# The University of the State of New York

## The State Education Department

### State Review Officer

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**No. 12-174**

**Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Lewis Johs Avallone Aviles, LLP, attorneys for respondent, Jennifer M. Frankola, Esq., of counsel

## DECISION

## I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's)[1] son and ordered it to reimburse the parent for a portion of her son's (the student's) tuition costs at the Rebecca School for the 2011-12 school year. The parent cross-appeals from that part of the IHO's decision which found that the Rebecca School was "only partially appropriate" to meet the student's needs and reduced the award of tuition costs accordingly. The appeal must be sustained in part. The cross-appeal must be dismissed.

## II. Overview—Administrative Procedures

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

[1] Although the answer and cross-appeal indicates that both of the parents are appearing on behalf of the student on appeal, only the student's mother is named in the due process complaint notice and the IHO's decision was directed to the student's mother only rather than to both parents. Additionally, the hearing record reflects that only the student's mother participated in the impartial hearing. Accordingly, for purposes of this decision I will deem the respondent to be the student's mother, and references to "the parent" shall refer to the student's mother alone.

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

This matter involves a student who, at the time that the IEP at issue was developed, was 12 years old. The hearing record reflects that the student has a history of mild cerebral palsy, scoliosis, hypotonia, asthma, hypothyroidism, febrile seizures, heart and lung defects, and difficulties with feeding, as well as gastrointestinal and orthopedic issues (Tr. p. 683, 1051-53; Dist. Ex. 6 at p. 2;

Parent Exs. S at p. 2; X at p. 1). The student demonstrates difficulties with cognition, academics, language processing, sensory regulation, fine and gross motor skills, activities of daily living (ADL), and social/emotional/behavioral functioning (Tr. pp. 122-25, 870-71, 877-80; Dist. Exs. 6-8). The student has attended the Rebecca School since September 2008 (Tr. p. 801).

On May 2, 2011, a CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 2). Finding the student eligible for special education as a student with multiple disabilities, the May 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 transitional paraprofessional (id. at pp. 1, 19).[2] The CSE, among other things, also recommended that the student receive the following related services: three 40-minute sessions per week of individual speech-language therapy, one 40-minute session per week of speech-language therapy in a group (2:1), two 40-minute sessions per week of individual occupational therapy (OT), one 40-minute session per week of OT in a group (2:1), one 40-minute session per week of individual counseling, one 40-minute session peer week of counseling in a group (2:1), and two 40-minute sessions per week of individual physical therapy (PT) (id. at pp. 1, 18-19). The May 2011 CSE also determined that the student would participate in the New York State alternate assessment due to his significant cognitive and academic delays, and recommended his participation in adapted physical education (id. at pp. 1, 6, 18-19).

By final notice of recommendation (FNR) dated June 13, 2011, the district summarized the special education services recommended in the May 2011 IEP, and identified the particular public school site to which the district assigned the student for the 2011-12 school year (Parent Ex. C). On June 16, 2011, the parent visited this public school site and, by letter dated June 17, 2011, notified the district that she felt that the school was not appropriate for the student (see Parent Ex. D at pp. 1-3). In particular, the parent identified several concerns with the school, including that it was old and "looked more like an institution than a school," that it lacked elevators, and that there was no air conditioning in the corridors and stairwells (id. at p. 1). The parent also raised concerns regarding the general safety of the school, and contended that the school lacked a "sensory gym or sensory equipment," that the school did "not employ any behavioral methods or therapies" that the student has "respond[ed] positively" to, and that certain related services would be "outsourced" at the school (id. at pp. 1-2). In addition, the parent raised a number of other concerns with the school, including that there was no parent counseling and training available at the school, that the 6:1+1 special class at the assigned school contained students who had received diagnoses of autism, there was no opportunity for "community learning," that a nurse was not available for "outings," and that the school was not the student's least restrictive environment (LRE) (id. at pp. 2-3). Accordingly, the parent advised the district that she felt that the school did not "offer even a basic floor of support" for the student, and that she would be unilaterally placing the student at the Rebecca School for the 2011-12 school year (id. at p. 3).

On June 22, 2011, the parent executed an enrollment contract with the Rebecca School for the student's attendance for the 2011-12 twelve-month school year (Parent Ex. I at pp. 1-6).[3]

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

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

### A. Due Process Complaint Notice

By due process complaint notice dated July 7, 2011, the parent alleged that the district "failed, both procedurally and substantively, to provide . . . an appropriate placement/program to [the student]" in the 2011-12 school year and requested an impartial hearing (Parent Ex. A at p. 1). In general, the parent asserted that the district (and/or its "placement/program")[4] did not "specifically address [the student's] needs" and did not "provide him with intensive therapeutic individual support" necessary to meet his academic and social/emotional needs (id. at p. 3).[5] In addition, the parent made a number of specific allegations, including that the district failed to develop "critical assessment reports" (id. at p. 6), that the district failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) (id. at p. 4), that the annual goals in the May 2011 IEP were inadequate because they failed to indicate criteria, methods of measurement, or schedules of progress (id. at p. 6), that the May 2011 IEP "ambiguously" states that the student "benefits from encouragement" without stating anything else about the student's academic performance and learning characteristics (id. at p. 5), that the May 2011 IEP lacked a recommendation for parent counseling and training (id.), that the May 2011 IEP lacked "adequate levels, ratios and placements of [the student's] related services" (id. at p. 6), that the district failed to develop an appropriate transition plan for the student (id.), that the 6:1+1 special class placement recommended for the student was "inappropriate" and "too restrictive" (id. at p. 5), and that the "recommended placement" was "not in the least restrictive environment" (id. at p. 7). The parent also contended that the district's "placement/program" was a "reflection of impermissible policy, based on what the [district] had to offer [the student], rather than a [recommendation] based on what [the student's] individual education needs call for" (id. at p. 5 [emphasis in original]), and she asserted that the May 2011 IEP minutes did not accurately reflect the discussions that took place at the May 2011 CSE meeting (id.).

In addition to the above, the parent made a number of allegations in her due process complaint notice that appear to relate to the public school site to which the student was assigned.

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[4] By challenging the district's "placement/program" (or sometimes just the district's "placement"), the parent's due process complaint is not clear with respect to which claims relate to the May 2011 IEP, and which relate to the public school site to which the student was assigned. This is especially true since the word "placement" can be equated to a student's "educational placement" which, as has been noted by the Second Circuit Court of Appeals, generally refers to the "general education program—such as the class and individualized attention and additional services a child will receive—and not the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 419 (2d Cir 2009). While at times the parent's intent can be deciphered from the context of the allegation, this is not always the case. Accordingly, allegations that appear from the due process complaint notice to relate to the assigned public school site are described below, and all others will be treated as pertaining to the adequacy of the May 2011 IEP.

[5] The parent made a number of general allegations in her due process complaint regarding the needs that the district and/or its "placement/program" allegedly failed to address. This includes allegations that the district failed to meaningfully consider the student's physical/mobility limitations (Parent Ex. A at p. 4), the student's participation in school activities (id.), and the student's need for consistency occasioned by his transition and generalization deficits (id. at p. 6); that the May 2011 IEP could not promote the student's "self-sufficiency and independence" (id.); that the district failed to consider or address the student's needs for an intensive therapeutic and sensory placement/program (id. at pp. 3-4, 7); and that the district's "placement/program" was not able to meet the student's needs for individualized and intensive instruction and intervention (including, but not limited to, addressing the student's needs for activities of daily living [ADL] skills, community skills, cognitive skills, social/emotional skills, sensory integration and leisure skills, gross motor and fine motor skills, reading skills, math skills and self-regulation skills (id. at p. 7).

In particular, the parent asserted, among other things, that the assigned school was inappropriately staffed (Parent Ex. A at pp. 3, 5), that the staff that the school did have were not adequately trained to meet the student's needs (id. at pp. 3, 4, 6), that the district's "representatives" did not discuss the specific teachers with whom the student would have worked (id. at p. 6), that the school did not have an elevator and lacked air conditioning in the hallways (id. at p. 4), that despite the May 2011 IEP's recommendation of a "sensory diet" for the student, the school lacked a sensory gym or equipment and would not be able to meet the student's sensory needs (id. at pp. 4, 6), that the student's related services would be "outsourced" (id. at p. 4), that the speech-language therapy provided at the school was insufficient (id. at p. 6), that the school failed to offer methodologies the student required (id. at p. 4), that the school presented safety concerns for the student (id. at p. 7), and that special classrooms in the recommended school were "segregated from the general population" and did not provide opportunities for "community learning" (id. at p. 5). In addition, the parent asserted that her unilateral placement of the student at the Rebecca School was appropriate and that there were no equitable considerations that would warrant a reduction or denial of relief (id. at p. 7). As relief, the parent requested tuition reimbursement or prospective funding for the costs of the student's tuition at the Rebecca School, related services, and transportation for the 2011-12 school year (id. at p. 8). The parent also invoked the student's right to a pendency placement at the Rebecca School along with related services (id.).

### B. Impartial Hearing Officer Decision

On February 16, 2012, an impartial hearing convened and concluded on June 26, 2012, after nine days of proceedings (Tr. pp. 1-1105).[6] By decision dated July 27, 2012, an IHO found that the "educational program recommended by the [district]" failed to offer the student a free appropriate education (FAPE) for the 2011-12 school year (IHO Decision at p. 36). Specifically, the IHO found that a January 2011 psychoeducational evaluation of the student that the district conducted was inadequate and "invalid" for a number of reasons, and that it "could not reasonably provide an accurate view of [the student's] present levels of performance, his instructional levels or meaningful strategies to facilitate [his] access to an education" (id. at p. 33).[7] The IHO also found that the district "ha[d] not met its burden regarding the IEP's ability to address [the student's]

[6] The hearing record reflects that during the sixth day of the impartial hearing, the IHO admitted the following exhibits into evidence: (1) Parent Exhibit Y, a twenty-one page motion to amend dated April 12, 2012; and (2) Parent Exhibit Z, an eighteen page neuropsychological evaluation report dated March 15, March 16, and March 22, 2012 (Tr. pp. 660-64). However, Parent Exhibits Y and Z were not included in the exhibit list appended to the IHO's decision (IHO Decision at pp. 42-43), and were not submitted to the Office of State Review by the district. Neither of these exhibits appears to have been relied upon by the IHO in rendering her decision. Moreover, and with respect to Parent Ex. Y, the IHO orally denied the parent's motion to amend her due process complaint notice on the record at the beginning of the third day of the impartial hearing and the parent does not now assert any argument that the IHO abused her discretion in so doing (Tr. pp. 406, 408-30). Additionally, Parent Ex. Z consists of a neuropsychological evaluation report that post-dates the May 2011 CSE meeting, that was not available to the May 2011 CSE during the development of the student's May 2011 IEP, and as such is not relevant to the determination of whether the May 2011 IEP offered the student a FAPE (see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 186 [2d Cir. 2012] [holding that an "IEP must be evaluated prospectively as of the time of its drafting"]). Thus, both Parent Exhibits Y and Z are not necessary for reviewing the May 2011 CSE's determination in this matter. However, while I find that the hearing record is sufficient for me to render a determination despite the omission of Parent Exhibits Y and Z, I remind the district of its obligation to ensure that a complete copy of the hearing record before the IHO is provided to the Office of State Review (8 NYCRR 279.9 [a], [c]).

[7] The reasons underlying the IHO's finding on this issue are identified and discussed in detail below.

behaviors," and that it was inappropriate for the district to develop an IEP without conducting an FBA and creating a BIP (id. at pp. 34-35). In addition, the IHO found that the public school site to which the student was assigned was inadequate because it lacked an elevator, the hallways and "presumably bathrooms" were not air conditioned, and that since the student's classroom would have been on the same floor with three classrooms for students classified as having emotional disturbances, that the student's "odd physical appearance and visible diapers would inescapably flag his availability for victimization" (id. at pp. 35-36). Moreover, the IHO indicated that there was uncertainty as to whether the student was assigned to a class at the assigned public school site (id. at p. 36).

In addition, the IHO made findings regarding the school (the Rebecca School) at which the student had been unilaterally placed, including that the student's program at the Rebecca School correlated well with the his functional needs (IHO Decision at pp. 37-38), that the student was appropriately functionally grouped in a classroom which would enable him both to serve as a peer model and to learn from others (id. at p. 38), and that the student received on-site related services in sensory processing (id.). However, the IHO found that the student's classroom at the Rebecca School was "overly distracting" and "over-stimulating" for a student with attentional, sensory processing, and dysregulation issues due to the "presence of 14 individuals within the same room" (id.). The IHO, therefore, found that the Rebecca School "was only partially appropriate" for the student and, since equitable considerations favored the parent, she ordered the district to partially fund the costs of the student's tuition for the 2011-12 school year (id. at pp. 38-40).

## IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 school year. Specifically, the district argues that the IHO erred in finding that the January 2011 psychoeducational evaluation was flawed and inaccurate and contends that the January 2011 psychoeducational evaluation accurately reflected the student and was consistent with a prior psychoeducational evaluation conducted by the district. Alternatively, the district asserts that even if the January 2011 psychoeducational evaluation was flawed, the parent and the IHO did not explain how it would have resulted in a denial of a FAPE to the student. In addition, the district argues that the IHO erred in finding that the district's failure to conduct an FBA and develop a BIP contributed in part to a denial of a FAPE and asserts that it was not required to conduct a FBA or develop a BIP. Further, and with respect to the assigned public school site, the district argues that the IHO erred in finding that the school was inappropriate in that her findings were speculative and not supported by the record.[8] The district also asserts that the IHO erred in finding that the district did not assign the student to a specific class at the assigned public school site because the student was never enrolled at the school and so was "never on a roster at [the assigned school]."

[8] The district contends that the student's mobility issues did not require the presence of an elevator and could have been adequately addressed by the 1:1 transitional paraprofessional recommended by the May 2011 IEP, that there was no evidence in the hearing record that a lack of air conditioning in the stairwells or hallways of the assigned school would cause the student to have an adverse medical reaction, and that the IHO's finding that the student would have been victimized by other students is speculative, mischaracterizes students with emotional disabilities as violent, and the hearing record established that the assigned school building separated students who were classified as emotionally disturbed and that there were adequate staff members to address any incidents.

In addition, the district appeals the IHO's finding that the Rebecca School was a partially appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief. Regarding the former, the district argues that the IHO was correct in finding that the classroom at the Rebecca School was "too distracting" for the student but erred in finding that the Rebecca School was appropriate at all. With respect to the latter, the district argues that equitable considerations preclude any award of tuition reimbursement because the parent did not intend to enroll the student in a public school placement, and that in any event, the parent should not be entitled to direct funding for the costs of the student's tuition because the parent failed to show that she lacked the financial resources to "front" the costs of tuition.

In an answer and cross-appeal, the parent generally denies the district's allegations and asserts that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year. In this regard the parent makes a number of allegations, including that the IHO "properly concluded" that the January 2011 psychoeducational evaluation conducted by the district was "incomplete and did not meaningfully reflect [the student's] current levels of performance," that the IEP failed to reflect certain disabilities and activities of the student, that the district failed to conduct "timely, adequate evaluations of [the student] in all areas of disability as required by law," that the district should have performed "an appropriate FBA and developed an appropriate BIP" for the student, that the IHO properly concluded that the "placement site/school" was inappropriate,[9] and that the district failed to conduct a vocational assessment and/or identify the student's needs "with respect to transition from school to post-school activities." In addition, the parent argues that the IHO "properly concluded and questioned whether there was actually a class assignment for [the student]," and makes a number of other contentions, including that the May 2011 CSE denied the parent and Rebecca School staff a meaningful opportunity to participate during the CSE meeting, that the district did not respond to her requests for further evaluation of the student, and that the student requires a small classroom ratio (2:1).[10] Further, and with respect to the Rebecca School, the parent argues that the IHO was correct in finding that the program offered at the Rebecca School correlated well with the student's functional needs and the student would have been appropriately functionally grouped. However, the parent cross-appeals the IHO's determination that the Rebecca School was only partially appropriate and argues that the IHO erred in finding that the classroom at the Rebecca School was overly distracting and stimulating for the student. Furthermore, the parent asserts that the IHO erred in awarding only partial tuition and direct payment for the tuition costs at the Rebecca School. Lastly, the parent contends that the IHO correctly found that equitable considerations favored the parent's request for relief.

In an answer to the parent's cross-appeal, the district reiterates the arguments contained in the petition and reasserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 school year. The district further argues that the IHO erred in finding that

[9] The parent specifically argues that the IHO properly concluded that the assigned public school site is inappropriate because it lacks an elevator, its hallways and bathrooms are not air-conditioned, and that the student "would most definitely be victimized" at the school.

[10] The parent also makes an assertion in her answer that the student's related services were "modified to conform to the periods of time in middle school and not based on [the student's needs]," however there is no allegation that the duration of the related services being offered to the student is in any way inappropriate, nor is any argument put forth with respect to this issue. In addition, and though not entirely clear, the parent also seems to suggest that the student requires a 1:1 crisis paraprofessional (as opposed to a 1:1 "transitional paraprofessional," which she claims does not exist in the district), and she asserts multiple times in conclusory fashion that the district's "recommended placement" would not be able to implement the IEP developed for the student.

the Rebecca School was partially appropriate. Lastly, the district argues that the IHO erred in finding that equitable considerations weighed in favor of the parent.

## V. Applicable Standards

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

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

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

Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

## VI. Discussion

### A. Preliminary Matters

#### 1. Unappealed Determinations

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. In this regard, a review of the record reveals that there are a large number of issues raised by the parent in her due process complaint notice which the IHO did not address in her decision, and which the parent does not identify and/or advance as issues in her answer and cross-appeal. These issues include that (1) the district failed to consider the student's participation in school activities and the student's need for consistency given his transition and generalization deficits; (2) the annual goals were inadequate because they failed to indicate criteria, methods of measurement, or schedule of progress; (3) the May 2011 IEP lacked a recommendation for parent counseling and training[11]; (4) the May 2011 IEP lacked adequate levels, ratios, and locations of related services;[12] (5) the May 2011 IEP could not promote the student's "self-sufficiency and independence"; (6) the CSE meeting minutes did not accurately reflect the discussions that took place at the CSE meeting; (7) the district failed to consider the student's needs for consistency, as well as for an intensive therapeutic and sensory placement/program; (8) the district's recommendation would not be able to meet the student's needs for individualized and intensive instruction and intervention including, but not limited to, addressing the student's needs for daily living skills, community skills, cognitive skills, social/emotional skills, sensory integration and leisure skills, fine and gross motor skills, reading skills, math skills, and self regulation skills; (9) the district's "program/placement" was a "reflection of impermissible policy, based on what the [district] had to offer [the student], rather than a [recommendation] based on what the student's individual education needs call for"; (10) the district's "recommended placement" was not the LRE, (11) the speech-language therapy available at the assigned public school site was not sufficient, (12) the assigned school was inappropriately staffed and the staff at the assigned school was not adequately trained to meet the student's needs; (13) special classrooms in the recommended school were segregated from the general population and did not provide opportunities for community learning, (14) the "placement/program" lacked individual academic and therapeutic support; (15) the assigned school lacked a sensory gym or equipment to address the student's sensory needs; (16) the student's related services at the assigned school would be "outsourced"; (17) the assigned school would not be able to meet the student's sensory diet needs; and (18) the assigned school failed to offer certain methodologies (compare Parent Ex. A at pp. 1-9, with IHO Decision at pp. 24-40, and Answer ¶¶ 1-62). It is not an SRO's role to research and construct the parties' arguments or guess what may have been intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review

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[11] The IHO did not make a finding on this issue; however, the IHO did note that the Rebecca School offers parent training (IHO Decision at p. 38).

[12] While, as noted above, the parent makes the blanket assertion in her answer that the duration of related services were "modified to conform to the periods of time in middle school and not based on [the student's needs]," there is no allegation made (or argument set forth) that the change in duration of related services, which were increased from 30 to 40 minutes (compare Dist. Ex. 1 at p. 21, with Dist. Ex. 2 at pp. 18-19), would have resulted in the denial of FAPE. Moreover, the hearing record reflects that there was some confusion about this issue, and that even the parent's attorney was "not quite sure" what the related services allegations in the parent's due process complaint notice meant (Tr. 420). Accordingly, I cannot find that this issue has been properly raised and/or advanced on appeal.

does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752-53, 2009 WL 3634098 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [noting that a generalized assertion of error on appeal is not sufficient]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]). Accordingly, and since the parent does not make any legal or factual assertions as to how these issues would rise to the level of a denial of a FAPE, 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]).

### 2. Additional Claims Raised on Appeal

In addition, the parent raises certain claims in her answer and cross-appeal that were not raised in her due process complaint notice, including that she and Rebecca School staff "were not allowed to meaningfully participate in the [May 2011 CSE] meeting," that the district did not respond to the parent's requests for further evaluation of the student both before and during the CSE meeting,[13] that the May 2011 IEP "does not indicate [the student's] multiple disabilities" and does not describe his activities of daily living, his intellectual functioning, his adaptive behavior, and his expected rate of progress in acquiring skills and information, and that the May 2011 IEP was deficient in the area of "language instruction."[14] Inasmuch as 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][b]; see N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 584-85 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]), and the parent did not seek the district's agreement to expand the scope of the impartial hearing or seek to include these assertions in an amended due process complaint notice, they are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 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]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . ., is limited to matters either raised in the . . . impartial hearing request or agreed to by (the opposing party)"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]).

[13] While the parent asserted as background in her due process complaint notice that "[s]ince January of 2011, [she] sent the [district] several requests for evaluations, a CSE review, and a school placement for [the student]" (Parent Ex. A at p. 3), there is no allegation that she asked the student be "tested again" and was ignored as she suggests in her answer and cross-appeal (Answer ¶ 12).

[14] As noted above, the parent also appears to suggest that the student requires a 1:1 crisis paraprofessional (as opposed to a 1:1 "transitional paraprofessional") in her answer. This too is a claim not raised in the due process complaint notice.

"By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review because it was not raised in the party's due process complaint notice]).[15] Accordingly, because the parent failed to raise the above-described allegations in her due process complaint notice, they may not be raised now for the first time on appeal (R.E., 694 F.3d at 187 n.4).

### B. May 2011 IEP

#### 1. Sufficiency of Evaluative Information

A significant issue in this matter concerns the sufficiency of the evaluative data that was considered by the May 2011 CSE. In general, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8

[15] As an aside, even if the issue of the parent's participation at the CSE meeting were properly before me, the hearing record reflects meaningful and active participation by the parent, a Rebecca School special education teacher, and a Rebecca School social worker in the development of the student's May 2011 IEP. The parent, for example, testified that she attended the May 2011 CSE meeting and expressed several concerns to the CSE (Tr. pp. 1059-60, 1062-63). In addition, the Rebecca School special education teacher testified that she also attended the CSE meeting and expressed her concern to the CSE regarding the inappropriateness of the district's recommendation (Tr. pp. 895-96). Although the Rebecca School social worker did not testify during the impartial hearing, the district school psychologist testified that the Rebecca School social worker fully participated during the CSE meeting and that the social worker did not voice any concerns with respect to the January 2011 psychoeducational evaluation (Tr. pp. 134, 254-55). Moreover, the May 2011 CSE minutes indicate that the parent and Rebecca School staff participated during the CSE meeting and provided information to the CSE regarding the student (Dist. Ex. 3). I also note that in her due process complaint notice, the parent explicitly asserted that she participated in the May 2011 CSE meeting (Parent Ex. A at p. 2), and that this is a contention that the parent continues to make on appeal (Answer ¶ 87). Based on the foregoing, the hearing record does not support a conclusion that the parent's ability to participate in the development of the student's IEP was significantly impeded at the May 2011 CSE meeting (see 20 U.S.C. §1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

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]).

The record reflects that the May 2011 CSE considered multiple sources of evaluative information in the development of the student's May 2011 IEP, including an Interdisciplinary Report of Progress from the Rebecca School dated December 2010 (December 2010 Rebecca School progress report), a December 2010 classroom observation, and a psychoeducational evaluation that was conducted by the district in January 2011 (January 2011 psychoeducational evaluation) (Tr. pp. 113-14; Dist. Exs. 6-8). The May 2011 CSE also considered the student's March 2010 IEP (Tr. pp. 114; Dist. Ex. 1).

Before addressing the totality of the evaluative data that was available to the May 2011 CSE, I note that a main point of contention in this matter concerns the validity of the January 2011 psychoeducational evaluation that the May 2011 CSE relied upon. Specifically, the IHO found that this evaluation was flawed and "was more of a reflection of [the student's] frustration tolerance, fatigue and distractibility than an assessment of [his] cognitive levels" and was therefore "invalid" (IHO Decision at pp. 28, 34). However, the January 2011 psychoeducational evaluation utilized a variety of assessment techniques, including the Stanford Binet Intelligence Scales – Fifth Edition (SB-V), the Vineland Adaptive Behavior Scales – Second Edition (Vineland-II), the Woodcock-Johnson Tests of Academic Achievement – Third Edition (WJ-III ACH), Bender Visual-Motor Gestalt Test (Bender-Gestalt), behavioral observations, a clinical interview, a mental status examination, and parent contact, to assess the student's needs in the areas of cognition, academics, visual motor skills, ADL skills, and social/emotional/behavioral functioning (Dist. Ex. 6 at p. 2). In addition, there is no indication in the record that the evaluator who conducted the January 2011 psychoeducational evaluation failed to follow standardized testing practices, and the results of the evaluation are generally consistent with what was known about the student at the time.[16] Accordingly, and while the January 2011 psychoeducational evaluation may not be perfect, I am unable to find that it is entirely "invalid" based on the record before me.

As an initial matter, the IHO's concerns with the January 2011 psychoeducational evaluation appear to relate in large part to testing procedures and the choice of assessments (or at least one assessment, the SB-V) utilized by the evaluator. For example, the IHO expressed concern that the evaluator did not include breaks during testing which the IHO felt "ensured little more than a minimal assessment" of the student's cognitive abilities (id. at pp. 14, 28). However, while a privately-retained evaluator who assessed the student in March 2012 (private evaluator) testified

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[16] For example, the 2011 January psychoeducational evaluation is generally consistent with a December 2010 Rebecca School progress report and a 2010 classroom observation of the student in terms of his demonstrated needs in the areas of cognition, academics, sensory processing, language, attention, motor skills, and social/emotional/behavioral functioning (compare Dist. Ex. 6, with Dist. Exs. 7-8). In addition, there is testimony in the hearing record indicating that the results of the evaluation were consistent with what was reported about the student by his teachers at the May 2011 CSE (Tr. pp. 253-54). In that regard, while the IHO indicated a belief that reliance on information provided by the student's teachers was a "spurious approach to test validity" and would lead to the validation of "even the most inaccurate testing as long as the child's teacher agrees with its contents" (IHO Decision at p. 32), I disagree and find that it is prudent to compare test results with what is known about a student by his or her teachers. This is especially true since if the results of an evaluation are truly inaccurate, it is unlikely a teacher would be able to agree with its contents based upon what they know about the child.

that it was necessary to "take breaks" with a student who exhibited speech-language and attentional delays, and that because the student had difficulty tolerating the battery of tests administered, the January 2011 psychoeducational evaluation represented a "minimum estimate" of the student's functioning (Tr. pp. 676, 689-90), there is no evidence in the hearing record indicating whether or not the evaluator who conducted the January 2011 psychoeducational evaluation provided the student with breaks between assessments.[17] Moreover, while the use of such breaks (assuming that they were not given) may have been helpful to the student and might have resulted in a different IQ being achieved, I am unable to find that this constitutes a basis to invalidate the evaluation in its entirety. This is especially true since, as noted above, there was no indication in the record that by not using such breaks the evaluator did not follow the standardized testing practices necessary to provide reliable and valid assessment results, and the hearing record reveals that the evaluation report indicates that the results of the evaluation might be an underestimate of the student's cognitive abilities (Dist. Ex. 6 at p. 3). While the IHO apparently believed that this acknowledgment evidenced "reservations regarding the accuracy of [the evaluator's] testing" because of the student's frustration, fatigue, and distractibility (IHO Decision at pp. 14; see also id. at pp. 28, 29, 33), this is not a fair characterization as it is common practice to note such a conclusion in an evaluative report when a student does not exhibit optimal attention and concentration during testing.[18]

Further, and with respect to the choice of assessments utilized by the evaluator, the IHO appears to take issue with the administration of the SB-V to the student. Specifically, the IHO indicated that she felt that the evaluator's "selection of test instruments was inconsistent with the abilities and limitations" of the student (IHO Decision at pp. 14, 34), and in support of this referred to the testimony of the private evaluator who indicated that the evaluator's use of the SB-V subtest with the student was not the preferred measure of the student's cognitive abilities in light of the language demands included in the test directions because of his severe language deficits (Tr. pp. 685-86; IHO Decision at p. 14). However, the hearing record reflects the student followed one-to-two step directions (Dist. Ex. 6 at p. 4), and in addition, during the 2010 classroom observation the student conversed with the classroom teacher including answering her questions and making comments (Dist. Ex. 7 at pp. 1-3). Accordingly, information in the hearing record (and that was

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[17] While the transcript pages cited by the IHO (Tr. pp. 686-95) indicate that the private evaluator considered it important to provide breaks to the student, it is not clear from this testimony whether the evaluator who conducted the January 2011 psychoeducational testing, in fact, did not provide the student with breaks. Rather, the testimony, at best, appears to be based on an assumption that, through no fault of the evaluator, that there would not have been enough time for breaks (id. at p. 690).

[18] Relatedly, the IHO indicated in her decision that even though the district school psychologist was aware of the concerns of staff from the Rebecca School regarding the testing practices of the evaluator who conducted the 2011 psychoeducational report, the concerns went unaddressed (IHO Decision at p. 33). In addition, the IHO indicated that staff from Rebecca School verbally expressed concerns to the district regarding the short processing opportunities given to the student to respond to test questions (Tr. pp. 531-32; IHO Decision at p. 10), and that the Rebecca School program director (director) testified that, in general, the psychoeducational assessment evaluator was disorganized, forgot testing materials, and was impatient with students (Tr. pp. 820-21). However, despite such testimony, and as stated above, there is no evidence in the hearing record that the evaluator failed to follow standardized assessment procedures in any respect, which is a significant consideration that the IHO—who indicated that she was only able to "speculate" about the appropriateness of the evaluator's testing protocol (IHO Decision at p. 30)—appears to have overlooked. Nor does the director's testimony indicate that the evaluator behaved in such a manner while conducting the psychoeducational assessment at issue here.

before the May 2011 CSE) suggests the student possessed the prerequisite language skills to engage in the testing process.

In addition, the IHO felt that the SB-V subtest was inappropriate because it was timed, and the student was highly distractible and had cerebral palsy (IHO Decision at p. 31). However, the SB-V is a standardized test and must be administrated in accordance with the standardized testing procedures in order to provide valid and reliable results. As noted above, the hearing record does not contain evidence that the evaluator, by timing this subtest, did not follow standardized practices. Moreover, administration of a timed subtest to the student would provide information regarding the student's abilities to work under such conditions.

Furthermore, and despite her concerns regarding the student's verbal abilities, the IHO found that the evaluator failed to conduct "appropriate verbal testing" of the student (IHO Decision at p. 33). Though not entirely clear, it appears that the IHO's concern in this regard relates to the absence of a verbal IQ in the report and/or the accuracy of the nonverbal IQ obtained by the evaluator (IHO Decision at pp. 9-10, 33). However, I am unable to find that the lack of a verbal IQ, by itself, is a basis to invalidate the evaluation. This is especially true since the record reflects that the evaluator administered nonverbal subtests because the student "had difficulty tolerating an extensive battery," preventing the evaluator from obtaining a verbal IQ of the student (Dist. Ex. 6 at p. 3). In addition, even assuming the IQ obtained by the evaluator was not completely accurate, the fundamental purpose of an evaluation is to determine a student's special education needs, which can be determined even without a precise IQ.[19] This is especially true where, as noted above, the evaluator noted that the student's potential may have been better than what was demonstrated. Furthermore, the nonverbal IQ in the report is a reflection of only one test of many administered by the evaluator (i.e., the SB-V). Thus, even if the IQ reflected in the report could be deemed entirely insufficient, this alone would not necessarily invalidate the sufficiency or usefulness of the other parts of the January 2011 psychoeducational evaluation. Accordingly, I cannot find that a lack of verbal testing renders the 2011 psychoeducational evaluation entirely invalid.[20]

The IHO, however, also suggested that the January 2011 psychoeducational evaluation was inadequate because the evaluator made a number of "mistakes" (IHO Decision at p. 31). In this regard, the IHO found that the evaluator improperly offered a diagnosis of "mental retardation," and that she "inadvertently" reported visual-spatial scores as "borderline" when they, in fact, should have been reported as "low average" (id.). However, the 2011 psychoeducational evaluation did not offer the student a diagnosis of mental retardation (see Dist. Ex. 6 at pp. 1-5).[21] Moreover, while the IHO is correct in that the evaluation report indicated that the student achieved a visual-spatial subtest scaled score of six and inaccurately described this as a score in the "borderline" range (id. at p. 3), this is not a basis on which to invalidate the assessment as a whole.

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[19] In fact, I note that the May 2011 IEP does not reflect an IQ of the student.

[20] I also note that the May 2011 CSE considered information regarding the student's verbal skills from the December 2010 Rebecca School progress report which assessed the student's language skills (Dist. Ex. 8 at pp. 8-10).

[21] In fact, the hearing transcript reflects that it was the private evaluator who first characterized the reported score as falling within the range of mental retardation, and promptly disagreed with offering the student a diagnosis of mental retardation (Tr. pp. 687-88).

This is especially true since there is no indication in the record that the scaled score of six was itself inaccurate.

In addition, the IHO indicated that another reflection of the evaluator's "mistakes" was the reporting of SB-V subtest scores which "diverged by more than two standard deviations" (Tr. p. 687; IHO Decision at p. 31). However, this is incorrect in that the SB-V subtests have a mean of ten and a standard deviation of three (see, e.g., "SB-5: Stanford-Binet Intelligence Scales – Fifth Edition [Scoring and Interpretation]," available at http://www.proedinc.com/customer/productView.aspx?ID=4615) and the student's SB-V subtest scores ranged from one through six. Accordingly, no two subtests were more than two standard deviations apart. Further, and more importantly, even if the subtest scores were more than two standard deviations apart, this alone would not necessarily indicate the results were inaccurate. In fact, other than the testimony of the private evaluator which references a "manual" that is not contained in the hearing record (Tr. p. 687), the hearing record does not support the conclusion that the subtest scores were inaccurate based solely upon the difference between the scores. In fact, and as the district school psychologist testified, the difference between the student's subtest scaled scores could be an indication that the student's skills were not "evenly developed" (Tr. pp. 191-92).[22]

The IHO also suggested that the January 2011 psychoeducational evaluation was inaccurate because the evaluation report was "internally inconsistent" (IHO Decision at pp. 29, 33), that the report's description of the student as "low average" in terms of his ability to apply academic skills was wholly inconsistent with teacher observation, prior IEPs and progress reports from the Rebecca school (id. at p. 32), and that the student's "math reasoning" score was not consistent with testimony and was "utterly inconsistent with measures on the Vineland" (id.). However, I do not find that any of these provide a basis to reject the January 2011 psychoeducational evaluation in its entirety.

With respect to the IHO's concern regarding "internal inconsistencies," this concern appears to be based on the fact that the evaluator noted that the student had highly distractible behavior, yet indicated that he worked at an adequate pace (IHO Decision at pp. 29, 33). However, while the IHO felt that this evidenced an inconsistency, it is not clear that such is the case. Rather, the evaluative report indicates that the student's "attention/concentration skills were noticeably decreased, he was easily distracted, worked at an adequate pace, displayed inconsistent effort and persistence, and completed all tasks with structured guidance, prompting and redirection. His impulse control, and frustration tolerance were decreased" (Dist. Ex. 6 at p. 2). Notably, this is consistent with the description of the student's behavior in the classroom which, according to a progress report from the Rebecca School, reportedly "fluctuates throughout the school day" (Dist. Ex. 8 at p. 1). Accordingly, the behavioral description of the student provided in the 2011 psychoeducational report may have been reflective of the student's fluctuations in his ability to remain attentive and regulated rather than being an inconsistent description of the student.

[22] I note that the private evaluator also testified that because of the large discrepancy between subtest scores, an overall standard score (the nonverbal IQ) should not have been computed as it was inaccurate (Tr. p. 693). However, I note that even though the overall IQ may not be the best indicator of the student's abilities, the subtest scores were provided which described the student's performance in all areas. In addition, as indicated above the evaluator reported that the student's "overall potential may be slightly better than currently demonstrated" (Dist. Ex. 6 at p. 3).

Further, and regarding the IHO's finding that the evaluation with respect to the student's ability to apply academic skills was "wholly inconsistent" with other evaluative materials, I note that the 2010 observation conducted by district personnel, as well as the 2010 Rebecca School reports themselves, were generally consistent with the student's low average ability to apply academic skills. Specifically, the observation and progress report indicated the student participated in lessons when regulated, applied skills to solve math problems, and answered "wh" questions (Dist. Exs. 7 at pp. 1-3; 8 at pp. 1-2, 4-5). In addition, I note that with respect to the student's application of academic skills, the private evaluator only noted that the psychoeducational evaluation did not indicate the name of the subtest that measured such an ability (Tr. pp. 699-700).

Lastly, and with respect to the student's "math reasoning" scores, while there was testimony at the hearing that the student's "math reasoning" score (which was reported as being at an 8.7 grade equivalent) appeared inaccurate (Tr. pp. 921-22), and even though the hearing record reflects that the 8.7 grade equivalent in math reasoning was not consistent with the student's other grade equivalences in reading, math, and writing, the CSE did not include the 8.7 grade equivalent in math reasoning in the student's May 2011 IEP (Tr. pp. 200-01).[23] Further, and although a teacher from the Rebecca School testified that the writing grade equivalency contained in the May 2011 IEP, which was taken from the 2011 psychoeducational testing, was inconsistent with the student's classroom performance (Tr. pp. 902-03), her testimony generally indicates that the other grade equivalencies contained in the May 2011 IEP were consistent with the student's abilities (Tr. p. 903), and the district school psychologist testified that the input from the Rebecca School teacher at the May 2011 CSE meeting regarding the student's instructional levels were consistent with the results of the psychoeducational assessment (Tr. pp. 253-54). In addition, the 2011 psychoeducational report and December 2010 Rebecca School progress report are consistent regarding the student's abilities, in that both reports described the student as demonstrating the ability to engage verbally with others, read sentences in a book, complete basic math problems, and that the student exhibited difficulties with self-regulation, attention, and impulsivity (compare Dist. Ex. 6 at pp. 2-5, with Dist. Ex. 8 at pp. 1-6). Accordingly, I cannot find that the 2011 psychoeducational evaluation as a whole is invalid because of one score in one subpart of the evaluation.[24]

In addition to the above, the IHO further suggested that the 2011 psychoeducational evaluation was incomplete, in part, because the evaluator "did little to assess [the student's] executive function" (IHO Decision at p. 31). However, the hearing record shows that the SB-V that was administered to the student measured his executive functioning (Dist. Ex. 6 at pp. 2-3), and that the district school psychologist indicated that it was clear from the student's performance that he was impaired in this area (Tr. pp. 375-76). In addition, the district school psychologist testified that the evaluator discussed executive functioning in that the report; indicating the student

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[23] The district school psychologist testified that the math reasoning grade equivalent of 8.7 was not included in the IEP because the subtest measured slightly different skills than classroom based skills in math reasoning, and that it was not reflective of the student's classroom abilities (Tr. pp. 200-02, 209-10).

[24] Moreover, to the extent that the IHO felt that the student's 8.7 grade equivalent in math reasoning was incorrect based on the student's well below average performance on the Vineland-II (IHO Decision at p. 32), I note that the Vineland-II is meant to measure the student's adaptive behavior and the math reasoning subtest measured the student's academic achievement in the area of math, and that these two measurements do not correlate directly with each other.

was impulsive and tended to grab items (id.). That being said, however, the private evaluator testified that the SB-V measured working memory, which related to executive functions, but the test did not measure the student's attention, inferential thinking, and ability to plan (Tr. p. 713), and the IHO expressed concern that the assessment did not measure either the "student's ability to manipulate and organize data" nor his "ability to attend to relevant details rather than perseverate on distractions" (IHO Decision at pp. 15-16). In that regard I note that while SB-V subtests generally measure attention, organization, and planning, the evaluator in this matter only commented on the student's attention, noting that his "attention/concentration skills were noticeably decreased," without addressing the student's ability to organize and plan (Dist. Ex. 6 at p. 2). However this, again, does not render the entire 2011 psychoeducational evaluation invalid in its entirety. Rather, it at best suggests that the May 2011 CSE could not rely exclusively on the 2011 psychoeducational evaluation to assess all of the student's management needs, which it did not need to do since the December 2010 Rebecca School progress report (which was another source of evaluative data for the May 2011 CSE) identified the student's needs related to planning, organization, and attention (see Dist. Ex. 8).[25]

Additionally, the IHO indicated that the 2011 psychoeducational evaluation was incomplete because it did not contain "writing scores" (IHO Decision at pp. 31, 33). However, this is incorrect in that a review of the psychoeducational evaluative report shows the student achieved a written language standard score (percentile rank) of 60 (.4) (see Dist. Ex. 6 at p. 4), which indicated the evaluator assessed the student's needs in written expression.

Finally, the IHO raised a number of additional concerns which, alone or in the collective, do not compel a finding that the 2011 psychoeducational evaluation should have been rejected in its entirety. For example, the IHO raised concerns regarding the timing of the report (IHO Decision at pp. 29, 32) and the lack of "test appendices" (id. at p. 31), which do not directly relate to the accuracy of the evaluation or the evaluation report itself. Likewise, the IHO expressed concern that the 2011 psychoeducational report did not include a review of records and background material (id. at pp. 29-30). However, the 2011 psychoeducational evaluation included "[p]arent contact" and a clinical interview, which the evaluator used to gather background information regarding the student (Dist. Ex. 6 at p. 2). Further, and with respect to the IHO's conclusion regarding the evaluator's failure to describe the student's medical and educational history, the 2011 psychoeducational assessment indicated the student had a history of asthma and febrile seizures (stabilized in the last two years), and the student had gastrointestinal problems and used diapers (id.). In addition, the report indicated that the student had no history of anxiety and depression

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[25] The December 2010 Rebecca School progress report is discussed below. However, for purposes of this point, I note that the December 2010 Rebecca School progress report included, for example, a goal related to reading that indicated the student would "sequence 5 events from [a] story" which required planning skills (Dist. Ex. 8 at p. 12). The progress report also targeted the student's organizational needs by including a goal related to OT that indicated the student would improve "efficient organization of self for effective participation in school and home activities" (id. at p. 13). In addition, the progress report addressed the student's attention and organization in part by reporting on the student's ability to self-regulate and engage with others (see id. at pp. 1-2). Specifically, the progress report indicated that the student was attentive to activities when regulated and interested, the student responded well to teacher interventions regarding sensory regulation, and was "attentive to those around him" (id.). Additionally, the report addressed the student's ability to maintain attention even when distracted by indicating that during social interactions, the teacher could easily reengage the student through a verbal cue and high affect when the student became distracted (id. at p. 2). The May 2011 CSE reviewed the December 2010 Rebecca School progress report and therefore was aware of the student's needs related to executive functioning (see Tr. pp. 113-14; Dist. Ex. 8).

and his hearing and vision were within normal limits (id.). Although the hearing record reflects the student had other medical and health needs such as a history of mild cerebral palsy, scoliosis, hypotonia, hypothyroidism, heart and lung defects, difficulties with feeding, and orthopedic issues (see Tr. pp. 683, 1051-53), and further while it may have been best practice to include all of the student's background information as well as medical and health issues within the psychoeducational report, I am unable to find that not doing so invalidates the psychoeducational assessment as a whole. This is especially true since there is no indication that the evaluator was unaware of this information, or that this information would necessitate that anything different be done.

In sum, I am unable to find that the January 2011 psychoeducational evaluation was entirely invalid. Further, and despite its flaws, I find that it contains a significant amount of useful information about the student. For example, the evaluator identified, regarding the student's health and medical history, that the student had a history of gastrointestinal problems, asthma, and febrile seizures (District Ex. 6 at p. 2). The evaluator also noted that the student ambulated independently, had functional use of his hands, was motivated and cooperative, exhibited inconsistent eye contact and some agitated behavior, and that his affect was appropriate (id.). In addition, the report contained information from the parent that the student hit himself in the past, and the evaluator indicated the student's expressive language skills were mildly decreased compared to his ability to organize his thoughts and engage in a goal directed conversation (id.). The evaluator also noted the student's attention, impulse control, frustration tolerance, and concentration skills were impaired, and that the student was easily distracted and displayed inconsistent effort and persistence (id.). In addition, and with respect to individual subtest data from the January 2011 psychoeducational evaluation, administration of the Bender-Gestalt assessment reflected that the student performed in the low average range in the areas of perceptual motor, organization, and integrative skills (id.), and administration of the WJ-III ACH to the student yielded standard scores (percentile rank) of 77 (6) in letter word identification, 71 (3) in passage comprehension, 59 (.03) in calculation, 108 (71) in math reasoning, 60 (.4) in written language, and 77 (6) in spelling (Dist. Ex. 6 at p. 4).[26] Further, the results of the Vineland-II reflect that, with the parent serving as informant, the student achieved standard scores (percentile rank) of 64 (1) in communication, 62 (<1) in daily living skills, 57 (<1) in socialization skills, and his adaptive behavior composite of 60 (<1) fell within the low range (id.).

In addition, and as noted above, the record reflects that the May 2011 CSE considered additional sources of evaluative information about the student when it developed the May 2011 IEP, including the December 2010 Rebecca School progress report and a December 2010 classroom observation (Tr. pp. 113-14; Dist. Exs. 7-8). The IHO does not address these reports in her decision. However, these reports contain significant functional, developmental, and academic information about the student and reflect that the student exhibited significant delays in cognition, academics, sensory regulation, ADL skills, language processing, and social/emotional/behavioral functioning, as well as fine and gross motor skills (Tr. pp. 870-71, 877-79; Dist. Exs. 7-8). In fact, even without the January 2011 psychoeducational evaluation, the May 2011 CSE had sufficient information from these reports to develop an appropriate educational program for the student (see

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[26] The 2011 psychoeducational report contains handwritten notations which indicated some of the titles of the subtests (Tr. p. 700).

R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *9-*10 [S.D.N.Y. Sept. 27, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31[S.D.N.Y. 2013]).[27]

For example, the December 2010 classroom observation of the student reflects that the student was observed during morning meeting and journal writing at the Rebecca School in a class consisting of five staff members and six students (Dist. Ex. 7 at p. 1). According to the observation report, the student demonstrated difficulties with attention and remaining seated (id. at pp.1-3). The observation report also reflected that the student required multiple prompts to return to his seat on several occasions (id. at pp. 2-3). However, the report also indicated the student participated in classroom activities such as sharing his weekend plans and a handwriting activity (id.). In addition, the report reflected that a peer sitting next to the student grabbed the student, that the students then "began to tussle," and that the teacher moved the student away from the peer (id. at p. 3). The report also contained additional information from the classroom teacher, including that the student would not initiate aggressive behavior but that if another student acted impulsively toward him that the student would respond, and that the student's behavior during the observation was typical in that he often needed redirection within group settings (id.).

In addition, the December 2010 Rebecca School progress report contains extensive information about the student, including information regarding the student's functioning and progress in academics, language, sensory processing, social/emotional/behavior functioning, and fine and gross motor skills (Dist. Ex. 8 at pp. 1-15).[28] According to this report, for example, the student communicated through language and gestures and the student was attentive to adults and peers (id. at p. 1). Additionally the report indicated that when regulated the student maintained attention during activities of interest (id.). The report further indicated that the student would engage for up to 25 minutes during a preferred activity, and during larger groups, more structured activities, and novel situations, the student required additional adult support but engaged for up to 15 minutes (id. at p. 2). The report also notes the student transitioned moderately easily to activities within and outside the classroom with a visual schedule, verbal reminders, and physical cues, that the student's ability to self-regulate fluctuated, and that he would seek out movement breaks throughout the day (id. at p. 1). The report also reflects that the student required adult supports such as verbal reminders and verbal encouragement with high affect especially within group settings during non-preferred activities, and that when the student became dysregulated, "at worst" he would pinch and may "head butt" (id.). The report also indicated that during social interactions, the teacher could easily reengage the student through a verbal cue and high affect when the student became distracted, though in severe moments of distress the student could "shut down and disengage" (id. at p. 2).

With respect to academics, the December 2010 Rebecca School progress report shows that the student read a few sentences in a row in books on his level, generally read sentences with slow

[27] In this regard I note that a district is not required to conduct its own evaluations in developing an IEP and recommending an appropriate program, but may rely on appropriate privately obtained evaluations (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *9-10 [S.D.N.Y. Feb. 16, 2011]). The district may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

[28] The report also provided goals and short-term objectives in the areas of regulation, socialization, play skills, literacy, math, social studies, science, OT, PT, speech-language, and social/emotional functioning (Dist. Ex. 8 at pp. 12-14).

speech and low volume, and tended to read familiar books and books with songs (id. at p. 4). The report noted that the student attended math in a small group of three where one or two adults provided instruction and that, with respect to math class, the student engaged in activities, which were hands on, creative, presented with high affect, and predictable (id.). Regarding the student's math skills, the report indicates that the student added and subtracted numbers up to 20, recognized coins and coin values, understood length and size, and told time to the quarter hour (id. at p. 5). According to the report, the student related with peers through common interests with "maximum support" (id.), and the report indicated the student benefited from clear expectations, verbal redirection, affirmation, and a one-to-one setting (id. at p. 4). The report also contains information about the student's progress and abilities in social studies and science (id. at pp. 5-6).

Further, the December 2010 Rebecca School progress report contained information regarding the student's sensory profile and the services that the student received and/or required. For example, the report indicated the student received four sessions per week of OT to address multisensory processing, ideation, sequencing, motor planning, upper extremity strengthening, coordination, ADL skills, and peer interaction across a wide range of emotions (Dist. Ex. 8 at p. 6). The report also reflects that the student was over responsive to light touch, loud auditory output, visually busy settings, and vestibular input and under-responsive to proprioceptive input, and that the occupational therapist paired vestibular and proprioceptive input, which greatly benefited the student with respect to his ability to remain alert and organized (id.). The report further indicated that the Rebecca School staff implemented a sensory diet with the student, and the student navigated throughout the school setting but continued to require cues for safety in the sensory gym with moving equipment and in a busy environment when his sensory system became overwhelmed (id.). Further, and with respect to PT, the report notes that the student received two sessions per week of PT to address safety and environmental awareness, visual spatial thinking, negotiation skills, balance, postural control, strength, endurance, and motor planning, and that student appeared to have good static standing balance and negotiated even and uneven surfaces in a variety of speeds with fair awareness of his environment (Dist. Ex. 8 at pp. 7-8). Additionally, the report indicates that the student improved in the areas of motor planning, sequencing, and visual-spatial skills (id.). The December 2010 Rebecca School progress report indicated that the student received two sessions per week of speech-language therapy, attended a cooking group one time per week, and that with one-to-one support, within a quiet setting, the student maintained an interaction during a motivating activity (id. at p. 8). The report also indicated the student used language to comment, greet, ask questions, protest, answer questions, gain attention, request, affirm, and to show humor, and that the student's ability to process language and respond to others was dependent upon his level of regulation, attention, and motivation (id. at p. 9). The report further reflected that the student used language throughout the school day but sometimes exhibited disorganized and fragmented language, and that the student received two sessions per week of individual music therapy to address social/emotional skills (id. at p. 10).

Based on the foregoing, I find that the evaluative date considered by the May 2011 CSE was sufficiently comprehensive to identify the student's special education needs. This is especially true where, as here, the hearing record reflects that the parent and the student's then-current teacher from the Rebecca School provided input into the development of the May 2011 IEP (Tr. pp. 118, 121, 133-34; Dist. Ex. 3 at p. 1).

**2. Present Levels of Performance**

In addition to finding that the May 2011 CSE did not consider sufficient evaluative data, the IHO suggested that the student's "current levels of performance" were not "meaningfully reflected" (IHO Decision at p. 33). I disagree.

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). 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]).[29] However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z., 2013 WL 1314992, at *8; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 582 [S.D.N.Y. 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]).

The hearing record reflects that the May 2011 CSE developed the present levels of performance in the May 2011 IEP based upon the 2010 observation report, December 2010 Rebecca School progress report, and 2011 psychoeducational report (all of which are discussed above), as well as information from the parent and the student's Rebecca School teacher (Tr. pp. 113-14, 118, 121; Dist. Exs. 3 at p. 1; 6-8). A careful comparison of these sources of information and the May 2011 IEP present levels of performance shows a high degree of correlation (compare Dist. Exs. 3; 6-8, with Dist. Ex. 2 at pp. 3-6). For example, the May 2011 IEP contained information from the 2011 psychoeducational evaluation that the student's overall cognitive skills fell in the mildly delayed range, indicating a significant developmental delay (Dist. Exs. 2 at p. 3; 6 at p. 3).[30] The May 2011 IEP also reflected the 2011 psychoeducational evaluation indicating the student's overall academic skills fell in the second grade range, and also included the grade equivalencies, which ranged from 2.1 through 2.9, in the areas of decoding, reading

[29] Although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

[30] This is generally consistent with the December 2010 Rebecca School progress report which also reflects that the student was developmentally delayed.

comprehension, writing, and computation (Dist. Exs. 2 at p. 3; 6 at p. 4).[31] In addition, and consistent with the December 2010 Rebecca School progress report, the May 2011 IEP indicates that the student read at a slow pace and low volume, recognized all coins and coin values, and understood length and size (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 8 at pp. 4-5). Furthermore, and with respect to social/emotional functioning, the May 2011 IEP (reflecting information in the December 2010 Rebecca School progress report) indicated the student shared attention with an adult within a 1:1 setting during a preferred activity when regulated (compare Dist. Ex. 2 at p. 5, with Dist. Ex. 8 at p. 1). The May 2011 IEP, consistent with the December 2010 Rebecca School progress report, also indicated the student demonstrated difficulties with regulation during non-preferred activities and when physically uncomfortable (compare Dist. Ex. 2 at p. 5, with Dist. Ex. 8 at p. 1). Also, by information provided by the parent regarding the student's health and physical development, the May 2011 IEP indicated the student had a history of hypothyroidism, heart and lung defects, a febrile seizure disorder, asthma, scoliosis, and decreased muscle tone (Tr. p. 121; Dist. Exs. 2 at p. 6; 3 at p. 1). Further, and with respect to sensory regulation, the May 2011 IEP indicated the student was over-responsive to light touch, loud auditory input, visually busy environments, and vestibular input, and was under-responsive to proprioceptive input and benefited from deep pressure (Dist. Ex. 2 at p. 6).

I note, however, that the parent in her answer asserts that the May 2011 IEP "does not indicate [the student's] multiple disabilities" and does not describe his activities of daily living, his intellectual functioning, his adaptive behavior, and his expected rate of progress in acquiring skills and information (Answer ¶ 55).[32] Initially, and noted above, the assertion that the May 2011 IEP does not adequately describe certain needs is not a claim raised by the parent in her due process complaint notice and is, therefore, not properly raised for the first time on appeal. Moreover, I note that although the IEP did not describe in detail all of the student's needs related to self-care skills, the IEP did provide information regarding the student's intellectual abilities, social skills, motor skills, and ability to communicate (see Dist. Ex. 2 at pp. 3-6). For example, the May 2011 IEP indicated that the student's overall intellectual abilities fell within the mildly delayed range and the student was "significantly developmentally delayed" (id. at p. 3). The IEP also indicated the student's overall academic functioning was at the second grade level and when regulated the student could interact with adults within a 1:1 setting during a motivating activity (id. at pp. 3, 5). The IEP indicated that the student would verbally interact with adults and peers throughout the day but when the student became dysregulated his verbal language decreased (id. at p. 5). The IEP provided information regarding the student's health and physical development noting that the student presented with decreased muscle tone, low endurance, and he tired easily which could lead to frustration (id. at p. 6). With regard to the student's motor skills, the IEP reflected that the

[31] As noted above, the teacher from the Rebecca School testified that the grade equivalencies reported in the student's IEP were generally consistent with his academic abilities, in that he was capable of achieving results commensurate with the equivalencies reported in the IEP, but that he performed at a lower level in the classroom if not regulated (Tr. pp. 900-03).

[32] To the extent the parent is arguing that the IEP is somehow deficient for failing to indicate the student's disabilities, once a student has been determined to be eligible for special education services, "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [emphasis in original]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [holding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial" and noting that an IEP is not necessarily invalid "for failing to include a specific disability diagnosis" so long as it is tailored to the student's needs]).

student could navigate through the school environment but required cues for safety, and had difficulty with bilateral motor coordination (id.). Accordingly, I cannot find that the parent's assertion amounts to a denial of FAPE.

### 3. Special Factors—Interfering Behaviors

Next, turning to the parent's assertion that the district's failure to conduct an FBA or develop a BIP resulted 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. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). 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., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "[t]he IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

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

a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . .; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/ specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, implementation of a student's BIP is required to include "regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP," with the results of the progress monitoring documented and reported to the student's parents and the CSE (8 NYCRR 200.22[b][5]).

In the instant case, the hearing record reflects that the May 2011 CSE did not conduct an FBA of or develop a BIP for the student (Tr. p. 232). As stated above, in developing the May 2011 IEP, the CSE considered multiple sources of evaluative information which contained information regarding the student's behavior, including a December 2010 Rebecca School interdisciplinary progress report and the January 2011 psychoeducational evaluation (Tr. pp. 113-14; Dist. Exs. 6, 8). The December 2010 Rebecca School progress report, reviewed by the CSE, indicated that, while the student would only disengage in severe moments of distress, when the student became dysregulated he, at his worst, would pinch (Dist. Ex. 8 at pp. 1-2). The CSE also reviewed the January 2011 psychoeducational evaluation that indicated that the student demonstrated difficulties with impulse control, frustration tolerance, and attention (Dist. Ex. 6 at p. 5). Moreover, the district school psychologist testified that the May 2011 CSE discussed the student's behaviors during the CSE meeting, including his pinching and kicking adults and peers (Tr. p. 231). Although the district school psychologist testified that the student's teacher from the Rebecca School indicated that the student's behaviors did not seriously interfere with instruction and the special education teacher could address the student's behaviors, the evaluative information before the CSE revealed that the student exhibited behaviors that impeded his learning and the learning of others. (Tr. pp. 168-69, 373, 522).[33] Accordingly, based on the totality of the information before the May 2011 CSE, I find that an FBA should have been conducted to determine the factors related to the student's interfering behaviors and whether it was necessary to develop a BIP (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]; see also Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005] [noting that safety concerns may be considered, where appropriate, in the development and review of an IEP]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *18-*20 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *10-*11 [E.D.N.Y. Aug. 7, 2008]).

[33] The Rebecca School teacher testified that the student's behavior affected his ability to learn and she did not remember discussing the student's need for a BIP during the May 2011 CSE meeting (Tr. pp. 871-72).

Notwithstanding the foregoing, the district's failure to conduct an FBA and develop a BIP does not, by itself, automatically render the IEP deficient, and in this instance, the May 2011 IEP must be closely examined to determine whether—in the absence of an FBA and BIP—the May 2011 IEP otherwise addressed the student's interfering behaviors (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L., 2014 WL 53264, at *3; M.W., 725 F.3d at 139-41).

According to the December 2010 Rebecca progress report, to address the student's behaviors the student benefited from adult support, movement breaks, and classroom breaks (Dist. Ex. 8 at pp. 1-2). Additionally, the progress report reflected that during larger group activities, more structured activities, and novel situations, the student required more adult support but would engage for up to 15 minutes (id. at p. 2). The report further indicated that even when the student became dysregulated, the student would remain engaged when provided with a co-regulation strategy (id.). The report reflects that the student would engage for up to 25 minutes during a preferred activity (id.). The classroom observation at the Rebecca School indicated that the student left his seat and needed multiple prompts to return to his seat but the report did not note any strategies other than prompting and positive reinforcement used with the student (Dist. Ex. 7 at pp. 1-3).

Consistent with the strategies indicated in the Rebecca School report and the December 2010 classroom observation, the May 2011 IEP provided the student with accommodations to address his behaviors including redirection, repetition, visual and verbal prompts, clear expectations, movements breaks, and sensory supports throughout the school day (Tr. pp. 110-11; Dist. Ex. 2 at pp. 3, 5-6; see Dist. Exs. 7; 8). Additionally, the IEP included numerous other strategies as follows: a brushing protocol, co-regulation from an adult in the form of verbal reminders, explanations provided in a clear and frequent soothing tone of voice, verbal redirection, encouragement using high affect, deep pressure input, a sensory diet, joint compressions, OT, PT, and counseling services (id.). The May 2011 CSE also recommended a full time 1:1 transitional paraprofessional who would provide individualized support to the student throughout the school day (Tr. p. 300; Dist. Ex. 2 at pp. 17, 19). The May 2011 CSE also developed annual goals and short-term objectives that focused on the student improving his ability to self-regulate and transition between activities to address the student's impulsivity and difficulties with attention and distractibility (Dist. Ex. 2 at pp. 12, 15; see Tr. pp. 373-75).

Based on the foregoing, the May 2011 IEP provided an adequate description of the student's interfering behaviors and recommended appropriate strategies and supports to adequately address the student's behavior problems. Thus, I cannot find that the district's failure to conduct an FBA or develop a BIP in this case supports a finding that the district failed to offer the student a FAPE.

**4. Transition Plan—Vocational Assessment**

Although not addressed by the IHO, the parent asserts in her answer that the May 2011 IEP was developed "without the benefit of a vocational assessment or any other assessments designed to identify [the student's] needs with respect to transition from school to post-school activities." In this regard I note that while the parent did allege in her due process complaint notice that the district "failed to develop an appropriate transition plan for [the student]" (Parent Ex. A at p. 6), she made no allegations regarding the need for a vocational assessment. Accordingly, this latter allegation, which is raised the first time on appeal, is not properly before me (see, e.g., R.E., 694 F.3d at 187 n.4). In any event, I find that neither allegation (i.e., that the May 2011 IEP did not

contain a "transition plan" and that the district failed to conduct a "vocational assessment") provides a basis for relief.

First, and with respect to the alleged lack of a "transition plan," the IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, if appropriate, independent living skills, as well as transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]).

Here, the hearing record reflects that at the time of the May 2011 CSE meeting, the student was 12 years old (Dist. Ex. 2 at p. 1). Moreover, the hearing record is devoid of any evidence that transition services were necessary for this student at this time. Accordingly, I am unable to find the May 2011 CSE was required to develop a "transition plan" (or provide transition services) for the student, as the May 2011 IEP would not be in effect at the time the student reached 15 years of age (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Accordingly, the lack of a "transition plan" or transition services in the May 2011 IEP does not, by itself, amount to a violation of the IDEA or the denial of a FAPE.

However, State regulations do require that "students age 12 and those referred to special education for the first time who are age 12 and over, shall receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]). This "assessment" has been described as a "process that occurs over a period of time," and which is a "useful tool" to ensure that a student's interest and abilities are "incorporated into the career making process" ("Level 1 Career Assessment for Students with Disabilities: A Manual," available at http://www.p12.nysed.gov/specialed/transition/level1careerassess.htm). Here the record reflects that the district failed to conduct such an assessment of the student. However, the parent does not set forth any explanation regarding how this failure rose to the level of a denial of a FAPE. Moreover, and as noted above, the May 2011 CSE reviewed sufficient information to identify the student's primary needs in the areas of cognition, academics, language processing, sensory regulation, fine and gross motor skills, ADL skills, and social/emotional/behavioral functioning. Accordingly, I cannot find that the district's failure to conduct a vocational assessment in this instance, while a procedural defect, rises to the level of a denial of a FAPE (see, e.g., R.B v. New York City Dep't of Educ., 2014 WL 1618383, at *13 [S.D.N.Y. Mar. 26, 2014] [finding that the CSE's failure to conduct a vocational assessment was a procedural violation yet did not result in the denial of a FAPE in light of other evaluative measures considered by the CSE, including progress reports, a classroom observation, and two psychoeducational evaluations]). This is

especially true in light of the student's profile and identified areas of need that existed at the time that the May 2011 IEP was developed.

### 5. 6:1+1 Special Class Placement

Finally, the parent contended in her due process complaint notice that the recommended 6:1+1 special class placement was not appropriate for the student. In her answer and cross-appeal the parent asserts that the student requires a classroom ratio of 2:1 to meet his needs. Although it is unclear whether the parent's assertion in her answer and cross-appeal relates to her claim that a 6:1+1 special class placement would have been inadequate, I will treat the assertion as being related to that claim.

As an initial matter I note that a 6:1+1 special class placement is designed for those 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]). Here the hearing record shows that consistent with this regulation, the student demonstrated intensive management needs such that he required extra support and accommodations including redirection, repetition, visual and verbal prompts, clear expectations, movements breaks, and sensory supports throughout the school day, a brushing protocol, co-regulation from an adult in the form of verbal reminders, explanations provided in a clear and frequent soothing tone of voice, verbal redirection, encouragement using high affect, deep pressure input, a sensory diet, joint compressions, OT, PT, and counseling services (Dist. Ex. 2 at pp. 3, 5-6). In fact, testimony by the district school psychologist indicates that a 6:1+1 special class was chosen for the student based on his significant developmental delays and his distractibility and because "he requires a lot of support throughout the school day" (Tr. p. 133).

Further, while there is testimony in the record indicating a belief that a 6:1+1 special class would not be appropriate for the student,[34] there is also testimony from the private evaluator indicating that a 6:1+1 special class could be "a good match" for the student (Tr. pp. 726, 817). Moreover, I note that the May 2011 IEP recommended the services of a 1:1 transitional paraprofessional for the student (Dist. Ex. 2 at p. 19), which the school psychologist noted would provide additional assistance in that there would be a smaller student–to-staff ratio within the classroom setting and create a ratio similar to that of the 8:1+3 student–to-staff ratio (essentially a 2:1 ratio) offered to the student at the Rebecca School (Tr. pp. 307-08; Dist. Ex. 8 at p. 1). The district school psychologist further testified that the 1:1 transitional paraprofessional would assist the student transition from an 8:1+3 class at the Rebecca School to a 6:1+1 special class within the district (id.). Additionally, the May 2011 CSE discussed the student's needs in the areas of cognition, academics, ADL skills, social skills, attention, impulsivity, frustration tolerance, and self-regulation (Tr. pp. 118, 122-24, 520), which could be addressed within a 6:1+1 special class together with a 1:1 transitional paraprofessional.

Based upon the foregoing, therefore, I find that the May 2011 CSE's recommended 6:1+1 special class was reasonably calculated to enable the student to receive educational benefits for the

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[34] The director of the Rebecca School, for example, testified that a 6:1+1 special class was not appropriate for the student because the student needed to work with only one other student, and within a 6:1+1 special class the smallest group would be a group of three (Tr. pp. 726, 817). In addition, the director indicated that the student required a small focused group and should not be in a class with students who were nonverbal and exhibited interfering behaviors (Tr. pp. 125, 883-84; Dist. Ex. 2 at p. 19).

2011-12 school year. This is especially true since the May 2011 IEP provided the student with a 1:1 transitional paraprofessional and, in general, addressed the student's identified needs.[35]

### C. Cumulative Impact

To the extent the district's violations described above constitute procedural violations, a finding that the district denied the student a FAPE is appropriate 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]). Under the circumstances of this case, I find it appropriate to consider the cumulative impact of the identified deficiencies in order to determine whether or not the district offered the student a FAPE (T.M. v. Cornwall Cent. Sch. Dist., 2014 WL 1303156 [2d Cir. Apr. 2, 2014]; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L., 2014 WL 1301957, at *10; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *10 [S.D.N.Y. Mar. 26, 2014]).

In the present case, the evidence in the hearing record shows that the district failed to follow State regulations regarding when it is necessary to conduct vocational assessments and FBAs. However, as noted above, the May 2011 IEP included supports and strategies to address the student's interfering behaviors and accounted for his primary areas of need. Under the circumstances of this case, therefore, I find these two violations, alone or in combination, do not rise to the level of a denial of a FAPE, and that the IEP, viewed as a whole, was reasonably calculated to enable the student to receive educational benefits and did not result in a denial of a FAPE to the student for the 2012-13 school year (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 190-91; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; see 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"]).

### D. Assigned Public School Site

Finally, the IHO found that the district's assigned public school site was inappropriate for the student because it lacked an elevator, hallways and bathrooms were not air conditioned, the student would be victimized, and because there was "some question" as to whether the student was actually assigned to a specific classroom. The district appeals from these findings and argues that these claims were speculative.

Where, as here, an IEP is rejected by a parent before a district has had an opportunity to implement it, the sufficiency of a district's offered program must be determined on the basis of the IEP itself. In R.E., for example, the Second Circuit was confronted with a situation where the

[35] For example, the May 2011 CSE used the Rebecca School report and input from the parent and Rebecca School teacher to develop multiple annual goals and short-term objectives which were aligned with the student's needs and addressed the areas of reading, handwriting, math, language processing, oral motor skills, social skills, sensory regulation, play skills, and fine and gross motor skills (Tr. pp. 129-30; Dist. Ex. 2 at pp. 7-15). Further, and as the district school psychologist testified, the May 2011 CSE also recommended related services of counseling, speech/language therapy, PT, and OT to address the student's need related to social skills, language skills, sensory processing, and fine and gross motor skills (Tr. pp. 124-25, 129; Dist. Ex. 2 at p. 18).

parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (id.). This claim, however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents," and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id.).

Likewise, in K.L., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x at 87). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (id., quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. (2014 WL 53264), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (id. at *6). Citing to R.E., the Court reiterated that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" (id. at *6, citing R.E., 694 F.3d at 195), and held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice" (id., citing R.E., 694 F.3d at 187 n.3). Accordingly, to the extent that the parent seeks relief in this matter based on claims related to the district's "choice of school" rather than the student's IEP, these claims do not constitute an appropriate basis for unilateral placement.[36]

Notwithstanding the above, I recognize that there are district court cases suggesting that a parent may rely on evidence outside of the written plan which is known to the parent at the time the decision to unilaterally place a student is made (see, e.g., C.U. v. New York City Dep't of Educ., 13 Civ. 5209, at *36-*41 [S.D.N.Y. May 27, 2014]; D.C. v. New York City Dep't of Educ., 950 F.Supp.2d 494, 510-11 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-79 [S.D.N.Y. 2012]). While the Second Circuit recently left open the question

[36] While I recognize that there are numerous district court decisions that suggest that claims related to a district's choice of school (as opposed to claims that relate to a student's IEP) may be raised in proceedings such as this, these decisions, to the extent that they discuss this issue, were generally either decided without the benefit of much (if not all) of the Second Circuit precedent discussed above (see, e.g., J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794 [S.D.N.Y. Sept. 29, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F.Supp.2d 635 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ., 716 F.Supp.2d 270 [S.D.N.Y. 2010]), or simply do not address this precedent (see, e.g., Scott v. New York City Dep't of Educ., 2014 WL 1225529 [S.D.N.Y. Mar. 25, 2014]). As such, I do not find that these cases necessitate the outcome that the parents seek. In fact, there are many cases that have considered this issue in light of the Second Circuit precedent discussed above that have held otherwise (see, e.g., M.L. v. New York City Dep't of Educ., 2014 WL 1301957 at *12 [S.D.N.Y. Mar. 31, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL at 1330891 at *20 [E.D.N.Y. Mar. 28, 2014]; M.O. v. New York City Dep't of Educ., 2014 WL 1257924 at *2 [S.D.N.Y. Mar. 27, 2014]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383 at *13 [S.D.N.Y. Mar. 26, 2014]; M.S. v. New York City Dep't of Educ., 2013 WL 7819319 at *16 [E.D.N.Y. Nov. 5, 2013]; 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 Dep't of Educ., 2013 WL 4834856 at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F.Supp.2d 270, 286 [S.D.N.Y. Aug. 9, 2013]).

as to whether one such case (B.R.) "properly construes R.E." (see F.L., 2014 WL 53264, at *2), the Court has not explicitly addressed this issue. Considering the Second Circuit's tentativeness in fully addressing this issue, as an alternative to the above, I will address each of parent's allegations related to the district's recommended school below.

### 1. Absence of an Elevator and Air Conditioning

Turning first to the IHO's determination that the assigned school was inappropriate, based on the student's medical and health needs, because it lacked an elevator and certain areas of the school were not air-conditioned, while the hearing record reflects that the assigned school building did not contain an elevator and that the hallways and stairwells were not air-conditioned (Tr. p. 79), these issues are speculative in that since the student did not attend the assigned school, it is difficult to determine how the student would have reacted to these circumstances (see, e.g., N.K., 961 F. Supp. 2d at 591-92). This is especially true since while there is testimony in the record indicating that using stairs (which the student would have to do) would be challenging for this student,[37] there is also substantial evidence in the hearing record that the student can use stairs, such as the student's ability to safely navigate the school environment at the Rebecca School, the student's good static standing balance, and his ability to negotiate even and uneven surfaces at a variety of speeds with fair awareness of his environment (Dist. Ex. 8 at pp. 7-8). Additionally, the district school psychologist testified that at the Rebecca School the students walked up and down the stairs to ready themselves for academic tasks (Tr. pp. 109-10), and there is evidence in the record that the student is able to do activities requiring balance, such as use a trampoline (District Ex. 8 at pp. 1, 6). Moreover, according to the 2010 Rebecca School report, the student attended field trips to the local library, parks and "other destinations in the city," though it did note that when walking in the community he required support to remain safe (id. at p. 5). However, the May 2011 CSE recommended a full time, 1:1 transitional paraprofessional who may have been able to assist the student with stairs and/or in hallways, etc., as well as adapted physical education, OT, and PT (Dist. Ex. 2 at pp. 1, 18-19). In addition, the May 2011 IEP also included annual goals and short-term objectives to address the student's needs related to functional negotiation skills and motor planning (Dist. Ex. 2 at pp. 14-15). Accordingly, what affect, if any, a lack of an elevator and/or air conditioning in certain areas of the school may have had on the student is, at best, speculative.

Further, and with respect to the student's need for an elevator, the May 2011 IEP indicated the student did not require an accessible program (Dist. Ex. 2 at p. 1) and did not have mobility limitations (id. at p. 6). Moreover, and relative to the IHO's determination that the lack of air conditioning in the hallways and bathrooms would be "dangerous" for the student because of his "medically fragile" status related to seizure disorder and asthma (IHO Decision at p. 35), the May 2011 IEP did not indicate the student required air conditioning (see Dist. Ex. 2). In fact, the only health procedures noted in the May 2011 IEP were that the student required medication for seizures and needed and a nebulizer and inhaler for asthma (see Dist. Ex. 2 at p. 6). Furthermore, the

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[37] The private evaluator, for example, testified that if the student used the stairs when he traveled from his classroom to the cafeteria it would be challenging, based in part on his awkward gait (Tr. p. 740). Also, the teacher from the Rebecca School testified that the student was challenged by walking up and down stairs, that he needed to hold the stair rail, and if there were many students walking or running nearby he could easily become distracted and fall (Tr. p. 891). Further, the occupational therapist from the Rebecca School indicated that the student tired easily when he walked the stairs at the Rebecca School and would often use the elevator instead (Tr. p. 1036).

hearing record contains no documentary or testimonial evidence regarding the student's need for air conditioning while moving around the school building, how it related to his asthma, or the consequences of the student being in a non-air conditioned hallway or stairwell for brief periods of time. Accordingly, there is no showing in the hearing record that the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded him from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297, at *2; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]). Nor is there any indication that in the event that the lack of an elevator or air conditioning in certain areas became a problem, that reasonable accommodations would not have been made (see B.K., 2014 WL 1330891, at *22; N.K., 961 F. Supp. 2d at 592). Thus, while I can understand the parent's preference for a school with an elevator and air conditioner in the hallways, in this instance, that preference does not equate to a violation of the district's obligation to offer the student the basic floor of opportunity through an IEP that was reasonably calculated to enable the student to receive educational benefits (M.L. 2014 WL 1301957, at *12; see Grim, 346 F.3d at 379).

**2. Safety Concerns**

Regarding the IHO's finding that the student's "availability for victimization" would have been flagged at this school, this too is speculative since the student did not attend the assigned school. Moreover, I note that issues such as this have been explicitly rejected by the Second Circuit as a basis for unilateral placement (see K.L., 530 Fed. App'x at 87 [rejecting claims that a school placement was "inadequate and unsafe" since the appropriate inquiry is into the nature of the written plan]). In any event, there is nothing in the May 2011 IEP that would prohibit, restrict, or preclude the district from utilizing strategies not contemplated by the May 2011 IEP to address these concerns in the event they should arise. Accordingly, the IHO erred in finding that the district failed to offer the student a FAPE because the assigned school would be unsafe for the student.

**3. Assignment of Classroom**

Finally, and with respect to the IHO's finding that there was uncertainty as to whether a seat was available for the student in the assigned school at the beginning of the 2011-12 school year, I note that to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]). The IDEA does not require districts to maintain classroom openings for students enrolled in private schools (E.H. v. Bd. of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 24, 2014] [finding that the parent's argument that the student was denied a FAPE because the proposed classroom did not have a space for the student was without merit and that the district public school was not obligated to hold a seat open for the student after the parent rejected the district's offered public school placement prior to the start of the school year]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *7 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; N.K., 961 F. Supp. 2d at 590). Here, the parent rejected the recommended placement by a letter to the district dated June 17, 2011 (Parent Ex. D), prior to the time the district became obligated to implement the May 2011 IEP (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), and subsequently enrolled the student in the Rebecca School (Parent Ex. I). Accordingly, the district was not obligated to hold

a seat for the student as the parent rejected the offered placement prior to the implementation of the May 2011 IEP. Thus, the IHO erred in finding that the uncertainty regarding the student's specific classroom placement at the assigned school, in part, led to a denial of a FAPE to the student and therefore must be reversed.

## VII. Conclusion

Having determined that the IHO erred in determining that the district denied the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of the Rebecca School or whether equitable considerations support the parent's claim for tuition reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated July 27, 2012 is modified, by reversing those portions which determined that the district failed offer the student a FAPE for the 2011-12 school year and awarded the parent partial reimbursement for the costs of the student's tuition at the Rebecca School.

**Dated:** **Albany, New York**
**May 30, 2014**

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**HOWARD BEYER**
**STATE REVIEW OFFICER**