The University of the State of New York

The State Education Department
State Review Officer
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No. 12-177

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, Esq., Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Susan Luger Associates, Inc., Special Education Advocates for respondents, Lawrence D. Weinberg, 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 respondents' (the parents') son and ordered it to reimburse the parents and directly pay for the costs of the student's tuition at the Rebecca School for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

On May 24, 2011, the district convened an "IEP [m]eeting" to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Exs. 6 at pp. 1-2; 7 at pp. 1-2; see Dist. Ex. 4 at p. 1).[1] Finding that the student remained eligible for special education programs and related services as a student with autism, the IEP included recommendations to place the student in a 12-month school program in a 6:1+1 special class placement with the following related services: one 30-minute session per week of individual occupational therapy (OT); two 30-minute

[1] In a "Notice of IEP Meeting: Reevaluation/Annual Review" dated May 12, 2011, the district invited the parents to attend the student's 2011-12 annual review scheduled for May 24, 2011, and indicated that the following individuals were also invited to attend: a district special education teacher (who would also act as the district representative), a district school psychologist, and "Rebecca School Staff" (Dist. Ex. 4).

sessions per week of OT in a small group; two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a small group; one 30-minute session per week of individual counseling; one 30-minute session per week of counseling in a small group; and the services of a full-time, 1:1 transitional paraprofessional (Dist. Ex. 6 at pp. 1-2, 14, 16-17).[2] In addition, the IEP included recommendations for a variety of academic, social/emotional, and health/physical management strategies, for the student to participate in State and local assessments with testing accommodations, and for the student to participate in adapted physical education (id. at pp. 3-5, 16-17). The IEP also included annual goals and corresponding short-term objectives to address the student's identified needs (id. at pp. 6-13).

In a final notice of recommendation (FNR) dated June 11, 2011, the district summarized the special education programs and related services recommended by the "IEP [t]eam" at the student's annual review on May 24, 2011, and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 16). The FNR listed the assigned school's address, as well as the name, address, and telephone number of an individual to contact if the parents wished to arrange a visit (id.).

By letter to the district dated June 17, 2011, the parents indicated that they visited the assigned school on June 16, 2011 with their educational advocate (Parent Ex. G at p. 1; see Dist. Ex. 6 at p. 2).[3] The parents noted that after "touring the school" and having "some of [their] questions and concerns addressed," they did not believe the assigned school was appropriate for the student, and listed a number of their concerns about the assigned school in the letter (see Parent Ex. G at pp. 1-3). As a result, the parents rejected the public school site, and notified the district of their intentions to continue the student's unilateral placement at the Rebecca School for the 2011-12 school year and to seek reimbursement for the costs of the student's tuition (id. at p. 3).[4]

A. Due Process Complaint Notice

In a due process complaint notice dated October 11, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, that the Rebecca School was an appropriate placement for the student, and that equitable considerations weighed in their favor (Dist. Ex. 1 at pp. 1-3). The parents asserted that the CSE was not duly composed because the neither the special education teacher nor the regular education teacher met the regulatory criteria and because no additional parent member was present (id. at pp. 2-3). The parents also alleged that the CSE disregarded their concerns about the "proposed program" voiced at the CSE meeting, which deprived them of an opportunity to meaningfully participate in the development of the student's IEP (id. at p. 2). The parents further asserted that the CSE denied their request to add parent counseling and training to the student's

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

[3] The educational advocate who accompanied the parents to the assigned school visit also attended the CSE's May 24, 2011 annual review (compare Dist. Ex. 6 at p. 2, with Parent Ex. G at p. 1).

[4] 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). The student has continuously attended the Rebecca School since September 2010 (Dist. Ex. 6 at p. 3; see Tr. pp. 179-80).

IEP and that the annual goals and short-term objectives in the IEP did not meet all of the student's "unique educational, social and emotional needs" (id.). In addition, the parents contended that the recommended program was not appropriate because it did not offer "adequate or appropriate supports, supervision, special methodologies, or services" to enable the student to make educational progress (id. at p. 3). The parents also alleged that the "class size and the student to teacher ratio" were too large for the student and that the recommended program did not include a sufficient opportunity for "1:1 instruction" (id.).

The parents also set forth a number of issues in the due process complaint notice related to the assigned public school (see Dist. Ex. 1 at p. 3). Specifically, the parents asserted that the student had not made progress in a "similar program;" the anticipated change in staffing would impede the student's progress; the classroom included nonverbal students who were not appropriate peer models for the student's communication and social interaction skills; the therapy room was too crowded and distracting; the classroom was too loud, chaotic, and stressful; and the assigned school did not have modified physical education as mandated in the student's IEP (id.). The parents also noted that during their visit to the assigned school, they witnessed unsupervised students in the hallways (id.). Finally, the parents asserted that since the student's IEP included a recommendation for a 12-month school program, the district was required to "appropriately place[]" him by June 15, 2011 (id.).

Regarding the unilateral placement of the student at the Rebecca School for the 2011-12 school year, the parents asserted that the Rebecca School provided appropriate instruction, supports, and services specially designed to meet the student's unique needs (Dist. Ex. 1 at p. 3). The parents also asserted that they cooperated with the CSE and timely notified the district of their intentions to unilaterally place the student at the Rebecca School and to seek reimbursement for the costs of the student's tuition for the 2011-12 school year (id. at p. 4). As relief, the parents requested direct payment of the student's tuition to the Rebecca School, door-to-door transportation services, prospective payment and/or compensatory educational services for the student's related services, the payment of costs and fees, and any other further relief as deemed appropriate (id.).

B. Impartial Hearing Officer Decision

On December 23, 2011, the parties met for a prehearing conference, and on February 22, 2011, the parties proceeded with the impartial hearing, which concluded on June 29, 2012 (see IHO Exs. I-II); Tr. pp. 1-321). In a decision dated August 1, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 school year, the Rebecca School was an appropriate placement, and equitable considerations did not preclude an award of tuition reimbursement as relief (see IHO Decision at pp. 4-14).

In finding a denial of a FAPE, the IHO determined that three procedural violations significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE (see IHO Decision at pp. 4-8). Specifically, the IHO found that the CSE failed to include an additional parent member, the CSE excluded the parents from discussions regarding the decision-making process and program recommendations, and the CSE failed to adequately and collaboratively discuss the student and his special education needs or the program recommendations, services, and annual goals and short-term objectives included in the student's 2011-12 IEP with the parents (id. at pp. 6-8).

Notwithstanding the IHO's conclusion that the procedural violations rose to the level of a denial of a FAPE, the IHO proceeded to analyze the parents' challenges to the assigned public school site in the "interest of a complete analysis of the [p]arents' claims" (see IHO Decision at pp. 8-12). The IHO determined that the assigned public school site was not appropriate for the student based upon "several factors:" the student would not have received the necessary "sensory input . . . throughout the school day," the student would not have been appropriately grouped due to the "very different academic and instructional needs" of the other students in the classroom, the one nonverbal student in the classroom would be "problematic" for the student, the classroom teacher could not provide the student with "individual instruction in all areas," and the other students in the classroom participated in alternate assessments (id. at pp. 9-11). The IHO also noted that the hearing record contained no evidence that the students in the classroom would have been "appropriate peers" for the student's "social and management needs, or for language-based play and interaction" (id. at p. 11). In addition, the IHO further found that the provision of related services in a shared therapy room at the assigned school—or alternatively, in the hallways or the stairwell—could not meet the student's needs, as it would have been too distracting and overwhelming for the student (id.).

Next, the IHO determined that the Rebecca School was an appropriate placement for the student for the 2011-12 school year (see IHO Decision at pp. 11-13). The IHO noted that the student received instruction in core academic areas in a 9:1+4 classroom along with related services, including OT, speech-language therapy, music therapy, and counseling (id. at p. 12). The IHO also noted that the provision of music therapy and play therapy addressed the student's counseling needs, and the Rebecca School provided sensory input throughout the day to help the student remain on task (id.). The IHO also concluded that the student made meaningful progress in all areas while attending the Rebecca School, specifically pointing to the student's social interactions; his improved use of "descriptive language;" his ability to cope with anxiety and to be more independent; and his improved reading fluency, reading comprehension, and mathematics skills (id.). The IHO also rejected the district's argument that the Rebecca School was not the least restrictive environment (LRE) for the student, noting that the 9:1+4 special class provided the student with "individualized instruction and support" to address his "academic and social/emotional needs," and thus, was not overly restrictive (id. at p. 13).

Turning to equitable considerations, the IHO concluded that the parents fully cooperated with the CSE, and the parents' subjective intent regarding placement was irrelevant as the hearing record contained evidence that the parents would have accepted a public school placement if it had been appropriate (see IHO Decision at pp. 13-14).

Next, the IHO considered whether the parents were entitled to direct payment of the student's tuition costs (see IHO Decision at pp. 14-15). Although the hearing record did not contain a contract between the parents and the Rebecca School, the IHO found that the parents remained obligated for the payment of the student's tuition for the 2011-12 school year (id. at p. 14). In addition, the IHO determined that the parents did not have the financial resources to pay the full costs of the Rebecca School's tuition, and thus, the IHO directed the district to reimburse the parents for the student's tuition costs they had paid and for the district to directly pay the Rebecca School for the student's remaining tuition costs for the 2011-12 school year upon presentation of a copy of the contract between the parents and the Rebecca School (id. at pp. 14-16).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in determining that it did not offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate unilateral placement for the student, that equitable considerations weighed in favor of the parents' requested relief, and that the parents were entitled to direct payment of the student's tuition costs to the Rebecca School. Specifically, the district argues that—contrary to the IHO's conclusions—the absence of an additional parent member at the CSE meeting did not deprive the student of a FAPE, the parents meaningfully participated in the development of the student's 2011-12 IEP, and the assigned school would have appropriately implemented the student's 2011-12 IEP. With respect to the IHO's finding that the Rebecca School was an appropriate placement, the district contends that the IHO erred because the Rebecca School did not provide the student with all of his required related services, and the Rebecca School did not provide the student with sufficient academic instruction. As for equitable considerations, the district asserts that the parents clearly intended for the student to continue attending the Rebecca School, and thus, the IHO erred in finding that the parents' intent was irrelevant to that analysis. In addition, the district argues that the IHO erred in concluding that the parents were entitled to direct funding of the student's tuition costs. As relief, the district seeks a finding that it offered the student a FAPE for the 2011-12 school year and to annul the IHO's award of reimbursement for the costs of the student's tuition at the Rebecca School. Alternatively, the district seeks findings that the parents did not sustain their burden to establish the appropriateness of the student's unilateral placement at the Rebecca School, that equitable considerations did not favor the parents' requested relief, and that the parents were not entitled to direct funding of the student's tuition costs.

In an answer, the parents respond to the district's allegations, and seek to uphold the IHO's decision in its entirety. In support of the IHO's determination that the district failed to offer the student a FAPE, the parents assert that the district's failure to comply with the procedural requirements "guaranteeing parental participation and due process" denied the student a FAPE, that any failure to cooperate by the parents was due solely to the district's procedural failures, and that the parents were denied an opportunity to meaningfully participate in the development of the student's IEP at the CSE meeting.

Regarding the student's 2011-12 IEP, the parents argue that the annual goals were not appropriate because the IEP contained "no baseline for the goals" and it was not appropriate to "include goals for a Sixth Grade Curriculum" when the student functioned on a "Second to Fourth Grade Level." Next, the parents allege that the recommended 1:1 transitional paraprofessional did not address the parents' concerns about the student's difficulty transitioning during the school day and between activities, but rather, the 1:1 transitional paraprofessional was recommended to assist the student in his transition from the Rebecca School—a private school—to a public school. The parents also allege that the student's present levels of academic performance in the IEP did not reference any testing and that the CSE's failure to use "relevant information" resulted in a denial of a FAPE because the student's present levels of academic performance were erroneous. Although the IEP included recommendations for the use of sensory tools and sensory breaks, the parents assert that the IEP failed to recommend the "specific sensory input" the student required, such as "hourly proprioceptive to focus academically."

With respect to the assigned school and classroom, the parents generally argue that it was not speculative for the IHO to address these issues. More specifically, the parents argue that the

student would not have been appropriately or functionally grouped in the proposed classroom because the annual goals in the IEP could not be implemented and because the students in the classroom all functioned at a "level lower" than the student. The parents also argue that the classroom was not appropriate because the student would only have access to sensory equipment during the provision of his related services, and the student required "hourly proprioceptive to focus academically." In addition, the parents contend that the inclusion of a nonverbal student in the assigned classroom was not appropriate because the student needed to engage in "back and forth conversations" with peers.

Next, the parents generally assert that the IHO's credibility determination cannot be disturbed, and more specifically argue that the IHO properly made findings of fact and credibility "regarding the parents' participation at the CSE meeting." The parents allege that the IHO properly "weighed the credibility" of the district school psychologist's testimony and the parent's testimony on this issue.[5]

Finally, the parents include additional arguments to support upholding the IHO's determinations that the Rebecca School was appropriate to meet the student's needs, that equitable considerations weighed in their favor, and that they were entitled to direct payment of the costs of the student's tuition at the Rebecca School.

V. Applicable Standards

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

[5] Although both parents attended the impartial hearing, only the student's father testified (see Tr. pp. 1-321).

officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 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, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. Scope of Impartial Hearing and Review

Before reaching the merits in this case, I must determine which claims are properly preserved for review on appeal. First, a review of the entire hearing record reveals that the IHO exceeded her jurisdiction by sua sponte raising, addressing, and relying upon issues related to the assigned school and classroom; issues which the parents did not raise in their due process complaint notice, in order to conclude, in part, that the district failed to offer the student a FAPE for the 2011-12 school year—specifically, that the student would not have received the necessary "sensory input . . . throughout the school day" at the assigned school, the student would not have been appropriately grouped due to the "very different academic and instructional needs" of the other students in the classroom at the assigned school, the classroom teacher could not provide the student with "individual instruction in all areas," the other students in the classroom participated in alternate assessments, and the hearing record contained no evidence that the students in the classroom would have been "appropriate peers" for the student's "social and management needs, or for language-based play and interaction" (see Tr. pp. 1-321; Dist. Exs. 1-18; 20; Parent Exs. A-H; IHO Exs. I-VII; compare Dist. Ex. 1 at pp. 1-3, with IHO Decision at pp. 8-11).

Second, a review of the entire hearing record also reveals that the parents raise the following issues in their answer for the first time on appeal as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year that were not raised in their due process complaint notice: the annual goals were not appropriate because the IEP did not include a "baseline for the goals;" it was not appropriate to "include goals for a Sixth Grade Curriculum" when the student functioned on a "Second to Fourth Grade Level;" the recommended 1:1 transitional paraprofessional did not address the parents' concerns about the student's difficulty transitioning during the school day and between activities; the student's present levels of academic performance in the IEP did not reference any testing; the CSE's failure to use "relevant information" in developing the IEP resulted in a denial of a FAPE; the CSE's failure to use relevant

information resulted in erroneous present levels of academic performance in the IEP; the IEP failed to recommend the "specific sensory input" the student required; the student would not have been appropriately or functionally grouped in the proposed classroom because the annual goals in the IEP could not be implemented and because the students in the classroom all functioned at a "level lower" than the student; and the classroom was not appropriate because the student would only have access to sensory equipment during the provision of his related services (see Tr. pp. 1-321; Dist. Exs. 1-18; 20; Parent Exs. A-H; IHO Exs. I-VII; compare Dist. Ex. 1 at pp. 1-3, with IHO Decision at pp. 8-11).

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

Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include—as set forth above with specificity—any of the issues sua sponte raised, addressed, and relied upon by the IHO to determine that the district failed to offer the student a FAPE for the 2011-12 school year, or any of the issues raised for the first time on appeal in the parents' answer as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2011-12 school year. The hearing record demonstrates that the issues for resolution before the IHO generally included challenges to whether the annual goals in the IEP met all of the student's unique educational, social, and emotional needs; the lack of parental participation in the development of the student's IEP; the composition of the CSE; the CSE's failure to recommend parent counseling and training in the IEP; general assertions regarding the recommended program, including the adequacy of the supports, supervision, special methodologies or services; the class size and student-to-teacher ratio; and the opportunity for 1:1 instruction, as well as challenging specific aspects of the assigned school and the district's ability to implement the student's IEP at

the assigned school (see Dist. Ex. 1 at pp. 1-3). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to amend their due process complaint notice (see Tr. pp. 1-321; Dist. Exs. 1-18; 20; Parent Exs. A-H; IHO Exs. I-VII).

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

Accordingly, the IHO exceeded her jurisdiction in finding that the district denied the student a FAPE based, in part, upon the issues sua sponte raised, addressed, and relied upon in the decision, and those determinations must therefore be annulled. In addition, the contentions in the parents' answer raised for the first time on appeal are outside the scope of my review, and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder, 2009 WL 3246579, at *7; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).[6]

A review of the IHO's decision also reveals that the IHO did not address certain allegations raised by the parents in the due process complaint notice, including that neither the special education teacher nor the regular education teacher met the regulatory criteria; that the annual goals and short-term objectives in the IEP did not meet all of the student's "unique educational, social and emotional needs;" that the CSE denied their request to add parent counseling and training to the student's IEP; that the recommended program was not appropriate because it did not

[6] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51), I note that the issues raised sua sponte by the IHO and the contentions raised in the parents' answer were first raised—if at all during the impartial hearing—by the parents or by counsel for the parents on cross-examination of a district witness (see, e.g., Tr. pp. 102, 104, 106, 109-11, 118, 135-42, 145-46, 187-90, 289-91). Here, the district did not initially elicit testimony regarding these issues and therefore, I find that the district did not "open the door" to these issues under the holding of M.H.

offer "adequate or appropriate supports, supervision, special methodologies, or services" to enable the student to make educational progress; that the "class size and the student to teacher ratio" were too large for the student; and that the recommended program did not include a sufficient opportunity for "1:1 instruction" (see IHO Decision at pp. 1-16; Dist. Ex. 1 at pp. 2-3). With regard to the assigned public school site, the IHO also did not address the following allegations raised by the parents in the due process complaint notice: the student had not made progress in a "similar program;" the anticipated change in staffing would impede the student's progress; the classroom was too loud, chaotic, and stressful; the assigned school did not have modified physical education as mandated in the student's IEP; there were unsupervised students in the hallways; and the district failed to appropriately place by student by June 15, 2011 (see IHO Decision at pp. 1-16; Dist. Ex. 1 at pp. 2-3). In addition, as noted by the district in its petition, the IHO did not make any findings regarding the substantive program and related services recommended in the 2011-12 IEP to conclude that the district denied the student a FAPE, but instead only found that procedural errors resulted in a denial of a FAPE (see IHO decision at p. 8).

Therefore, although the parents' answer includes a general statement that the parents "did not waive any issues at hearing and do not waive any issues on appeal," this statement alone—without any legal or factual arguments or further explanation as to why these unaddressed issues would rise to the level of a denial of a FAPE—is insufficient to resurrect any issues not addressed by the IHO for a determination in this appeal.[7] Under these circumstances, it is not this SRO's role to research and construct the parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments] Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; 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]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; 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, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]). Based on the above, the substantive appropriateness of the program and placement recommendations contained in the 2011-12 IEP are issues that are not properly before me and thus, will not be reviewed; moreover, I further decline to review the issues listed above that the IHO did not address and which the parents did not construct arguments upon which to adjudicate these issues.[8] As such, the issues properly preserved for review include

[7] Furthermore, while the parties met for a prehearing conference in this case, the summary of that conference reflects that the parties used that time to schedule hearing dates and to discuss the compliance date and did not additionally utilize the prehearing conference for the purpose of "simplifying or clarifying the issues" to be addressed by the IHO in this matter (compare IHO Ex. I, with 8 NYCRR 200.5[j][3][xi][a]).

[8] Recently, two district court decisions reviewed the scope of a respondent's right to cross-appeal issues that were not addressed by the IHO (J.F., 2012 WL 5984915, at *9-*10 [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also D.N. v. New York City Dep't of Educ., 2012 WL 6101918 [S.D.N.Y. Dec. 10, 2012] [notice of appeal filed Jan. 3, 2013] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). However, these two decisions do not suggest that such a conclusory allegation—as included in the parents' answer—provides a basis upon which the SRO is required to construct legal or factual arguments on a party's behalf when the party has not elected to do so in order to resolve issues that the IHO did not address.

the procedural violations relied upon by the IHO to conclude that the district failed to offer the student a FAPE, as well as whether the assigned school would have been able to appropriately implement the student's related services and whether the inclusion of a nonverbal student in the assigned classroom would have "negatively impacted his social and emotional growth."

B. 2011-12 IEP

1. CSE Composition–Additional Parent Member

Turning to the merits of the appeal, the district argues that the IHO erred in finding that the absence of an additional parent member at the May 2011 IEP meeting deprived the parents of an opportunity to participate in the development of the student's IEP (see IHO Decision at pp. 6, 8). In particular, the district asserts in its petition that although it did not convene a subcommittee of the CSE, it was otherwise permitted to do so since the student was not being considered for initial placement in a special class, for initial placement in a special class outside of the student's school of attendance, or for placement in a school primarily serving students with disabilities or a school outside of the student's district. Alternatively, the district asserts that the parents were not prejudiced by the absence of an additional parent member at the IEP meeting because the parent's educational advocate attended the IEP meeting, as well as Rebecca School staff.

While the district's initial argument is not persuasive because it is not consistent with evidence in the hearing record, the district's alternative argument finds support in the hearing record. Therefore, as explained more fully below, I disagree with the IHO's conclusion, and find that the absence of an additional parent member at the May 2011 IEP meeting did not rise to the level of a denial of a FAPE because it did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

At the time of the May 2011 IEP meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 11-136; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042).[9] Under applicable State law and regulations, a CSE subcommittee has the authority to perform the same functions as a CSE, with

[9] Effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). State law and regulations have never required an additional parent member as a member of a subcommittee of a CSE (see Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]).

the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

In this case, it is not altogether clear whether the district intended to convene a CSE meeting or a CSE subcommittee meeting to conduct the student's annual review, and the IHO did not consider this distinction as a relevant to her analysis (see IHO Decision at pp. 6, 8). According to the notice sent to the parents, an additional parent member was not identified as an individual who was invited to attend the IEP meeting, which implies that a CSE subcommittee would conduct the annual review, and thus, the absence of the additional parent member would not be a procedural violation (see Dist. Ex. 4). Yet, the district school psychologist testified that although she could not recall the specific reason for the additional parent member's absence at the IEP meeting, it was "likely" that the individual could not attend due to "personal reasons" (Tr. pp. 112-13). She also testified that she did not recall asking the parents to waive the additional parent member's participation (see Tr. p. 113). Given the testimony, one could reasonably infer that a CSE was scheduled to conduct the annual review, and thus, the absence of an additional parent member at that time would, in fact, constitute a procedural violation.

However, even assuming that the May 2011 IEP meeting was intended to be conducted by a CSE and an additional parent member was a required member, the hearing record does not support the IHO's conclusion that the presence of an additional parent member may have assisted the parents in understanding the CSE process or facilitated their ability to participate in discussions and decision-making such that the lack of such a member resulted in a denial of a FAPE (IHO Decision at p. 8).[10] Other than making this broad conclusion, the IHO does not point to any evidence in the hearing record to illustrate that the parents did not understand the CSE process or that the parents required the assistance of an additional parent member to discuss the student's program or to participate in the decision-making process (see IHO Decision at pp. 1-16). Moreover, although it is undisputed that an additional parent member did not participate in the May 2011 IEP meeting, it is also undisputed that both parents, a district special education teacher (who also acted as the district representative), a district school psychologist, a Rebecca School social worker, the parents' educational advocate, and the student's then-current Rebecca School teacher all attended the May 2011 IEP meeting (Dist. Exs. 6 at p. 2; 7 at p. 1). Thus, it is unclear how an additional parent member could have contributed any more knowledge or expertise to the parents than they already had available to them from their own educational advocate, such that the absence of an additional parent member deprived the parents of a meaningful opportunity to participate in the decision-making process and denied the student a FAPE. In addition, as

[10] An additional parent member can provide important support and information to the parents during a CSE meeting and can participate in discussions and decision making from the perspective of a student with a disability ("Guide to Quality Individualized Education Program [IEP] Development and Implementation, " at p. 7, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

discussed more fully below, the hearing record also shows that the parents were given an opportunity to participate in the IEP meeting and did so.

2. Parental Participation

Upon review of the hearing record, I agree with the district's argument in the petition and find that the evidence does not support the IHO's determination that the parents were excluded from participating in the development of the student's IEP such that the student was denied a FAPE (IHO Decision at pp. 6, 8). The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation."]; Sch. for Language & Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

In finding that the district failed to discuss the student's needs and the recommended annual goals and program recommendations with the parents and that the district also excluded the parents from participating in the decision-making process, the IHO gave "little weight" to the district school psychologist's (school psychologist's) testimony regarding what took place during the May 2011 IEP meeting, but found that the parent's testimony on this issue was "clear and convincing" (IHO Decision at pp. 6-7). Generally, deference is accorded to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). However, in reviewing the IHO's decision it is unclear whether her conclusion was based upon a weighing of inconsistent testimonial evidence or upon a finding that the school psychologist's testimony inability to independently recall this specific IEP meeting—which was only 1 meeting out of approximately 125 to 150 IEP meetings she had attended (Tr. p. 102)—appropriately formed the basis upon which to make a credibility finding and reject the school psychologist's testimonial evidence.

In rejecting the school psychologist's testimony regarding the CSE's "discussions and deliberations," the IHO noted that the school psychologist did not specifically recall the IEP meeting and instead based her testimony on the "usual process, procedures, and discussions" routinely followed at other IEP meetings in which she had participated (IHO Decision at p. 7; see Tr. pp. 102-03). However, the IHO ignored the fact that the school psychologist also based her testimony on documents admitted into evidence, which included a contemporaneously written and detailed account of the May 2011 IEP meeting minutes (Tr. p. 103; Dist. Ex. 7). Nor did the IHO's determination regarding this issue include an analysis of that documentary evidence (see IHO Decision at pp. 6-8). According to the May 2011 IEP meeting minutes, the parents were asked for

input regarding the student's performance, to which the parents added that the student was working on his "internal clock" (Dist. Ex. 7 at p. 1).[11] The IEP meeting minutes further indicated that the parents provided information regarding the student's functional academic levels, that the IEP team members read aloud pages three and four of the IEP—as well as the annual goals in the IEP—during the meeting, and that the IEP team revised portions of the IEP with input from the student's parents and teacher (id. at pp. 1-2). As per the meeting minutes, the IEP team also discussed the student's need for a 12-month school year program, the student's need for a 1:1 transitional paraprofessional instead of a crisis management paraprofessional, parent counseling and training, the appropriate student-to-teacher ratio for a special class placement, whether the student's behavior interfered with instruction, what related services the student required (including frequency and duration), and that the parents "expressed their disagreement" with the recommendation for the 1:1 transitional paraprofessional (id. at pp. 1-2). Additionally, the meeting minutes indicated that the student's Rebecca School teacher and the Rebecca School social worker voiced their opinions regarding the recommended program and services, asserting that the student required more support, and identifying their belief that an 8:1+3 classroom was appropriate for the student (id.).

Moreover, in giving greater weight to the parent's testimony over that of the school psychologist, the IHO discussed those portions of the parent's testimony that the IEP team had only very general discussions during the May 2011 IEP meeting; that the IEP team did not review the student's academic or social/emotional management needs; that the IEP team did not discuss the student's annual goals; that the IEP team discussed the 6:1+1 special class placement and program recommendation, but did not allow the parents an opportunity to participate in that discussion; and that IEP team members had discussions between themselves without including the parents (see IHO Decision at p. 7; see also Tr. pp. 264-69). Notably, the IHO did not discuss certain conflicting portions of the parent's testimony in the decision (see Tr. pp. 263-69, 284-86, 288-91; IHO Decision at pp. 6-8). For example, while the parent testified that the IEP team did not discuss the student's academic or social/emotional management needs, he also testified that the student's Rebecca School teacher provided input during the meeting regarding the student's academic and social/emotional management needs (Tr. pp. 264, 288-89). Additionally, contrary to the parent's testimony that they did not have an opportunity to participate, the parent testified that they raised concerns during the May 2011 IEP meeting regarding the student's ability to transition, which resulted in the addition of a 1:1 transitional paraprofessional to the IEP (Tr. pp. 284, 289-91). Moreover, the parent testified that after the IEP team recommended a 6:1+1 special class placement, the parents discussed their belief that a smaller classroom was better for the student in an appropriate setting (Tr. pp. 292-93). The parent further testified that they were not prevented from offering opinions or suggestions and that they did not object to the IEP team's program recommendation during the IEP meeting because they were "new to the process" and unsure of what they should be doing (Tr. pp. 285-86).[12]

In addition, as noted above, the parents' educational advocate attended the May 2011 IEP

[11] The May 2011 IEP indicated that the student's Rebecca School teacher stated that the student was working on his internal clock in order to develop a sense for transitioning from preferred to non-preferred activities (Dist. Ex. 6 at p. 3).

[12] A review of the hearing record indicates that both parents also attended the student's prior CSE meeting in March 2010 to develop the student's 2010-11 IEP (Dist. Ex. 15 at p. 2).

meeting with the parents (Tr. pp. 282-83; Dist. Exs. 6 at p. 2; 7 at p. 1; see Parent Ex. G at p. 1). Although the parent testified that their educational advocate was not "invited" to give input during the IEP meeting, the hearing record reflects that she was present at the meeting and could have explained the process to the parents to aide them in participating in the development of the student's IEP (see Dist. Exs. 6 at p. 2; 7 at p. 1). The parent further testified that the educational advocate took notes during the meeting, but that she did not otherwise participate (Tr. pp. 283-84). The IHO did not address the presence of the parents' educational advocate—or the attendance and input of the Rebecca School personnel—at the May 2011 IEP meeting, and therefore, I cannot find that the parents were not aware of the IEP process when they had their own advocate available to consult during the IEP meeting, as well as Rebecca School personnel.

Under the circumstances of this case and regardless of whether the IHO's determination was based upon a weighing of testimonial evidence or a credibility determination, the documentary evidence in the hearing record and the hearing record, when read as a whole, compels a contrary conclusion regarding parental participation. An independent review of the entire hearing record indicates that the IEP team discussed the recommended programs and services and annual goals during the meeting, including the student's academic and social/emotional management needs (Tr. pp. 263-69, 288-89; Dist. Ex. 7 at pp. 1-2). The hearing record also indicates that the parents had an opportunity to participate during the May 2011 IEP meeting as they provided input into the development of the student's IEP, and in particular, regarding the student's transition needs, and the student's Rebecca School teacher provided input regarding the student's performance and management needs (Tr. pp. 288-90; Dist. Exs. 6 at pp. 3-4; 7 at pp. 1-2). Conversely, the parent conceded in his own testimony that they were not prevented from participating in the IEP meeting or from offering their opinions or suggestions (Tr. pp. 285-86).

Based upon my review of the hearing record and contrary to the IHO's conclusions, I find that the parents were afforded a meaningful opportunity to participate in the decision-making process regarding the development of the student's IEP and in the provision of a FAPE to the student for the 2011-12 school year (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]; see also Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W., 869 F. Supp. 2d at 330; Schaefer, 84 A.D.3d at 796).

C. Assigned School

In his decision, the IHO also addressed some of the parents' concerns raised regarding the particular public school site to which the district assigned the student to attend during the 2011-12 school year. On appeal, the district contends that the IHO erred in reaching the parents' contentions about the assigned school since the student did not attend the assigned school, and alternatively, even if the IHO properly addressed these issues, the hearing record does not support her conclusions. As set forth in greater detail below, neither the law nor the facts of this case support the IHO's conclusions.

1. Implementation of the IEP at the Assigned School

Initially, the district correctly argues that the IHO erred in reaching the parents' contentions about the assigned school since such analysis would require the IHO—and an SRO—to determine what might have happened had the district been required to implement the student's 2011-12 IEP. Generally, challenges to an assigned school involve implementation claims, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only

where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]),[13] and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

In this case, the parents rejected the student's 2011-12 IEP and enrolled the student at the Rebecca School prior to the time that the district became obligated to implement the student's IEP (see Parent Ex. G at pp. 1-3).[14] Thus, the district was not required to establish that the assigned school was appropriate or that the student would have been grouped appropriately upon the implementation of his IEP in the proposed classroom, and therefore, it was error for the IHO to reach any of the parents' contentions with respect to the assigned school or how the student's 2011-12 IEP would have been implemented at the assigned school. However, even assuming for the sake of argument that the student had attended the district's recommended program at the assigned school, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. Aug. 19, 2011]).

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6). The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320).

In order to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan.

[13] With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; V.M. v. North Colonie Cent. Sch. Dist., 2013 WL 3187069 at p. *12 [N.D.N.Y. June 20, 2013]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

[14] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063).[15] Additionally, the United States Department of Education (USDOE) has also clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

2. Related Services at the Assigned School

The district argues on appeal that the IHO erred in finding that the assigned school was not appropriate due, in part, to the provision of his related services in a shared therapy room—where "multiple students" received "different related services at the same time"—which would be too distracting for the student and therefore, he would be "unable to benefit from instruction" (IHO Decision at p. 11). However, while the student's OT and speech-language therapy may have occurred in a therapy room shared by more than one therapist and more than one student simultaneously, there is no evidence in the hearing record indicating that the environment would have been overwhelming or distracting to the student, or that the student in this case would not have benefitted from related services delivered in this manner (Tr. pp. 138-39). The hearing record reveals that the student received instruction in a class consisting of 9 students and 5 staff members while attending the Rebecca School, and there is no indication in the hearing record that the student was unable to receive educational benefits due to the presence of other students when his class was broken down into smaller groups (Tr. pp. 231, 242-43). In addition, the student's olfactory and auditory sensitivities are noted in his IEP, and the IEP includes management strategies for addressing the student's sensitivities, including preparation for loud noises, wearing ear plugs, sensory breaks, and access to a quiet space (Dist. Ex. 6 at p. 4). Therefore, although the parents may have preferred that the student receive his related services in a therapy room that was not shared for the delivery of related services, there is insufficient evidence in the hearing record to support a finding that the student would not have received all of his mandated related services set forth in the 2011-12 IEP, and there is also insufficient evidence to support a finding that the presence of other students in the therapy room would have prevented the student from benefiting from the mandated related services.

3. Nonverbal Student in the Assigned Classroom

In their due process complaint notice and answer, the parents alleged that the assigned school was not appropriate for the student, in part, because the classroom included one nonverbal

[15] The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504).

student, which would not help the student to improve his "communication skills" and his "social interaction skills," and which would "negatively impact his social and emotional growth." The IHO agreed, and found that the assigned school would not be appropriate, in part, because the nonverbal student's presence in the classroom would be "problematic" for the student, as the student required peers that could model '"verbal communication"' and '"maintain a continuous flow of interaction, and conversation, and language-based play"' (IHO Decision at p. 10).

Here, although the hearing record indicates that a nonverbal student attended the proposed classroom, the weight of the evidence does not support the IHO's determinations regarding this issue. Specifically, the IHO ignored evidence that the remaining four students in the classroom were all verbal, and the IHO did not address how these four remaining verbal students would not otherwise be able to model verbal communication or maintain a continuous flow of interaction, conversation, and language-based play with the student, which the IHO determined that the student would not receive from the nonverbal student in the classroom (see Tr. pp. 139-40; IHO Decision at p. 10). Based on the foregoing, the IHO ignored the weight of the evidence in finding that the presence of one nonverbal student in the assigned classroom resulted in a failure to offer the student a FAPE.

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to consider the appropriateness of the Rebecca School or to consider whether equitable factors weigh in favor an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13, aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 1, 2012 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year and that directed the district to reimburse the parents for tuition paid to the Rebecca School and further ordered the district to directly pay the Rebecca School for the student's remaining tuition costs for his attendance at the Rebecca School during the 2011-12 school year.

Dated: **Albany, New York**
July 5, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER