The University of the State of New York

The State Education Department
State Review Officer
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No. 12-208

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Lauren A. Baum, PC, attorneys for petitioner, Lauren A. Baum, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at the Rebecca School for the 2010-11 school year. Respondent (the district) cross-appeals from the IHO's determination that equitable considerations favored the parent and the parent would be entitled to direct funding of the student's tuition. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

Prior to December 2008, the student attended a public school in a collaborative team teaching (CTT) classroom and received related services of speech, counseling, physical therapy (PT) and occupational therapy (OT) (see Tr. pp. 701-02). In addition, the student also received the services of a full-time 1:1 crisis paraprofessional in first grade, however the student's behaviors led to her suspension from this school three times within two months (Tr. pp. 703-04). The student

remained home until she began attending the Rebecca School in December 2008, where she remained a student during the 2010-11 school year (Tr. pp. 704-05).[1]

On March 10, 2010, the CSE convened to conduct the student's annual review and to develop an IEP for the 2010-11 school year (see Dist. Ex. 3 at pp. 1-2). Finding the student remained eligible for special education and related services as a student with emotional disturbance, the March 2010 CSE recommended a 12:1+1 special classroom placement in a community school with related services of three 30-minute sessions per week of individual counseling; two 30-minute sessions of counseling per week in a small group; three 30-minute sessions per week of individual OT; two 30-minute sessions of speech language therapy per week in a small group; and a full-time 1:1 behavior management paraprofessional (id. at pp.14,16).[2] In addition, the March 2010 CSE recommended that the student's related services be provided on a 12-month program basis (Dist. Ex. 3 at p. 1).[3]

On May 4, 2010, the parent executed an enrollment contract with the Rebecca School for the student's attendance for the term July 6, 2010 through June 24, 2011, and paid a non-refundable deposit (Parent Ex. P at pp. 1-5).[4]

By final notice of recommendation (FNR) dated June 8, 2010, the district summarized the special education and related services recommended in the March 2010 IEP, and identified the particular public school site to which the district assigned the student for the 2010-11 school year (see Dist. Ex. 6).

By a letter dated June 22, 2010, the parent notified the district that having visited the assigned school on June 21, 2010 she "need[ed] time" to consult with the student's current providers and would contact CSE within the next few days (Parent Ex. D at p. 1).

By letter dated June 23, 2010, the parent informed the district that the educational program and placement recommended by the March 2010 CSE was inappropriate, the student would continue at the Rebecca School for summer 2010, and the parent would seek tuition reimbursement/funding and transportation for the Rebecca School until such time as the district offered an appropriate placement (id.).

A. Due Process Complaint Notice

By a due process complaint notice dated October 20, 2011, the parent alleged that the district failed to offer the student a FAPE for the 2010-11 school year (see Dist. Ex. 1 at pp. 1-5).

[1] 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).

[2] The student's eligibility for special education programs and related services as a student with emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

[3] The March 2010 IEP provided for related services for summer 2010 (Dist. Ex. 3 at p. 1). The hearing record contains testimony from the district special education teacher that these services were for summer 2011 (Tr. p. 93).

[4] The Rebecca School staff signed the enrollment contract on June 3, 2010 (Parent Ex. P at p. 2, 5).

More specifically, the parent asserted that the March 2010 CSE was not properly composed, the CSE members did not attend for the entire meeting, the March 2010 CSE did not evaluate the student or consider sufficient and appropriate evaluative information, and the March 2010 CSE deprived the parent of the opportunity to meaningfully participate in the decision-making process by predetermining its recommendations for the student's IEP and failing to discuss the student's annual goals and progress (id. at p.1-2). In addition, the parent alleged that the March 2010 IEP did not accurately or fully reflect the student's current levels of (id. at p. 2). The parent also alleged that the academic and social/emotional management needs did not adequately address the student's needs (id.). With regard to the annual goals, the parent asserted that the March 2010 IEP did not include a sufficient number of annual goals, and the goals included therein were not appropriate given the student's academic, social and emotional needs, failed to enable the student to make progress and were not measurable (id. at pp. 2-3). Further, the parent asserted that the March 2010 CSE failed to conduct a functional behavioral assessment (FBA) for the student and the behavior intervention plan (BIP) included in the March 2010 IEP failed to adequately, appropriately, or sufficiently describe the student's problem behaviors and provide appropriate interventions (id. at p. 3). Also, the parent alleged that the March 2010 CSE failed to provide a 12-month academic placement for the student and only provided related services on a 12-month basis (id.). The parent further alleged that the March 2010 IEP failed to include transition supports to assist the student's transition to a significantly larger classroom and school, "despite the student's anxiety, behavioral and sensory issues and acknowledged difficulty with transitions" (id.).

The parent contended that the recommended 12:1+1 class would not appropriately provide the level of individual support from trained educational professionals the student required to make academic and social/emotional progress (Parent Ex. A at p. 4). In addition, the parent claims that the March 2010 IEP could not be implemented at the assigned school, particularly with respect to the provision of a 1:1 crisis paraprofessional (id.).

The parent asserts that the Rebecca School provides the student with a program that appropriately addresses the student's needs and enables her to make measurable academic and social /emotional progress (Parent Ex. A at p. 4). The parent also maintains that equitable considerations weighed in favor of the requested relief of tuition reimbursement (id.). Accordingly, as a remedy, the parent requested prospective funding or reimbursement for the costs of the student's tuition at the Rebecca School for the 2010-2011 school year, in addition to reimbursement for any costs or fees, including the cost of transportation. (id. at p. 5).

B. Impartial Hearing Officer Decision

On February 15, 2012, the parties proceeded to an impartial hearing, which concluded on July 3, 2012 after eight days of proceedings (see Tr. pp 1-1073). By decision dated September 21, 2012, the IHO concluded that the district offered the student a FAPE for the 2010-11 school year (see IHO Decision at pp. 16-22). With respect to the procedural violations claimed by the parent, the IHO found that the failure of the March 2010 CSE to provide the parent and the Rebecca school teacher, who attended the meeting via telephone, with the December 2009 Rebecca school progress report and the December 2009 classroom observation, prior to the March 2010 CSE meeting, was not a procedural defect resulting in a denial of FAPE (id. at p. 17). More specifically, the IHO based her decision on the parent's request for these documents on two- hour notice, prior to the start of the March 2010 CSE and the parent's acknowledgement that she was provided with these

documents upon her arrival at the March 2010 CSE meeting (id.). Further, the IHO found that the parent and the student's classroom teacher at the Rebecca School should have been familiar with both the school progress report and classroom observation (id.).

