The University of the State of New York

The State Education Department
State Review Officer
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No. 12-165

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, Gary S. Mayerson, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for costs incurred in connection with home based related services for their son during the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's determinations that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that year, that the parents' placement of the student at the McCarton School (McCarton) was appropriate for the student for the 2011-12 school year, that equitable considerations supported the parents' claim for tuition reimbursement, and that the parents were entitled to reimbursement of the costs of their son's tuition at McCarton for the 2011-12 school year. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a 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

According to the hearing record, the student had attended McCarton, a nonpublic school for students with autism utilizing applied behavior analysis (ABA)[1] as its core intervention and teaching methodology, for the last 11 years (Tr. pp. 391, 442, 486, 562; see Tr. p. 50; Parent Exs. Y at p. 1; LL).[2] The hearing record further reflects that for the 2011-12 school year, the student was enrolled in a class at McCarton consisting of five students, one head teacher, and four to five additional assistant teachers; that he received related services consisting of speech-language therapy and occupational therapy (OT)[3] at McCarton; and that over the last five years, he had received additional services outside of school, including ABA services, speech-language therapy, and OT, the latter of which had recently been discontinued (Tr. pp. 325-26, 347-48, 392, 429, 443-44, 570-72, 575; Parent Ex. I at p. 1).

The hearing record describes the student as exhibiting deficits in academic achievement, expressive, receptive and pragmatic language skills, sensory processing skills, including self regulation and attending skills, fine and gross motor skills, and self care skills (Parent Exs. G-H). The hearing record also indicates that the student presented with maladaptive intervening behaviors including rigidity, verbal perseveration, disruptive behavior, such as screaming, falling to the floor, throwing or destroying materials, noncompliance, aggression toward others, noncontextual vocalization and laughter, tantruming, self injurious behavior (hitting or grabbing his face), and inappropriate sexual behavior, all of which prevented him from staying on task, taking part in social interactions, and progressing toward his goals (Tr. pp. 342-43, 393, 396, 577-78, 608, 612-15; Parent Exs. C at pp. 6, 26; E; G at p. 1; H at p. 3; I at pp. 2, 3, 6-7). The student's eligibility for special education programs and services as a student with autism is not in dispute in

[1] The hearing record describes ABA as "the primary evidence-based intervention for individuals with autism spectrum disorder," which utilizes "direct one-on-one instruction … some group instruction, community-based instruction … [and] some [discrete] trial instruction, but all this is in the context of a highly-reinforced, highly community-referenced curriculum base" (Tr. p. 391).

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

[3] The hearing record reflects that for at least a portion of the 2011-12 school year, due to staffing issues, the student was receiving a lower level of OT at McCarton than had been originally mandated for him by the school at the start of the 2011-12 school year (compare Parent Ex. H at p. 1, with Tr. pp. 564-67).

this appeal (see Dist. Ex. 10 at p. 1; Parent Exs. C at p. 2; J; U; 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).[4, 5]

On May 16, 2011, the CSE convened for the student's annual review to develop his educational program for the 2011-12 school year (Dist. Ex. 6; Parent Ex. C). The CSE recommended, among other things, a 12-month educational program including a 6:1+1 special class in a specialized school (Dist. Exs. 6 at p. 2; 8; Parent Ex. C at pp. 2). The CSE also recommended related services consisting of a 1:1 behavior management paraprofessional, OT twice per week for 45 minutes per session in a 2:1 setting, and speech-language therapy five times per week for one hour sessions in a 1:1 setting, once per week for 45 minutes per session in a 5:1 setting,[6] and once per week for 45 minutes per session in a 2:1 setting (Dist. Exs. 6 at pp. 2-3; 8; Parent Ex. C at pp. 2-3, 6, 8, 11, 23-26). The CSE also recommended program modifications consisting of, relative to academics, a highly structured, predictable learning environment, clear and consistent expectations and routines, consistent positive reinforcement schedule (token system), systematic visual prompting using written cues, breaking down of tasks into small steps, "chunking" of material into manageable units, frequent variation of work tasks and materials, repetition, drill, and review, emphasis on a functional application of skills, systematic generalization of skills across people, materials, settings, and contexts, frequent breaks to improve attention, teacher prompts to refocus, and functional practical emphasis in choice of material (Parent Ex. C at p. 5). Relative to the student's social/emotional functioning, the CSE recommended positive reinforcement and praise, redirection to task, a 1:1 behavior management paraprofessional, and advance warnings of change in schedule; and a behavior intervention plan

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

[5] There is one discrepancy in the documentary evidence appearing in the hearing record. The hearing record contains two placement office referral forms, one of which is blank, and the other of which contains the student's educational information, both of which appear to have been separately admitted into evidence during the impartial hearing as Parent Ex. "U." However, only the blank version of the exhibit is identified on the exhibit lists appended to the IHO decision and included in the hearing record, and on both exhibit lists, it is identified as a one page, undated document (see Tr. pp. 121-22, 318; IHO Decision at p. 46). I note that the completed form bears a handwritten notation that it was "entered 4/25/12," during the impartial hearing. This discrepancy is not otherwise resolved elsewhere in the hearing record. The relevance of the bank form is unclear, so for the purposes of this decision, I refer only to the completed form that bears the student's name when referencing Parent Ex. "U" in this decision.

[6] Although the May 2011 IEP lists the length of the student's speech-language therapy sessions as 42 minutes, the district social worker indicated that this was in fact a typographical error, and that the recommended sessions were actually for 45 minutes each (compare Tr. p. 93, with Parent Ex. C at p. 25).

(BIP) (id. at pp. 6-7, 11, 26).[7] The CSE also determined that the student was eligible to participate in New York State alternate assessment (id. at p. 25).

On May 30, 2011, the student's mother signed an enrollment contract for the student to attend McCarton for the 2011-12 school year, and remitted a non-refundable deposit of $5,000 on the following day (Tr. p. 499; Parent Exs. AA; NN at pp. 1, 3; ZZ at pp. 1-2).

By letter dated June 15, 2011, the parents advised the district that they had received neither a copy of the student's May 2011 IEP, nor a final notice of recommendation (FNR) form (Parent Ex. K at p. 1; see Tr. p. 457). The parents further advised unless district offered an appropriate placement, they were unilaterally placing the student at McCarton for the 2011-12 school year and would seek reimbursement and/or direct public funding for McCarton,[8] 22 hours per week of 1:1 ABA therapy, 45 minutes per week of 1:1 OT, 1.5 hours per week of 1:1 speech and language therapy, and transportation to and from the school (Parent Ex. K at p. 1).

On an unspecified date thereafter, the parents received an FNR dated June 14, 2011 in which the district summarized the recommendations made by the May 2011 CSE and notified the parents of the particular public school site to which it had assigned the student (Parent Ex. J; see Parent Ex. L). On June 21, 2011, the student's mother visited the assigned school (Parent Ex. L at p. 1; see Tr. pp. 452-57, 491-92, 646-48).

By letter dated June 27, 2011, the parents, among other things, rejected the public school site as inappropriate for the student for the following reasons: the assigned school lacked an ABA-based program; the assigned school's 6:1+1 student/teacher ratio was inappropriate for the student; the public school site lacked a sufficient number of service providers to fulfill the levels of related services recommended in the student's May 2011 IEP; the assigned school did not utilize the PROMPT methodology as part of its speech and language therapy and lacked speech-language therapists properly trained in its use; and because the assigned school did not engage in data collection in order to track student progress (Parent Ex. L at p. 1).[9] The parents further advised the district that they still had not received a copy of the student's May 2011 IEP, and reiterated their intention to unilaterally enroll the student at McCarton at public expense in the absence of an

[7] Although the hearing record contains a 12-month school year consent form corresponding with the date of the May 2011 CSE meeting and bearing what appears to be the parent's signature, the form does not indicate whether she consented to agree for the student to receive special education services during July and August 2011 (see Dist. Ex. 8).

[8] The hearing record indicates that the parents paid the student's tuition at McCarton for the 2011-12 school year in full (Tr. p. 469; see Tr. p. 499; Parent Exs. AA; NN; ZZ).

[9] Although not identified in the hearing record, the acronym "PROMPT" stands for "PROMPTs for Restructuring Oral Muscular Targets" (see e.g. E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at *2 n.3 [S.D.N.Y. Mar. 15, 2013]). It is described in the hearing record as a "manipulat[ion] [of] parts of [the student's] face and tongue" during speech-language therapy sessions, "a method that they use where they help to shape [the student's] language because he's very low tone and has a lot of sensory issues. … [I]t helps promote better language for him and shaping," and the hearing record indicates that "[w]hen they're doing PROMPT, they're actually touching his face. They're helping … his articulation" (Tr. pp. 459-61).

appropriate educational placement as set forth in their previous letter of June 15, 2011 (id. at pp. 1-2; see Parent Ex. K at p. 1).

According to the hearing record, the district sent a postmarked copy of the student's May 2011 IEP to the parents on June 28, 2011, and, according to the student's mother, she received the copy of the student's May 2011 IEP "some time in the beginning of July" 2011 (Tr. p. 447; see Parent Ex. C at pp. 1, 3). On July 5, 2011, the student began the 2011-12 school year at McCarton (Parent Exs. AA at p. 1; NN at p. 1). On July 6, 2011, the parents remitted a second payment to McCarton in the amount of $60,000 toward the student's 2011-12 tuition (Parent Exs. AA; ZZ at pp. 1, 3; see Parent Ex. NN at pp. 1, 3).

On August 29, 2011, the parents filed their due process complaint notice (Parent Ex. A).

The hearing record reflects that on September 27, 2011, the student's mother signed a contract with a private bus service to transport the student to and from McCarton for the 2011-12 school year and remitted a non-refundable deposit of $1,750.91 (Parent Ex. AAA). On October 31, 2011, the parents remitted a third payment to McCarton in the amount of $50,000 toward the student's 2011-12 tuition (Parent Exs. AA; ZZ at pp. 1, 4; see Parent Ex. NN at pp. 1, 3).

A. Due Process Complaint Notice

The parents filed a due process complaint notice, dated August 29, 2011, alleging, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, that McCarton was appropriate to address the student's unique educational needs, and that equitable considerations justified an award of tuition reimbursement for the student's 2011-12 school year at McCarton (Parent Ex. A at pp. 1-8). The parents enumerated more than 60 allegations in their due process complaint notice and those relevant to this appeal included: that the May 2011 CSE was improperly constituted because it lacked a "general" education teacher familiar with the district's recommended program; that the May 2011 CSE failed to meaningfully consider appropriate evaluative information in developing the student's IEP; that the May 2011 IEP was not reasonably calculated to provide the student with a FAPE, because it lacked both a "transition plan" (to assist the student in his transition from an ABA-based program at McCarton to the district's recommended program, which employed the "TEACCH"[10] methodology);[11] the IEP lacked parent counseling and training services and transportation services; the district failed to properly conduct a functional behavioral assessment (FBA) and developed an inadequate BIP; the IEP failed to address the student's need for 1:1 teaching support; the CSE failed to select the particular methodology that would be used with the student; and that

[10] The "TEACCH" acronym is defined in the hearing record as "Treatment and Education of Autistic and related Communication Handicapped Children" (Tr. p. 236; see A.D. v. New York City Dept. of Educ., 2013 WL 1155570 at **4, *12 [S.D.N.Y. Mar. 19, 2013].

[11] According to the hearing record, the TEACCH methodology "looks at establishing … sort of a prosthetic environment. [A]n environment under which things are labeled and organized. There are different workstations. There are different activities. People … move through these different parts. There's more of an acceptance of differences … as opposed to a push for skill development" (Tr. pp. 407-08).

the IEP lacked a recommendation for extended school day services for the student (id.; see Tr. p. 236).

Relative to implementation of the IEP at the assigned public school site, the parents also alleged that there would be inadequate training and supervision of district staff, including the 1:1 paraprofessional; that district staff would have been unable to implement the student's May 2011 IEP; that after summer 2011 the student would have been required to transition to a different public school building; and that the assigned school would not have adequately fulfilled the related services mandates set forth in his May 2011 IEP (Parent Ex. A at pp. 2-8). The parents also alleged that the district failed to hold a meeting with the parents to select the location of the student's services (Parent Ex. A at pp. 5-7). The parents contended that the district failed to disclose or comply with a stipulation and consent order in a federal class action suit (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982] aff'd 669 F.2d 865 [2d Cir. 1982]) (Parent Ex. A at p. 5).

For relief, the parents sought an order from an IHO directing the district to provide reimbursement for the costs of the student's tuition at McCarton for the balance of the 2011-12 school year; related services consisting of 22 hours per week of 1:1 home-based and community-based ABA therapy, 45 minutes of home-based 1:1 OT, and 90 minutes per week of 1:1 speech-language therapy; transportation services for the entirety of the student's 12-month program; and an award of compensatory education for any services for which he was eligible that he did not receive (Parent Ex. A at p. 8).

B. Impartial Hearing Officer Decision

On April 18, 2012, an impartial hearing commenced in this matter, and concluded on May 24, 2012 after four days of proceedings. On June 14, 2012, the IHO issued an interim decision noting that for the 2011-12 school year the parties agreed that, pursuant to pendency (stay put) and upon proof of attendance and/or payment, the district was required to fund the student's tuition at McCarton, 20 hours per week of home-based ABA services, and 2.5 hours of speech-language therapy per week, which arose from a December 29, 2009 decision issued by a different IHO in a prior due process proceeding (IHO Interim Decision at pp. 2-3; see Tr. pp. 8-10; Parent Ex. B).

On July 23, 2012, the IHO issued a decision on the merits determining, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that McCarton was an appropriate placement for the student for the 2011-12 school year, that the student was entitled to special education transportation services during the 2011-12 school year, and that although equitable considerations supported the parents' claims for the tuition costs of the student's 12-month program at McCarton, they did not support an award of reimbursement for home-based related services; consequently, the IHO granted the parents' requests for reimbursement for the student's tuition and transportation expenses at McCarton for the 2011-12 school year and the balance of the costs of the student's 2011-12 school year at McCarton, but denied their request for reimbursement for home-based related services (IHO Decision at pp. 20-42).

Specifically, the IHO found that the May 2011 CSE's reliance upon evaluative reports and input offered by McCarton staff in attendance at the CSE meeting in lieu of psychological or

educational testing conducted by the district was inappropriate, but declined to find that this violation rose to the level of a denial of FAPE under the circumstances of this case "because the issue was not advanced at the hearing" (IHO Decision at p. 21). The IHO also determined that the failure to conduct an FBA did not rise to the level of a denial of a FAPE because the May 2011 CSE possessed sufficient information to develop a BIP that addressed the student's behavior needs (id. at pp. 22-23). However, the IHO found that the May 2011 IEP did not adequately address the student's self-injurious behaviors and that this failure constituted a denial of a FAPE (id. at p. 23). The IHO also determined that the May 2011 CSE erred in failing to discuss the appropriate methodology — in this case, ABA — to be used with the student for the 2011-12 school year and in failing to indicate ABA on the IEP itself, and that these errors contributed to a denial of a FAPE to the student (id. at pp. 24-25). The IHO found that the district failed to include a special education teacher at the CSE meeting "who was familiar with the recommended program to explain how the IEP would be implemented" and that this failure denied the parents meaningful opportunity to participate in the May 2011 CSE meeting (id. at pp. 25-26). The IHO also determined that the CSE's recommendation of a 6:1+1 special class with a 1:1 behavior management paraprofessional was not reasonably calculated to provide the student with meaningful educational benefits because it did not afford him adequate 1:1 instruction or address his interfering behaviors and his inability to work independently, and because the May 2011 IEP lacked a recommendation for transitional support services to assist the student in his transition from McCarton to a public school placement (id. at pp. 26-28). However, the IHO also found that the absences of recommendations for parent counseling and training and extended school day services on the student's May 2011 IEP, by themselves, did not rise to the level of denials of a FAPE, and that because there was no evidence contained in the hearing record suggesting that the student required home-based services, the lack of a recommendation for such services on the student's May 2011 IEP, by itself, also did not render the IEP defective (id. at pp. 28-30).

The IHO also found that "the [district's] placement process in this case violated federal law because the parents were not given an opportunity to participate in the placement decision …" because the district failed to provide the parents with a copy of the student's May 2011 IEP at the time that they visited the assigned school, and because of the timing of the district's notification to the parents of the school to which it had assigned the student (IHO Decision at p. 31). The IHO further determined that, although the district was not required to designate an assigned school on the May 2011 IEP, it nevertheless erred by failing to conduct a "placement meeting" and by failing to timely furnish the parents with placement information regarding a specific assigned school; however, the IHO ultimately concluded that this violation did not rise to the level of a denial of a FAPE because the hearing record reflected that "most of the parents' objections to the [district's] recommendations involved IEP issues not related to the ability of the [assigned] school … to implement the IEP" (id. at pp. 31-33).[12]

[12] The IHO referenced 34 CFR 300.351[c][7], however, this was not an enumerated provision of the 2006 or 1997 federal regulations attendant to the IDEA and therefore the reference is unclear (IHO Decision at p. 31). The statutory provision 20 U.S.C. §1414(e) referenced by the IHO refers to the "educational placement" of a child with a disability (IHO Decision at p. 31).

Relative to the assigned school, however, the IHO found that the hearing record lacked evidence establishing that a 1:1 paraprofessional would have been sufficiently trained or capable of "instructing" the student, addressing the student's interfering and self injurious behaviors, and redirecting the student, and that the hearing record "was not clear" regarding whether the public school site would provide the student's related services (id. at pp. 27-28, 33).

In denying the parents' requests for reimbursement of home-based ABA, OT, and speech-language services, the IHO determined that, although the home-based ABA program that the student received "[was] an appropriate and necessary part of [his] special education program … the [hearing] record does not reflect that the [student's] need for such services was presented to the CSE for consideration in a timely way," and further found that "the parents did not meet their burden to demonstrate both the [student's] need for and appropriateness of the [OT and speech-language] services" (IHO Decision at pp. 37-38, 40-41). The IHO also found that equitable considerations supported the parents' claims, and ultimately awarded them reimbursement for the student's tuition at McCarton and for private transportation expenses incurred in connection with the student's 2011-12 school year, but denied them reimbursement for home-based ABA, OT, and speech-language services for the 2011-12 school year (id. at pp. 38-42).

IV. Appeal for State-Level Review

The parents appeal the IHO decision. The parents note that the IHO ultimately determined that the district denied the student a FAPE for the 2011-12 school year and granted them relief in part; however, the parents assert, among other things, that: the IHO erred in denying them relief insofar as the IHO misallocated the burden of proof to the parents to prove that the student required home-based ABA and related services, and they argue that the district's failure to conduct psychological or educational testing of the student prior to developing his May 2011 IEP rose to the level of a denial of a FAPE. The parents contend that the IHO improperly relied upon retrospective testimony in finding that parent counseling and training were available at the assigned school and the IHO erred in failing to find that the lack of extended school day services in the May 2011 IEP constituted a denial of FAPE. According to the parents, the district failed to timely provide the parents with copies of the student's IEP and FNR. The parents allege that the IHO should have found that the district's failure to conduct an FBA rose to the level of a denial of a FAPE to the student and that the district failed to develop a transition plan to support the student's transition from McCarton to the public school. The parents claim that IHO erroneously determined that the district's failure to conduct a placement meeting did not rise to the level of a denial of a FAPE to the student.

Relative to the assigned public school site, the parents allege that had the district been required to implement the student's May 2011 IEP, it could not have fulfilled the student's required levels of related services. For relief, the parents request reversal of the IHO's findings listed above and the denial of the parent's request for reimbursement for costs of the student's home-based ABA and speech-language services provided to the student during the 2011-12 school year.

The district answers the parents' petition and counters that it offered the student a FAPE for the 2011-12 school year, because, among other things, the IHO correctly determined that the

issue of the sufficiency of the evaluative data reviewed by the May 2011 CSE was not properly before him and the student did not require home-based related services in order to receive educational benefits. The district asserts that the IHO properly determined that the absence of parent counseling and training on the student's IEP and the failure of the district to conduct an FBA, albeit technical violations, did not rise to the level of depriving the student of a FAPE. The district also argues that the IHO erred in addressing the parents' allegations regarding the district's ability to implement the student's May 2011 IEP, because the student did not attend the assigned public school site; however, assuming for the sake of argument that the district was required to implement the student's May 2011 IEP, the district asserts that the hearing record establishes that it could have successfully implemented the student's IEP.

The district also cross-appeals those adverse portions of the IHO decision finding that it failed to offer the student a FAPE for the 2011-12 school year, that the student required home-based ABA services, and that equitable considerations supported the parents' request for tuition reimbursement. Specifically, the district contends that the May 2011 CSE was duly constituted, that the May 2011 CSE reviewed sufficient evaluative material to develop the student's IEP, that the district was not required to recommend ABA for the student in the May 2011 IEP or to provide the student with a transition plan or transitional support services relative to the student's transition from McCarton to the assigned public school. The district also argues that its recommendation of a 6:1+1 special class with related services and a 1:1 behavior management paraprofessional was appropriate for the student, that the BIP developed by the district was appropriate, and that the IHO erred in finding that the district's placement process was defective.

Relative to the assigned public school site, the district asserts that because the student did not attend the assigned school, the district was only obligated to have an IEP in place for the student on the first day of school, and was not required to defend its program for the entire 2011-12 school year, and that assuming for the sake of argument that the student had attended the assigned school, the IHO erred in finding that a 1:1 behavior management paraprofessional would not have been sufficiently trained or capable of addressing the student's interfering and self injurious behaviors and redirecting the student. The district also maintains that the assigned public school would have been able to fulfill the student's related services mandates as set forth in his May 2011 IEP. The district seeks reversal of the IHO's determination that it failed to offer the student a FAPE for the 2011-12 school year, or, alternatively, that the parents established that the student required home-based ABA services for the student and that equitable considerations favored the parents, and reversal of the award of tuition reimbursement to the parents for the student's 2011-12 school year at McCarton.

The parents answer the district's cross-appeal, asserting, among other things, that the district was prohibited from introducing retrospective evidence to modify those aspects of the district's recommended program that were not contained in the May 2011 IEP, including the level of 1:1 instruction that would have been provided to the student in the assigned 6:1+1 special class and the appropriateness of the TEACCH methodology utilized in the assigned 6:1+1 special class, that the student did indeed require a "transition plan" to move successfully from McCarton to the assigned school, that the student's behavioral needs could not have been successfully addressed in a 6:1+1 special class environment even with a 1:1 behavior management paraprofessional, and that

the BIP developed by the district would have been inappropriate for implementation in the 6:1+1 special class environment of the district's proposed placement.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 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, 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. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability 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).

VI. Discussion

A. Mootness

Initially, I must note that in this case the parents have already received all of the relief they were seeking at the impartial hearing by virtue of pendency and the 2011-12 school year at issue has expired (IHO Interim Decision at pp. 2-3), which raises the question of whether the instant appeal has been rendered moot by the passage of time (F.O. v. New York City Dept. of Educ., 2012 WL 4955124, at *3 [S.D.N.Y. Sept. 10, 2012]; M.S. v. New York City Dept. of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]). Consequently, I find that regardless of the merits of a decision concerning whether the district offered the student a FAPE for the 2011-12 school year, no further meaningful relief may be granted to the parents because they have received all of the relief sought pursuant to pendency, and thus, the parents' appeal has been rendered moot (Application of a Student with a Disability, Appeal No. 12-011). However, in view of the recent decisions issued by the United States District Courts in New York City Dep't of Educ. v. S.A. and J.A., 2012 WL 6028938, at *2-*3 [S.D.N.Y. Dec. 4, 2012] and New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. July 29, 2011], I will review the merits of the instant appeal.

B. Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's findings that McCarton was an appropriate placement for the student for the 2011-12 school year and that the parents were entitled to reimbursement for transportation expenses for the student's 2011-12 school year at McCarton. Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*11 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013).

C. Burden of Proof

Initially I will address the parents' argument on appeal asserting that the IHO impermissibly misallocated the burden of proof by requiring the parents to establish that the district's failure to conduct updated psychological or educational testing of the student prior to the May 2011 CSE meeting rose to the level of a denial of a FAPE to the student, and that the student required home-based ABA services in order to receive a FAPE for the 2011-12 school year. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Reyes v. New York

City Dep't of Educ., 2012 WL 6136493, at *5 [S.D.N.Y. Dec. 11, 2012; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]). Although the IHO may have used less than optimal language in his decision to describe the appropriateness of the district's program (see IHO Decision at pp. 21-22, 38), a review of the IHO's decision in its entirety and of the complete impartial hearing transcript, taken together, demonstrates that the IHO properly placed the burden on the district to prove that it offered the student a FAPE (see id. at p. 20). Even if the IHO had allocated the burden of proof to the parent, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was equipoise (Schaffer, 546 U.S. at 58; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479 at *9 n.6 [S.D.N.Y. Mar. 21, 2013]; A.D. v. New York City Dept. of Educ., 2013 WL 1155570 at *5 [S.D.N.Y. Mar. 19, 2013]). Moreover, I have independently examined the evidence in the entire hearing record (see 34 CFR 300.514[b][2]), and, as discussed more fully below, I find that regardless of which party bore the burden of proof, the evidence in the hearing record demonstrates that the district offered the student a FAPE for the 2011-12 school year (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 336 [E.D.N.Y. June 13, 2012].

D. May 2011 CSE Process

1. Composition of the May 2011 CSE

Next I will consider the district's cross-appeal of the IHO's finding that the May 2011 CSE was improperly composed because it lacked a special education teacher "who was familiar with the [district's] recommended program to explain how the IEP would be implemented" (IHO Decision at p. 25). Initially, the parents' due process complaint contains the claim that the May 2011 CSE was "improperly composed" and then alleged there was no "general education teacher" present during the development of the IEP (Parent Ex. A at pp. 3, 6). However, the IHO did not address the parents' claim and instead ruled that the lack of a special education teacher with sufficient expertise instructing children with autism resulted in the parents' inability to participate in the CSE meeting (IHO Decision at pp. 25-26).

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parents' due process complaint notice, I find that the parents allegation that a general education teacher was absent and that the IEP team was not properly composed may not be reasonably read to raise the claims that the CSE lacked a special education teacher or that the CSE participants in attendance lacked sufficient expertise to develop an IEP for the student (see Parent Ex. A; Dist. of Columbia v Pearson, 2013 WL 485666, at *5 [DDC Feb. 8, 2013][declining to hear all potential claims

flowing from a general foundational basis and addressing the specific claims alleged). The hearing record also does not suggest that the district agreed to expand the scope of the impartial hearing to include the additional issues (Application of the Bd. of Educ., Appeal No. 10-073).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I find that it was not appropriate for the IHO to render determinations on these issues (S.M. v. Taconic Hills Cent. School Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013). The failure allege these issues in the original complaint, file an amended complaint or obtain the opposing parties' agreement inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Assuming for the sake of argument that these issues had been properly raised or that the district "opened the door" to issues outside the complaint by arguing those issues to meet its burden (M.H., 685 F.3d at 250–51), the parents would not prevail on their claim. The IDEA requires 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][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicate 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]).

According to the hearing record, the May 2011 CSE included, from the district, a special education teacher, a social worker, and a school psychologist (who also served as district representative), an additional parent member, the student's mother, and four representatives from McCarton, including the student's head classroom teacher, his board certified behavior analyst (BCBA), and his occupational therapist and speech-language therapist (Tr. pp. 23-24; Dist. Ex. 6 at p. 1; Parent Ex. C at p. 3). Although it is unclear from the hearing record whether the special education teacher from the district who participated in the CSE meeting would be responsible for implementing the student's IEP, the district social worker testified that she herself had formerly

been employed as a special education teacher in a collaborative team teaching (CTT)[13] classroom serving students from kindergarten through second grade, that she previously taught in a district program and interned two summers as part of her teaching program at a district school for students with autism, that she previously attended CSE meetings, during which she reviewed student data and assisted in the development of program recommendations based thereon, and that she had an understanding of and was familiar with the features of a 6:1+1 special education program (see Tr. pp. 20, 24, 81, 83-84). The district social worker also testified that the school psychologist/district representative who attended the May 2011 CSE meeting was aware of the continuum of services available within the district (Tr. pp. 25-26). While there is no indication in the hearing record that the district special education teacher at the May 2011 CSE meeting lacked familiarity with the proposed district program, I find that, based upon the hearing record, the members of the May 2011 CSE were sufficiently knowledgeable with regard to the proposed program to enable the CSE to develop the student's May 2011 IEP.

Furthermore, assuming for the sake of argument that the IHO's finding was supported by the hearing record, I am not persuaded by the evidence that it 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]) where, as here, the hearing record reflects the active participation of the student's mother and the four McCarton representatives—including the student's classroom teacher from McCarton, who also was a special education teacher—who were personally familiar with the student (see A.D., 2013 WL 1155570, at *6-*7; C.T. v. Croton-Harmon Union Free School Dist., 812 F.Supp.2d 420, 430-31 [S.D.N.Y. 2011]; Application of the Dep't of Educ., Appeal No. 11-040; Application of the Dep't of Educ., Appeal No. 08-105). The parents' participation in the CSE process is also addressed further below. Accordingly, I will reverse the IHO's finding that as a result of improper composition of the May 2011 CSE the parents' opportunity to meaningfully participate in the development of the student's May 2011 IEP was impeded by a failure to the required CSE participants.

Additionally, with regard to the CSE composition claim that was unaddressed by the IHO, to the extent that the parents asserted that the regular education teacher was not included in the CSE meeting, I note that the IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; see also 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of

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

the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). In this case, although the evidence shows that no regular education teacher participated at the May 2011 CSE meeting, the hearing record demonstrates that the student was not being considered by either party for placement in a general education classroom and that both parties were seeking to place the student in a special class setting and, moreover, this claim appears to have been abandoned insofar as neither party has asserted below or on appeal that he would be appropriately placed in a general education setting (Tr. p. 26; Parent Ex. C at pp. 2, 23). Therefore, I find that a regular education teacher of the student was not required at the May 2011 CSE meeting because the evidence does not support the conclusion that there was a reasonable likelihood that the student would have been participated in a general education setting (34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see J.G. v. Kiryas Joel U.F.S.D., 777 F. Supp. 2d 606, 644-45 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ. 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 365-66 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *5-*6; see also Application of the Dep't of Educ., Appeal No. 11-136; Application of the Bd. of Educ., Appeal No. 11-129; Application of a Student with a Disability, Appeal No. 08-035).

2. Parent Participation

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., 569 F. Supp. 2d at 383 ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). The consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W., 869 F. Supp. 2d at 333-34; D.D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K, 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A

key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D. D-S, 2011 WL 3919040, at *10-*11; M.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

Here, the district formulated an IEP for the student that recommended a 6:1+1 special class placement in a specialized school (see Parent Ex. C at p. 2; 8 NYCRR 200.6[h][4]). The hearing record reflects that the May 2011 CSE meeting was attended by the student's mother and four representatives from McCarton, including the student's head classroom teacher, his BCBA, and his occupational therapist and speech-language therapist, and, moreover, that the CSE meeting was conducted at the student's private school placement, McCarton (Tr. pp. 23-24; Dist. Ex. 6 at p. 1; Parent Ex. C at p. 3). The district social worker testified that during the annual review meeting, which lasted "about an hour and a half," the CSE received information regarding the student's present levels of academic and social performance, his progress, strengths, weaknesses, and the supports that helped him learn from the student's head teacher and his related service providers (Tr. pp. 23, 27-30), and her testimony is consistent within the documentary evidence insofar as the student's May 2011 IEP and the CSE meeting minutes indicate that the McCarton representatives furnished the other Committee members with the student's information and that the other Committee members took note of their impressions and recommendations (see Dist. Ex. 6 at pp. 2-3; Parent Ex. C at pp. 4-6, 8). She also testified that the May 2011 CSE decided on the levels of related services recommended for the student in the May 2011 IEP after discussions were held with the student's McCarton service providers (Tr. pp. 91-92),[14] and the CSE meeting minutes contained in the hearing record noted the recommendation of McCarton personnel that the student "will always have his own 1:1 support" during his related services sessions (Dist. Ex. 6 at p. 3).

Additionally, the student's mother testified that the May 2011 CSE meeting lasted "about an hour and a half, two hours," that "[w]e discussed [the student's] inappropriate behaviors at the time of the meeting" as well as his self-injurious behaviors, that "[w]e discussed his needs and deficits," that "I did discuss my concerns about [the student," and that [w]e discussed what he had achieved that year and the previous year at school, and our goals" (Tr. pp. 448-50, 495-97). The hearing record also reflects that the May 2011 CSE considered recommending a 10-month special education program in a community school, but ultimately rejected this option, noting that "mom stated that this would be a goal but he is not ready yet," and also considered recommending both a 12:1+1 and an 8:1+1 special class in a specialized school, but ultimately rejected them because the CSE "felt that [the student] requires a small class setting with the additional support of a behavior management paraprofessional to meet [his] IEP goals at this time" (Dist. Ex. 6 at p. 2; Parent Ex. C at p. 24). Based upon my review of the hearing record, I find that the parent actively provided the May 2011 CSE with specific and current information regarding the student's educational skills and needs and, that together with the four McCarton representatives, they ensured that the CSE was directly informed when developing the student's May 2011 IEP, and

[14] According to the hearing record, during the 2011-12 school year, McCarton provided the student with OT services three times per week for 45 minutes per session in a 1:1 setting and once per week for 45 minutes per session in a group setting, and speech-language therapy services twice per week for 45 minutes per session in a 1:1 setting, once per week for 45 minutes per session in a dyad, and once per week for 45 minutes per session in a group setting (Tr. pp. 334-37, 564-66).

therefore, was afforded an opportunity to meaningfully participate in the IEP development process (G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *20-*21 [S.D.N.Y. Mar. 29, 2013]; T.P., 554 F.3d at 253; see M.W., 869 F. Supp. 2d at 333-34; M.R., 615 F. Supp. 2d at 294).[15]

Next I will address the parents' assertion that they were denied input or discussion as to the selection of the assigned school. As noted above, although the IHO acknowledged that the district was not required to designate an assigned school for the student on the May 2011 IEP itself, he did find that the district's placement process denied the parents the opportunity to participate in the placement decision because the district did not conduct a "placement meeting," because it did not furnish the parents with a copy of the student's May 2011 IEP at the time they visited the assigned school, and because of the timing of the district's notification to the parents of the school to which it had assigned the student (IHO Decision at pp. 31-32). However, although the IHO found that these deficiencies violated federal law, he ultimately found that, collectively, they did not rise to the level of a denial of a FAPE (id. at pp. 32-33). The parents assert that the IHO reached his ultimate finding in error, and contend that these deficiencies denied the student a FAPE for the 2011-12 school year.

Generally, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116, 300.327, 300.501[c]; 501[b][1][i]). 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" (R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. Aug. 19, 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167; 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]). In T.Y., the student's IEP did not "name the school [the student] would attend," but rather, the parents received notice "in the mail that recommended a specific school placement" (T.Y., 584 F.3d at 416). The parents in T.Y. visited the recommended site, but thereafter rejected it; the district recommended a second site, which the parents "called" but did not visit, and thereafter unilaterally placed the student in a nonpublic school (id. at 416). Pointing to the IDEA and its implementing regulations, the parents argued in T.Y. that "'procedural safeguards . . . make clear that parents are to be afforded meaningful participation in the decision-making process as to the location and placement of their child's school and classroom'" (id. at 419). The T.Y. Court, however, relied upon precedent establishing that the "the term 'educational placement'" did not refer to the specific school, and expressly rejected the parents' argument (id. at 419-20; see also R.E., 694 F.3d at 191). Moreover, the R.E. Court found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and that "[t]he [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (R.E., 694 F.3d at 191-92; see S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *5 [N.D.N.Y. Feb. 28, 2013]; J.L. v. City Sch. Dist. of City of New

[15] As discussed above, there is no indication in the hearing record that the student's mother asserted any objections to the IEP during the May 2011 CSE meeting.

York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013];F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *12 [S.D.N.Y. Oct. 16, 2012]); K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. Nov. 18, 2011]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12, *14 [S.D.N.Y. Nov. 9, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9 [S.D.N.Y. Oct. 28, 2011]; A.L, 812 F. Supp. 2d at 504). Consequently, the parents' argument on appeal must be rejected because the parents' right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school building or classroom, which is the crux of the parents' arguments in this case (T.Y., 584 F.3d at 416, 419-20; J.L., 2013 WL 625064, at *10; C.F., 2011 WL 5130101, at *8-*9).[16]

To the extent the parents argue that the district's failure to provide a "placement meeting" violated the stipulation reached in the Jose P. class action suit, I note that the remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P., 553 IDELR 298; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see also Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L., 2012 WL 4891748, at *11; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F.Supp.2d 90, 101 n.3 [E.D.N.Y. 2011]). Therefore, I lack the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K., 2011 WL 1131492, *17 n.29; W.T., 716 F. Supp. 2d at 289-90 n.15; see F.L, 2012 WL 4891748, at *11-

[16] After the Second Circuit discussed the term "educational placement" in T.Y., a number of cases have more recently made use of the term "placement classroom" to distinguish educational placement from the proposed location or site (M.Z., 2013 WL 1314992, at *10; A.D., 2013 WL 1155570, at *4; E.C., 2013 WL 1091321, at *25; E.A.M. v. New York City Dept. of Educ., 2012 WL 4571794, at *4 [S.D.N.Y., Sept 29, 2012]; S.F. v. New York City Dept. of Educ., 2011 WL 5419847, *13. The Second Circuit has also made clear that just because a district is not required to place details such as the particular school site or classroom location on a student's IEP, the district is not free to choose any random classroom and services at random that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). Districts are held accountable for providing services in conformity with the IEP. Thus, in reaffirming T.Y., the Court held that, the district "may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (R.E., 694 F.3d 167, 191-92).

*12; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]).

Turning to the parents' allegation that the district's failure to furnish them with a copy of the resultant IEP at the conclusion of the May 2011 CSE denied them a meaningful opportunity to participate in the CSE process, the IDEA does not require parental presence during the actual drafting of the written education program document (E.G., 606 F. Supp. 2d 384 at 388-89). Moreover, there is no legal authority requiring districts to produce an IEP at the time that the parents demand — or, as is the case here, at the time they visit an assigned school; districts must only ensure that a student's IEP is in effect at the beginning of each school year and that the parents are provided with a copy (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).[17] In this case, the hearing record reflects that both requirements were met (see Tr. p. 447; Parent Ex. C at pp. 1, 3).[18]

The IHO also took issue with the timing of the district's notification of the parents of the school to which it had assigned the student, which, the IHO found, occurred too late in the summer to enable the parents "to continue to engage in the placement process if they disagreed with the [district's] recommendation" (IHO Decision at p. 31). As discussed above, the hearing record reflects that the parents received an FNR, dated June 14, 2011, at some point between June 14, 2011 and June 21, 2011, that the student's mother visited the assigned school on June 21, 2011, and formally rejected the assigned school on June 27, 2011 (see Tr. pp. 452-57, 491-92, 646-48; Parent Exs. J; L at p. 1). However, I note that, although the district offered the parents the opportunity to visit the assigned school in this case, neither the IDEA nor State regulations confer upon parents the right to visit a recommended school and classroom (S.F., 2011 WL 5419847, at *11-*12 [even if FNR was untimely, it did not interfere with the provision of a FAPE to the student because district was not obligated to afford parents an opportunity to visit assigned school]).[19] Furthermore, the U.S. Department of Education's Office of Special Education (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013). While I can understand and sympathize with the parents' desire to know as many details as early as possible about the particular building site, the actual classroom in which the child would be

[17] As a matter of State law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]).

[18] I note that the parents do not claim that the district failed to provide them with a copy of the IEP before the start of the school year. Further, even assuming for the sake of argument that the district somehow improperly delayed delivery of the IEP, there is no evidence in the hearing record that such a delay impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2; Application of the Dep't of Educ., Appeal No. 10-070).

[19] Nothing in this decision, however, is intended to discourage districts from offering parents the opportunity to view school or classroom placements as such opportunities can only foster the collaborative process between parents and districts.

sitting, his teachers and other professionals that would work with him on a daily basis, and his classmates, the district does not impermissibly inhibit the parents' participation and thereby violate the IDEA or State regulations, where, as here the State as chosen to assign the function of determining the educational placement to the CSE and the CSE has performed that function (J.L., 2013 WL 625064 at *10).

In summary, based upon the foregoing, the parents could not be deprived of the opportunity to participate in the selection of the student's specific school because neither the IDEA nor its implementing regulations entitles them to such right.

E. Appropriateness of the May 2011 IEP

1. Sufficiency of Evaluative Information

I will next consider the parents' allegation that the district's failure to conduct updated psychological or educational testing of the student prior to developing his May 2011 IEP rendered the student's IEP deficient and denied the student a FAPE. An independent review of the information considered by the May 2011 CSE, as detailed below, reflects that the CSE had before it current evaluative information relative to the student which was sufficient to enable the CSE to develop the student's May 2011 IEP.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see E.A.M v. New York City Dep't of Educ., 2012 WL 4571794, at *9-*10 [S.D.N.Y. Sept. 29, 2012]; S.F., 2011 WL 5419847, at *12; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

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

However, contrary to the parents' allegation that the CSE failed to conduct its own evaluations, a CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80). In addition, as part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see, e.g., G.W., 2013 WL 1286154, at *19; C.H., 2013 WL 1285387, at *15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, at *15 [S.D.N.Y. Mar. 21, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; 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 Bd. of Educ., Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-095; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child Suspected of Having a Disability, Appeal No. 06-087).

In this case, the district social worker testified that the May 2011 CSE reviewed "progress reports from [the student's] related service providers as well as the general — … educational progress update from the [McCarton] school" (Parent Exs. G-I) the student's proposed IEP from the 2010-11 school year,[20] and a December 14, 2010 classroom observation report generated by the district (Dist. Ex. 2; see Tr. pp. 24, 26-27, 43).

According to the student's January 2011 McCarton educational progress report, the student was receiving 1:1 or small group instruction "both in the classroom and in the community" (Parent Ex. I at p. 1). According to the results of the Vineland Adaptive Behavior Scales, Second Edition,

[20] The student's proposed IEP from the 2010-11 school year is not included in the hearing record.

Teacher Rating Form (Vineland-II TRF),[21] the student's functioning in the receptive communication subdomain, relative to skills such as listening, paying attention, and understanding, was at an age equivalent of 3 years and 4 months; his functioning in the expressive communication subdomain, relative to skills such as using words and sentences to gather and provide information, was at an age equivalent of below 3 years; in the written subdomain, relative to reading and writing skills, the student's functioning was assessed at an age equivalent of 6 years and 10 months; in the daily living skills domain, the student's functioning in the personal subdomain indicated his personal care and hygiene skills were at an age equivalent of below 3 years; his functioning in the academic subdomain, relative to his understanding of time, money, and math, was at an age equivalent of 6 years and 11 months; his functioning in the school community subdomain, relative to his ability to follow rules and routines, was at an age equivalent of 3 years and 1 month; in the socialization domain, the student's functioning was rated as below 3 years in all three subdomains and their corresponding skills, including interpersonal relationships, play and leisure time, and coping skills (id. at pp. 1-2).

The McCarton educational progress report also reflected the student's maladaptive behaviors, including verbal perseveration, which was defined as the student commenting or asking about a topic twice or more within one minute, and repeatedly talking about topics either aversive to him or outside of his typical routine, such as weather, past specific dates and events, and changes in his daily schedule, and identified his disruptive behaviors including falling to the floor, throwing or destroying materials, and non-compliance lasting longer than one minute (Parent Ex. I at p. 2). The progress report reflected several intervention strategies were used to address these behaviors, including honoring those student requests that were deemed appropriate, providing him with high levels of reinforcement when the student independently chose to engage in activities that he typically protested, and creating an hourly schedule with the instructor and a "contract" in which he earned a chosen, preferred activity after successfully completing the schedule; the instructor also provided the student with frequent feedback regarding his positive and negative behaviors to increase the student's self management skills (id.).

The McCarton educational progress report indicated that the student's "current functioning level and his learning characteristics require highly individualized education based on the principles of [ABA] to facilitate his learning," and that his educational program required a dense schedule of reinforcement, functional communication response training, multiple practice opportunities, generalization training, use of visual aids, and a positive behavioral support plan (Parent Ex. I at pp. 2-3). It also emphasized the importance of collaboration between his related services providers due to the overlap with regard to skills worked on among the student's multiple instructors (id. at p. 3).

With regard to communication, the McCarton educational progress report indicated that the student was able to speak in full sentences, although he was inconsistent in his use of correct syntax and grammar, and often confused pronouns and used "me" and "you" incorrectly (Parent Ex. I at p. 3). However, it also noted that the student was able to consistently communicate his wants and needs, to carry on simple conversations with adults, and to answer simple questions

[21] The hearing record does not indicate the date that the Vineland-II TRF was administered to the student.

regarding presented topics, although he often would not attend to the conversation unless he was intrinsically motivated to discuss the topic (id.). It reflected that the student did not effectively express his frustration or confusion, but instead, repeated comments or questions that affected him; that he repeatedly protested events or activities that did not follow his typical routines; that he was unable to negotiate in a constructive manner; that he repeatedly asked for items, events or people that were not attainable; and that his perseverative behavior often escalated into disruptive behavior or aggression toward others without early intervention (id.). It further noted that several of the student's goals contained in his then-current McCarton "individual education plan" for the 2011-12 school year (which is not included in the hearing record) targeted the student's communication skills and summarized his progress toward them (id.).

Relative to the student's academic functioning, the McCarton educational progress report reflected that the student received 1:1 and group instruction in reading, utilized his decoding skills to steadily gain new reading words and learn their definitions, was able to identify the setting and main character of a story in a multiple choice format, and reliably answered "WH" questions after reading short passages (Parent Ex. I at p. 4). It described the student's writing skills as "inconsistent" and requiring the support of visual cues and fill in blank worksheets, although he reportedly was acquiring new spelling words at the third and fourth grade levels, and was learning to write simple sentences in his daily journal and to describe photographs (id.). Relative to math, it indicated that the student had mastered double digit addition with carrying, double digit subtraction without regrouping, and simple word problems involving multiple operations, and that he was currently working on multiplication, specifically, the "three times table" using manipulatives and money managing skills, both in the classroom and in the community (id.). It further described the student as having a "great interest" in social studies, as demonstrated by his use of the internet to search facts about various countries of interest, and that in science, the student was able to identify planets of the solar system (id.).

Relative to the student's activities of daily living (ADL) skills, the McCarton educational progress report noted student's abilities and needs in the classroom setting with regard to food preparation, toileting skills, dressing, and self care skills, and identified corresponding classroom activities addressing these needs and the supports the student required in order to participate in these activities (Parent Ex. I at pp. 4-5). It also reflected that the student had begun to learn skills required to function in the community, and, with adult assistance, he was navigating in the community and was able to enter a store and use his money management skills to make a purchase (id. at p. 5).

With regard to the student's socialization skills, the student demonstrated his interest in students and instructors by asking about them, joking with instructors (although this sometimes lead to disruptive behavior if he was not successfully redirected back to task), greeting peers and adults (although he occasionally used inappropriate inflection or yelled from a distance and occasionally greeted repeatedly, even after the greeting was reciprocated and invaded the personal space of others) (Parent Ex. I at p. 6). It noted that the student did not engage in play activities without adult mediation, that usually he could tolerate playing with peers for only brief periods, and that he required extra incentives—points accumulated to exchange for a special lunch—in order to participate in group activities without disruptive behavior (id.).

Relative to the student's adaptive behavior in the classroom, the McCarton educational progress report reflected that the student demonstrated self advocacy skills by verbally asserting his wants, needs, and preferences and that he could refuse offers that he did not want or need; however, it also noted that the student did not consistently demonstrate coping skills in response to changes in his environment or routines, and that he responded to these changes by engaging in verbal perseveration, which often escalated to disruptive behavior and, occasionally, to aggression toward others; it further indicated that the frequency of these verbal perseverations had increased by 45% since July 2010, and the topics of the perseverations were concentrated on his transition to McCarton's upper school and the accompanying changes in his instructors and classmates (Parent Ex. I at p. 6).[22] However, according to the McCarton educational progress report, although the average number of disruptive episodes during the same period remained at one episode per day, the average number of minutes per day in which the student engaged in disruptive behavior increased to just under 14 minutes (id. at pp. 6-7). It cited the student's progress in organization and task engagement, and noted that he was able to wait for two minutes without exhibiting target behaviors in 1:1 and group instruction, that he was able to remain engaged independently for two minutes while completing multiple worksheets, and that he currently was able to work for five minutes at a time without engaging in verbal perseveration (id. at p. 7).

According to a January 14, 2011 McCarton OT progress report, the student was mandated to receive OT 5 times per week for 45 minutes per session in a 1:1 setting (Parent Ex. H at p. 1). Results of a December 2010 administration of the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2) reflected that the student had progressed in all but one area tested (strength), and had increased his performance levels by 2 to 18 months in various subtests, with the most notable increases occurring in the areas of upper-limb coordination (+18 months), fine motor precision (+12 months), bilateral coordination (+9 months), and running speed and agility (+6 months) (id. at pp. 1-2).[23]

The McCarton OT progress report also documented the student's progress toward his long term OT goals (Parent Ex. H at pp. 3-7). Relative to his first long term OT goal, to improve his sensory processing skills for improved self regulation and increased interactions with the environment, it reflected that the student's participation in activities that provided vestibular and proprioceptive input helped him to attend to desktop activities for longer periods of time, although, it noted that, due to inconsistency, he had not achieved his goal of attending for 20 minutes without redirection (id. at p. 3). It also indicated that the student's attention to tasks depended on the level of activity around him and his ability to filter out external stimuli; however, the student was able to perform two to three tasks before requiring a sensory break during testing (id.). It also noted that decreased self regulation was indicated by the student's presentation of non-contextual laughing, loud screams, and perseverative speech that was usually related to a change in schedules

[22] According to the hearing record, McCarton's upper school educated adolescent students with autism ranging in age from 12 to 21 years (see Tr. pp. 389-91; Parent Ex. LL).

[23] The McCarton OT progress report indicated that the December 2010 BOT-2 was administered to the student in a "non-standardized manner" due to the high degree of complex verbal directions required to understand each task, and that visual demonstration, encouragement, and sensory breaks were used to facilitate the student's compliance in attempting each skill (Parent Ex. H at p. 1).

and typically occurred during OT sessions and throughout the school day (id.). With regard to his second long term OT goal, to improve his motor planning skills, trunk control, and balance for improved negotiation of his environment, it further noted "great gains in the gross motor area," particularly in his abilities to throw a small ball and to dribble and shoot a basketball (id. at pp. 3-4). Relative to his third long term OT goal, to improve his fine motor and perceptual skills, it cited the student's improvements in his abilities to copy simple sentences using upper and lower case letters, to demonstrate refined scissor skills and typing skills, and to copy his signature onto one-inch, three-lined paper, and noted that the student had achieved his goal to write numbers 1-20 on half inch, three-lined paper (id. at pp. 4-5). With regard to his fourth long term OT goal, to increase independence with self care skills, the McCarton OT progress report indicated that the student had improved his awareness of his appearance and his abilities to adjust his clothing, comb his hair, and wipe his face, but noted that he had made little progress in tying his shoelaces (id. at p. 5). Relative to his fifth long term OT goal, to develop his basic prevocational skills, it reflected the student's "great progress," including his abilities to identify the names and values of coins and to begin to add their values together, and his mastering of his goals to distribute addressed envelopes to staff members and to sort and file peer worksheets alphabetically, and described the student as "efficient" and able to verbally request assistance when encountering reading difficulty (id.).

A December 2010 McCarton speech-language progress report reflected that the student received speech-language therapy 3 times per week for 60 minutes per session in a 1:1 setting and twice per week for 60 minutes per session with a peer, with individual support within the classroom setting (Parent Ex. G at p. 1). It further indicated that the broad goals of the student's speech-language therapy included improving his receptive and expressive language skills and his spontaneous use of language, facilitating his interactions with peers, and expanding his leisure and recreational skills (id.). It also described the student's behaviors as including "tensing," hitting objects (such as his desk and objects in the environment), pooling saliva, throat clearing, uncontrollable laughter, screaming, staring off at people or objects, imitating the self-stimulating behavior or vocalizations of other students, scripting about past events, and swaying, and reflected that the student exhibited perseverative language related to preoccupying thoughts about negative past experiences, the weather, and changes in routine, such as a peer or staff absence, which was addressed by utilizing a "written problem identifying/problem solving script" that the student utilized with the help of a clinician to identify the source of his perseverative language, clarify how he felt, and identify what would make him happy (id.). It further noted that the student benefited from the use of both a point system, in which he earned points in order to receive a "reinforcer," and a visual schedule; that the student was easily upset by changes to his daily schedule and usually memorized his weekly schedule, including which teachers were working with him; and that when distracted by internal dialogue or his environment, the student had difficulty looking at the task at hand, and, at times, stared off while "going through the motions of the activity," pointing randomly without looking at his answer, or giving nonsense answers to factual questions (id. at pp. 1-2).

According to a December 14, 2010 classroom observation of the student conducted by the district school psychologist (who participated in the May 16, 2011 CSE), the student was observed for an unspecified time period in his classroom at McCarton in a reading group with two other students, during which he initially sat quietly during a review of the previous lesson, but was eventually removed from the classroom for the remainder of the lesson after exhibiting verbal

perseveration (Tr. pp. 24, 43; Dist. Ex. 2 at p. 1). Upon his return to the classroom, the student was observed working in a 1:1 setting with a teacher, and was able to attend and follow along with the activities related to colors and size concepts (Dist. Ex. 2 at p. 1). When instructed to locate the school psychologist in the classroom, the school psychologist noted that the student required some guidance from the teacher to approach the observer, introduce himself, and look at the observer, all of which he accomplished with teacher assistance (id.). However, the school psychologist also noted that when the student was taught in a 1:1 setting, he was able to appropriately complete an activity involving identification of items and to finish the work identified on his schedule, after which he was rewarded with an opportunity to engage in an activity of his choice, wherein he asked to go to the library to do a puzzle (id. at pp. 1-2). In summary, she indicated that "[o]verall, [the student] worked well with his teacher, but required a lot of guidance and prompting" (id. at p. 2).

In addition to the information described above, the hearing record reflects that the student's mother and the four McCarton representatives in attendance at the CSE meeting provided verbal information regarding the student's current academic and social/emotional functioning, needs, and progress (see Tr. pp. 27-30, 34-38, 41-43, 48, 495-97; Dist. Ex. 6; Parent Ex. C at pp. 3-6, 8). The district social worker testified that at the time of the May 2011 CSE meeting, "the team [had the student's] current progress and his performance in his academic and social domains," and that these "were … considered … for purposes of drafting the [student's May 2011] IEP" (Tr. p. 103).

Furthermore, while permissible, there is no requirement under federal or State regulations that an IEP contain specific references to criterion referenced testing, achievement testing or diagnostic testing. Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). Although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see Application of the Dep't of Educ., Appeal No. 11-137; Application of a Student with a Disability, Appeal No. 11-043). As noted above, the hearing record demonstrates appreciable input from the student's head teacher and related services providers from McCarton during the development of the student's 2011-12 IEP relative to the student's needs in reading, math, writing, language processing, motor skills, and social/emotional functioning (see Tr. pp. 27-30, 34-38, 41-43, 48, 495-97; Dist. Ex. 6; Parent Ex. C at pp. 3-6, 8), and courts have found that such input may be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at *10; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011]).

Based on the foregoing, I find that the evidence contained in the hearing record does not support the parents' contention that the lack of psychological or educational testing of the student by the district prior to developing his May 2011 IEP compromised the resultant IEP or denied the student a FAPE for the 2011-12 school year. Moreover, the hearing record reflects that the evaluative data considered by the May 2011 CSE, direct input received from the student's head classroom teacher, his BCBA, and his occupational therapist and speech-language therapist from

McCarton, provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his 2011-12 IEP notwithstanding the absence of any formal psychological or educational testing on the part of the district (J.F. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012]; S.F., 2011 WL 5419847, at *9-*10; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of the Dep't of Educ., Appeal No. 12-055; Application of a Student with a Disability, Appeal No. 12-044; Application of the Dep't of Educ., Appeal No. 11-147; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

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

2. Parent Counseling and Training

Next I will consider the parents' argument that the IHO improperly relied upon retrospective testimony in finding that the absence of a recommendation for parent counseling and training on the May 2011 IEP did not rise to the level of a denial of a FAPE to the student for the 2011-12 school year because, had the student been educated under the May 2011 IEP, opportunities for parent counseling and training would have been available to the parents at the assigned school. For the reasons discussed below, I will not disturb the IHO's conclusion that the lack of parent counseling and training on the student's IEP did not amount to a denial of a FAPE.

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to

include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.W., 869 F. Supp. 2d at 335; C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509). Recently, the Second Circuit explained that "because school districts are required by [State regulation][24] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191). The Court further explained that "[t]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" (id.; see A.D., 2013 WL 1155570, at *11-*12; FB and EB v. New York City Dep't of Educ., 2013 WL 592664, at *11-*13 [S.D.N.Y. Feb. 14, 2013]; F.L., 2012 WL 4891748, at *10; K.L., 2012 WL 4017822, at *14).

In this case, although the hearing record is unclear as to whether parent counseling and training were in fact discussed during the May 2011 CSE meeting, the parties to this appeal do not dispute that the May 2011 CSE failed to include a recommendation for parent counseling and training on the student's 2011-12 IEP, which, under these circumstances, constituted a violation of State regulations (IHO Decision at p. 29; see Tr. pp. 43-44, 83, 467; Parent Ex. C). However, neither the parents' claim by itself nor the evidence in the hearing record offer much in the way of insight or rationale to support that the failure to specify parent counseling and training on the student's IEP in this instance rose to the level of a per se denial of a FAPE, and, as stated above, the Second Circuit does not appear to support application of such a broad rule when the principal defect in the student's IEP is failure to set forth parent training and counseling services (R.E., 694 F.3d at 191, 195; see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y. Oct. 30, 2008]).

I further note that in this case, the district defended this claim substantively by proffering testimony of the district social worker, who testified that "[p]arent counseling and training is programmatic, part of [the district's] specialized programming. That's part of the reason it's considered a specialized school, a specialized program that would be what is called programmatically embedded, so it would not be on the IEP," and, although she was unable to provide information regarding specific frequencies, durations, and scheduling of parent counseling and training opportunities available at the assigned school during the 2011-12 school year, she testified that "[m]y understanding is that—and you know it's not only my understanding—again, I've visited [district] programs. I've actually worked at [district] programs—is that parent training is part of the program. It's part of what they do at the specialized … schools" (Tr. pp. 83-84).

However, as discussed above, even acknowledging that the May 2011 CSE's failure to recommend parent counseling and training violated State regulations, the hearing record ultimately supports the conclusion that this violation, alone, did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process

[24] 8 NYCRR 200.13[d].

regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Although I find that the district's technical violation did not rise to the level of a denial of a FAPE to the student for the reasons discussed above, in light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I will order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on a form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).[25]

3. Transitional Support Services

In this case, the IHO found that relative to the student's potential move from his private school placement at McCarton to the proposed public school placement, "no services were recommended [by the district] for [the student's] transition to this less restrictive setting" and that "[u]nder the circumstances [of this case], I find that the CSE should have considered the need for transitional support services … to facilitate the transition …" (IHO Decision at p. 28). The IHO did not address the parents' allegation regarding the lack of a "transition plan" in the student's May 2011 IEP to facilitate his transfer from a nonpublic school to a district school.[26]

State regulations require that, in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8

[25] The State now requires prior written notice to be completed on a form prescribed by the Commissioner. A sample prior written notice form and guidance materials are located at http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html.

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

NYCRR 200.13[a][6]). Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes the provision of transitional support services to teachers and how they relate to students IEPs (see http://www.p12.nysed.gov/specialed/formsnotices /IEP/training/QA-411.pdf).

While it is undisputed that the May 2011 CSE did not recommend transitional support services in the student's IEP; these facts do not support the IHO's conclusion that such services were required. The hearing record indicates that had the student attended the proposed classroom in the assigned school beginning in July 2011, he would have been placed in a 6:1+1 special class in a specialized school with five other students classified as students with autism, but this placement would not have triggered the CSE's obligation to include a recommendation for transitional support services in the student's IEP under State regulations (Tr. p. 196; see 8 NYCRR 200.13[a][6]). Although the IHO concluded that the May 2011 CSE recommended a "less restrictive" setting than the student had at McCarton (IHO Decision at p. 28), the hearing record does not contain evidence that the student, who was also placed in a special class setting at McCarton, was placed together with nondisabled peers at McCarton, beyond "community outings," but it indicates that the student was in a class at McCarton with four other students and five adult teachers (Tr. pp. 391-92, 411, 605-06, 612-13). In circumstances such as those in this case, LRE is not defined by the particular special education student-to-adult staff ratio present in the placement recommendations urged by the parties. Instead, as described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers, that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120 [emphasis added]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 639 [S.D.N.Y. 2011]). The level of access to nondisabled peers in the regular education environment, however, is of little moment in this case insofar as neither party has asserted that the student should be mainstreamed with nondisabled peers. Accordingly, to the extent that some discernable difference in restrictiveness, if any, existed between McCarton and the public school program, such a change would be so inconsequential that transitional support services for the student's teacher would not be required on the student's IEP in this case (8 NYCRR 200.1[ddd]), and the IHO's determination on this issue must be reversed.

Notwithstanding the above, the hearing record reflects that the May 2011 CSE did in fact address the parents' concern with the student's transition on the IEP (see A.D., 2013 WL 1155570, at *9). The district social worker testified that a 1:1 behavior management paraprofessional "was … added on to support [the student] because [the May 2011 CSE] understood that his transition issues were … present … and the one-to-one support was really crucial in terms of helping him to … remain on task and function," that "the one-to-one support was ultimately … a transitional support as well," and that the May 2011 IEP contained additional strategies and academic and

social/emotional environmental modifications "to help [the student] in all areas of instruction and transition," including positive reinforcement and praise, redirection to task, advance warnings of changes in the student's schedule, verbal and visual supports, and a clear and consistent classroom routine; I note that several of these environmental modifications were also included in the proposed BIP attached to the student's May 2011 IEP (Tr. pp. 50, 106-07; see Parent Ex. C at pp. 6, 26).[27] The hearing record also reflects that many of the academic environmental modifications included on the May 2011 IEP were grounded in the principles of the ABA teaching methodology with which the student had been familiar at McCarton, and would have further assisted the student in his transition to a public school environment (compare Parent Ex. C at p. 5 with Parent Exs. G at pp. 1-4; H at p. 3; I at pp. 2-3). Consequently, based upon the foregoing, I find that although the May 2011 CSE was not required to include transitional support services for the special education teacher pursuant to State regulations, the IEP was nevertheless designed with services in mind to address the student's transition to from his private school to his public school and any deficiency perceived by the parents, in light of the array of other services provided on the IEP, would not be sufficient to conclude that the IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]). Based on the foregoing, I decline to find under the circumstances of this case a denial of a FAPE on the basis of a lack of transitional support services.

4. 6:1+1 Special Class with a 1:1 Paraprofessional

The district cross-appeals from the IHO's finding that its recommendation of a 6:1+1 special class in a specialized school with a full-time 1:1 behavior management paraprofessional was not tailored to address the student's unique needs, and that the district failed to establish that the student could be successfully educated in a less restrictive setting than the student's 1:1 ABA-based program at McCarton (see IHO Decision at pp. 27-28). Specifically, the parents contend that the proposed 6:1+1 special class would not have provided the student with adequate 1:1 support by a special education teacher, and that the student's interfering and self injurious behaviors could not have been adequately addressed within the proposed 6:1+1 special class by a 1:1 behavior management paraprofessional. As further described below, I have conducted an independent review of the evidence in hearing record and find that the May 2011 CSE's

[27] The IDEA does not specifically require a school district to formulate a transition plan as part of a student's IEP when a student transfers from one school to another, and courts have found that a school district's failure to identify services in a student's IEP relating to the student's transition from a nonpublic to a public school placement did not deny the student a FAPE (see A.D., 2013 WL 1155570, at *8; F.L., 2012 WL 4891748, at *9; Dep't of Educ., Hawaii v. C.B., 2012 WL 220517, at *8-*9 [D.Hawaii Jan. 24, 2012]; E.Z.-L, 763 F. Supp. 2d at 598 aff'd R.E, 694 F.3d at 195). Moreover, assuming for the sake of argument that the district was required to provide a transition plan in this case to facilitate the student's transfer from a nonpublic school to a district school, the parents have not articulated why the absence of a transition plan in his May 2011 IEP rose to the level of a denial of a FAPE to the student (see R.E., 694 F.3d at 195; F.L., 2012 WL 4891748, at *9). Accordingly, I am not persuaded by the parents' argument that the student was denied a FAPE based on a lack of a transition plan in the May 2011 IEP.

recommendation of a 6:1+1 special class and a full time 1:1 behavior management paraprofessional was appropriately designed to address the student's special education needs.

According to the hearing record, at the time of the May 2011 CSE meeting, the student exhibited significant deficits in academics, receptive, expressive, and pragmatic language skills, sensory processing skills including self regulation and attending, fine and gross motor skills, and self care skills, in addition to significant interfering and disruptive behaviors that prevented him from staying on task, participating in social interactions, and progressing toward his goals (Dist. Ex. 6 at pp. 2-3; Parent Exs. C at pp. 4-8, 26; E; G at pp. 1-4; H at pp. 1-7; I at pp. 1-7).

The hearing record also indicates that the May 2011 CSE considered recommending a 12:1+1 and an 8:1+1 special class in a specialized school for the student, but ultimately rejected these options because the CSE "felt that [the student] requires a small class setting with the additional support of a behavior management paraprofessional to meet [his] IEP goals at this time" (Parent Ex. C at p. 24; see Dist. Ex. 6 at p. 2). Consistent with the student's needs as identified in the evaluative data reviewed by the May 2011 CSE, and in conformity with State regulations, the May 2011 CSE recommended that the student be placed in a 12-month special education program consisting of a 6:1+1 special class in a specialized school with the assistance of a full time 1:1 behavior management paraprofessional to address his intensive management needs (Parent Ex. C at pp. 1-3, 23, 25). State regulations provide that a 6:1+1 special class placement is the maximum allowable class size for special classes designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). The CSE also developed two annual goals with short term objectives that targeted the student's interfering and disruptive behaviors via sensory processing and via the assistance of a 1:1 paraprofessional for improved classroom functioning; developed a BIP for the student which was attached to the May 2011 IEP; and included a multitude of strategies in the May 2011 IEP to address the student's academic and social/emotional management needs as described above (Parent Ex. C at pp. 5-6, 9, 11, 26).

In addition to the 6:1+1 special class recommendation, the May 2011 CSE developed academic and prevocational goals and short-term objectives to address the student's deficits in reading decoding and comprehension, written expression, and math, and also developed annual goals and short-term objectives to address the student's deficits in gross motor, fine motor/perceptual skills, and self care skills; recommended OT twice per week for 45 minutes per session in a group of two; developed annual goals and short-term objectives targeting the student's deficits in receptive, expressive and pragmatic language skills and recommended that the student receive speech-language services five times per week for 60 minutes per session in a 1:1 setting, once per week for 45 minutes per session in a group of five and once per week for 45 minutes per session in a group of two; and included an annual goal with short-term objectives related to adaptive physical education (Parent Ex. C at pp. 2, 9-10, 14-17, 20, 22, 25).[28]

[28] The May 2011 IEP contains duplicative annual goals (compare Parent Ex. C at pp. 9-10, with Parent Ex. C at pp. 12-13).

I also note the issuance of a guidance document by the Office of Special Education in January 2012 entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," which indicated that with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented (see http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (id.). Consistent with the student's needs, the May 2011 CSE recommended a 1:1 behavior management paraprofessional and a BIP to address the student's behaviors (Dist. Ex. 6 at p. 3; Parent Ex. C at pp. 6-7, 25-26). Although the parents maintain that the student required intensive 1:1 instruction to receive educational benefits, there is nothing in the hearing record to suggest that the student would not be adequately supported by a 1:1 paraprofessional working under the direction of the special education teacher to provide support with the student's behaviors.

For example, in the special class setting at McCarton during the 2011-12 school year (which, according to the hearing record was the highest functioning class in McCarton's upper school) the student was placed with a group of five students, a head teacher, and four assistant teachers; the student's daily instruction was delivered in both individual and small group settings, indicating not only that the student was not in fact receiving solely 1:1 direct instruction during the school day at McCarton, but also that he did not require 1:1 instruction exclusively in order to receive educational benefits (see Tr. pp. 392, 408-09, 462-63, 605-07; Parent Exs. I at pp. 1, 3-4; EE at p. 8). The McCarton director testified that during group instruction, the student had a "hidden prompter" who sat behind him and, although the prompter was not actively engaged in the instruction, the prompter made sure that the student attended and was actively involved in the group (Tr. p. 409). The student's head teacher testified that the student was able to attend in groups for approximately 20 minutes, with 1:1 support (Tr. p. 619; see Parent Ex. EE at p. 8). The student's McCarton speech-language pathologist testified that one of the primary roles of the McCarton 1:1 paraprofessional was "to redirect [the student's] attention to the teacher. The first thing is to address any interfering behaviors, but as that's not usually an issue, they usually will redirect [the student's] attention" (Tr. p. 355). Additionally, the hearing record indicates that according to the input offered by the student's McCarton speech-language therapist during the May 2011 CSE meeting, "a lot" of the student's progress "has been incidental and not even where he has to be working at a table" as "he seem[ed] to have realized that if he wants to get what he wants he knows he has to say it" (Dist. Ex. 6 at p. 2). The McCarton speech-language pathologist also testified that the student had demonstrated the ability to go to a grocery store and buy his own food by himself (Tr. pp. 345-46). The hearing record also reflects that the student was responding to less intensive prompt strategies—for example, the student's December 2010 McCarton speech-language progress report noted that, at times the student was able to participate in speech groups with verbal reminders from the clinician to refocus to task and that he was able to self correct and refer to himself as "I" when the clinician prompted him to do so— and that the student not only benefited from repeating a question asked of him, as it gave the student a chance to fully process

what was being asked, but also that the student was able to employ this strategy independently (Parent Ex. G at pp. 2-3).

The district social worker testified that classroom personnel in the district's recommended program, including the student's 1:1 behavior management paraprofessional, would be able to provide the student with 1:1 support adequate to address his interfering and self injurious behaviors, and that "the school is specialized and everybody at the school is trained and skilled and that's why it's a specialized program to deal with students who are engaging in interfering behaviors. These are not unusual for … the staff. They respond to behaviors of this nature regularly," and further testified that the student's 1:1 behavior management paraprofessional "is again a part of a specialized program. There's a licensed, advanced degree holding person in the classroom … 24/7…. They're never on their own and people who are trained … and supervised well can be very, very effective" (Tr. pp. 67-68).

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

5. Home-Based Services

The parents assert that the student required home-based ABA services and speech-language

services during the 2011-12 school year to address his needs.[29] The IHO concluded that, because the hearing record lacked evidence suggesting that the student required home-based services,[30] the district's failure to include such services on the May 2011 IEP did not render the IEP deficient (IHO Decision at pp. 28-30).[31] I note that several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also K.L., 2012 WL 4017822, at *14 [upholding the determination that home-based ABA services provided to generalize skills and improve the student's custodial care are not a necessary component of a FAPE]; Application of the Dep't of Educ., Appeal No. 12-086; Application of a Student with a Disability, Appeal No. 12-074; Application of the Dep't of Educ., Appeal No. 12-052; Application of a Student with a Disability, Appeal No. 11-068; Application of the Dep't. of Educ., Appeal No. 11-031). For the reasons discussed below, I find that, because the evidence contained in the hearing record establishes that the primary purpose of these home-based services was to generalize progress he achieved in the day program to the home setting and that such services were not required during the 2011-12 school year in order for the student to be offered an IEP that was "likely to produce progress, not regression" and provide an opportunity for more than "trivial advancement" Walczak, 142 F.3d at 130 [2d Cir.1998] [internal quotation marks omitted]; see M.H., 685 F.3d at 224).

Review of those evaluative reports before the May 2011 CSE which are included in the hearing record reflects that no recommendations for home-based services were included in those

[29] The hearing record reflects that at the time of the impartial hearing, the student was receiving 20 hours per week of home-based ABA services and 2.5 hours per week of home-based speech-language therapy per week pursuant to the IHO's June 14, 2012 interim order on pendency; the student's mother testified that the student was receiving between 11 and 14 hours of ABA therapy per week and 1 hour and 45 minutes of speech-language therapy per week "outside of school" (compare Tr. pp. 442-46, with Tr. pp. 8-10, and Interim IHO Decision at pp. 1-2; Parent Ex. B at pp. 5-6, 9-11).

[30] Although in the decision the IHO distinguished between "extended school day" services and "home-based" services, the IHO did not appear to distinguish in the decision between home-based and other community-based services outside of the school day (see IHO Decision at pp. 29-30). In the interests of clarity and consistency, I use the latter term in this decision when referring to all services received by the student after the regular school day and outside McCarton.

[31] As noted previously, the IHO determined that the need for home-based services was not "presented to the CSE for consideration in a timely way." While I have concluded that evidence does not show the student required home based ABA services, I note that the IDEA places the responsibility to identify the needs of a student on the district—not the parents (see A.D. v. Bd. of Educ. of City School Dist. of City of New York, 690 F.Supp.2d 193, 208 ([S.D.N.Y. 2010]). It is not clear to me whether the IHO intended to hold that the parents were responsible for identifying the student's alleged need for home-based services when they attended the CSE, or was merely holding, as I have, that none of the information before the CSE indicated that the student required home-based services.

reports (see Dist. Ex. 2; Parent Exs. G-I).[32] The student's home-based ABA therapist testified that the bulk of her work with the student was in the "self management and communication domains," that she was familiar with the work that the student was doing at McCarton and that McCarton's ABA program also addressed the student's self management, and that the difference between the areas upon which she was working with the student as opposed to those areas targeted by the student's home-based speech therapists was "just a matter of generalizing it to the home setting" (Tr. pp. 594-97).[33] The student's speech-language pathologist from McCarton testified that she believed that home-based speech-language therapy was a "good chance for [the student] to generalize the skills in a different setting with different people" (Tr. pp. 336-37). The student's home-based speech-language pathologist testified that the student needed home-based speech-language services beyond the speech-language services he received at McCarton "for generalization," that the student experienced difficulty translating skills that he demonstrated in school to office sessions with her and his other speech-language therapists, that she encouraged the student's parents to work on generalizing the pragmatic skills that the student had been working on, and that although generalization was addressed during the school day in the student's speech-language therapy sessions at McCarton, "for [the student] to generalize something, he really needs to generalize it with many people in many different situations" and that "there are still situations where he needs to generalize [something] and there are still many people in this world to generalize it with," such as waiting in a waiting room or conversing with a doorman (Tr. pp. 365-66, 369, 379-81). The student's mother testified that, although she believed that McCarton was addressing the student's need for generalization via the services he received during the school day, and that the student had progressed at McCarton, he required home-based services because "[it is] a really tough thing for [the student] to generalize and so it's a constant repetition for [him] that we need generalizations and going over things in different environments with different people to learn how to deal in different situations" and that the student required additional generalization outside of McCarton "because it's a different environment and it's different skills that he also works on," such as bathing, showering, and doing laundry (Tr. pp. 482, 493-95).

Upon review of the hearing record, I find that the district offered the student an appropriate educational program that was designed to appropriately address the student's special education needs during the school day and allow the student to make progress in his day program. The evidence does not suggest that the student required home-based programming in addition in order to avoid regression, make progress during the in-school portion of his program, or to enable the student to receive educational benefits. While I can sympathize with the parents in this case, who may desire a more ideal program for their son that would offer even greater educational benefits through the auspices of special education, it does not follow that the district has failed in meeting the more modest standard offering the student an appropriate program, because school districts are

[32] Although the December 2010 McCarton speech-language progress report recommended that the student "be provided with opportunities to generalize his expressive language skills, as well as leisure skills, across a variety of settings and contexts," the report contained no specific recommendation for home-based services as a means toward accomplishing such generalization (see Parent Ex. G at p. 4).

[33] The hearing record reflects that home-based speech-language services were provided to the student at the therapists' office (see Tr. pp. 364-66, 381, 384).

not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Bryant v. New York State Educ. Dept., 692 F.3d 202, 215 (2d. Cir. 2012); Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). The IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567 [citations omitted]; J.L., 2013 WL 625064, at *10.

6. Consideration of Special Factors—Interfering Behaviors

The parents appeal the IHO's determination that the district's failure to conduct an FBA of the student prior to developing his BIP constituted a technical violation, but that it did not rise to the level of a denial of a FAPE to the student for the 2011-12 school year (see IHO Decision at pp. 22-23). As set forth in greater detail below, I find that although the May 2011 CSE did not conduct its own formal FBA of the student, it nonetheless properly considered the special factors related to the student's behavior that impeded his learning, and furthermore, that the May 2011 IEP and proposed BIP otherwise appropriately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S. 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP]

must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

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

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

State regulations call for the procedure of using an FBA when developing a BIP, and 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). However, the failure to comply with this procedure does not automatically render a BIP deficient (R.E., 694 F.3d at 190; A.D., 2013 WL 1155570, at *9; A.H., 2010 WL 3242234, at *4; see FB and EB, 2013 WL 592664, at *8-*11; F.L., 2012 WL 4891748, at *8; K.L., 2012 WL 4017822, at *11; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796, at *9 [S.D.N.Y. Sept. 26, 2012]; M.W., 869 F. Supp. 2d at 333; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8-*9 [S.D.N.Y. Dec. 8, 2011]; C.F, 2011 WL 5130101, at *9).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student, "the [BIP] shall identify: (i) the baseline measure of the problem behavior,

including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[34] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the parties do not dispute that the May 2011 CSE did not conduct a formal FBA prior to developing the student's May 2011 IEP and proposed BIP (see Tr. pp. 467-68). However, as noted above, the district's failure to conduct an FBA prior to developing the student's 2011-12 BIP did not, by itself, automatically render the May 2011 IEP so deficient as to deny the student a FAPE (A.D., 2013 WL 1155570, at *9-*10; A.H., 2010 WL 3242234, at *4). While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at **3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

An independent review of the hearing record reflects that, notwithstanding the lack of a formal FBA of the student prior to developing the student's May 2011 IEP and BIP, the CSE considered information sufficient regarding the student's interfering behaviors. The district social worker testified that at the time of the May 2011 CSE meeting, the student's behavioral issues "included throwing himself to the ground, hollering, screaming out, sometimes property destruction and … some tendency towards some self-injurious behavior since he moved up to [McCarton's] Upper School," and that the CSE obtained this information "from reports from the school … the oral report and written report of [McCarton] staff members at the school" (Tr. p. 37). She further testified that during the May 2011 CSE meeting, "there was an informal FBA conducted" whereby "discussion took place about the intensity, frequency, [and] duration of some

[34] 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]).

of [the student's] behaviors. There's documentation which also references … those behaviors. And based on that, [the student's BIP] was developed" (Tr. p. 75). The evaluative information reviewed by the May 2011 CSE reflected the student's noncompliance, laughing and verbal perseveration, lack of attention to tasks, falling to the floor, and throwing or destroying materials (compare Parent Ex. C at p. 26 with Parent Exs. G at pp. 1-3, H at p. 3, and I at pp. 2-3). Additionally, the CSE meeting minutes contained in the hearing record reflect discussion of the student's interfering behaviors, and noted that, while he was exhibiting the same behaviors he had during the previous school year, he was now also exhibiting tantrums and some aggressive and self injurious behaviors, which his classroom teacher attributed to changes in his school setting after he transitioned to McCarton's upper school, and also indicated the student's tendencies to become frustrated and noncompliant when things did not go according to plan (Dist. Ex. 6 at p. 3).

The proposed BIP attached to the student's May 2011 IEP described the student's behaviors that interfered with learning, including noncompliant behaviors (laughing and verbal perseveration), throwing/destroying materials, lack of attention to task, noncontextual vocalizations and dropping to the floor, and tantrums; outlined the student's expected behavior changes, including increasing the student's attention to task and decreasing his noncompliant and tantrum behaviors; and identified strategies to be employed in an effort to change the student's behavior, including positive reinforcement throughout the day, redirection to task upon display of noncompliant behaviors, reinforcement/reward for reengaging to task, a clear and consistent classroom schedule and routine, and verbal reminders (Parent Ex. C at p. 26). However, I note that the proposed BIP did not follow the procedures for including the baseline measure of the student's problem behaviors or the schedule to measure the effectiveness of the interventions, as required by State regulations (see id.; 8 NYCRR 200.22 [b][4][i][iii]), however this was not so significant that it resulted in a denial of a FAPE due to the loss of educational opportunity for the student.

I also find that the student's interfering behaviors were sufficiently addressed by the May 2011 IEP itself, and therefore, any technical violations with the FBA or BIP did not deny a FAPE to the student. The May 2011 IEP incorporated supports to assist the student in changing his behavior, including a 1:1 behavior management paraprofessional (see M.Z., 2013 WL 1314992, at *5, *8 [even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits … in addressing the problematic behaviors"], related services consisting of speech-language therapy and OT, a small 6:1+1 classroom setting; it recommended environmental modifications to address the student's academic and social/emotional management needs, consisting of a highly structured, predictable learning environment, clear and consistent expectations and routines, consistent positive reinforcement schedule (token system) and praise, systematic visual prompting (especially written cues), breaking down tasks into small steps, "chunking" of material into manageable units, frequent variation of work tasks and materials, repetition, systematic generalization of skills across people, materials, setting and contexts, frequent breaks to improve ability to attend, teacher prompts to refocus, advance warnings of changes in schedule, verbal and visual supports, and emphasis on functional application of skills; and it contained annual goals and short term objectives targeting, among other things, increasing the student's abilities to attend and follow directions, and improving his classroom functioning, his

tolerance of change, and his sensory processing for increased self regulation (Parent Ex. C at pp. 2, 5-6, 9, 11, 19, 25; see Tr. pp. 104-05). Accordingly, in this case, where the district formulated a BIP based on information from the evaluative reports available to the CSE and input from the student's parent and four McCarton representatives, and developed management needs designed to target the student's interfering behaviors, I find that the absence of a baseline measure of the student's problem behaviors and a schedule to measure the effectiveness of interventions neither resulted in any substantive harm to the student nor rose to the level of a denial of a FAPE (R.E., 694 F.3d at 190-91; S.H., 2011 WL 6108523, at *8-*9; C.F., 2011 WL 5130101, at *9-*10; W.S., 2011 WL 1332188, at *10; Connor, 2009 WL 3335760, at *4).

The IHO also determined that, relative to the student's self injurious behaviors, "there is nothing on the [May 2011] IEP indicating how to handle the situation. I find this failure contributed to a denial of [a] FAPE in this case" (IHO Decision at p. 23). As discussed above, the CSE meeting minutes reflect that the student had begun to exhibit tantrum behaviors, which included some aggressive and self injurious behaviors (Dist. Ex. 6 at p. 3).[35] The hearing record does not indicate the severity of the student's self injurious behavior at the time of the May 2011 CSE meeting, as the evaluative reports provided to the CSE by McCarton do not reference such behavior; however, the student's mother testified that the student's inappropriate and self injurious behaviors were, in fact, discussed during the May 2011 CSE meeting (Tr. p. 448). There are three photographs taken by the student's teacher at McCarton that depict at least one to two scratches to the left side of student's cheek allegedly stemming from these behaviors (see Parent Ex. G-I; LLL; see also Tr. pp. 608-09, 629-30), the hearing record is unclear regarding when these photographs were taken.[36] However, the student's McCarton speech-language pathologist testified that self injurious behavior did not usually occur during her sessions with the student, and that on those occasions when they did occur, he was "redirected by his 1:1 [paraprofessional] pretty easily" (Tr. pp. 326, 354-55).

Although the parents took issue with the point that the proposed BIP attached to the May 2011 IEP did not specifically reference the student's interfering behaviors as "aggressive" or "self injurious" behaviors, according to the social worker, it referenced the student's tantrum behavior, which the district social worker testified "can be a broad and general [category] and often includes … sometimes banging of head or arms," and that the references to "the tantruming and noncompliant behaviors … were general and could have referenced the self-injurious [behaviors]

[35] During the impartial hearing, the student's head classroom teacher and several of his related services providers testified that the student's self injurious behaviors included hitting (with both hands and with either an open or closed fist), grabbing, pinching, or scratching his face, and banging his arms against a table (Tr. pp. 328, 396, 577, 608-09, 614; see Parent Ex. BB at p. 1).

[36] There are five additional marks — on the student's right cheek, near his lip, and on his chin—but its unclear which may be the result of interfering behaviors or may result from another condition such as acne, which is not uncommon for any teen aged student (Parent Ex. LLL at p. 3). The student's mother describe the marks as "just one scratch", but that the photos do not indicate "how bad it gets" and that they under represent the severity of the self injurious behaviors "a little bit" (Tr. pp. 629-30). The photographs appear to have been taken at McCarton at the same time.

(Tr. pp. 65-66),[37] On the one hand, the social worker acknowledged that it "would have been better to have self-injurious included" in the proposed BIP (Tr. pp. 66-67); however, the social worker also testified that the proposed BIP attached to the May 2011 IEP did, in fact, address the student's self injurious behaviors in that "the BIP itself is inclusive and offers strategies, which would change the behavior …. [R]ather than treat a behavior per [se] … setting a program and environment which would help the student not to have the behaviors in the first place is really what … a specialized program should be doing and that is … why [the recommended program] was thought to be appropriate for the student," and further testified that the strategies for behavior modification referenced in the proposed BIP were also incorporated into the May 2011 IEP (Tr. pp. 104-05; compare Parent Ex. C at p. 6, with Parent Ex. C at p. 26).

I also note that several of the annual goals and short term objectives contained in the May 2011 IEP targeted improving the student's self regulation and classroom functioning, and were designed to be implemented by the student's 1:1 behavior management paraprofessional (see Parent Ex. C at pp. 9, 11-13). In consideration of the foregoing, I find that, while the student's May 2011 IEP or the proposed BIP attached to the IEP ideally could have also included the term "self injurious" to describe the student's interfering behaviors as the parent suggests insofar as the evidence shows that the student has scratched himself at McCarton, both the May 2011 IEP and the proposed BIP nevertheless adequately addressed such behaviors as identified in the evaluative information available to the May 2011 CSE.

In view of the foregoing, I find that the evidence does not support the IHO's conclusion that the CSE did nothing to address the concerns about self injurious behavior. The evidence suggests that at the time of the hearing, the student's self injurious behavior continued from time to time and that he had been successful in self management of his behavior using a token economy wherein every 15 minutes he checked whether or not he had displayed any of "said behaviors" and was then reinforced every 45 minutes (Tr. pp. 419, 608-09, 614, 619). However, the hearing record reflects that after the CSE convened and as the 2011-12 year progressed, the student's primary target behavior became inappropriate displays of affection related to hormonal changes and puberty (Tr. pp. 342, 420, 611-12, 621). Although, as discussed above, there was sufficient information and discussion of the student's interfering behaviors at the time of the May 2011 CSE meeting, full compliance with all of the formal procedures for identifying a baseline measure of the student's problem behaviors and a schedule to measure the effectiveness of interventions in the BIP would be appropriate to further assist the student and the parents. Accordingly, prior to convening of the next CSE, I direct the CSE, if it has not done so already, to conduct an FBA of the student which, in accordance with State regulations, provides a baseline of the student's self injurious behavior with regard to frequency, duration, intensity and/or latency across activities, settings, people and times of day and includes information in sufficient detail to conform with all State regulations for BIP development, including addressing antecedent behaviors, reinforcing

[37] I note that a document describing the student's "challenging behaviors" generated by McCarton and included in the hearing record also described the student's tantrum behavior as including self injurious behavior (Parent Ex. BB at p. 1).

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]).

In summary, based on the evidence above, the hearing record demonstrates that the recommended 6:1+1 special class program with a 1:1 behavior management paraprofessional and related services, as set forth in the student's May 2011 IEP and attached BIP, was appropriate to address the student's needs as identified in the evaluative information before the CSE and was reasonably calculated to enable him to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]). Consequently, in view of the foregoing evidence, I find that the parents' claims that the May 2011 IEP was so deficient that it denied the student a FAPE are without merit, and I will reverse the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year as the result of an inappropriate IEP.

F. Assigned School

I will next address the parties' contentions regarding the district's choice of assigned school. Initially, the district correctly argues that the IHO erred in reaching the parents' contentions about the assigned school since such analysis would require the IHO—and an SRO—to determine what might have happened had the district been required to implement the student's May 2011 IEP. Generally, challenges to a district's assignment of a student to a particular public school site or classroom delves into the implementation of the IEP, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11),[38] and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L., 2012 WL 4891748, at *15-*16; Ganje., 2012 WL 5473491, at *15] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Public Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D.Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented); but see E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child

[38] With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

In this case, the parents rejected the proposed IEP for the 2011-12 school year and enrolled the student at McCarton prior to the time that the district became obligated to implement the proposed IEP (Tr. p. 499; Parent Exs. L at p. 1; N at pp. 1, 3). Thus, while the district was required to establish that the IEP was appropriate during the impartial hearing, the district was not required to establish that the IEP was actually implemented in accordance with State and federal law in the proposed classrooms.[39]

Even assuming for the sake of argument that the student had attended the district's recommended program, as further discussed below, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D-S, 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at *3 [S.D.Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

1. 6:1+1 Classroom Assignment

On cross-appeal, the district challenges the parents' allegation—raised in their due process complaint notice but not addressed by the IHO in his decision— that it failed to offer the student a FAPE for the 2011-12 school year because the recommended placement "ostensibly would start on July 1 [2011], but involved a placement and personnel that would materially change, once again, as of September [2011]" (Parent Ex. A at p. 7) by asserting that, because the student was not ultimately educated under the May 2011 IEP, the district only had to show that it had a program and seat available to the student at the start of the 2011-12 school year, and was not required to defend the recommended placement from the fall to the end of the 2011-12 school year.

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

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6). The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). 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).

Here, it is undisputed by the parties that the district had a program available to the student at the start of the school year and was therefore in conformity with State and federal regulations, and the parents rejected the district's program (Tr. p. 499; Dist. Ex. 9; Parent Exs. L at p. 1; N at pp. 1, 3). Moreover, because the student in this case did not ultimately attend the assigned classroom after the parents rejected the student's IEP on June 27, 2011, I concur with the district's argument that it was not required to defend the recommended placement from the fall to the end of the 2011-12 school year (K.L., 2012 WL 4017822, at *16; Application of the Bd. of Educ., Appeal No. 12-096).

However, assuming for the sake of argument that the district was obligated to defend the recommended placement from the fall to the end of the 2011-12 school year, it is unclear in the hearing record whether the student would in fact have been moved to a different classroom in September 2011. The assistant principal of the assigned school testified that in July 2011, the assigned classroom had six students, but by September 2011, "there weren't enough students in the class" and the "class closed because of availability" because as of September 2011, the assigned classroom "had to have less than three [students] or three [students] in order for [the district] to close the class" (Tr. pp. 516-18, 520-21). When asked if the student would have had to transition to a different classroom with a different teacher and different students in September 2011, the assistant principal testified "[n]o, not necessarily," because, had the student attended the assigned classroom in July 2011, "[h]e may have been the one that kept the class open" by enabling the class to maintain a student complement of "[a]nywhere between three and four students" (Tr. pp. 522). However, even if the student had been required to transition to a different classroom in September 2011, as alluded to earlier, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; J.L., 2013 WL 625064, at *10 [S.D.N.Y. 2013]); see also Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063). Additionally, the United States Department of Education (USDOE) has also clarified that a school district "may have two or more equally appropriate locations that meet the child's special education

and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Notwithstanding the parents' assertions that the hearing record weighs against a finding that the district offered the student a FAPE, because of the possible change in location of the delivery of the student's IEP, the parents have not submitted any legal authority to show that a future change in school buildings amounts to an actionable claim pursuant to the IDEA (see K.L, 2012 WL 4017822, at *16). Thus, I find the parents' argument that the student was denied a FAPE based on the potential change in classrooms the student may have attended in September 2011 had he attended the public school program to be without merit.

2. Educational Methodology—ABA vs. TEACCH

Next I will address the district's contention that the IHO erred in finding that the May 2011 CSE's alleged failure to consider ABA methodology for the student contributed to a denial of a FAPE (IHO Decision at pp. 24-25). Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.D., 2013 WL 1155570, at *12; F.L., 2012 WL 4891748, at *9; K.L., 2012 WL 4017822, at *12; Ganje, 2012 WL 5473491, at *11-*12; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012]; A.S., 10-cv-00009 [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

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

Turning next to the educational methodology that actually would have been used with the student in the assigned 6:1+1 special class had the district been required to implement his May 2011 IEP, the parents allege that the assigned school could not have successfully addressed the

student's special education needs because the assigned school utilized primarily the TEACCH methodology (see Tr. pp. 80-83, 105-06), instead of ABA, the instructional methodology which the parents maintain the student required in order to receive educational benefits. In this case, although the hearing record suggests that the student demonstrated progress when instructed using ABA, it did not establish that the student could only make progress when instructed using ABA (see Dist. Ex. 2; Parent Exs. G-I).[40] The student's mother testified that during the 2011-12 school year, the student was placed in the highest functioning class at McCarton, that during his 11 years at McCarton he had not been exposed to any methodology other than ABA, and that the last time the student received instruction via any methodology other than ABA was "[w]hen he was younger … [in] a home therapy program. [H]e went through Early Intervention and also we tried other things with [him] and nothing was working" prior to the student's enrolling at McCarton 11 years ago (Tr. pp. 463, 486-87, 489-90).

The director of the McCarton upper school (McCarton director) and the student's head teacher from McCarton testified that the student's class for the 2011-12 school year consisted of one head teacher, five students, and four to five supporting or assistant teachers, all of whom worked with the student each day on a rotational schedule (Tr. pp. 392, 429, 605, 607). The McCarton director further testified that the student received ABA instruction at the school in a variety of instructional settings, including 1:1, dyads, and group instruction (Tr. pp. 408-09). In describing the difference between ABA and TEACCH methodologies, the McCarton director testified in the form of an analogy to a person with weight issues, stating "in [ABA] for someone who was overweight, we would [teach] you how to go on a diet, how to exercise, how to work with some meal planning, how to look at nutrition. And with the TEACCH, they would give you a bigger shirt" (Tr. p. 408).

However, the district social worker testified that the May 2011 CSE "did not believe that the only exclusive way that [instruction could] be delivered [to the student] is with the rubric of ABA" (Tr. p. 81). Although the assigned school teacher testified that ABA and TEACCH are the same when put in place in the classroom, the district social worker more aptly described the two methodologies as having some similarities (Tr. pp. 241-42). Her testimony indicated that principles from ABA methodology can be used and applied in the context of other methodologies and specifically noted that the management needs on the student's IEP reflected strategies than can be applied in ABA, TEACCH, or in the natural environment (Tr. pp. 79-80). The district social worker testified that a lot of the features that McCarton uses are "mirrored in TEACCH" such as the use of a schedule and visuals to help prompt the student to the next level, and that there are features within the McCarton program which she knew and recognized as features that she sees in

[40] I note that while a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), the parents point to no authority that suggests that either the IDEA or federal nor State regulations require a district to conduct evaluations to rate the effectiveness of particular teaching methodologies for each student with a disability prior to providing instruction to the student. Instead a CSE is required to conduct an annual review and consider, among other things, any lack of expected progress toward his annual goals (see 20 U.S.C. § 1414[d][4][A][ii][I]). To hold otherwise would suggest that the district was required to "guarantee totally successful results" but this would exceed the IDEA's demands (see Walczak, 142 F.3d at 133; see Bryant, 692 F.3d at 215).

6:1+1 programs that are not strictly ABA (Tr. pp. 82-83). Moreover, the hearing record demonstrates that although the educational methodology used in the 6:1+1 special class was not exclusively ABA-based, it would have been appropriate for use with the student because it incorporated principles of ABA which had previously been proven to be successful in educating the student. The district social worker testified that the management needs that were included in the student's IEP were developed from input from McCarton School staff and that these management needs reflected principles that are also part of the ABA model that McCarton staff successfully utilized with the student, as reflected in the student's McCarton School progress reports (Tr. pp. 79, 82-83; compare Parent Ex. C at pp. 5, 6 with Parent Exs. G at pp. 1, 2, 3, 4; H at p. 3; I at pp. 2, 3).

Although one can understand the parents' preference that the student receive instruction in a classroom by a teacher using an ABA methodology exclusively, based upon the foregoing, I do not find support in the hearing record for the parents' argument that the student required ABA exclusively or that the public school site could not have successfully addressed the student's special education needs using TEACCH or other methodology (see R.E., 694 F.3d at 192; Reyes, 2012 WL 6136493, at *8; F.L., 2012 WL 4891748, at *14-*15). It would be unreasonable to arbitrarily preclude the district from using other strategies that have been used with students with autism especially where, as here, there has been an extended time period since the student was last exposed to any other educational methodology.

3. Qualifications of the 1:1 Paraprofessional

The district cross-appeals the IHO's finding that the hearing record lacked sufficient evidence establishing that the student's 1:1 behavior management paraprofessional was sufficiently trained and capable of addressing the student's interfering and self injurious behaviors and redirecting him (IHO Decision at pp. 27-28). I note that a State has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (Ganje, 2012 WL 5473491, at *18; S.H., 2011 WL 6108523, at *12; see L.K v. Dep't of Educ. of the City of New York., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]), and that the purposes of the IDEA may nevertheless be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is provided by personnel who are not certified (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]; Carter, 510 U.S. at 14 [noting that in a tuition reimbursement case, the lack of services by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE, but rather the issue is a fact-specific inquiry. I also note, however, that the precise extent to which each distinct state requirement is adopted for purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 821 F. Supp. 2d 1197, 1201 n.3 [S.D.Cal. 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730 [2d Cir.2007]]).

In this case, the assigned classroom teacher testified that, although she was not aware of the qualifications of all three of the paraprofessionals working in assigned 6:1+1 special classroom in July 2011, she was aware that one of the individual paraprofessionals, who was assigned to a specific student in the class, possessed a college degree, while one of the two classroom paraprofessionals was working on her bachelor's degree (Tr. pp. 183-86, 198-99). Additionally, as previously discussed above, the district social worker also testified that the district's 1:1 paraprofessionals on staff at the assigned school possessed requisite qualifications, training, and experience to address the student's educational needs and his interfering and self injurious behaviors (Tr. pp. 67-68; see Parent Ex. O). The evidence does not support the parents' assertion that the district's paraprofessionals lacked the requisite certifications or were insufficiently capable of assisting the teacher to implement the student's 2011-12 school year IEP in the event that the student had attended the assigned school (Ganje, 2012 WL 5473491, at *18; S.H., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K., 2011 WL 127063, at *11).

4. 1:1 Support in the Assigned 6:1+1 Special Classroom

I also note that in his decision, the IHO agreed with the parents' contention that "a para[professional], who is only required to have a high school diploma and some college credit … is [in]capable of instructing [the student], which occurs in the 6:1:1 program during small group instruction" (IHO Decision at p. 27; see Tr. pp. 214-16). The January 2012 guidance memorandum issued by the Office of Special Education, and previously discussed above, states in part that:

> One-to-one aides may not be used as a substitute for certified, qualified teachers for an individual student or as a substitute for an appropriately developed and implemented behavioral intervention plan or as the primary staff member responsible for implementation of a behavioral intervention plan. While a teaching assistant may assist in related instructional work, primary instruction must be provided to the student by a certified teacher(s). A teacher aide may assist in the implementation of a behavioral intervention plan, but may not provide instructional services to a student.

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf).

The classroom teacher at the public school site testified that in July 2011, the assigned 6:1+1 special classroom consisted of five students and four adults—herself, as special education teacher, and three paraprofessionals, and that one of the students presented with interfering behaviors and was supported with a BIP and a 1:1 paraprofessional (Tr. pp. 183-85, 196, 198-99, 246-47, 250-51, 271) She further testified that she had prior experience teaching students who exhibited self injurious behaviors, that she received training from the district addressing how to deal with such behaviors, and explained how she typically dealt with incidents arising from such behaviors, including aggressive behavior, throwing of objects, and tantrums, in the assigned 6:1+1 special class (Tr. pp. 277-88). She also testified that she provided the students in the assigned 6:1+1 special class with 1:1 attention, and that on any given day, "everybody will get the one-to-one. When it comes to time, the student will tell me. Depending on how hard the day is or how

motivated a student is or how the mood of a student is will tell me how much one-to-one" each student received, and that she would also be guided by the student's IEP as to how much 1:1 attention each student required, and that "[o]ne-to-one can be provided by any—by the individual in the classroom that has been trained. I can do [it] … every day—the service can do it, my para[professionals] can do it, but that student will get one-to-one [assistance] in the classroom" (Tr. pp. 243-45; see also Tr. pp. 213-16).

However, the assigned classroom teacher also testified that the role of a 1:1 paraprofessional in the assigned classroom was to support, reinforce, and help the students after receiving direction and instruction from the classroom teacher as to how best to reinforce and assist the students during the day after the classroom teacher had provided whole group instruction (Tr. pp. 185-87) (emphasis added).[41] She further testified that "[t]hey're responsible to support what I instructed them. I'm responsible to provide instruction and they support instruction. … I'm the one with the license in the classroom" (Tr. pp. 242-43). Based upon this evidence, I do not find that the hearing record indicates that the 1:1 paraprofessional would have exercised any responsibilities outside of those which she was allowed to perform (E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at *26-*27 [S.D.N.Y. Mar. 15, 2013].

The evidence demonstrates that the classroom instruction was primarily provided by the special education teacher and that the paraprofessional would provide additional individualized support for the student under the direction of the teacher. Consequently, I find that the IHO's conclusion that the district's 1:1 paraprofessionals at the assigned school were insufficient to address the student's interfering and self injurious behaviors during the 2011-12 school year in the event that the student had attended the assigned school is not supported by the hearing record and must be reversed (E.C., 2013 WL 1091321, at *26-*27; Ganje, 2012 WL 5473491, at *18; S.H., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K, 2011 WL 127063, at *11).

5. Provision of Related Services Mandates

The IHO found that it was unclear if the school would be able to meet the related service mandates of the student's IEP without issuing RSAs (IHO Decision at pp. 32-33). The parents assert that the assigned school would not have implemented the IEP by providing the student with all of his mandated related services in accordance with the plan (Tr. p. 461; see Parent Ex. W). Once again, assuming the parents had accepted the public school offer and the district was called upon to implement the proposed IEP, I find that the evidence does not support the conclusion that the district would have deviated from the IEP by failing to provide the related services. According to the classroom teacher, related services were provided at the assigned school, which could have fulfilled the levels of related services mandated in the student's May 2011 IEP; however, she further testified that in the event that a student did not receive a mandated related service at the assigned school, the student would receive an RSA, enabling the student to receive the related service from an outside provider at no cost (Tr. pp. 264, 274-76; see Parent Ex. HHH). The assistant principal testified that the assigned school "[had] been doing very well in terms of RSA

[41] The Office of Teaching Initiatives has also provided a description of the certification, qualification, and duties of teacher aides and assistants, which is available at http://www.highered.nysed.gov/tcert/career/tavsta.html.

letters or fulfilling the mandates. If we cannot fulfill the mandates, we have been sending out RSA letters, contacting the district, contacting agencies. So, we've been doing very well with that" (Tr. pp. 529-30).

The evidence above supports that the district was able to fulfill the student's related services mandated in the student's IEP, and that if there was inadequate in-house staff, the IEP services could be implemented through the use of RSAs (see, e.g., F.L., 2012 WL 4891748 at *17). A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

> [S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(http://www.p12.nysed.gov/resources/contractsforinstruction/ qa.html Question 5; see http://www.p12.nysed.gov/resources/contractsforinstruction/).

Moreover, case law supports a finding that it is permissible for the district to offer parents vouchers to obtain related services outside of school in response to a recognized shortage of service providers (see A.L., 812 F. Supp. 2d at 503). In addition, case law supports a finding that special education delivery service reports indicating that a school has not always delivered full special education services to every student does not mean that the school would have denied the student a FAPE by failing to provide the services to the student whose IEP is being challenged in a due process proceeding (see id.; F.L., 2012 WL 4891748, at *16; M.S, 734 F. Supp. 2d 271, 278-79 [E.D.N.Y. Aug. 25, 2010]). Therefore, even if the district had needed to provide the student with an RSA for related services, this would not have denied the student a FAPE.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year must be reversed. As described above, the hearing record demonstrates that the May 2011 CSE considered appropriate evaluative data in developing the student's 2011-12 IEP, and that the district's recommended program, consisting of a 6:1+1 special class in a specialized school, a full-time 1:1 behavior management paraprofessional, and related

services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE in the LRE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). It is therefore unnecessary to reach the issues of whether McCarton was appropriate for the student and whether equitable considerations supported the parents' claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D-S, 2011 WL 3919040, at *13).

Because, as noted previously, the student is entitled to the relief sought by virtue of pendency, the district will be directed to provide it on that basis. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated July 23, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to reimburse the parents for the student's tuition at McCarton for the 2011-12 school year and to directly fund the remainder of the student's tuition at McCarton for the 2011-12 school year.

IT IS FURTHER ORDERED that at the next CSE meeting regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision;

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall conduct an FBA of the student prior to the next CSE meeting in accordance with State regulations; and

IT IS FURTHER ORDERED that the parents are entitled by operation of law to the costs of the student's tuition at McCarton for the 2011-12 school year as well as home-based ABA services and speech-language therapy in accordance with pendency through the date of this decision.

Dated: **Albany, New York**
April 22, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER