annual review plan, the physical therapist described the student's improved mobility, school navigation, and gross motor skills (see Dist. Ex. 8 at p. 1). Based upon the student's improved mobility within the school environment and his performance on Gross Motor Function Classification System (GMFCS), the Gross Motor Functional Measure (GMFM), and the School Function Assessment (SFA), the physical therapist recommended terminating the student's PT services for the 2011-12 school year (see Dist. Ex. 8 at pp. 1-2).[24]

A review of the June 2011 IEP reflects information obtained from the June 2011 PT annual review plan within the physical development section of the IEP, which noted that the student performed at the "most independent level possible on the [SFA]," he made "great progress," and he no longer required PT services for his gross motor skills (compare Dist. Ex. 8 at pp. 1-2, with Dist. Ex. 4 at p. 2).

Finally, the June 2011 CSE had undated progress notes—as well as the attendance and participation of the preschool special education teacher who prepared the progress notes—to develop the June 2011 IEP (see Tr. pp. 44-46, 216-18, 220-21; compare Dist. Ex. 4 at p. 13, with Dist. Ex. 6).[25] According to the progress notes, the student enjoyed interacting with peers and adults; he could name colors, shapes, and body parts; and he could "recognize and name all upper and lowercase letters of the alphabet" (Dist. Ex. 6). An administration of the Brigance Diagnostic Inventory of Early Development to the student revealed "age-appropriate" levels in general knowledge and comprehension; in addition, the progress notes indicated that, at that time, the student could read at a "pre-primer" level (id.). The student also achieved "age-appropriate" levels for quantitative concepts—such as "little-big" and "slow-fast"—and for directional or positional concepts—such as "up-down" and "in-out" (id.). The student could also provide "one or two word explanations" when asked "what to do in certain situations or tell about an object's function" (id.). With respect to reading, the student enjoyed listening to and looking at books, and he could answer "concrete questions" about story events (id.).

[24] Although the parents expressed concern at the June 2011 CSE meeting about the student's low muscle tone, the physical therapist told the parents that the student would "always have the low muscle tone," but it did not interfere with the student academically (Tr. p. 94, see Dist. Ex. 8 at p. 2).

[25] Given the student's birthdate and the student's noted age at the time of the report, it appears that the preschool teacher prepared the undated progress notes in or around January 2011, and not in May 2010 as indicated by the district special education teacher's testimony (compare Dist. Ex. 6, with Tr. pp. 46-47).

The preschool teacher's progress notes also indicated that the student could write his name in "capital letters," copy simple shapes, and draw a person with "six body parts" (Dist. Ex. 6). At that time, the preschool teacher reported that the student could also rote count to 100, count objects to 10, and read numbers to 100 (id.). In addition, the progress notes indicated that the student could be "distracted in large groups," and benefitted from seating close to the teacher and in front of the group, as well as redirection and focusing (id.). With respect to fine motor skills, the student could cut with scissors with "minimal assistance" and colored within the lines of a picture (id.). During unstructured situations, the student played in centers with his peers (id.). At that time, he was learning to "share, play appropriately and to use his words to communicate" (id.). Although he needed supervision to remain on task, the student could independently use the bathroom and wash his hands; however, the student did require "some assistance" with outerwear, zippers, and packing and unpacking his "belongings" (id.). According to the progress notes, the student exhibited "[s]ome regression" in skills and language during "extended breaks from school," and required "consistency to get the full benefit from instruction" (id.). Overall, the preschool teacher recommended that the student continue in "this placement" with "peer models along with special education support" (id.).

The June 2011 CSE included portions of the May 2010 teacher's progress notes within the present levels of performance of the IEP, which reflected that the student understood "many language concepts such as, big/little, over/under, and first/last" (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 6). The district special education teacher testified that the preschool special education teacher described the student at the June 2011 CSE meeting as a sweet and social child who has difficulty maintaining an appropriate conversation, and, further that he was impulsive (Tr. pp. 52-53; see Dist. Ex. 4 at p. 1). The student's needs that the preschool special education teacher discussed with the CSE, which included attention, "speech needed to be improved", and he "definitely need[ed] prompts and cues," were reflected in the June 2011 IEP (Tr. pp. 220-21; see Dist. Ex. at pp. 1-2). Additionally, the district special education teacher testified that the CSE discussed the student's current progress at the June 2011 IEP meeting "at length" with the preschool special education teacher (Tr. pp. 101-02).