With respect to the parent's claims regarding the alleged failure of the CSE to consider appropriate evaluative information, the IHO noted that the psychological evaluation utilized by the CSE had been completed seventeen months earlier, well within the regulations requiring triennial evaluations of students (id.).[5] Further, the IHO determined that based on the data provided by the student's related services providers and classroom teacher, three months prior to the March 2010 CSE, the CSE had "a sufficiently well-defined sense of [the student's] educational deficits and [the student's] speech, OT and counseling needs" (id.).[6]

In addition, the IHO determined that the lack of an FBA did not result in a denial of FAPE since BIP developed by the March 2010 CSE was based on information provided by the student's Rebecca School teacher and included sufficient strategies to address the student's behavioral needs (IHO Decision at p. 18). Also, the IHO determined that any lack of a transition plan in the March 2010 IEP would be handled by the provision of the 1:1 crisis paraprofessional (id.). Accordingly, the IHO found no procedural deficiencies that would amount to a denial of FAPE to the student (id.).

Concerning substantive IEP issues, the IHO found that the March 2010 IEP adequately described the student's then-current levels of performance based on teacher assessments as well as the student's academic, management, social/emotional, health and physical needs (IHO Decision at p. 18). The IHO indicated that the annual goals on the March 2010 IEP were primarily derived from the December 2009 Rebecca school progress report (id.). Thus, the IHO determined that the description of the student's goals on the March 2010 IEP were "sufficiently measureable and appropriate" (id.).

In addressing the parent's objections to the March 2010 IEP recommendation of a 10-month 12:1+1 class with a 1:1 crisis paraprofessional with related services provided to the student on a 12-month basis (IHO Decision at p. 19), the IHO found that based on the December 2009 Rebecca school progress report and the December 2009 classroom observation, the student had made improvements in her behaviors it was reasonable for the March 2010 CSE to consider a small, self-contained class as appropriate (id.), particularly in light of the provision of a 1:1 crisis paraprofessional for support with transitioning, implementing coping strategies, and providing 1:1 instruction as needed (id). Concerning the March 2010 CSE's recommendation of a 12-month school year program for related services only, the IHO determined that the student was doing well academically and that her dominant needs were in the areas of self-regulation, transition, communication and socialization, all of which would continue to be addressed within her related

[5] A district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]).

[6] The December 2009 Rebecca School progress report contained reports from each of the student's related services providers, as well as a report from the student's classroom teacher (Dist. Ex. 5 at pp. 1-14).

services of speech, OT and counseling, during the summer months of July and August 2010 (id. at p. 21).

Turning to the parent's allegations pertaining to the assigned public school site, the IHO found that the parent's claims objecting to the assigned school are unsupported by the record and do not result in a denial of FAPE as the recommended class and school setting would have been "age appropriate" and "functionally grouped academically" for the student (IHO Decision at p. 20). Further, the IHO determined that the parent's claims are speculative regarding the assigned school's ability to address the student's needs and provide a 1:1 crisis paraprofessional as this is "mandated" in the March 2010 IEP (id.).

Having determined that the district offered the student a FAPE for the 2010-11 school year, the IHO indicated there was no need to consider the appropriateness of the unilateral placement at Rebecca School or whether equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at p.21). However, "for the sake of completeness" the IHO did review the unilateral placement and equitable considerations (id.). The IHO determined that the Rebecca School was an inappropriate program for the student (id. at p. 22). The IHO also found that the parent had cooperated with the district and had signed a contract legally obligating her to pay the student's tuition at the Rebecca School, thus equitable considerations favored the parent (id.).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2010-11 school year. Specifically, the parent asserts that the IHO erred in failing to find the evaluative information reviewed by the March 2010 CSE was insufficient and the March 2010 CSE failed to afford the parent with a meaningful opportunity to participate as the March 2010 CSE drafted the student's IEP prior to the March 2010 CSE meeting.

In addition, the parent argues that the IHO erred in determining that the lack of additional testing and evaluative information did not result in a denial of FAPE, as the March 2010 CSE should have included in their discussions the student's social history and medical report as well as current speech/language and OT assessments. Further, the parent asserts that the IHO failed to consider that the classroom observation, relied on in drafting the student's IEP, was inadequate as it failed to specify the length of the observation or the extent of individual support the student requires in the classroom. In addition, the parent alleges that the IHO erred in determining that the 2007 psycho-educational assessment was adequate as there was no indication that the testing accurately reflected the student's current abilities. The parent also contends that the IHO erred by failing to consider the parent's lack of participation in the March 2010 CSE as information discussed was not provided to the parent or the student's current teacher prior to the March 2010 CSE meeting.

Next, the parent alleges the IHO erred in determining that the March 2010 IEP was substantively adequate. Specifically, the parent claims the IHO erred in determining that the student's present levels of performance adequately and accurately described the student's level of functioning. Also, the parent asserts that the IHO erred in determining that the March 2010 IEP included sufficient measureable annual goals, as the March 2010 IEP lacked short-term objectives and baselines for measurement, including goals using a methodology from student's current school

not used in the proposed assigned school. The parent alleges that the IHO erred in finding that the March 2010 CSE did not deny the student a FAPE by failing to conduct an FBA prior to developing the student's BIP, that the BIP was the same as that in the student's 2009-10 IEP, and that an FBA could be performed "later" if necessary. Further, the parent asserts that the IHO erred in finding that the related services recommended by the March 2010 CSE were sufficient to address the student's needs over the summer and no academic program was necessary during July and August 2011, and in addition, the district failed to provide notice as to a location for these services. The parent also argues that the IHO erred in finding the 12:1+1 classroom placement with a 1:1 crisis paraprofessional appropriate, as the addition of a 1:1 crisis paraprofessional in the March 2010 IEP did not mitigate the lack of a transition plan for the student.

Next, the parent alleges that the IHO erred in finding that the assigned school could meet the sensory and behavioral needs of the student within transitions and failed to address the ability of the assigned school to implement the March 2010 IEP, including the provision of a 1:1 crisis paraprofessional.

With regard to the unilateral placement, the parent contends that the Rebecca School was appropriate for the student because it addressed her needs and the student made progress. With regard to equitable considerations, the IHO correctly found that equitable considerations supported the parent's request for prospective funding or reimbursement for the costs of the student's tuition at the Rebecca school for the 2010-11 school year.

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's conclusion that it offered the student a FAPE for the 2010-11 school year. In addition, the district argues that the parent did not sustain her burden to establish the appropriateness of the student's unilateral placement at the Rebecca school, and in this case, equitable considerations precluded an award of tuition reimbursement. In a cross-appeal, the district asserts that the IHO erred in determining that equitable considerations favored 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL

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

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

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

VI. Discussion

A. CSE Process

1. Parental Participation/Predetermination

The parent alleges that the district impermissibly predetermined the student's March 2010 IEP program and placement recommendations and failed to provide the parent and the student's current teacher with certain documents, namely the December 2009 Rebecca school progress report and the December 2009 classroom observation, prior to the meeting, thereby significantly impeding the parent's ability to participate in the development of the student's IEP. Although the IHO failed to specifically address the issue of the participation, it is raised in both the parent's due process complaint notice and petition and, as such, will be discussed below.

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

Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Bd. Of Educ. Of Beacon City Sch. Dist., 2013 WL 25959, at *18, [S.D.N.Y. 2013], quoting M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

A review of the hearing record shows that attendees at the March 2010 CSE were a district school psychologist, a district special education teacher (who also served as the district representative), the parent, an additional parent member, and the student's Rebecca School teacher, who participated by telephone (Dist. Ex. 3 at p. 2; 8 at p. 1; see Tr. p.73).

Prior to the March 2010 CSE meeting, the district special education teacher, the district school psychologist, and the additional parent member reviewed the student's prior school year (2009-10) IEP, the December 2009 Rebecca School progress report, the April 2007 psycho-educational report, and a December 2009 classroom observation, and prepared a draft IEP for discussion at the March 2010 CSE (Tr. pp. 77-79, 121-22, 135-36).[7] Such preparation is entirely permissible, (Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]). The district special education teacher testified that all March 2010 CSE members were told that they would start with this draft and make changes as appropriate for the student (Tr. p. 122). There is no evidence in the hearing record that suggests that the March 2010 CSE foreclosed the possibility of recommending a different placement for the student.

In reaching the decision to recommend a 12:1+1 special class placement in a community school with the services of a full-time, 1:1 crisis management paraprofessional, the evidence in the hearing record demonstrates that the March 2010 CSE considered, but rejected, other placement options for the student for the 2010-11 school year. First, the CSE considered a general education classroom but rejected this option as it determined the student continued to need a small, supportive classroom (Tr. p. 118; Dist. Ex. 3 at p. 15). Next, the March 2010 CSE considered, and rejected, 12:1 special class in a community school as insufficient to meet the student's "social and behavioral delays" (Dist. Ex. 3 at p.15). In addition, the March 2010 CSE considered placing the student in a 12:1+1 special class in a community school without a 1:1 crisis management paraprofessional but elected not to do so because the student's behaviors warranted individual support (id.). Lastly, the March 2010 CSE considered and rejected special class placements in a specialized school in either a 12:1+1, 8:1+1 or 6:1+ 1 classroom, as these would be overly restrictive and the student would benefit from access to non-disabled peers (Tr. p. 119; Dist. Ex. 3 at p. 15). This evidence contradicts the parents' assertion that the March 2010 CSE's recommendation was predetermined.

[7] In the hearing record, the district special education teacher testified that this type of meeting usually took place at least one week prior to the actual CSE meeting, but she could not recall the exact date (see Tr. at pp. 121-22, 135-36).

The parent also argues that she was denied the opportunity to participate in the development of the student's IEP because the March 2010 CSE failed to provide certain documents to her and the student's Rebecca school teacher prior to the March 2010 CSE meeting.

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]). Moreover, the IDEA "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S., 2011 WL 3919040, at *11, quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

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]). In other words, "[m]eaningful participation does not require deferral to parent choice" (Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006]). Further, the IDEA's requirement that the district provide a parent with meaningful participation in the development of an IEP does not equate to the right of a parent to dictate the provisions of a student's IEP (Doe v. East Lyme Bd. of Educ., 2012 WL 4344301, at * 4 [D. Conn. Sept. 21, 2012]; New Fairfield Bd. of Educ., 2011 WL 1322563, at*16 [D. Conn. Mar. 31, 2011]).

Here, the district special education teacher testified that all those present at the March 2010 CSE meeting had the opportunity to participate, as it was a team discussion and team recommendation, and the March 2010 CSE considered evaluative information including the December 2009 Rebecca School progress report and the December 2009 classroom observation which were also available to the parent (see Tr. pp. 71-2, 96, 104). While waiting for the student's Rebecca School teacher to attend the March 2010 CSE via telephone, the district special education teacher testified that she spoke with the parent, read her the parental rights, discussed if the parent had any new information to be shared and asked the parent to express any concerns (Tr. p. 73). Further, the district special education teacher testified that all CSE members attended for the entire meeting, except for the student's Rebecca School teacher, who left early, but was present for "the meat" of the IEP discussions (see Tr. pp. 73-4). Also, the district special education teacher testified that the March 2010 CSE team discussed the program recommendation with the parent, informed the parent of the district's obligation to provide a placement for the student, and reported there was

no indication that the parent did not approve of the recommendation (Tr. p. 91-2; see Dist. Ex. 8).[8] Further, the district special education teacher testified that the parent was asked and agreed that she had all documents to be considered at the March 2010 CSE meeting (Tr. pp. 94-5).

At the March 2010 CSE meeting, the district special education teacher testified that, using the December 2009 Rebecca School progress report and "goals" as a "jump off" point, the CSE team drafted the March 2010 IEP annual goals to address the student's needs, the goals were read out loud in the parent's presence, and the parent and the student's Rebecca School teacher made changes to the annual goals, which were then handwritten on the draft IEP (Tr. pp. 100, 103-04; see Tr. p. 148, 162-63; Dist. Ex. 8 at p. 2). The district special education teacher further testified that she asked the parent to review the student's related services goals to make sure they were correct (Tr. p. 105). Further, the district special education teacher testified that the BIP was drafted by the district school psychologist and the student's Rebecca School classroom teacher, and the March 2010 CSE meeting minutes indicated that the BIP was discussed and agreed upon by the student's current teacher (Tr. pp 110-11; Dist. Ex. 8 at p. 2).

The district special education teacher testified that the student's BIP was read out loud at the March 2010 CSE and the parent did not have anything to add, "she may have done some slight tweaks [to] …academic goals but she did not have anything that was noteworthy for [the team's] reaction" (Tr. p. 110-11, see Tr. p. 149, 220, 224, 226). In addition, the district special education teacher testified that the March 2010 CSE team discussed the program recommendation for the student and the parent "didn't react negatively to the program" however, the student's Rebecca School teacher did request consideration of an 8:1:1 program as he believed that it would be "similar" to the current Rebecca School classroom ratio (Tr. p. 91-2; Dist. Ex. 8 at p. 2).

Significantly, the parent testified that she did "participate in an IEP meeting" and discussed the student's need for 12 months of related services to prevent regression (Tr. pp 705-06, 710). Also, the parent testified that the draft IEP was used and notes were made on it by the CSE members during the meeting (see Tr. p. 713, 741-42). In addition, the parent admitted to receiving copies of the December 2009 Rebecca School progress report and the December 2009 classroom observation (see Tr. p. 737). The March 2010 CSE meeting minutes indicate that the mother expressed her concerns regarding the student's behaviors, explained the student's difficulties with writing and noted the student's medication for seizures, which the parent reported as no longer a problem and need not be reported on the student's March 2010 IEP (Dist. Ex 8 at p. 1).

As to the student's current Rebecca School teacher not receiving the documents reviewed by the March 2010 CSE, there is insufficient information in the hearing record, however, the Rebecca School teacher was the individual who prepared the December 2009 progress report and was in the classroom for the district's December 2009 classroom observation (see Dist. Exs. 4; 5).

Based on the evidence in the hearing record, the parent was not deprived of a meaningful opportunity to participate in the development of the March 2010 IEP and the student's

[8] The hearing record shows that the student's Rebecca School teacher did ask the March 2010 CSE to consider an 8:1+1 classroom placement for the student, which they did but determined it would be too restrictive for the student (Tr. p. 92; see Ex. 8 at p. 2).

recommended program and placement were not predetermined by the district. Accordingly, there was no denial of FAPE with respect to the parent's procedural participation claims.

2. Sufficiency of Evaluative Information

The parent argues that, contrary to the IHO's findings, the March 2010 CSE failed to consider sufficient evaluative information in its development of the March 2010 IEP. Specifically, the parent indicates that March 2010 CSE was unaware of the student's educational history including past difficulties in a community school, as well as the purpose of the two medications prescribed for the student, because the CSE did not conduct a social history and lacked medical documentation. In addition, the parent asserts that the classroom observation relied upon by the March 2010 CSE was deficient because it failed to indicate the length of the observation and the extent of individual support the student required in the classroom. The parent also contends that the March 2010 CSE developed related services recommendations and goals without conducting or reviewing standardized assessments in the areas of speech-language and OT and failed to consult with the student's then-current related service providers. A review of the hearing record supports the IHO's findings with respect to the sufficiency of evaluative information considered by the March 2010 CSE.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, neither the IDEA nor State law requires a CSE to '"consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider '"every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *8 [S.D.N.Y. Feb. 14, 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]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the

student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

With respect to evaluative information used in developing the March 2010 IEP, the hearing record demonstrates that the March 2010 CSE relied upon a December 2009 classroom observation and a December 2009 Rebecca School progress report as well as input from the parent and the student's then-current teacher at the Rebecca School (see Tr. pp. 72-74, 94-97; Dist. Exs. 4 at pp 1-2, 5 at pp. 1-14). The December 2009 classroom observation included information regarding the student's academic and behavioral needs (see Dist. Ex. 4 at pp. 1-2). The district school psychologist conducted the December 2009 classroom observation of the student at the Rebecca School class which consisted of a teacher, three teaching assistants, and four students (Dist. Ex. 4 at p. 1).[9] According to the report, as the students ate their snacks at a table, the student left the snack table but rejoined the group after the teacher asked her twice (id.). While the teacher read a story to the class, the student participated at first, but then she "abruptly got up" and stated she wanted more hot water for her cup (id.). After the teaching assistant provided the student with the hot water for her cup, the student joined the group and listened to the story (id.). According to the observation report, the student answered the teacher's questions regarding the story, which required use of both memory and insight (id.). The report indicated the student followed the teacher's directive to draw a gingerbread cookie and interacted appropriately with the teaching assistant while drawing (id. at p. 2). As directed by the teacher, the student then engaged in free play, and while doing so interacted with the teacher by replicating the music patterns set out for her by the teacher (id.).

The December 2009 Rebecca School interdisciplinary report of progress, prepared by the student's current Rebecca school teacher, contained information regarding the student's abilities, needs, and progress related to behavior, language processing, sensory regulation, academics, fine and gross motor skills, and social/emotional functioning (Dist. Ex. 5 at pp. 1-14). According to the report, the student presented with an "even state of regulation" but when angry or frustrated, the student became dysregulated and would often yell and run from the classroom (id. at p. 2). However, the December 2009 report also reflected that when dysregulated the student would respond in a positive manner to staff interventions, which included the use of high language affect and humor (id.at p. 1). Additionally, the report indicated the student's ability to transition within the classroom and to activities outside the classroom had increased but the student continued to demonstrate difficulty with transitions when she was feeling angry, sad, confused, and frustrated (id.). The report also noted that the student was working on developing her ability to regulate her

[9] The Rebecca School progress report indicated the student was attending a 9:1+4 class (Dist. Ex. 5 at p. 1).

emotions related to anger, frustration, sadness, and fear (id.). With respect to language skills, when regulated, the student would express herself verbally and nonverbally to adults and peers but when frustrated, sad, or angry the student's ability to engage verbally decreased (id.).

With regard to academics, the December 2009 Rebecca School progress report shows the student demonstrated average decoding and word recognition skills when motivated and engaged (Dist. Ex. 5 at p. 4). In the area of reading comprehension, the student retold events in a story but exhibited difficulty with more complex vocabulary and inferential thinking (id.). According to the report, the student read in a quiet volume and frequently did not exhibit a range of affect (id.). With respect to mathematics skills, the student subtracted numbers one through ten and solved additional problems using higher numbers (id. at p. 5). In addition, the student identified coin names and values and demonstrated basic measurement skills (id.).

Next, the December 2009 Rebecca School progress report contained information regarding the student's sensory needs and fine and gross motor skills (Dist. Ex. 5 at pp. 6-7). The report indicated the student received three 30-minute sessions per week of OT to address her needs in the areas of sensory processing, sensory modulation skills, motor planning, visual motor/perceptual skills, and fine and gross motor skills (id. at p. 6). Specifically, to address the student's sensory regulation needs, the student engaged in many sensory activities involving vestibular, proprioceptive, and tactile input (id. at p. 7). The report noted the student continued to increase her ability to interact with peers for longer amounts of time and her peers motivated her (id.). With respect to motor skills, the student followed a five-step obstacle course with minimal to moderate verbal cues regarding sequencing (id.). The report also reflected that the student made some letter reversals during handwriting activities (id.).

Further, the December 2009 Rebecca School progress report indicated that the student received an individual and group session of speech-language therapy to address receptive, expressive, and pragmatic language skills (Dist. Ex. 5 at pp. 7-8). The report indicated the student was organized and maintained attention, interacted during most of the school day and only experienced brief moments of dysregulation when she had difficulty interpreting others intentions (id. at p. 8). The report reflected the student followed up to three-step directives within a context and sequenced up to five pictures (id.). The reported noted that the student's expressive language skills were a relative strength and at an age-appropriate level when the student was regulated (id.). The report also indicated the student attended two 45-minute sessions per week of counseling to assist the student with regulation, attention, expression of emotions, and to explore her ideas and emotions (id.).

Given that the March 2010 CSE convened for the student's annual review, rather than an initial evaluation or reevaluation, the CSE was not automatically required to conduct a classroom observation, social history or medical evaluation of the student (see Dist. Ex. 3 at p. 1).[10] Even so, the district conducted a classroom observation of the student to gather information on the student's needs and abilities (Dist. Ex. 4 at pp. 1-2). The classroom observation, as set forth above, contained information as to how the student engaged in classroom activities, interacted with adults

[10] A student's IEP must be reviewed not less than annually (8 NYCRR § 200.4[f]).

and peers, and performed academically (see id.). It also demonstrated the student's need for individualized support (see Dist. Exs. 3 at pp. 4, 16; 4 at p. 1-2).

The hearing record shows that the March 2010 CSE did not have before it a social history or medical evaluation of the student. With respect to a social history or medical evaluation, as this was not an initial review for the student, none were required (see 8 NYCRR § 200.4[b][4]). Further, the parent provided the March 2010 CSE with medical information regarding the student (see Dist. Ex. 8 at p. 1). Although details of the student's prior attendance at a community school was not discussed at the March 2010 CSE, the CSE was not required to do so (see generally 8 NYCRR §200.4[b]; [f]).

The parent alleges that the April 2007 psychological evaluation used to develop the draft IEP did not contain an assessment of the student's academic abilities and was not sufficient to describe the student's current needs. The April 2007 psychological evaluation assessed the student's cognitive and social/emotional functioning based upon standardized measures (Dist. Ex. 11 at pp. 1-4). As part of the April 2007 psychological report, results of standardized testing indicated the student demonstrated overall average cognitive abilities (id. at p. 1) and included the Behavior Assessment for Children-Second Edition (BASC-2), which yielded an externalizing composite in the at-risk range, an internalizing composite in the clinically significant range, and adaptive skills composite in the average range (id. at p. 4). Although the April 2007 psychological report did not contain standardized assessment results in the area of academics, the December 2009 Rebecca School progress report, as shown above, included comprehensive information regarding the student's academic abilities including specific information regarding the student's needs and abilities in all developmental areas including academic functioning (Tr. pp. 77-78; 94-96; 135-36; see Dist. Exs. 5 at pp. 1-14; 11 at pp. 1-4).

The parent also asserts that the March 2010 CSE developed related services recommendations and annual goals without conducting or reviewing speech-language and OT standardized assessments or consulting with the student's then-current related service providers. The December 2009 Rebecca School progress report contained informational reports from all of the student's then-current related service providers in the areas of speech-language, OT, and counseling (Dist. Exs. 5 at pp. 6-9). It also contained a thorough assessment regarding the student's abilities and progress in the areas of language processing, sensory regulation, fine and gross motor skills, and social/emotional/behavioral functioning (id. at pp. 1-14). Based on the foregoing, the evaluative information considered by the March 2010 CSE was sufficiently comprehensive to identify the student's special education needs and, therefore, there was no denial of FAPE with respect to the parent's procedural evaluative information claims.

B. March 2010 IEP

1. Present Levels of Performance

With respect to the student's present levels of performance, the parent argues that the academic instructional levels recorded in the March 2010 IEP were inaccurate and failed to describe the student's receptive, expressive and pragmatic language needs as well as her needs related to sensory regulation and frustration tolerance.

Among the other 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]).

A review of the evaluative information available to the March 2010 CSE compared to the information included in the present levels of performance in the March 2010 IEP reflects that the March 2010 CSE accurately memorialized the information presented (compare Dist. Exs. 4-5, with Dist. Ex. 3 at pp. 3-7).

The hearing record reflects that the March 2010 CSE developed the present levels of performance in the March 2010 IEP based upon the December 2009 Rebecca School progress report, the December 2009 classroom observation, as well as information from the parent and the student's Rebecca School teacher (Tr. pp. 72-74, 94-97). A careful comparison of the evaluative information and the March 2010 IEP present levels of performance shows a high degree of correlation (compare Dist. Ex. 4-5, with Dist. Ex. 3 at pp. 3-7). For example, the March 2010 IEP contained information from the December 2009 Rebecca School progress report that the student continued to present with difficulties with impulse control, attention, and auditory processing (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 5 at p. 1-2, 8), which was also generally consistent with the December 2009 classroom observation (see Dist. Ex. 4 at pp. 1-2). The March 2010 IEP also reflected the December 2009 Rebecca School progress report indicating the student's ability to transition with ease increased even though she sometimes, continued to struggle with transitions when unable to cope with her emotions (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 5 at p. 1). In addition, and consistent with the December 2009 Rebecca School progress report, the March 2010 IEP indicated the student had difficulty with word recognition, decoding challenging words inaccurately and moving forward with the text without realizing she had decoded incorrectly (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 5 at p. 4).

The parent believes that the information provided by the student's Rebecca School teacher was incorrectly reported in the March 2010 IEP because it indicated a 2.7 grade equivalent in computation skills when the Rebecca School teacher indicated the student performed at an early second grade level (see Parent Ex. E at p. 1). The minutes of the March 2010 CSE meeting and testimony of the special education teacher both indicated the Rebecca School teacher provided the March 2010 CSE with the student's academic instructional levels as follows: decoding (2.7), reading comprehension (2.2), written expression (2.2), computation (2.7), and problem solving (2.2) (Tr. p. 74; Dist. Ex. 8 at pp. 1-2). Regarding the accuracy of the 2.7 grade equivalent in computation, both the minutes of the March 2010 CSE meeting and the March 2010 IEP reflected the same information regarding the student's performance in computation (see Tr. p. 74; Dist. Exs. 3 at p. 3, 8 at pp. 1-2). To the extent the student may perform at an early second grade level rather than a 2.7 grade level, the grade equivalencies were within one-half year of each other. In addition, the March 2010 IEP contained an annual goal in mathematics with several short-term objectives to address the student's mathematic needs (Dist. Ex. 3 at p. 8-9).

With respect to present levels of social/emotional performance, the March 2010 IEP, reflected information from the December 2009 Rebecca School progress report, which indicated the student was usually able to negotiate a solution to the problem; however, when emotionally upset and unable to co-regulate with an adult, she would scream and run into the hallway (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 5 at p. 1). The minutes of the March 2010 CSE meeting reflected that the student's Rebecca School teacher participated in the discussion and agreed with the information contained within the present levels of social/emotional performance (Dist. Ex. 8 at p. 2). Additionally, according to the minutes of the March 2010 CSE meeting, the parent reported to the CSE regarding the student's prescriptions for medications, which the CSE reflected in the IEP in the area of the student's health and physical development (Dist. Exs. 3 at p. 7; 8 at p. 1).

Concerning the student's language needs, the March 2010 IEP indicated the student demonstrated difficulties with auditory processing (Dist. Ex. 3 at p. 3). The March 2010 IEP also contained approximately three annual goals and corresponding short-term objectives related to receptive, expressive, and pragmatic language and well as social and verbal engagement (id. at pp. 11-13). Also, the hearing record shows the student demonstrated an adequate ability to communicate until dysregulated when her communication skills were limited (Dist. Ex. 5 at p. 8). Therefore, when the March 2010 IEP addressed the student's self-regulation needs and ability to cope with her emotions, the March 2010 IEP also indirectly addressed the student's language needs. The March 2010 IEP addressed the student's self-regulation needs in the present levels of performance and annual goals and short-term objectives (Dist. Ex. 3 at pp. 3-4, 10-11). The present levels of performance identified in detail the student's sensory regulation and social/emotional needs, which were the student's primary needs and related to the student's language needs (see Dist. Ex. 3 at pp. 3-4). For example, the March 2010 IEP indicated that the student experienced frustration but would often co-regulate with an adult (Dist. Ex. 3 at p. 4). The March 2010 IEP contained four annual goals related to sensory and emotional regulation, which again would in turn address the student's language needs (id. at pp. 10-11). In summary, the March 2010 CSE identified the student's needs related to language as well as sensory and emotional regulation by including information in the present levels of performance and addressing such needs in the annual goals and short-term objectives (id. at pp. 3-4, 10-11).

Based on the above, the March 2010 IEP described the student's present levels of performance adequately and accurately reflected evaluation results and incorporated information directly from the December 2009 Rebecca School report, which was also consistent with the December 2009 classroom observation, as well as the input of March 2010 CSE participants. Accordingly, the IHO did not err in finding that the March 2010 IEP adequately reflected the student's then current levels of performance, including the student's academic, management, social/emotional, health and physical needs.

2. Annual Goals

The parent argues that the annual goals included in the March 2010 IEP were insufficient to meet the student's needs, were not measureable and lacked baselines. For the reasons that follow, a review of the evidence in the hearing record shows that the annual goals in the March 2010 IEP targeted the student's identified areas of need.

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

Here, the March 2010 IEP included approximately 13 annual goals and 43 short-term objectives to address the student's identified needs in the areas of reading, math, sensory regulation, behavior, social/emotional functioning, language processing, and motor skills (Dist. Ex. 3 at pp. 8-13). According to the district special education teacher, the March 2010 CSE utilized the goals from the December 2009 Rebecca School progress report to draft the IEP annual goals and short-term objectives by modifying the goals based on input from the parent and the student's Rebecca School teacher to address the student's academic, sensory processing, social/emotional/behavioral, language, and motor needs (Tr. pp. 103-04). Additionally, the district special education teacher testified that the March 2010 CSE developed the related service goals based upon those written by the related service providers from the Rebecca School and modified them based on input from the parent (Tr. pp. 104-05).

The March 2010 IEP annual goals and short-term objectives reflected the areas of need as identified in the present levels of performance (see Dist. Ex. 3 at pp. 3-4, 8, 10-11). For example, the present levels of performance described the student's difficulties with decoding challenging words, and the March 2010 IEP contained corresponding annual goals and short-term objectives in the area of decoding (see Dist. Ex. 3 at pp. 3, 8). Further, the present levels of performance described the student's difficulties with coping skills related to her feelings, and the March 2010 IEP contained several annual goals and short-term objectives to address the student's limited coping skills and ability to function during the day with peers and during activities (Dist. Ex. 3 at pp. 3-4, 10-11).

The district special education teacher testified that the annual goals and short-term objectives were measurable and addressed the student needs related to academics and social/emotional functioning (Tr. pp. 100-01, 105-06). A careful review of the annual goals and short-term objectives reveals that each short-term objective included an evaluative criteria (i.e., with 80 percent accuracy, in 8/10 trials) (Dist. Ex. 3 at pp. 8-13). In view of the foregoing, the hearing record shows that the annual goals contained within the student's March 2010 IEP appropriately targeted the student's identified areas of need and the IHO did not err in finding that the goals were both appropriate and measurable (see P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013] ["Courts have been reluctant to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress"]; see also D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F., 2013 WL 4495676, at *18-*19; D.B., 2013 WL 4437247, at *13-*14; Tarlowe, 2008 WL 2736027, at *9). Accordingly, the hearing record does not support a finding that the district denied the student a FAPE for the 2011-12 school year on this basis.

3. Special Factors - Interfering Behaviors

Next, turning to the parent's assertion that the March 2010 CSE's failure to conduct an FBA, and its development of a BIP based on the student's previous IEP, resulted in a failure to offer the student a FAPE, the hearing record indicates that the March 2010 IEP appropriately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; F.L. v. New York City Dep't of Educ., 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] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed /publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

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

(8 NYCRR 200.1[r]).

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

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

> (i) the student exhibits persistent behaviors that impede his
>
> (ii) or her learning or that of others, despite consistently
>
> (iii) implemented general school-wide or classroom-wide
>
> (iv) interventions; (ii) the student's behavior places the student
>
> (v) or others at risk of harm or injury; (iii) the CSE or CPSE
>
> (vi) is considering more restrictive programs or placements as
>
> (vii) a result of the student’s behavior; and/or (iv) as required
>
> pursuant to"8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student’s behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR

200.22[b][4]).[11] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed /formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In the instant case, the hearing record reflects that the March 2010 CSE did not conduct a functional behavioral assessment (FBA) but did develop a BIP for the student (see Tr. pp. 149; Dist. Ex. 3 at p. 6). The parent alleges that the lack of an FBA denied the student a FAPE, as the BIP on the March 2010 IEP was identical to that of the student's previous school year IEP. Although the BIPs were the same, the CSE developed the BIP included in the March 2010 IEP, based on current evaluative information and input from the student's Rebecca School teacher (Tr. pp. 110-11; see Dist. Ex. 3 at p. 6; Parent Ex. G at p. 16). The testimony of the district special education teacher indicates that, the district school psychologist and the Rebecca School teacher developed a draft BIP based upon the December 2009 classroom observation, teacher interview, and the December 2009 Rebecca School progress report (Tr. pp. 110-11). According to the district special education teacher, she read the BIP aloud and the CSE members, including the Rebecca School teacher, discussed the BIP included in the March 2010 IEP during the CSE meeting (Tr. pp. 110-11, 220). The district special education teacher testified that the parent and Rebecca School teacher did not express concerns regarding the BIP (Tr. p. 220).

The BIP included on the March 2010 IEP identified the behaviors that interfered with the student's learning as emotional dysregulation (screaming, threatening, laying on the floor, attempts to flee the classroom), aggressive behaviors towards peers (kicking, hitting, screaming), failure to follow teacher directives, avoidance of challenging tasks and peers interactions, and leaving the room to avoid tasks (Dist. Ex. 3 at p. 6).

The goals of the BIP were to maintain regulation within a group setting 50 percent of the time, eliminate aggressive behaviors and attempts to flee the building, follow teacher directives 50 percent of the time, engage in challenging group activities, and transition to therapies with minimal support (Dist. Ex. 3 at p. 6).

The March 2010 BIP also contained strategies to address the behaviors including problem solving to better understand the consequences of her words and actions, rating the intensity of her emotions on a scale of 1 to 10, motivating the student to return when the she runs from the classroom, pretend play to recreate challenging situations to help her processing, and advanced preparation before engaging in novel tasks (Dist. Ex. 3 at p. 6). According to the BIP, in order to

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

address target behaviors, the student would receive support from the 1:1 crisis management paraprofessional, counseling, OT, speech-language therapy, and the special education teacher (id.).

In addition March 2010 IEP provided additional behavioral interventions and supports. It described the student's interfering behaviors including her difficulties related to impulsivity, attention, transitions, emotional coping skills, and running into the hallway (Dist. Ex. 3 at pp. 3-4). To address the behaviors that interfered with the student's learning, the March 2011 IEP included annual goals and short-term objectives designed to improve the student's coping and communication skills (id. at pp. 10-13). The IEP also included annual goals and short-term objectives to improve the student's ability to self-regulate and engage socially with peers including improving her emotional regulation skills with the assistance of the 1:1 crisis management paraprofessional (id. at pp. 10-11).

The March 2010 IEP contained accommodations and strategies that provided support to address the student's behaviors including the following: sensory and body breaks, visual aids and prompts, avoidance of over-stimulation, redirection, behavior checklist, breaks, help with transitions, and use of high language affect and humor to assist with de-escalation (Tr. pp. 97-100; Dist. Ex. 3 at pp. 3-4). The March 2010 CSE also recommended that the student receive OT, counseling, speech-language therapy to work on improving her self-regulation, emotional and social coping skills, and functional communication skills as well as the services of a 1:1 crisis management paraprofessional to assist with the student's interfering behaviors (Tr. pp. 108-09, 229-31; Dist. Ex. 3 at p. 16). Thus, the hearing record reflects, that together with the BIP, the March 2010 IEP provided additional supports to address the student's behavioral needs.

Accordingly, the March 2010 CSE developed an appropriate BIP based upon the student's well documented behavioral needs, recommended the services of 1:1 crisis management paraprofessional, and provided accommodations and supports within the IEP including behaviorally based annual goals and short-term objectives. Thus, the district's failure to conduct an FBA in this case does not support a finding that the district failed to offer the student a FAPE.

4. 12:1+1 Special Class Placement

Turning next to an analysis of the parent's claim that the 12:1+1 special class placement recommended in the March 2010 IEP was inappropriate for the student, State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]).

Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (8 NYCRR 200.1[ww][3][i][d]).

A review of the hearing record indicates that the March 2010 CSE recommended a 12:1+1 special class placement for the student (Dist. Ex. 3 at p. 1). In reaching the decision to recommend

a 12:1+1 special class placement, the special education teacher testified that the March 2010 CSE considered and discussed the student's evaluative information and information provided by individuals attending the CSE meeting including the parent and Rebecca School teacher (Tr. pp. 72-74, 94-97). According to the testimony of the district special education teacher and minutes of the CSE meeting, the Rebecca School teacher requested an 8:1+1 special class for the student (Tr. p. 92; Dist. Ex. 8 at p. 2). The testimony of the district special education teacher, and the March 2010 IEP, indicate that the CSE discussed and considered several placement options for the student including a general education setting and a 12:1 special class in a community school, but believed these placements lacked the support required to address the student's needs (Tr. pp. 117-19; Dist. Ex. 3 at p. 15). The March 2010 CSE also considered a 12:1+1 in a community school without the support of a 1:1 behavior management paraprofessional but due to the student's behavior, determined the student required the 1:1 support of a crisis paraprofessional (Tr. pp. 117-19; Dist. Ex. 3 at p. 15). The CSE also considered 12:1+1, 8:1+1, and 6:1+1 special classes in a specialized school but believed it would be too restrictive for the student as these placements would deny her access to non-disabled peers (Tr. pp. 117-19; Dist. Ex. 3 at p. 15).

The district special education teacher testified that a 12:1+1 special class in a community school would challenge the student academically and allow her to reach her potential with supports and provide her with access to non-disabled peers (Tr. pp. 119, 121).

The student's abilities and progress, as indicated in the evaluative documents before the March 2010 CSE, support that a 12:1+1 special class in a community school, with a 1:1 crisis paraprofessional was appropriate to address the student's needs. The December 2009 Rebecca School progress report and December 2009 classroom observation reviewed by the March 2010 CSE demonstrated the student participated in group activities, had improved regarding behavior and transitions, and responded to staff intervention regarding self-regulation (Dist. Exs. 4 at pp. 1-2; 5 at pp. 1-2). The report also indicated the student demonstrated progress regarding interacting and communicating with adults and peers (Dist. Ex. 5 at p. 10). According to the Rebecca School progress report, the student was "related, organized and able to attend and interact for most of the school day" (id.at p. 8).

With respect to the parent's assertion that the CSE's recommendations lacked individual support for the student, the March 2010 CSE recommended a 1:1 crisis management paraprofessional to address the student's needs related to self-regulation, behavior, coping skills, and academics (Tr. pp. 108-09; Dist. Ex. 3 at p. 16). Additionally, to address the student 's needs for individualized supports related to language skills, coping skills, and self-regulation, the March 2010 CSE recommended a combination of individual and small group related services consisting of two 30-minute sessions per week of speech-language therapy in small group, two 30-minute sessions per week of counseling in a small group, three 30-minute sessions per week of individual counseling, and three 30-minute sessions per week of individual occupational therapy (OT) (Tr. pp. 229-31; Dist. Ex. 3 at p. 16). In addition, a 12:1+1 special class setting itself would provide the student with individualized support.

The hearing record supports the IHO's finding that a 12:1+1 special class setting in conjunction with the individual supports provided by a 1:1 crisis management paraprofessional and the individual and small group based related services provided were sufficient to address the

student's needs related to academics, sensory regulation, social/emotional/behavioral functioning, language processing, and motor skills.

5. Transition Plan

The parent alleges that the March 2010 IEP fails to provide the student with sufficient transition supports as she moved into a larger class setting.[12]

The hearing record shows that the IEP addressed the student's transition related needs. For example, the 2009 Rebecca School progress report indicated that the student's ability to transition to a new activity within the classroom and from the classroom to other areas of the school building had improved but she continued to struggle with transitions especially when feeling angry, sad, frustrated, and confused (Dist. Ex. 5 at p. 1). The district special education teacher testified that the student experienced anxiety surrounding transitions especially regarding challenging tasks (Tr. p. 112).

To address the student's transition needs, the March 2010 IEP, including the BIP, identified the student's needs related to transition and contained strategies to address them (Dist. Ex. 3 at p. 6). The March 2010 IEP indicated the student continued to demonstrate difficulties with transition although she had improved in transitioning between classroom activities and to activities in other areas of the school building (id. at p. 3). According to the BIP, one of the student's goals was to transition to therapy sessions with minimal support (id. at p. 6). As previously noted, the BIP contained a behavioral strategy to address the student's transition related needs, to provide the student with "[a]dvanced preparation before engaging in novel tasks and activities" (id.). The March 2010 IEP also provided the student the support of a 1:1 crisis management paraprofessional to assist the student with transitions between activities, self-regulation, and with coping skills (Tr. pp. 108-09). The March 2010 IEP also provided the student with annual goals and short-term objectives to address transition needs by targeting the student's ability to self- regulate and cope with her emotions, which often triggered her difficulties with transitions (Dist. Ex. 3 at pp. 10-11). Additionally, the March 2010 IEP included accommodations and strategies to assist with transitions, as noted above, such as "help with transitions" and use of high affect and humor to assist with transitions (id. at p. 4). Based on the foregoing the hearing record demonstrates that the March 2010 IEP addressed the student's transition related needs.

6. 12-Month School Year Program/Related Services

The parent alleges that the CSE's recommendation of a 10-month academic program with the provision of 12-month related services was inappropriate. However, the hearing record does not support this claim. The district special education teacher testified that the student required a 12-month program of related services to participate in class and learn to her potential but did not require a 12-month academic component (Tr. pp. 210-11). The December 2009 Rebecca School

[12] Notably, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).

progress report, reviewed by the March 2010 CSE, reflected that the student was making progress in all areas. The December 2009 Rebecca School progress report also indicated that the student demonstrated progress in academics, self-regulation, language, and social/emotional/behavioral functioning (Dist. Ex. 5 at pp. 1, 7, 10). For example, the report indicated the student increased her ability to communicate with adults and peers (id. at pp. 1, 10). The report also indicated the student was increasing her ability to self-regulate and engage with peers, interacting for longer periods of time (id. at pp. 1, 7). In addition the report noted that, overall the student has improved upon her skills in reading and mathematics (id. at pp. 4-5).

As set forth above, the hearing record reflects that the student exhibited progress across all areas with no evidence of regression. Although the director from the Rebecca School, who was not present for the March 2010 CSE meeting, testified that she believed the student required a 12-month program because a "two-month break could have definitely caused regression in skills for her" (Tr. p. 392), sufficient evidence in the record supports the recommendation that the student did not require a 12-month academic program given the related services supports that the March 2010 IEP provided to the student over the summer months.

C. Assigned Public School Site

The parent's assigned school claims must also fail. 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.

Challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 - *16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, *15 [W.D.N.Y. Sept. 26, 2012][finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore missed placed], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 12, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement the school district may not rely on evidence that a child would have had a specific teacher or specific aid to support otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continue to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ.,

2013 WL 1234864, at *11 - *16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in a school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]); as well as 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, C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; VS v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 9, 2014]; it is necessary to depart from those cases. The Second Circuit, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally place the student prior to IEP implementation, has determined "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K., 2013 WL 2158587, at *4), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F.., 2013 WL 4495676, at *26; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because '[t]he appropriate inquiry is into the nature of the program actually offered in the written plan']). In view of the foregoing, the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

In this case, the parent rejected the IEP prior to the time that the district became obligated to implement the student's IEP (Parent Ex. C). The district was not required to establish that the assigned school would have been appropriate upon the implementation of his IEP. The issues raised and the arguments asserted by the parent with respect to the assigned public school site are

speculative, and, as indicated above, a retrospective analysis of how the district would have executed student's IEP at the assigned public school site is not an appropriate inquiry (see K.L., 2013 WL 3814669 at *6). Therefore, the findings of the IHO, that the district offered the student a FAPE for the 2010-11 school year, must be affirmed.

VII. Conclusion

Having determined that the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Rebecca school was appropriate or whether equitable considerations supported the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED

THE CROSS-APPEAL IS DISMISSED

Dated: Albany, New York
August 29, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER