The University of the State of New York

The State Education Department
State Review Officer
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No. 12-166

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Jesse Cole Cutler, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 for payment of the costs of the student's tuition at the Rebecca School for the 2011-12 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The hearing record reflects that the student has a history of global developmental delays and has received diagnoses including an autism spectrum disorder, apraxia, and hypotonia (Tr. p. 265; Dist. Exs. 4 at p 1; 7 at p. 1). The hearing record further reflects that the student is nonverbal and communicates her wants and needs using modified sign language, gestures, and a communication book (Dist. Ex. 6 at p. 1). Additionally, the student has difficulty balancing as a result of her low muscle tone and decreased strength, and exhibits poor safety awareness (id. at pp. 5-6). The student began receiving early intervention services at ten months of age and has attended the Rebecca School since September 2007 (Tr. pp. 265, 360).

On March 7, 2011, the CSE convened to conduct the student's annual review and develop the student's IEP for the 2011-2012 school year (Dist. Ex. 3).[1] Finding the student eligible for special education and related services as a student with autism, the March 2011 CSE recommended a 12-month program in a 6:1+1 special class placement in a specialized school with the support of a 1:1 paraprofessional (id. at pp. 1, 14, 16).[2] The CSE also recommended that the student receive the following related services: five 30-minute sessions of individual occupational therapy (OT) per week, five 30-minute sessions of individual physical therapy (PT) per week, and five 30-minute sessions of individual speech-language therapy per week (id. at p. 16). Additionally, the CSE recommended the use of a communication book, a barrier-free environment, and participation in adapted physical education (id. at p. 5). The March 2011 IEP also indicated that the student would participate in the New York State alternate assessment due to her significant global delays and academic deficits (id. at p. 16).

By final notice of recommendation (FNR) dated June 15, 2011, the district summarized the special education services recommended in the March 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 12).

In a letter dated June 17, 2011, the parents notified the district of their intention to unilaterally place the student at the Rebecca School at public expense for the 12-month 2011-12 school year (Parent Ex. A).[3] The parents indicated that the district failed to offer the student a free appropriate public education (FAPE) (id. at pp. 1-2). More specifically, the parents stated that the district's recommendation was based on "the usual and customary programs relied upon for students with autism" and the March 2011 IEP was not individualized based on the student's needs (id. at p. 2). Additionally, the parents indicated that although they agreed with the CSE's recommendation for placement in a specialized school, the CSE failed to identify an appropriate public school site for the student (id.).

The parents visited the assigned public school site on June 21, 2011 and, in a letter dated June 22, 2011, the parents rejected the assigned public school on the basis that it was not appropriate for the student (Parent Ex. D). Although noting that the assigned school was a barrier-free site, the parents identified several aspects of the school that they believed rendered it inappropriate to meet the student's needs, including that (1) the elevator at the school was operated by a key that they did not believe would be available to the student's paraprofessional despite having been told that it would be; (2) the student would not be appropriately grouped; (3) the classrooms to which the student could potentially have been assigned did not have windows; (4) the classrooms at the assigned school contained items that would pose safety hazards; (5) the classrooms did not contain a meeting area or comfortable seating; (6) the public school site would

[1] The district and the parents agreed to amend the first page of the March 2011 IEP by consent in April 2011 to reflect the student's need for assistive technology and specify that her special education transportation needs included limited travel time in an air-conditioned mini-wagon (Tr. pp. 69-70, 113-15, 271-72; Dist. Exs. 15; 16).

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

[3] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

not be able to provide the student with her mandated related services; (7) there was no sensory gym or appropriate equipment available and the outdoor play area was unsafe for the student; and (8) the majority of the students at the assigned school had behavioral issues which raised safety concerns in the parents' minds (id.).

On June 22, 2011, the parent executed an enrollment contract for the student's attendance at the Rebecca School for the 12-month 2011-12 school year (Parent Ex. F).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2011, the parents requested an impartial hearing, asserting that the district denied the student a FAPE for the 2011-12 school year (Dist. Ex. 1). First, the parents asserted that the March 2011 CSE was not properly composed because no special education teacher who could have implemented the student's IEP was present (id. at pp. 3-4). Next, the parents alleged that the Rebecca School teacher who participated via telephone was not provided with all the documents reviewed by the March 2011 CSE and that the CSE failed to provide the parents with copies of these documents prior to the CSE meeting (id. at p. 4). The parents further alleged that the CSE failed to consider appropriate evaluative information to determine the student's present levels of functional performance (id. at pp. 4-5).

Relative to the March 2011 IEP, the parents asserted that the annual goals and short term objectives were insufficient because they failed to establish a method by which to measure the student's progress (Dist. Ex. 1 at p. 5). Additionally, the parents asserted that the social/emotional goals contained in the IEP were insufficient to address the student's needs (id. at pp. 5-6). The parents further asserted that the IEP did not contain any goals concerning adapted physical education or the student's alternative means of communication (id. at p. 5). Next, the parents contended that the March 2011 CSE failed to conduct a functional behavioral assessment (FBA) and create a behavioral intervention plan (BIP) for the student to address her social/emotional needs (id. at p. 6). The parents further contended that the CSE failed to recommend parent counseling and training as a related service in the student's IEP (id.).

With respect to the recommended placement, the parents contended that a 6:1+1 special class was not appropriate because the student required "a smaller, more supportive setting" (Dist. Ex. 1 at pp. 3, 6-7). The parents also asserted that the program recommendation was made based on available programs in the district rather than the student's needs (id. at p. 3). Relative to the assigned public school site, the parents contended that it was not appropriate because: (1) the school was "inordinately far" from the student's home; (2) the majority of students in the school were students with emotional disturbances, which could pose a safety hazard to the student; (3) many of the classrooms were small and windowless; (4) the school did not have a sensory gym; (5) the school could not offer the student an appropriate functional peer group; and (5) the school had not always been able to provide all related services required by students' IEPs and the school's OT and PT providers shared space, which would not allow the student to maximize her therapy time (id. at pp. 7-8).

The parents also contended that their unilateral placement of the student at the Rebecca School was appropriate and equitable considerations would not bar an award of tuition reimbursement (Dist. Ex. 1 at p. 8). For relief, the parents requested direct funding for the costs

of the student's tuition at the Rebecca School for the 2011-12 school year and door-to-door transportation (id. at pp. 3, 9).[4]

B. Impartial Hearing Officer Decision

On August 30, 2011, the parties proceeded to an impartial hearing, which concluded on February 10, 2012, after five days of proceedings (Tr. pp. 1-440). In a decision dated July 11, 2012, the IHO determined that the district offered the student a FAPE and denied the parent's request for direct funding for the costs of the student's tuition at the Rebecca School for the 2011-12 school year (IHO Decision at p. 28). Although the IHO did not make explicit findings on several of the claims raised by the parent in their due process complaint notice, the IHO found that the district offered the student a FAPE, holding that the March 2011 CSE's recommendations were consistent with the available evaluative information and noting that the district recommended the services of a 1:1 paraprofessional, the CSE recommended that the student receive assistive technology, the parent agreed with the special class recommendation, and the assigned public school site could have provided the student with appropriate peer grouping and offered parent counseling and training (id. at pp. 27-28).

With respect to relief, the IHO found that the parents did not have standing to bring a claim for the student's tuition at the Rebecca School for the 2011-12 school year (IHO Decision at pp. 22-25). More specifically, the IHO found that the Rebecca School enrollment contract did not bind the parents, and that the hearing record did not contain any evidence that the parents made "meaningful" payments to the Rebecca School or that the Rebecca School intended to seek payment from the parents (id. at pp. 23-25). Accordingly, the IHO found that the hearing record supported a finding that the Rebecca School incurred the financial burden associated with the student's education for the 2011-12 school year (id. at pp. 22, 25). The IHO further found that the parents did not have standing to seek public funding for the costs of the student's tuition on behalf of the Rebecca School, which was not a party to the case and not entitled to relief under the IDEA (id. at pp. 24-25). Based on the foregoing, the IHO denied the parents' request for public funding of the student's tuition at the Rebecca School for the 2011-12 school year (id. at p. 28).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn the IHO's denial of their request for public funding of the costs of the student's tuition at the Rebecca School for the 2011-12 school year. Initially, the parents allege that the IHO failed to consider the allegations raised in their due process complaint notice. Next, the parents allege that the March 2011 CSE meeting was held too far in advance of the intended implementation date of the March 2011 IEP and that the special education teacher who attended the CSE meeting failed to meet the "minimal requirements" to participate. The parents further contend that the CSE did not have sufficient evaluative data before it when developing the March 2011 IEP and the evaluative data relied on used inappropriate tools to assess the student. Additionally, the parents argue that the CSE failed to make "meaningful references"

[4] The parents also "reserve[d] the right" to raise other issues, specifically referencing the possibility that they would challenge the qualifications of district personnel, whether the assigned public school site would "maintain an appropriate student-to-staff ratio for the entirety of the school day," and that the assigned school would not provide all of the related services required by the student's IEP (Dist. Ex. 1 at p. 8).

to the December 2010 Rebecca School progress report or include in the IEP the strategies used by Rebecca School staff to address the student's needs. The parents also argue that the use of the December 2010 Rebecca School progress report by the CSE resulted in functional levels, management needs, and annual goals that would have been outdated by the time the IEP was implemented. With respect to the annual goals contained in the IEP, the parents contend that they were generic, vague, failed to contain baseline functioning or expected levels of mastery, and were not measurable. The parents next argue that the IEP did not contain annual goals or management needs to appropriately address the student's social-emotional, behavioral, communication, adapted physical education, and sensory integration needs. The parents further contend that the March 2011 CSE failed to conduct a FBA of the student despite her interfering behaviors.[5] Next, the parents contend that the CSE failed to recommend parent counseling and training in violation of State regulations. With regard to the recommended special class placement, the parents assert that the student required a smaller, more supportive environment than that provided by a 6:1+1 special class but that the CSE did not consider recommending a nonpublic school program for the student. The parents also argue that the CSE did not include an appropriate methodology on the student's IEP.

With respect to the assigned public school site, the parents allege that the IHO failed to consider the appropriateness of the school and further maintain that it was not appropriate for the student because (1) it did not represent the student's least restrictive environment (LRE) because of its distance from the student's home; (2) the student would not be appropriately grouped with peers of similar functional abilities or age; (3) the OT and PT available at the assigned school were not appropriate to address the student's needs; and (4) the district did not establish that the school could provide the related services or 1:1 paraprofessional required by the student's IEP.

The parents also argue that the Rebecca School program was appropriate to meet the student's individualized needs and that equitable considerations weigh in favor of their request for direct funding of the costs of the student's Rebecca School tuition because they fully cooperated during the March 2011 CSE meeting and did not impede the district's ability to offer the student a FAPE. Lastly, the parents allege that the IHO exceeded his jurisdiction by sua sponte raising the issue and finding that the parents lacked standing to assert a claim for public funding of the student's tuition at the Rebecca School.

In an answer, the district responds to the parents' petition by admitting or denying the allegations raised and asserting that the IHO correctly determined that it offered the student a FAPE for the 2011-12 school year. The district asserts that to the extent the March 2011 CSE did not comply with the procedural requirements of the IDEA, none of these violations constituted a substantive denial of a FAPE to the student. Furthermore, the district contends that the March 2011 IEP was substantively appropriate to meet the student's needs, noting in particular that the student's mother conceded during the impartial hearing that a 6:1+1 special class placement with the addition of a 1:1 paraprofessional was appropriate to meet the student's needs. With respect to the appropriateness of the assigned public school site, the district contends that the parents' arguments are speculative as the student never attended the assigned school and that in any event

[5] Although the parents argued in their due process complaint notice that the district failed to conduct an FBA and develop a BIP, the parents no longer raise on appeal the district's failure to develop a BIP.

the hearing record reflected that the assigned school would have been able to implement the student's IEP. In the event that it is determined that the district failed to offer the student a FAPE, the district also argues that the Rebecca School was not an appropriate unilateral placement because the parents failed to establish that the student received an adequate amount of related services. The district further contends that equitable circumstances do not favor the parents' request for relief. Lastly, the district contends that the IHO properly found that the parents had not incurred an obligation to pay the costs of the student's tuition at the Rebecca School for the 2011-12 school year and that the parents could not assert a claim on behalf of the Rebecca School.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matter—Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. In the instant case, the parents' July 2011 due process complaint notice included the following allegations that the IHO did not address in the decision and the parents do not advance on appeal in their petition: (1) the Rebecca School teacher who participated in the March 2011 CSE meeting via teleconference was not provided with the reports, evaluations, and other written documents reviewed by the CSE, (2) the CSE failed to provide the parents with copies of "all requisite documents" five days prior to the March 2011 CSE meeting; and (3) the assigned school did not have a sensory gym and some of the classrooms were small and windowless (compare Dist. Ex. 1 at pp. 4, 8, with IHO Decision at pp. 17-29). Under the circumstances, the parent has effectively abandoned such claims by failing to identify them in any fashion or advance them by making any legal or factual argument as to how one or more of these unaddressed issues would rise to the level of a denial of a FAPE. Therefore, these claims will not be further considered (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Additionally, the parents contend that the IHO failed to address all of the issues raised in their due process complaint notice. When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013].) In reviewing the hearing record in this case, an adequate record for review of these issues was developed over the course of the impartial hearing. Both parties had the opportunity to question witnesses, enter exhibits into evidence, and present their case with regard to the merits of the parents' claims. In this instance, because I agree with the IHO's overall conclusion that the district offered the student a FAPE, and in the interests of economy, in my discretion I decline to remand this matter to the IHO.

Furthermore, the parents now raise the following issues in the petition—which they did not raise in the due process complaint notice and upon which the IHO did not issue findings—as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2011-12 school year: (1) the CSE failed to specify an appropriate "educational and therapeutic

methodology" in the March 2011 IEP; (2) the March 2011 CSE meeting was held too far in advance of the intended July 2011 implementation date; (3) the district would not be able to provide a 1:1 paraprofessional for the student at the assigned public school site; and (4) the assigned public school site could not provide the student with a peer group of students in her grade at the assigned public school site. With respect to these claims, raised for the first time on appeal, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]). The parents' due process complaint notice cannot reasonably be read to include claims regarding methodology, the timing of the CSE meeting, consideration of a nonpublic school placement, or the provision of a 1:1 paraprofessional and grouping of the student with students in the same grade at the assigned public school site (see Dist. Ex. 1). A review of the hearing record shows that the district did not agree to an expansion of the scope of the impartial hearing to include these issues, nor did the parents attempt to amend the due process complaint notice to include these issues. Accordingly, these allegations in the parents' petition are outside the scope of my review and will not be considered.[6]

B. March 2011 CSE Process

1. CSE Composition

Turning to the issues properly raised on appeal, the parents contend that the March 2011 CSE was not properly composed due to the absence of a special education teacher who would have been responsible for implementing the March 2011 IEP. The presence of a "special education teacher" or "special education provider" of the student is required by the IDEA (20 U.S.C. § 1414[d][1][B][iii]; 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). The Official Analysis of Comments to the federal regulations states that the special education teacher member of the CSE "should be the person who is, or will be, responsible for implementing the IEP" (IEP Team, 71

[6] Even if they had been properly before me, the parents would not prevail on them because each of these arguments would be without merit. A CSE is generally not required to specify methodology on an IEP, and the precise teaching methodology to be used is usually a matter to be left to the student's teacher (Rowley, 458 U.S. at 208; M.H., 685 F.3d at 257; A.S. v New York City Dep't of Educ., 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]). With respect to the timing of the CSE meeting, the hearing record does not reflect that the parents objected to the timing of the CSE meeting or that the parents requested another CSE meeting to update the student's IEP (see Tr. pp. 1-440; Dist. Exs. 1-18; Parent Exs. A-N). Moreover, there is no indication in the hearing record that the timing of the CSE meeting resulted in a loss of educational opportunity for the student, nor do the parents assert any particular detriment to the student (see P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 513 [S.D.N.Y. 2013]). Regarding the recommended program, the CSE was not required to consider a nonpublic school placement once it determined that it could meet the student's needs in a public school placement (B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *9 [E.D.N.Y. Mar. 31, 2014]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15-*16 [E.D.N.Y. Aug. 19, 2013]; A.D., 2013 WL 1155570, at *7-*8). Finally, the parents' arguments regarding potential implementation of the student's IEP are speculative for the reasons discussed below.

Fed. Reg. 46670 [Aug. 14, 2006]). Participants at the March 2011 CSE meeting included a district special education teacher (who also served as the district representative), a district school psychologist, an additional parent member, the parents, the Rebecca School social worker, and the student's Rebecca School classroom teacher (via telephone) (Dist. Ex. 3 at p. 2).

In the instant case, it is undisputed that the district special education teacher who took part in the March 2011 CSE would not have been responsible for implementing the March 2011 IEP; however, even assuming that this alone constitutes a violation of the IDEA, the hearing record lacks any evidence to show—and the parents do not specifically assert—that this violation impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646-47).[7] This is particularly so given that during the March 2011 CSE meeting, the student's special education teacher at the Rebecca School discussed the student's needs, present levels of performance, and annual goals and short-term objectives with the CSE (Tr. pp. 60-61; Dist. Ex. 17 at pp. 1-2). Furthermore, the March 2011 CSE minutes indicate that the Rebecca School teacher provided "input" to the CSE which was used to develop and modify the student's March 2011 IEP (Dist. Ex. 17 at pp. 1-2). Moreover, the hearing record reflects that the CSE considered a December 2010 Rebecca School progress report, prepared in part by the student's Rebecca School teacher (Tr. pp. 61-62; Dist. Ex. 6 at pp. 1-5). Additionally, the district school psychologist testified that a Rebecca School social worker also participated and expressed her concerns during the CSE meeting (Tr. pp. 61, 76). As the student's Rebecca School teacher and the Rebecca School social worker—who were directly acquainted with this student's particular needs—were able to fully participate in the March 2011 CSE meeting, and because I find the CSE had adequate evaluative information to recommend an appropriate program for the reasons stated below, the participation of a district special education teacher who would not have been able to execute the IEP did not rise to the level of a denial of a FAPE in this instance (A.H., 394 Fed. App'x at 720-21; see R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *6 [S.D.N.Y. Mar. 26, 2014]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 [S.D.N.Y. Dec. 8, 2011]).

2. Sufficiency and Consideration of Evaluative Information

The parents allege on appeal that the March 2011 CSE failed to use sufficient evaluative information in developing the student's functional levels. More specifically, the parents contend that the CSE did not have accurate measures of the student's cognitive or academic abilities because the student was assessed with an evaluative instrument that was not appropriate for use with a non-verbal child with autism.[8] The parents further assert that the Rebecca School progress report was not "meaningfully referenced" in the March 2011 IEP.

[7] The hearing record reflects that the district special education teacher had previously taught special education but was not a classroom teacher at the time of the March 2011 CSE meeting (Tr. pp. 103, 137-38).

[8] The parents do not assert any other specific deficiencies in the evaluative information available to the CSE.

An 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]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and 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]). 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]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). 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]). In developing the student's IEP, the district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. March 29, 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

The hearing record reflects that the March 2011 CSE reviewed a November 2010 psychoeducational evaluation report, a November 2010 classroom observation, and a December 2010 Rebecca School progress report (Dist. Ex. 17 at p. 1; see Dist. Exs. 4-6). The CSE also obtained input from the parents, the Rebecca School social worker, and the student's Rebecca School special education teacher (Tr. pp. 61, 76; Dist. Ex. 17 at pp.1-2). Additionally, the parents provided the CSE with information regarding the student's medical needs (Tr. pp. 104-06; Dist. Ex. 7 at pp. 1-2).

With respect to the student's functioning levels, the hearing record reflects that in October and November 2010 the district conducted a psychoeducational evaluation of the student that included an assessment of the student's mental status and behavior, cognitive functioning, visual motor functioning, academic readiness skills, adaptive functioning, and emotional functioning (Dist. Ex. 4). According to the evaluator, although the student was at times very active, the student was able to sit for short periods of time and focus on a task with appropriate external support (id. at p. 1). The evaluator noted that the student's frustration tolerance and attention improved slightly during a second evaluation attempt, and the student was able to establish fleeting eye contact (id.).

Relative to cognitive testing results, the evaluator reported that due to the student's known history of developmental delays and limited attention span she administered the nonverbal section of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) to the student in order to obtain an

estimate of her then-current level of cognitive functioning (Dist. Ex. 4 at p. 2). The evaluator further explained that she employed "appropriate" accommodations, such as extended time and prompting, based on the student's delays (id.). The evaluator reported that the student's non-verbal composite IQ fell within the "[m]oderately [d]elayed range" (id.).

In addition to cognitive testing, the evaluator also conducted an informal assessment of the student's academic achievement, stating that she could not administer standardized tests of academic achievement to the student due to the student's cognitive and communication deficits (Dist. Ex. 4 at p. 3). According to the evaluator, the student exhibited basic academic readiness skills including identification of letters of the alphabet, numbers, geometric shapes, her name, some words, and several colors and body parts by pointing to them (id.). The evaluator reported that the student demonstrated awareness of self, familiar people, and routines within her classroom setting (id.).

The evaluator also assessed the student's perceptual-motor and organization/integrative skills (Dist. Ex. 4 at p. 3). The student was able to hold a pencil "somewhat awkwardly" and make circular type motions; however, she was not able to copy vertical and horizontal lines or simple recognizable geometric shapes (id.).

To ascertain the student's then-current level of adaptive functioning, the examiner completed the Vineland Adaptive Behavior Scales-Second Edition (VABS) with the student's mother acting as reporter (Dist. Ex. 4 at p. 3). The parents' responses yielded an overall adaptive behavior composite score below the first percentile range of functioning, generally commensurate with the student's cognitive abilities (id.). With respect to communication skills, the examiner characterized the student as "preverbal" and reported that she communicated using gestures, vocalizations, and word approximations (id. at p. 4). The evaluator noted that the student was able to carry out simple one-step commands and two-step commands with prompting and demonstration (id.). In terms of adaptive self-help skills, the examiner reported that the student's basic needs and toileting had to be anticipated and scheduled for caregiver intervention, but that with assistance the student could eat, drink, doff clothing that opened in the front, brush her hair, and use a zipper (id.). Finally, with respect to the student's social/emotional functioning, the evaluator reported that the student showed affection towards familiar people, but did not generally initiate interaction or spontaneously engage in interactive play with peers (id.).

The evaluator noted in her report that she chose to administer the nonverbal subtests of the SB-5 due to the student's developmental delays and difficulties with attention span and frustration tolerance (Dist. Ex. 4 at p. 2). In addition, the evaluator reported that due to the student's history of cognitive and communication deficits, a standardized test of academic achievement could not be administered and therefore she chose to conduct an informal assessment of the student's academic readiness skills (id. at p. 3). Moreover, the district school psychologist testified that, contrary to the parents' contentions, the student was not administered the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), a standardized instrument designed to measure academic functioning in school-aged students, because the student was nonverbal and the test required mostly verbal responses (Tr. pp. 65-66). The district school psychologist opined that use of the WJ-III ACH would make it difficult for the student to "show her skills," which was why the examiner opted to use an informal assessment (id.). The district school psychologist further testified that she was not aware of any nonverbal standardized tests for academics (Tr. p. 138).

Additionally, the CSE reviewed the Rebecca School progress report, which described the student's academic abilities with respect to reading, mathematics, social studies, and science (Dist. Ex. 6).

With respect to the parents' argument that the CSE failed to meaningfully reference the Rebecca School progress report, the hearing record reveals that the Rebecca School progress report was used extensively by the March 2011 CSE. As indicated below, information from the December 2010 Rebecca School progress report was included in developing the present levels of functional performance, management needs, and annual goal sections of the March 2011 IEP (compare Dist. Ex. 3, with Dist. Ex. 6). The progress report described the student's program at the Rebecca School, as well as the student's educational needs (Dist. Ex. 6).

Consistent with the December 2010 Rebecca School progress report, the March 2011 IEP indicated that the student was able to attend with adults surrounding her "passions," but did not typically attend with peers unless they had a book or toy she wanted (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 6 at p. 1). Consistent with the December 2010 Rebecca School report, the March 2011 IEP indicated that the student was not able to initiate a problem solving interaction with peers, but if an adult invited a peer to help the student, the student would reference the peer as they worked toward reaching the student's goal (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 6 at p. 2). The March 2011 IEP also indicated that the student showed communicative intent by initiating interactions with adults surrounding her passions (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 6 at p. 2). Additionally, consistent with the Rebecca School progress report, the IEP indicated that the student was also using her communication book to work on identifying the emotions she was experiencing, as well as being able to answer concrete "wh" questions (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 6 at p. 3). Further, when provided verbal choices the student was improving her ability to answer "why" questions in relation to herself (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 6 at p. 3).

The March 2011 IEP also indicated that the student could engage with an adult for about five minutes by following the adult's lead, but was not yet able to sustain engagement with peers (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 6 at p. 2). Additionally, the March 2011 IEP reflected that it was challenging for the student to remain engaged when "she was intent on something and she was not allowed at that time" or when she had difficulty navigating her physical environment (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 6 at p. 2). However, consistent with the Rebecca School progress report, the March 2011 IEP indicated that when an adult followed the student's lead and did not attempt to challenge or change the interaction, the student was able to remain engaged for approximately 10 minutes (compare Dist. Ex. 3 at pp. 4, 12, with Dist. Ex. 6 at p. 2). Also reflected in the March 2011 IEP was that the student had difficulty regulating her attention and participating during group activities, that the student became "dysregulated" when demands were placed on her, and that when frustrated the student may pinch adults or drop to the floor and rub her head against the floor (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 6 at p. 1). In addition, the IEP reflected that the student benefited from regulating activities such as deep pressure massages to her face, head, arms, and legs and would request this by taking an adult's hand and placing it on the area she wanted to be squeezed (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 6 at pp. 1-2).

With respect to academics, consistent with the Rebecca School Progress report, the March 2011 IEP reflected that the student was able to answer explicit who, what, and where questions when given visual or verbal choices in relation to a text that was read aloud several times (compare

Dist. Ex. 3 at p. 3, with Dist. Ex. 6 at p. 3). In math, the student demonstrated an understanding of 1:1 correspondence for numbers 1-10 and showed an understanding of positional vocabulary by placing items inside a bin and on top of a table (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 6 at p. 4). According to the December 2010 Rebecca School report, and further reflected in the March 2011 IEP, the student was working on matching manipulatives with quantities 1-10; expressively identifying a penny, nickel and dime; making groups of items and identifying which was more and less; and was beginning to demonstrate an understanding of morning and afternoon (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 6 at p. 4). In addition, consisted with the progress report, the March 2011 IEP indicated that the student was working on numerous activities of daily living (ADL) (compare Dist. Ex. 3 at pp. 4-5, 13, with Dist. Ex. 6 at p. 4).

The December 2010 Rebecca School progress report also included information that was reflected in the March 2011 IEP regarding the student's related services needs (compare Dist. Ex. 3 at pp. 5, 7-8, with Dist. Ex. 6 at pp. 5-8). Consistent with the Rebecca School progress report, the March 2011 IEP indicated that the student was described as "hyper responsive" to unexpected tactile input and loud auditory input and exhibited sensory seeking behaviors, as evidenced by her fast paced movement and need for movement throughout the day (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 6 at p. 5). In addition, the progress report and March 2011 IEP both indicated that the student continued to need support in busy environments or when engaging in novel tasks as she could become emotionally dysregulated; and that the student responded well to deep pressure and proprioceptive input, which calmed the student and helped her to become more attentive (compare Dist. Ex. 3 at pp. 3-5, with Dist. Ex. 6 at p. 5). Also, according to the Rebecca progress report and reflected in the March 2011 IEP, the student presented with low muscle tone and decreased strength, experienced difficulty with fine motor tasks, and the student required 1:1 continuous support to stay engaged in these types of activities (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 6 at p. 5). As a result of the student's decreased muscle tone, she used "fixing" strategies as a compensatory measure (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 6 at p. 7). With respect to visual spatial processing, consistent with the progress report, the March 2011 IEP indicated that the student was able to navigate the school environment, but also noted that the student's decreased attention span limited her ability to visually focus and scan large and busy environments (compare Dist. Ex. 3 at p. 8, with Dist. Ex. 6 at p. 6). Additionally, consistent with the Rebecca School report, the March 2011 IEP indicated that the student demonstrated difficulty climbing on and off furniture without upper extremity and trunk support due to postural insecurity, lower extremity weakness, and decreased coordination (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 6 at p. 7). Consistent with the Rebecca School progress report, the March 2011 IEP indicated that the student communicated primarily using non-verbal language including pointing to symbols and letters in her communication book, as well as using signs, gestures and a limited range of vocalizations (compare Dist. Ex. 3 at pp. 3-5, with Dist. Ex. 6 at p. 7). Additionally, the student's ability to process and respond to language was described in the Rebecca School report and reflected in the March 2011 IEP as dependent upon her level of regulation, motivation, and attention, and that the student demonstrated the ability to follow a number of familiar one and two-step directions (compare Dist. Ex. 3 at pp. 3-4, with Dist. Ex. 6 at p. 8). With respect to oral motor development, consistent with the progress report, the March 2011 IEP indicated that the student presented with features of hyposensitivity in the oral mechanism such as mouthing inedible objects and decreased control of saliva (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 6 at p. 8).

Finally, consistent with the Rebecca School progress report, the IEP included numerous long and short term goals that targeted, among other things, the student's ability to remain regulated and engage with peers, expand her academic skills, improve her ability to perform ADL skills, improve motor planning and visual motor skills, improve strength and endurance, increase her intentional communication and improve her oral motor function (compare Dist. Ex. 3 at pp. 6-13, with Dist. Ex. 6 at pp. 9-11).

To the extent that the parents assert that use of the December 2010 Rebecca School progress report to develop the student's March 2011 IEP resulted in outdated functional levels, and therefore outdated management needs and goals, the hearing record does not support this claim, as a subsequent Rebecca School progress report reflects that the student's abilities and needs did not significantly change between December 2010 and May 2011, the date of the next Rebecca School progress report (Dist. Ex 6; see Parent Ex. N). Similarly, although the parents assert that it was inappropriate for the March 2011 IEP to reflect information from the Rebecca School progress report regarding the student's needs without incorporating the strategies used by the Rebecca School to address those needs, they cite to no evidence in the hearing record establishing that these strategies were the only means of appropriately addressing the student's needs (see M.H., 685 F.3d at 257; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]).

In summary, the evidence in the hearing record demonstrates that the March 2011 CSE adequately considered and reviewed a variety of sources, including the December 2010 Rebecca School progress report, to develop the student's March 2011 IEP. Based on the foregoing, the parents' assertions regarding the sufficiency of the evaluative data and its consideration by the March 2011 CSE are not supported by the hearing record (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, at *10-*11 [noting that while the CSE is required to consider recommendations made in evaluative information provided by the parents, the IDEA does not require the CSE to adopt each recommendation made]).

C. March 2011 IEP

1. Annual Goals

Turning to the dispute regarding the annual goals in the March 2011 IEP, the parents assert that the annual goals were generic, vague, failed to contain baseline functioning or expected levels of mastery, were not measurable; and did not appropriately address the student's social/emotional and sensory needs. The parents further assert that the March 2011 CSE failed to include goals and objectives to address the student's communication and adapted physical education needs.

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

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

a. Measurability

With regard to the measurability of the student's goals, State regulations requires that each annual goal include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal (8 NYCRR 200.4[d][2][iii][b]). The State Education Department's Office of Special Education issued a guidance document in December 2010 which specifies that evaluative criteria refers to "how well and over what period of time a student must perform a behavior in order to consider it met" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 32, Office of Special Educ. Mem. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). A student's performance can be measured in terms of frequency, duration, distance, or accuracy; and period of time can be measured in days, weeks, or occasions (id.). Evaluation procedures refers to the method that will be used to measure progress, such as structured observations, student self-monitoring, written tests, recordings, work samples, and behavior charting (id. at p. 33). Evaluation schedules refer to the date or intervals of time by which evaluation procedures will be used to measure the student's progress (id.).

A review of the annual goals and short-term objectives included in the March 2011 IEP reveals that the annual goals contained in the March 2011 IEP lacked specificity and measurability (Dist. Ex. 3 at pp. 6-13). However, a majority of the goals contained short-term objectives related to the student's needs, by which the student's progress could be measured (id.). More specifically, embedded in the annual goals and short-term objectives were the means by which the student's progress would be measured, including teacher observation and assessment, teacher-made tests, OT observation, PT observation, and checklists (id.). In addition, the short-term objectives included targeted levels of mastery such as "with 80% accuracy," "for 15-20 consecutive minutes" and "in 4/5 opportunities" (id.). Additionally, the March 2011 IEP indicated that three reports of progress toward the annual goals would be issued during the 2011-12 school year (id.). Thus, a review of the May 2011 IEP demonstrates that, contrary to the parents' assertions, the annual goals, combined with their corresponding short-term objectives, contained "sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress" (Tarlowe, 2008 WL 2736027, at *9 [internal quotations omitted]; see N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9-*10 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *10-*12 [E.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13-*14 [S.D.N.Y. Sept. 27, 2013]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*19 [E.D.N.Y. Aug. 19, 2013]; D.B., 966 F. Supp. 2d at 334-35; see also M.Z., 2013 WL 1314992, at *6; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *8 [S.D.N.Y. Sept. 22, 2011]; P.K. v. New York City Dep't of Educ., 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011], aff'd 526 Fed. App'x 135 [2d Cir. May 21, 2013] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress]).

b. Social/Emotional and Sensory Needs

The parents argue that the goals and objectives relating to the student's social/emotional needs are insufficient. More specifically, the parents claim that the March 2011 IEP lacks goals and objectives to address the student's delays in attention, distractibility, self-regulation, and modulation. With respect to these deficit areas, the hearing record reflects that the March 2011 IEP included a short-term objective which targeted the student's ability to select and follow through with a self-regulatory strategy, and another objective targeting the student's use of co-regulation strategies with an adult to remain with a group during activities (Dist. Ex. 3 at pp. 7, 11). Furthermore, apart from the goals and objectives, the CSE recommended that the student be placed in a 6:1+1 special class and also recommended numerous environmental modifications and human/material resources to address the student's management needs, including her attending deficits and dysregulation (Dist. Ex. 3 at pp. 3-5). Accordingly, in this instance, the hearing record does not support the conclusion that the goals and objectives relating to the student's social/emotional needs were insufficient.

c. Communication Needs

The parents assert on appeal that the March 2011 IEP did not contain specific goals regarding the student's use of alternative communication or use of the student's communication book into all academic and related services goals. The hearing record shows that the student communicated using signs, gestures, and a communication book and that the communication book was one of her central means of communication (Tr. pp. 83-84; Dist. Exs. 3 at p. 1; 6 at p. 1). The March 2011 IEP noted the student's use of a communication book, and also included use of the book in several short-term objectives (Dist. Ex. 3 at pp. 6, 11). The IEP also referenced the use of a picture board for one of the student's short-term objectives in OT, and a letter board for an objective designed to address her expressive language skills (Dist. Ex. 3 at pp. 7, 9). Furthermore, the student's mother testified that the CSE discussed communication devices "at length" (Tr. p. 273). Based on the foregoing, the evidence in the hearing record does not support the parents' contention that March 2011 IEP was deficient for failing to include goals directly referencing the student's use of an alternative communication device, as the IEP properly addressed the student's communication needs.

d. Adapted Physical Education Needs

With respect to adapted physical education goals, the parents accurately note that the March 2011 IEP did not include annual goals related to the student's participation in adapted physical education; however, this deficiency, alone, does not rise to the level of a denial of a FAPE in this case.

State regulation defines adapted physical education as "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]). If a student with a disability is not participating in a regular physical education program, the IEP shall describe "the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education" (8 NYCRR 200.4[d][2][viii][d]). In

this case, although the March 2011 CSE recommended adapted physical education in the IEP as a direct service to be provided to the student, the CSE did not otherwise provide any description of the extent to which the student would participate in such specially-designed instruction or develop annual goals related to the student's participation in adapted physical education (Dist. Ex. 3 at p. 1, 5). However, as described more fully below, the hearing record does not support a conclusion that the CSE's failure to develop annual goals to address the provision of this service to the student resulted in a failure to offer the student a FAPE, especially given that the March 2011 IEP described the student's deficits and included the recommendation for the provision of adapted physical education as well as related services to address the student's needs.

The evidence in the hearing record demonstrates that the March 2011 CSE properly identified the student's physical limitations, her need for sensory input, and her motor deficits (Dist. Ex. 3 at pp. 4-5). Additionally, the March 2011 CSE included recommendations for adapted physical education as a direct service; related services such as OT and PT to address the student's gross motor deficits, sensory processing, and motor planning skills; and environmental modifications and human and material resources to further address the student's identified needs in these areas (Tr. pp. 83, 86-88, 92-93; Dist. Ex. 3 at pp. 1, 5, 7-8, 10-11, 13). In particular, the March 2011 CSE relied upon information contained in the December 2010 Rebecca School progress report, including reports from the student's then-current clinicians to draft the section of the March 2011 IEP describing the student's present level of health and physical development and goals (Dist. Ex. 3 at pp. 5, 7-8, 10-11; see Tr. pp. 62-63). Specifically, the March 2011 IEP indicated, among other things, that the student had congenital static encephalopathy, a chromosomal translocation, severe hypotonia, and strabismus (Dist. Ex. 3 at p. 5). The IEP noted that the student wore orthotics, was not yet toilet trained, had emergent body awareness, displayed both sensory seeking and sensory avoiding characteristics, presented with low muscle tone and decreased strength, and had poor safety awareness and may put small objects in her mouth (id.). Further, the March 2011 IEP indicated that the student had mobility limitations and required the provision of an accessible program and adapted physical education in a 6:1+1 staffing ratio (id.). As noted above, the IEP also detailed environmental modifications and human and material resources needed to address the student's deficits in health and physical development (id.). These included the need for a barrier free-site to assist with the student's mobility and safety issues; the assistance of a 1:1 paraprofessional due to safety issues and the student's propensity for mouthing inedible objects; use of a communication book to communicate; assistance with toileting; and OT and PT (id.).

In addition, the March 2011 CSE meeting minutes indicate that the CSE discussed the student's health and physical development and need for an accessible program (Dist. Ex. 17 at p. 2). A statement regarding the student's lack of safety awareness was also added to the IEP (Dist. Ex. 3 at. p. 5). In addition to recommending OT and PT as related services, the March 2011 CSE drafted annual goals and short-term objectives that addressed the student's sensory processing, motor planning, visual motor, oral motor, strength and endurance, balance, and personal safety (id. at pp. 7-8, 10-11, 13).

Therefore, in reviewing and considering the evidence regarding the services provided by the IEP as a whole, in this instance the March 2011 CSE adequately addressed the student's physical needs and the lack of annual goals related to the student's participation in adapted physical education instruction did not rise to the level of a denial of a FAPE (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]; see also W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).[9]

2. Parent Counseling and Training

Turning next to the parents' claim that the omission of parent counseling and training from the March 2011 IEP resulted in a denial of a FAPE to the student, 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]). 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]). State regulations further provide for the provision of parent counseling and training for the parents of students with autism to enable them "to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]). 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 a "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 1, 2014]).

In the instant matter, it is undisputed that the March 2011 CSE did not recommend parent counseling and training in the student's March 2011 IEP, which violates the procedures for formulating an IEP. However, the district school psychologist testified that at the assigned school, parent counseling and training "takes place as part of the program" and "is support for the parents, in terms of addressing the needs of students with disabilities" (Tr. p. 79, 122-23; Dist. Ex. 17 at p. 1). The district school psychologist further testified that parent counseling and training was discussed at the March 2011 IEP meeting, and that she encouraged the parents to obtain specific information from their visit to the assigned public school site as to by whom and how frequently it would be provided (Tr. pp. 79-80; Dist. Ex. 17 at p. 1). Additionally, the assigned school teacher

[9] With regard to the student's use of an assistive communication device and participation in adapted physical education, the CSE appropriately developed goals to address the student's needs, rather than the strategies used to address the student's needs (20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]).

testified that parent counseling and training was offered through the district at the assigned school "twice a month" and covered a variety of topics (Tr. p. 160).

Based upon the foregoing, I find that although the March 2011 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (see F.L., 553 Fed. App'x at 7; M.W., 725 F.3d at 141-42; R.E., 694 F.3d at 191).

3. Consideration of Special Factors—Interfering Behaviors

The parents assert that despite the district's knowledge of the student's interfering behaviors, the district failed to conduct an FBA for the student, resulting in a failure to offer the student a FAPE. 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 C.F. v. New York City Dep't of Educ., 746 F.3d 68, 72-73 [2d Cir. 2014]; E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *14 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *9 [S.D.N.Y. Mar. 31, 2014]; 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. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulations provide that "[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]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguide Dec2010.pdf [stating the necessary "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"]).

It is undisputed that the district did not conduct an FBA in this case. As stated above, in developing the March 2011 IEP, the CSE considered multiple sources of evaluative information which contained information regarding the student's behavior, including a December 2010 Rebecca School progress report, an November 2010 classroom observation, and a November 2010

psychoeducational evaluation (Dist. Exs. 4-6). The 2010 Rebecca School progress report indicated that the student's behaviors included dropping to the floor, having tantrums in response to adult directed transitions, rubbing her head against the floor, and pinching adults in frustration (Dist. Ex. 6 at p. 1). The progress report further indicated that the student demonstrated sensory-seeking behaviors and would search for objects to place in her mouth (id.). The November 2010 psychoeducational evaluation indicated that the student demonstrated behavioral issues including biting others, tantrumming, poor delay of gratification, and smelling or tasting inanimate objects (Dist. Ex. 4 at p. 4). Additionally, the psychoeducational evaluation indicated that the student demonstrated issues with self-regulation, impulse control, frustration tolerance, attention, and decreased awareness of dangerous situations (id.). Although the hearing record indicates that the student's behaviors were addressed at the Rebecca School in the classroom by goals in the Rebecca School progress report targeting the student's ability to remain regulated and that the Rebecca School does not use BIPs, the evaluative information before the CSE revealed that the student exhibited behaviors that had the potential to impede her learning and the learning of others (Tr. pp. 84-85, 422-23; Dist. Ex. 6 at pp. 9-10). Accordingly, under the circumstances of this case, the CSE should have conducted an FBA to determine the factors related to the student's interfering behaviors and whether the student required a BIP to address her behaviors (20 U.S.C. § 1414 [d][3][B][i]; 34 CFR 300.324 [a][2][i]; 8 NYCRR 200.4 [d][3][i], 200.22[a], [b]).

Notwithstanding the foregoing, the district's failure to conduct an FBA does not, by itself, automatically render the IEP deficient, and in this instance, the March 2011 IEP must be closely examined to determine whether—in the absence of an FBA—the May 2011 IEP otherwise addressed the student's interfering behaviors (C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 139-41). As noted above, while on appeal the parents assert that the district should have conducted an FBA, they do not challenge the district's failure to develop a BIP, nor do they assert that the failure to conduct an FBA impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits to the student. Accordingly, there is no basis for a finding on appeal that the district's failure to conduct an FBA resulted in a denial of a FAPE to the student (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Nonetheless, even if the parents had asserted such a claim it would fail.

According to the December 2010 Rebecca School progress report, to address the student's behaviors the student benefited from oral motor protocol, use of a communication book, singing, speaking in a soft and soothing voice, limited language, additional processing time, and adult support (Dist. Ex. 6 at p. 1). The report further reflects that when the student became dysregulated, the student would be re-regulated with co-regulation strategies (id.). Additionally, the classroom observation at the Rebecca School indicated that when the student began stuffing her mouth, the teacher utilized deep pressure techniques to reduce sensory integration issues (Dist. Ex. 5 at p. 2). Consistent with the strategies indicated in the Rebecca School progress report and by the student's teacher during the December 2010 classroom observation, the March 2011 IEP provided the student with accommodations to address her behaviors, including a brushing protocol, oral motor protocol, looking through books, singing and counting (Dist. Ex. 3 at p. 4). Additionally, the March 2011 IEP included strategies to improve the student's regulation levels including soothing voice, limited language, additional processing time, clarifying what was expected from the student, deep pressure, a visual schedule, and narrating changes in routine (id.). The March 2011 IEP also

included a 1:1 paraprofessional due to safety issues and the student's propensity for mouthing inedible objects; use of a communication book to communicate; assistance with toileting; and OT and PT (id. at p. 5). The IEP included annual goals and short-term objectives to address the student's emotional dysregulation and oral motor sensory issues (id. at pp. 7, 10-11). In addition, the IEP contained an annual goal and corresponding short term objectives which targeted the paraprofessional's support of the student in addressing her needs with respect to wandering, safety awareness, and mouthing inedible objects (id. at pp. 5, 13).

Based on the foregoing, the hearing record supports the conclusion that the March 2011 IEP adequately described the student's interfering behaviors and provided appropriate strategies and supports to address the student's interfering behaviors. Thus, the district's failure to conduct an FBA in this case does not support a finding that the district failed to offer the student a FAPE, particularly because the March 2011 CSE provided accommodations and strategies to address the student's behavior, the services of a 1:1 paraprofessional, as well as annual goals and short-term objectives related to behavior within the March 2011 IEP.

4. 6:1+1 Special Class Placement

The parents assert on appeal that the district's recommendation of a 6:1+1 special class placement was not appropriate because the student required additional support and a smaller educational environment to address her individualized needs. The IHO found that the district's recommendations were consistent with the evaluations provided to the March 2011 CSE. A review of the hearing record reveals that the March 2011 CSE's recommendation of a 6:1+1 special class, a 1:1 paraprofessional, and related services was appropriately designed to address the student's special education needs.

Consistent with the student's needs as identified in the evaluative data reviewed by the March 2011 CSE, the March 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 paraprofessional (Dist. Ex. 3 at pp. 1, 19). State regulations provide that a 6:1+1 special class placement is designed for the instruction of 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]).

At the outset, it should be noted that during the impartial hearing, the student's mother testified that the recommended 6:1+1 special class placement would be appropriate for the student if the district could provide the related services identified in the student's March 2011 IEP, while also offering a safe environment (Tr. pp. 274-75). The district school psychologist testified that a 6:1+1 special class was the appropriate placement for the student because she required a "very small, supportive classroom environment" (Tr. pp. 74-75). The school psychologist further testified that the March 2011 CSE agreed that 12:1+1 and 8:1+1 special class programs would be "too large" for the student (Tr. p. 76; Dist. Exs. 3 at p. 15; 17 at p. 2).

The hearing record indicates that at the time of the March 2011 CSE meeting, the student demonstrated significant deficits in academics; expressive, receptive, and pragmatic language; ADL skills; sensory integration; and social/emotional development (Tr. p. 82-83; Dist. Exs. 3-6). The student's dysregulation, sensory, and communication difficulties sometimes resulted in

frustration and behavioral issues (Tr. pp. 84-86, 125, 422; Dist. Exs. 3-6). The hearing record further reflects that the student demonstrated problems with motor planning (Tr. pp. 92-93; see Dist. Exs. 3-6). The student's functional math level was identified by her then-current teacher as prekindergarten level and the teacher further indicated that because the student was non-verbal, her functional reading level was "really difficult" to identify (Tr. pp. 424-26). Consistent with the psychoeducational evaluation, the March 2011 IEP indicated that the student's instructional levels for reading, writing, and math were identified as "NT" for "not testable" (compare Dist. Ex. 3 at p. 3; with Dist. Ex. 4 at p. 3).

To address the student's needs, the March 2011 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school (Dist. Ex. 3 at p. 1). The CSE developed goals and objectives that targeted the student's reading, math, and visual motor skills, as well as goals and objectives targeting the student's ability to self-regulate, engage in peer interactions, and engage in safety awareness (id. at pp. 6-13). The CSE recommended numerous environmental modifications and human/material resources to address the student's management needs including a 1:1 paraprofessional, frequent redirection, visual prompts and support, use of manipulatives and a communication book; co-regulation strategies such as books, singing, counting, and deep pressure, a visual schedule, and narration of class routine, sensory input tools and breaks (Dist. Ex. 3 at pp. 3-5). To address the student's speech-language deficits, the CSE developed goals and objectives related to improving the student's pragmatic, receptive, and expressive language skills and also recommended that the student receive individual speech-language therapy five times per week (Dist. Ex. 3 at pp. 8-10, 12, 16). Along with goals and objectives to address the student's gross and fine motor, ADL, sequencing, visual-spatial, sensory, and motor planning needs, the CSE recommended that the student receive individual OT and PT five times each per week (Dist. Ex. 3 at pp. 5, 7-8, 10-11, 16). The March 2011 CSE also recommended a 1:1 paraprofessional and a goal and objectives to address the student's poor safety awareness, her mouthing small and inedible objects, poor balance and bodily awareness as well as other physical needs including toileting assistance (Tr. pp. 74-75; Dist. Ex. 3 at p. 5, 13).

Based upon the foregoing, the evidence contained in the hearing record supports a finding that the district's recommendation of a 6:1+1 special class in a specialized school with a 1:1 paraprofessional and related services was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

D. Assigned Public School Site

Finally, the parents contend that the IHO erred in not addressing whether the assigned public school site would be able to implement the student's March 2011 IEP, including providing related services, functionally grouping the student with appropriate peers, and placing the student in the LRE. For the reasons explained more fully below, the parents' contentions must be dismissed.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the

IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[10] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services

[10] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the March 2011 IEP because a retrospective analysis of how the district would have implemented the student's March 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the March 2011 IEP (see Parent Exs. D; F). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the March 2011 IEP.[11]

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

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

1. Related Services

With respect to the assigned public school site's ability to implement the student's related services mandates, the assistant principal of the assigned school testified that the student would receive the related services recommended on the March 2011 IEP at the public school or, if the school could not provide the full amount, the district would issue related service authorizations ("RSAs") to the parents (Tr. pp. 252-254; see Tr. pp. 311, 314-15).[12] There is no evidence in the hearing record that supports a finding that the district would have been unable to implement the student's related services as recommended in the March 2011 IEP, making the parents' claim precisely the sort of speculative argument that has been rejected by the Second Circuit as a basis for a finding of a denial of a FAPE (see F.L., 553 Fed. App'x at 9).

2. Functional Grouping

With regard to the parents' argument that the student would not have been appropriately grouped with the other students at the assigned school site, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]). Upon review of the hearing record, assuming that the student had attended the assigned public school

[12] RSA is a common acronym for "related service authorization," which "'allows a family to secure an independent provider paid for by the [district]' and 'is issued only when a contracted agency cannot provide the service' for the [district]" (F.O. v. New York City Dep't of Educ., 976 F. Supp. 2d 499, 507 n.4 [S.D.N.Y. 2013] [quoting a document published by the district]). The State Education Department has authorized districts to enter into such arrangements in limited circumstances ("Questions and Answers Related to Contracts for Instruction" [June 2012], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).

site, the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned school for the 2011-12 school year.

The hearing record reflects that at the time of the March 2011 CSE meeting, the student was nine and a half years old and demonstrated pre-kindergarten math skills (Tr. p. 424; Dist. Ex. 3 at pp. 1, 6). The teacher of the classroom defended at the impartial hearing by the district testified that the student could have been appropriately grouped at the assigned school (Tr. p. 177). According to the teacher of the proposed class, on the first day of school the teacher had one student in her class (Tr. p. 162). The teacher opined that the other student would have provided an "excellent model" for the student with regard to language skills and would have encouraged interaction (Tr. p. 178). Moreover, the teacher testified that based on the annual goals described in the student's March 2011 IEP, the student's goals were similar to the other student in the classroom (Tr. p. 187). Accordingly, the hearing record does not support a conclusion that the student was denied a FAPE based on the grouping of the student at the assigned school site by peer group or functional level.[13]

3. LRE—Location of the Assigned Public School Site

Turning to the issue of whether the district's recommended program was provided in the LRE, the parents assert that the assigned public school site was not in the LRE because the school was a "significant distance" from the student's home and the district did not assign the student to attend the public school "closest to her home" (Pet. ¶ 31; see 8 NYCRR 200.4[d][4][ii][b]; 34 CFR 300.116[b][3], [c]).

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d 111; Gagliardo, 489 F.3d 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112 at 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR

[13] As further evidence of the speculative nature of claims regarding functional grouping for an unimplemented IEP, the teacher of the proposed classroom at the assigned public school site testified that her class roster for summer 2011 included five students, that three students attended over the course of the summer, and that only one was present on the first day of school in July (Tr. pp. 162, 206, 238-39).

200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR. 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

Here, the parents assert no argument regarding the degree to which the student was educated with nondisabled peers, contending only that the student's assignment to a public school that was not the closest public school to her home constituted a failure to place the student in the LRE and a consequent denial of FAPE. According to the hearing record, the student's mother testified that the assigned public school site was "over four miles away from [the student's] home" (Tr. p. 277). The mother further testified that there were "multiple" specialized public schools that were closer to the student's home other than the assigned school; however, the hearing record contains no evidence that any of these schools would have been able to fully implement the student's March 2011 IEP (see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]). In addition, although the IEP reflected that the student required limited travel time, it did not specify a time limit for the student's commute (Dist. Ex. 15 at p. 1). The hearing record, does, however, contain medical records provided by the parents, which indicated that the student's travel time should be no more than "45 minutes each way" (Dist. Ex. 7 at p. 1). However, the hearing record is unclear as to whether the travel time between the student's home and the assigned public school site exceeded 45 minutes. Moreover, the parents do not provide any information regarding the distance from the student's home to the assigned public school site other than indicating that it is "over four miles away from [the student's] home" (Tr. p. 277). In any event, although the assigned public school site was required to be "as close as possible to the student's home" (8 NYCRR 2004[d][4][ii][b]), this provision does not mandate that the district's school assignment must be the closest school to the student's home (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379-82 [5th Cir. 2003]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]).[14] Although it would have been optimal for the district to present evidence that the other public school sites near the student's home could not implement the student's IEP, under the circumstances herein, I do not find the distance of the assigned school from the student's home constituted a denial of FAPE for failure to strictly adhere to the LRE requirements in State and federal regulations.

[14] As noted previously, when a district is determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A., 371 Fed. App'x at 154; T.Y., 584 F.3d at 420; White, 343 F.3d at 373, 379; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 & n.6 [5th Cir. Jan. 5, 2005]; A.W., 372 F.3d at 682; 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).

E. Available Relief/Standing

Finally, although not necessary to my ultimate determination, I briefly address the IHO's determined that the parents did not have standing to seek public funding for the costs of the student's tuition at the Rebecca School for the 2011-12 school year. Rather than being a question of standing in the traditional sense, the IHO's determination instead goes to the question of what forms of equitable relief would be available to the parents in the event that the district failed to offer the student a FAPE. Under the IDEA and New York State law, a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). In this case, there is no dispute that petitioners are the parents of the student within the meaning of the IDEA (see 20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; see also 8 NYCRR 200.1[ii]). Accordingly, the parents were permitted by the IDEA to file a due process complaint notice asserting that the district had failed to offer the student a FAPE on the basis that the March 2011 CSE had not complied with the procedural requirements set forth in the IDEA, or that the March 2011 IEP was substantively inadequate and not reasonably calculated to enable the student to receive appropriate educational benefits (see Winkelman, 550 U.S. at 531, 533; 34 CFR 300.507[a], 8 NYCRR 200.5[i]). To the extent that the IHO found otherwise, he erred in relying on concepts of standing not applicable to due process proceedings under the IDEA.

The only courts in New York to have addressed the question have found that the denial of a FAPE constitutes an injury in fact sufficient to confer standing on a parent to bring a claim in federal court under the IDEA (M.F. v. New York City Bd. of Educ., 2013 WL 2435081, at *13 n.9 [S.D.N.Y. June 4, 2013]; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at *6 [S.D.N.Y. Mar. 14, 2011], rev'd on other grounds by 2014 WL 3377162 [2d Cir. July 11, 2014]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 359-360 [S.D.N.Y. 2009]; see also E.M. v. New York City Dep't of Educ., 2014 WL 3377162, at *10-*16 [2d Cir. July 11, 2014]; Heldman v. Sobol, 962 F.2d 148, 154-56 [2d Cir. 1992]; M.M. v. New York City Dep't of Educ., 2014 WL 2757042, at *8 [S.D.N.Y. June 17, 2014]; but see Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007], quoting Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]). The other relevant factor in determining whether the parents have standing is whether the relief requested is likely to redress the injury (see S.W., 646 F. Supp. 2d at 356).[15] Consistent with the court's determination in S.W., an award of tuition would redress the denial of a FAPE in circumstances where a nonpublic school has provided an appropriate education to the student and the parents have not made any payments to the private school (see S.W., 646 F. Supp. 2d at 359; see also M.F., 2013 WL 2435081, at *13 n.9). A request for tuition reimbursement would also redress the denial of a FAPE in circumstances where a nonpublic school has provided an appropriate education to the student and the parents have made or will make payments to the

[15] The other element of standing doctrine, that the injury be traceable to the district's conduct, is not at issue here as it is undisputable that the district has the obligation to offer the student a FAPE (see 20 U.S.C. § 1412[a][1][A]; 34 CFR 300.101[a]).

private school (see Burlington, 471 US at 369-370).[16] The inquiry regarding standing ends there, without needing to determine whether the relief requested is in fact available (S.W., 646 F. Supp. 2d at 359-60). A party who has satisfied the foregoing conditions has standing to bring a claim under the IDEA even if the relief requested is ultimately unavailable to that party (see E.M., 2014 WL 3377162, at *16; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *7-*8 [S.D.N.Y. Mar. 17, 2010]). Accordingly, under the circumstances of this case the IHO erred in determining that the parents lacked standing to pursue a claim for public funding for the costs of the student's tuition at the Rebecca School for the 2011-12 school year.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE, the necessary inquiry is at an end and there is no need to reach the issues as to whether the Rebecca School was an appropriate unilateral placement for the student or whether equitable considerations support the parents' request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 11, 2012, is modified by reversing that portion which found that the parents lacked standing in this matter to seek public funding of the costs of the student's tuition at the Rebecca School for the 2011-12 school year.

Dated: **Albany, New York**
July 24, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[16] While the IHO found that the parents had not incurred a legal liability for the costs of the student's Rebecca School tuition, the hearing record reflects that the parents entered into a contract obligating them to pay the costs of the student's tuition and made partial payment toward the costs of the student's education (Tr. pp. 289, 307; Parent Exs. F; G). Accordingly, even if the parents were not liable for the bulk of the costs of the student's tuition, the Second Circuit has recently found standing to pursue a claim where the parents incurred an obligation with regard to the costs of the student's tuition that could be rectified by an award of public funding (E.M., 2014 WL 3377162, at *11-*16).