Therefore, in light of the foregoing, the evidence in the hearing record demonstrates that the June 2011 CSE considered and relied upon a variety of sources to ascertain information about the student's academic, physical, speech-language, behavioral, and social/emotional needs, and moreover, that the June 2011 CSE had sufficient evaluative information upon which to develop the present levels of performance and an appropriate IEP. Based upon the evidence, the parents' assertions regarding the sufficiency of the evaluative data and its consideration by the June 2011 CSE—as more fully discussed below—in the development of the present levels of performance and the June 2011 IEP are not supported by the hearing record and must be dismissed (see J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10 [S.D.N.Y. Aug. 5, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 429-32 [S.D.N.Y. 2013).

4. Consideration of Evaluative Information

Next, the parents contend that the June 2011 CSE failed to consider privately obtained evaluations in the development of the June 2011 IEP and improperly ignored recommendations in the evaluation reports. A review of the evidence in the hearing record does not support the parents' contentions.

In developing a student's IEP, a CSE must also consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).

As more fully developed in the memorandum of law, the crux of the parents' contentions rests in the June 2011 CSE's failure to review—"line by line"—the recommendations within the November 2010 evaluation report, the failure to discuss the recommendations in the April 2011 speech-language progress report, and the failure to consider the June 2011 classroom observation report in the development of the June 2011 IEP. However, as discussed above and as reflected in the district special education teacher's testimony at the impartial hearing, the June 2011 CSE had both the November 2010 evaluation report and the April 2011 speech-language progress report available at the meeting, and the June 2011 CSE relied upon—and incorporated—information from both evaluation reports into the present levels of performance in the June 2011 IEP (see Tr. pp. 68, 89-90, 96; Dist. Ex. 4 at pp. 1-2, with Dist. Ex. 11 at pp. 8, 10, and Dist. Ex. 7 at pp. 1-4). Admittedly, the June 2011 CSE did not individually review each of the enumerated recommendations in the November 2010 evaluation report at the meeting or discuss the specific recommendations in the April 2011 speech-language progress report at the meeting (see Tr. pp. 68, 89-90, 96). However, a district's legal obligation to consider privately obtained evaluations did not require the district—or more specifically, the CSE—to substantively discuss the evaluation reports or adopt any of the recommendations within privately obtained evaluation reports (see T.S., 10 F.3d at 89-90; G.W., 2013 WL 1286154, at *19).

The same rationale holds true for the parents' assertion regarding the June 2011 CSE's alleged failure to consider a June 2011 classroom observation report in this instance. While unclear from the hearing record whether the June 2011 CSE had the June 2011 classroom observation report available at the meeting, the district special education teacher testified that she saw a copy of the June 2011 classroom observation report prior to the CSE meeting and the district school psychologist—who conducted her own observations of the student as part of the administration of the May 2011 ADOS—"mention[ed]" it at the meeting and reported on her own observations of the student at the June 2011 CSE meeting (Tr. pp. 65-67, 96-97; see Parent Ex. I at pp. 1-6;

compare Dist. Ex. 4 at p. 13, with Dist. Ex. 10 at pp. 1-2). Even if one concluded that the June 2011 CSE did not have the June 2011 classroom observation report available at the CSE meeting and did not consider it, the hearing record does not contain sufficient evidence to find that the failure to consider the June 2011 classroom observation report in the development of the June 2011 IEP impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see Tr. pp. 96-97). Rather, the evidence in the hearing record reveals that the information in the June 2011 classroom observation report was consistent with other evaluative information available to and relied upon by the June 2011 CSE in the development of the June 2011 IEP (see Dist. Ex. 4 at pp. 1-2; compare Parent Ex. I at pp. 1-6, with Dist. Ex. 6, and Dist. Ex. 10 at pp. 1-2, and Dist. Ex. 11 at pp. 1-10).

5. Notice of the Assigned Public School (FNR) and Prior Written Notice

Next, the parents contend that they did not receive notice of the assigned public school site through the issuance of an FNR, and consequently, the IHO erred in rejecting their argument that the district failed to offer the student a timely placement. In addition, the parents assert that the district failed to provide prior written notice and written notice of the student's placement. The district rejects the parents' contentions, noting that the parents did not raise the issue of prior written notice in the due process complaint notice. Alternatively, the district argues that even if the parents properly raised the issue of prior written notice in the due process complaint notice, it would not result in a finding that the district failed to offer the student a FAPE. The parents' contentions are not supported by either State and federal laws or regulations or by the evidence in the hearing record.

First, regardless of whether the parents received an FNR identifying the assigned public school site in this case, the parents received actual notice of the assigned public school site at the June 2011 CSE meeting—and attended the open house for students accepted into the Nest program at the assigned public school site (see Parent Ex. E at p. 1; see also Tr. pp. 118-20, 132-33, 519-22, 557-58).

Second, the parents mistakenly argue that a district's obligation to provide prior written notice encompasses an obligation to provide the parents with written notice of an assigned public school site. Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]).[26] In addition, a district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the

[26] In this regard, the Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). Thus, a change from one school building to another, without more, is not a "change in educational placement" that triggers the district's obligation to provide the parents with prior written notice (see Concerned Parents, 629 F.2d at 753-54; see also Veazey, 121 Fed. App'x at 553; Weil v. Bd. of Elementary and Secondary Educ., 931 F.2d 1069 [5th Cir. 1991]).

district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).

Notably absent from the prior written notice provisions is any requirement that the district provide parents with written notice of a student's assigned public school site (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[a]-[d]; 8 NYCRR 200.1[oo]). Rather, to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and 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). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also *R.E.*, 694 F.3d at 191–92 [district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]). The FNR, rather than being an entitlement created by the IDEA or State law, is the mechanism by which this particular district notifies parents of the school to which their child has been assigned and at which his or her IEP will be implemented. For these reasons, I decline to find a denial of a FAPE based on a possible change in the classroom the student may have attended had she attended the public school program from the one listed on the FNR (see Application of the Dep't of Educ., Appeal No. 12-159).

Finally, although the parents properly assert that the district did not provide them with prior written notice in conformity with the State and federal regulations described above, this procedural violation would not result in a denial of FAPE as the parents do not allege that the failure to provide

prior written notice impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). However, as I have cautioned in previous decisions, the district is obligated to provide parents with prior written notice consistent with State and federal regulations on the form prescribed for that purpose by the Commissioner (see 34 CFR 300.503; 8 NYCRR 200.5[a]; see also http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html).

B. June 2011 IEP

1. Annual Goals

The parents assert that the annual goals in the June 2011 IEP were not appropriate due to the lack of short-term objectives, and based upon testimony by the teacher of the assigned public school classroom, the annual goals required modifications in order to be implemented.[27] In the memorandum of law, the parents further argue that the annual goals were not appropriate because the June 2011 CSE did not discuss the student's progress related to the annual goals in his previous IEP, the June 2011 CSE did not discuss whether the student required social skills training or play therapy, and the June 2011 CSE did not create the annual goals at the CSE meeting, but rather, created the annual goals outside of the CSE meeting without the parents' participation.[28] The district rejects the parents' contentions, and argues that the annual goals in the June 2011 CSE addressed the student's needs and were based upon discussions about the student's strengths and weaknesses at the CSE meeting. A review of the evidence in the hearing record does not support the parents' contentions.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a

[27] The parents cannot rely upon retrospective evidence—here, the assigned public school classroom teacher's testimony at the impartial hearing regarding the annual goals—to attack the appropriateness of the annual goals in the June 2011 IEP (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Thus, the parents' assertion that the annual goals in the June 2011 IEP were not appropriate because they required modifications in order to be implemented must be dismissed.

[28] At the impartial hearing, the parents' attorney asked the district special education teacher during cross-examination whether the June 2011 CSE discussed "social skills training or play therapy"—however, this line of questioning directly related to whether the June 2011 CSE discussed specific recommendations in the November 2010 evaluation report and not with respect to annual goals in the June 2011 IEP (see Tr. pp. 88-94; Dist. Ex. 10 at p. 7; Parent Ex. G at p. 7). Therefore, it is unclear how the June 2011 CSE's alleged failure to discuss social skills training or play therapy—as a recommendation in the November 2010 evaluation report—relates to a challenge to the annual goals, and the parents do not further particularize this allegation.

student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).[29]

Turning first to the parents' allegation that the annual goals in the June 2011 IEP were not appropriate due to the absence of short-term objectives, as noted above both State and federal regulations only require a CSE to develop short-term objectives for students who participate in alternate assessments (8 NYCRR 200.4[d][2][iv]; see 34 CFR 300.320[a][2][ii]). Therefore, consistent with State regulation, the annual goals in the June 2011 IEP did not include—and were not required to include—corresponding short-term objectives because the June 2011 CSE did not recommend that the student participate in alternate assessments (see Dist. Ex. 4 at p. 9). Furthermore, the hearing record contains no evidence that the student should have participated in alternate assessments (see generally Tr. pp. 1-603; Dist. Exs. 1-26; Parent Exs. A-K; V-Z; AA-DD; IHO Exs. I-II). Thus, the parents' argument is without merit and must be dismissed.

Next, a review of the June 2011 IEP indicates that it included approximately 16 annual goals designed to address the student's needs as identified in the present levels of performance and individual needs section of the IEP related to visual-motor skills, graphomotor skills, core strength, activities of daily living (ADL) skills, attention, sensory integration skills, reading and language comprehension skills, writing, mathematics, pragmatic and social language skills, and social skills (see Dist. Ex. 4 at pp. 1-7).

The district special education teacher testified that prior to creating the annual goals, the June 2011 CSE discussed the student's strengths and deficits, noting that he demonstrated "some very good high functioning cognitive skills;" he had an "emerging" sight word vocabulary; and he recognized letter, shapes, and colors (Tr. pp. 47-48). In addition, the June 2011 CSE discussed the student's ability to safely navigate the school environment and that he was "beginning to interact socially with the other children" (id.). The district special education teacher also testified that the June 2011 CSE discussed that although the student could "play" with other children, he had difficulty maintaining "reciprocal exchanges" (Tr. p. 48). In addition, the June 2011 CSE recognized the student's distractibility in "group settings" and that he could be a "bit impulsive" (id.). Prior to creating the annual goals, the June 2011 CSE also discussed the student's eligibility for special education as a student with autism and having received a diagnosis of pervasive developmental disorder (PDD), as well as the student's communication deficits (see Tr. pp. 48-50).

At the impartial hearing, the preschool special education teacher testified that she provided the June 2011 CSE with a progress report about the student, she described what the student had been doing and how he functioned in class, and she offered annual goals that she "thought were appropriate" for the student (Tr. pp. 220-21). The preschool special education teacher also testified that she described the student's deficits, such as his attention and speech-language needs, as well as the importance of having "age-appropriate peer models in an inclusive setting" for the student at the June 2011 CSE meeting (id.).

[29] An alternate assessment has been described as a "datafolio-style assessment in which students with severe cognitive disabilities demonstrate their performance toward achieving the New York State P-12 Common Core Learning Standards in English language arts and mathematics" (http://www.p12.nysed.gov/assessment/nysaa).

Based upon the discussions at the June 2011 CSE meeting—in addition to their knowledge of kindergarten academic requirements and input from the student's providers at the meeting—the district special education teacher and the district school psychologist created the annual goals in the June 2011 CSE (see Tr. pp. 43, 50, 70-71). The preschool special education teacher testified that the annual goals in the June 2011 IEP were "definitely appropriate" because they addressed the student's needs and "were on target" (Tr. pp. 221-22).

At the impartial hearing, the parents described the June 2011 CSE meeting as "relatively quick" without a "lot of discussion around generating the [annual] goals" at the meeting (Tr. pp. 509-10). In addition, although the parents also testified that the June 2011 CSE did not "walk through the proposed [annual] goals goal by goal" or ask their opinion as to the annual goals, the parents admitted that the June 2011 CSE—and specifically, the preschool special education teacher—discussed the student's needs and what he had been working on in class (Tr. pp. 517, 571).

Overall, the hearing record supports a finding that the annual goals in the June 2011 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S.,454 F. Supp. 2d at 146-47; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]). In addition, the evidence in the hearing record indicates that the parents attended the June 2011 CSE meeting, listened to the discussions regarding the student's progress and the annual goals, and had the opportunity to participate in these discussions; therefore, any failure to discuss the specific annual goals in the June 2011 IEP, or any failure to draft the annual goals at the June 2011 CSE meeting, did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefits (see Tr. pp. 50, 220, 231, 571; see also E.A.M v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that annual goals be drafted at the CSE meeting]).

2. Consideration of Special Factors—Interfering Behaviors

The parents argue that the June 2011 CSE failed to conduct a FBA or develop a BIP in light of the student's attention needs, his need for frequent redirection, his sensory issues, and his impulsive behaviors. The district rejects the parents' contentions, and asserts that neither an FBA nor a BIP was necessary because the student did not exhibit any disruptive, self-injurious, or aggressive behaviors. For the reasons discussed below, a review of the evidence in the hearing record does not support the parents' contentions.

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., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). 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., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 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., 569 F. Supp. 2d at 380).

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," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines 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 Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA

will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

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

In this case, it is undisputed that the June 2011 CSE did not conduct an FBA or develop a BIP. According to the preschool special education teacher, she reported the student's deficits in the area of attention, as well as "his hyperactivity," to the June 2011 CSE (Tr. pp. 220-21). In addition, she testified that if the student was "not attending to a task and not being redirected," the student's attention needs interfered with the "learning process"—however, she clarified that the student remained on task "once he was redirected gently by the teacher" (Tr. p. 234). The student could also be redirected and refocused with "prompts and cues" or remain on task with a teacher

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

in close proximity (id.). According to the preschool special education teacher, the student might need redirection approximately three times within a 15-minute lesson (id.).

Throughout the 2010-11 school year, the preschool special education teacher took data to determine the "frequency and the duration and the intensity" of the student's behavior and attention and shared the information with her supervisors and her co-teacher in order to address these needs (Tr. pp. 234-37). However, the preschool special education teacher testified that she "never" found the student's attention needs or behavior to "be so strong" as to require a BIP or to otherwise "alert" her supervisor (Tr. p. 237). Moreover, the preschool special education teacher testified that the student's behaviors and attention needs could be handled within the classroom through "redirection" or "modeling" and that the student responded to "teacher prompts, cues, positive reinforcement, stickers, [and] that kind of thing" (id.). The preschool special education teacher also testified that during the 2010-11 school year, she discussed the student's attention and behavior with his parents, and she invited the parents into the classroom (id.). In addition, she testified that an "[applied behavior analysis (ABA)] teacher" visited the classroom—as well as "other people that the parents sent to the class"—and these individuals shared her opinion of the student's attention needs and behavior (Tr. pp. 237-38). The preschool special education teacher further testified that the student could attend with "slight prompts by the teacher," the student was "involved," and responded with information; the student also enjoyed social activities in the classroom and "did everything . . . with mild assistance," which was not unlike other preschool students (Tr. p. 238). Overall, the preschool special education teacher did not think the student's behavior seriously interfered with his learning, and she testified that she reported information about the student's behaviors and the ability to handle the student's behaviors within the classroom to the June 2011 CSE (see Tr. pp. 252-53).

According to the district special education teacher, the June 2011 CSE discussed the student's distractibility in group settings, his impulsivity, and how these behaviors affected his academics, and the preschool special education teacher recommended a "behavior reward system," modeling, and direct instruction to address the student's needs in these areas (Tr. pp. 47-48, 51; see Tr. p. 80-81). The district special education teacher also testified that the preschool special education teacher indicated to the June 2011 CSE that the student's behavior was "fine" and he did not demonstrate any "aggressive behavior" (Tr. pp. 51-52). Based upon this information, the June 2011 CSE did not draft a BIP (see Tr. p. 52). The district special education teacher testified that because the student did not exhibit any disruptive behavior, self-injurious behavior, or aggressive behavior toward other students, neither an FBA nor a BIP was warranted (id.; see Tr. p. 62). However, the district special education teacher further testified that although the June 2011 CSE did not conduct an FBA or develop a BIP, the June 2011 IEP included information about the student's needs in the areas of attention, focus, and impulsivity in the present levels of performance and individual needs section of the IEP and further addressed these needs through the management needs and annual goals in the IEP (see Tr. pp. 50-51; Dist. Ex. 4 at pp. 1-2, 5, 7).

Based upon the foregoing, the evidence in the hearing record does not support a finding that the student's attention needs and behavior impeded his learning or that of others such that the June 2011 CSE was required to conduct an FBA or develop a BIP (see 8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

3. Related Services—Parent Counseling and Training

The parents assert that the June 2011 CSE failed to recommend parent counseling and training in the June 2011 IEP. The district asserts that the failure to include parent counseling and training in the June 2011 IEP, alone, would not result in a failure to offer the student a FAPE, and notes that the Nest program offered monthly parent group meetings on a variety of topics. As discussed below, the failure to recommend parent counseling and training in the June 2011 IEP does not rise to the level of a denial of a FAPE.

It is undisputed that the June 2011 IEP did not include a recommendation for parent counseling and training; however, under the circumstances of this case, the district correctly argues the failure to recommend such service did not, by itself, result in a failure to offer the student a FAPE for the 2011-12 school year. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M., 583 F. Supp. 2d at 509). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

Therefore, while it is undisputed that the June 2011 CSE did not recommend parent counseling and training as a related service in the student's June 2011 IEP, the hearing record in this case does not contain sufficient evidence upon which to conclude that the failure to recommend parent counseling and training in the June 2011 IEP resulted in the district's failure to offer the student a FAPE for the 2011-12 school year. In addition, although the June 2011 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, this violation alone does not support a finding that the district failed to offer the

student a FAPE (R.E., 694 F.3d at 191; see also F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *4 [2d Cir. Jan. 8, 2014]; see also M.W., 725 F.3d at 141-42).[31,32]

4. Transition Plan

The parents assert that the June 2011 CSE failed to discuss the student's transition from one program to another. The district argues that the June 2011 CSE was not required to recommend a transition plan or offer transitional support services for the student. Additionally, the district asserts that because the student's recommended ICT/Nest program for the 2011-12 school year was located across the hallway from his preschool classroom for the 2010-11 school year, any transition for the student would be minimal and the June 2011 IEP included supports and services to address any "problems" the student may encounter as a result of this transition. A review of the evidence in the hearing record does not support the parents' contentions.

Initially, to the extent that the parents contend that the absence of a transition plan in the June 2011 to assist the student's transitions from environment to environment or from one school to another resulted in a failure to offer the student a FAPE, the IDEA does not require such a "transition plan" as part of a student's IEP (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York

[31] The district is cautioned, however, that it cannot continue to disregard its legal obligation to include parent counseling and training in a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

[32] The district social worker testified that the Nest program included monthly parent groups, and upon parent request, offered individualized parent counseling and training, which suggests that parent counseling and training was a "programmatic" component of the Nest program (see Tr. pp. 123-24, 126; see also Tr. pp. 201-02). However, the Second Circuit has explained that under the "snapshot" rule, this evidence may not be considered because it constitutes "retrospective testimony" regarding services that the district failed to list in the IEP (R.E., 694 F.3d at 185-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of the parents' placement decision and that "retrospective testimony" regarding services not listed in the IEP may not be considered, but rejecting a rigid "four-corners rule" that would prevent consideration of evidence explicating the written terms of the IEP]; see B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-77 [S.D.N.Y. 2012]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; F.L., 2012 WL 4891748, at *14; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *10 [W.D.N.Y. Sept. 26, 2012], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]). Even though retrospective, this testimony indicates that if the student attended the Nest program at the assigned public school site, the parents could have availed themselves of the monthly parent groups or, upon request, individualized parent counseling and training services. Based upon the foregoing, although the June 2011 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation is not sufficient in this case to support a finding that the district failed to offer the student a FAPE (see M.W., 725 F.3d at 142; R.E., 694 F.3d at 191; F.L. v. New York City Dep't of Educ.., 2012 WL 4891748, at *9-*10 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N v. New York City Dep't of Educ.., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 25, 2010]; M.M., 583 F. Supp. 2d at 509).

City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).

Notwithstanding the above, the parents do not point to any specific difficulties the student experienced with transitions in support of their argument, and a review of the evidence in the hearing record indicates that the student did not exhibit any particular difficulty with transitions (see Pet. ¶ 31; Parents Mem. of Law at pp. 11-12). For example, upon report by the parents the November 2010 evaluation noted that "[t]ransitions [were] occasionally difficult" for the student, but during the evaluation session, the student transitioned "easily to the testing room" (Dist. Ex. 11 at pp. 1, 3). Further, according to the November 2010 evaluation, the student exhibited adequate coping skills based upon his testing results on the VABS (id. at p. 10). Similarly, the April 2011 speech-language progress report described the student as transitioning "easily" to the therapy room (Dist. Ex. 7 at p. 1). In the June 2011 PT annual review plan, the evaluator noted that the student required "verbal cues to walk instead of run down the hallway to his classroom or to the therapy room" (Dist. Ex. 8 at p. 1). With respect to transitions in the school environment, the evaluator indicated that the student could "get himself from one area of the school to another" and followed "routines/rules when accompanied by an adult" (id.). However, according to the January 2011 OT progress report, the evaluator checked the column marked "No" with respect to whether the student transitioned "easily," but did not provide any further comments for this category (Dist. Ex. 9 at p. 3). In the summary and recommendation, the evaluator did note that the student made "good gains" in his ability to transition "between activities in [an] OT session" and suggested an annual goal related to transitions between activities, which the June 2011 CSE did not directly incorporate into the June 2011 IEP; the June 2011 CSE did, however, recommended continued OT services (id. at p. 5; see Dist. Ex. 4 at pp. 3-7). Neither the May 2011 ADOS nor the undated progress notes considered by the June 2011 CSE revealed any difficulties with transitions (see Dist. Exs. 6; 10 at pp. 1-2).

Therefore, in this case even though the parents correctly assert that the June 2011 CSE did not discuss the student's transition from the June 2011 ICT preschool setting to the July and August 2011 related services' summer program and then to the September 2011 ICT/ Nest program, the evidence in the hearing record does not reveal that the student had particular needs in this area to be addressed through the IEP (see Tr. pp. 82-83; Dist. Exs. 6; 7 at p. 1; 8 at p. 1; 9 at pp. 3, 5; 10 at pp. 1-2; 11 at pp. 1, 3, 10). Thus, given that no legal obligation exists with respect to the type of transition plan contemplated by the parents—in addition to no particular transition needs of the student—the absence of a transition plan or supports and services in the June 2011 IEP to otherwise address the student's anticipated transitions cannot result in a failure to offer the student a FAPE for the 2011-12 school year.

Next, although it appears that the district conflates its obligations to recommend a transition plan with its obligation to recommend transitional support services pursuant to State regulation governing educational programs for students with autism, the evidence in the hearing record does not reveal that the June 2011 CSE was required to recommend transitional support services in this case.

State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are defined as "temporary services, specified

in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]).[33]

Here, even assuming that a change in restrictiveness occurred with the student's transition from the July and August 2011 summer program to the September 2011 ICT/Nest program—which the parents do not argue—there is no suggestion that the State regulation regarding transition support services for teachers was intended for certified special education teachers of a highly intensive class settings, such as the ICT/Nest program recommended in this case. Instead, it is much more likely that an individual with such experience would be the provider of transitional support services to another teacher having either less familiarity or formal training in working with a student with autism (e.g., a regular education teacher).

Based upon the foregoing, the evidence in the hearing record does not support the parents' assertion that the district failed to offer the student a FAPE for the 2011-12 school year because the June 2011 CSE failed to either discuss or recommend a transition plan.

5. 12-Month Services

The parents assert that the June 2011 CSE failed to consider a school-based program as a component of the recommended 12-month school year program, and the parents object to the IHO's conclusion that they agreed to the June 2011 CSE's recommendation of only related services as the student's 12-month school year program. The district rejects the parents' contentions and argues that the student only required related services for the summer and he received such services during summer 2011 under the March 2011 CPSE IEP.[34]

The IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE for the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). State regulation defines substantial regression as "a student's inability to

[33] The Office of Special Education issued a guidance document, updated in April 2011 and entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

[34] Consistent with State law, the student continued to receive services pursuant to his March 2011 CPSE IEP through July and August 2011 (Educ. Law § 4410[1][i] [indicating that a "preschool child" remains the responsibility of the Committee on Preschool Special Education for programming purposes "through the month of August of the school year in which the child first becomes eligible to attend school pursuant to section thirty-two hundred two of this chapter"]; see Dist. Exs. 1 at pp. 1-2, 13; 2). The parents testified that that the student received the services listed on the March 2011 CPSE during summer 2011 (see Tr. pp. 532-33, 559-61, 590, 596). Moreover, the parents admitted at the impartial hearing that their signature—dated March 21, 2011—on an FNR expressed their agreement for the student to receive the related services listed on the FNR (see Tr. p. 584; Dist. Ex. 22). Notably, the parents did not raise any allegation in the due process complaint notice challenging the special education or related services recommended in the March 2011 CPSE IEP (see Parent Ex. A at pp. 1-10). In addition, although the parents chose to place the student in a "school-based program" for summer 2011, they did not seek—and do not now seek—reimbursement for the costs of that school-based summer program (Tr. pp. 532-34).

maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106).[35]

Here, it is undisputed that the student required a 12-month school year program to prevent substantial regression, and consistent with this need, the June 2011 CSE recommended a 12-month school year program for the student (see Dist. Ex. 4 at pp. 8, 10-11).[36] While the parents do not challenge the related services' portion of the 12-month school year program recommended in the June 2011 IEP, at the impartial hearing, the parents testified that the student required a school-based component for "generalization" and to "integrate with other children" (Tr. pp. 532-34). However, the evidence in the hearing record does not demonstrate that the student exhibited substantial regression in these particular areas and required a school-based component as part of the recommended 12-month school year program to prevent substantial regression (see Tr. pp. 1-603; Dist. Exs. 1-26; Parent Exs. A-K; O; V-Z; AA-DD; IHO Exs. I-II). Admittedly, the November 2010 evaluation report included a recommendation for a "continuous 12 month program of intervention, including the summer months," but other than noting the student would "regress" without "consistency in intervention services" the evaluator did not identify any particular area of need for such services to address or more particularly, that the student required a school-based component (Dist. Ex. 11 at pp. 1-7). Absent evidence of substantial regression with respect to the parents' noted areas of concern—i.e., "generalization" and integrating with other children—the hearing record supports a finding that the June 2011 CSE was not required to offer a school-based program during summer 2011.

6. Extended Day Services

The parents assert that the IHO ignored evidence in the hearing record demonstrating that the student required extended day services, and further, the June 2011 CSE failed to recommend such services or to otherwise provide for "any type of fading back plan" upon the termination of extended day services. The district rejects the parents' contentions, and argues that the student did not require extended day services because he functioned well academically and did not exhibit delays or deficits warranting such services. A review of the evidence in the hearing record does not support the parents' contentions, thus, there is no reason to disturb the IHO's finding.

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[35] Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

[36] At the impartial hearing, district special education teacher clarified that the recommended 12-month school year program only consisted of related services—and not a "class program"—as mistakenly indicated by the box checked in the June 2011 IEP (compare Tr. pp. 58-59, 102-04, 107-08, with Dist. Ex. 4 at p. 8). She further testified that the June 2011 CSE made it "clear" to the parents that the recommended 12-month school year program only included the provision of related services (Tr. pp. 107-09). The district special education also testified that based upon a report, the student was expected to receive SEIT services during summer 2011, as well as related services, indicated in the student's March 2011 CPSE IEP (see Tr. pp. 58-59; Dist. Ex. 1 at p. 1).

With respect to home-based or extended day 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 settings 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 K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17 [E.D.N.Y. Oct. 30, 2008]; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. April 21, 2008]).

In this case, the evidence in the hearing record reflects that the evaluative information considered by the June 2011 CSE to develop the June 2011 IEP reflected that the student made progress during the 2010-11 school year (see Dist. Exs. 4 at pp. 1-2; 6-11). Based upon this information, the June 2011 CSE determined that in light of student's "high" academic functioning, extended day services were not required for him and the "Nest program was perfectly tailored to his needs" (Tr. p. 101). Thus, the hearing record supports the IHO's finding that there was no evidence demonstrating that the student required extended day services.

C. Challenges to the Assigned Public School Site

The parents assert that the assigned public school site was not appropriate because the student would not receive the individualized attention necessary to meet his needs and the student would have to work independently for at least 1.5 hours a day. The district asserts that due to the parents' rejection of the June 2011 IEP, the district was not required to demonstrate that the assigned public school site was appropriate. Alternatively, the district argues that student would receive individualized instruction, as needed, at the assigned public school site and that the assigned public school site could implement the student's June 2011 IEP.[37]

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., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [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 a student would be placed

[37] To support their assertion, the parents impermissibly rely upon retrospective testimony presented by the teacher at the assigned public school site (see Tr. pp. 150-53, 158-59, 180-82, 187-189, 196). Additionally, to the extent the parents' argument about the individualized attention at the assigned public school site is an attempt to challenge the IEP as failing to provide individualized attention, there is no evidence in the hearing record that the student required individualized attention in order to receive educational benefits (see generally Dist. Exs. 6-11).

in 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 [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., 746 F.3d at 79). 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]).[38] 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 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 parents cannot prevail on their claims regarding implementation of the June 2011 IEP because a retrospective analysis of how the district would have implemented the student's March 2011 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). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to

[38] 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 [2d Cir. Mar. 30, 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.

implement the June 2011 2011 IEP (see Parent Exs. D; F). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the June 2011 IEP.[39]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

[39] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the district's cross-appeal regarding whether the student's unilateral placement at the Children's Academy was an appropriate placement or whether equitable considerations supported the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 31, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER