The University of the State of New York

The State Education Department
State Review Officer
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No. 13-032

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

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for petitioner, Cynthia Sheps, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Jean Marie Brescia, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse them for their son's tuition costs at the McCarton School (McCarton) as well as the cost of the student's home-based program for the 2011-12 school year. The parents cross-appeal the IHO's decision to the extent that he did not adjudicate a number of claims raised in the due process complaint notice in their favor. The appeal must be sustained. 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior administrative appeal related to the 2006-07 school year, and as a result, the parties' familiarity with the student's earlier educational history and prior due process proceedings is assumed and will not be repeated here in detail (Application

of the Dep't of Educ., Appeal No. 07-120).[1] Briefly, the student has been characterized as hardworking, cooperative, and having demonstrated a willingness to learn (Tr. p. 61). The student has experienced deficits with respect to language and communication and exhibits difficulties with regard to his social/emotional needs and behavior (Tr. p. 62). He also has exhibited difficulty with regard to his ability to focus (Tr. pp. 62-63). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Tr. pp. 72-73; Dist. Ex. 2 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

At the time of the impartial hearing, the student was enrolled in McCarton and was receiving home-based services that relied on applied behavioral analysis (ABA) techniques (Tr. pp. 301, 506-07; Parent Exs. K; V).[2, 3] On June 15, 2011, the CSE convened for the student's annual review and to formulate his IEP for the 2011-12 school year (Dist. Ex. 2). For the 2011-12 school year, the June 2011 CSE recommended a 12-month placement for the student in a 6:1+1 special class in a specialized school with related services comprised of four 45-minute sessions per week of 1:1 occupational therapy (OT), one 45-minute session of OT per week in a group of five, and five 45-minute sessions per week of 1:1 speech-language therapy (id. at pp. 1-2, 19).[4] Additionally, the June 2011 CSE developed 12 annual goals and 45 corresponding short-term objectives related to the student's primary areas of need (id. at pp. 7-16). The June 2011 CSE also recommended the provision of 1:1 behavior management paraprofessional services to the student on a full-time basis, and upon a determination that the student exhibited behaviors that seriously interfered with instruction, the June 2011 CSE also developed a behavioral intervention plan (BIP) and attached it to his IEP (id. at pp. 4-5, 19).

In a final notice of recommendation (FNR) to the student's mother dated June 16, 2011, the district summarized the June 2011 CSE's program recommendation for the student and advised her of the location of the particular public school site to which the student had been assigned for the 2011-12 school year (Dist. Ex. 9).

A. Due Process Complaint Notices

By due process complaint notice dated June 30, 2011, the parents alleged, among other things, that the district had failed to furnish them with a written IEP for the student and further advised the district that they planned to enroll the student in McCarton for the 2011-12 school year (Parent Ex. A at pp. 2, 7). On July 8, 2011, the student's mother visited the assigned public school

[1] By decision dated July 24, 2008, an IHO directed the district to reimburse the parents for the student's tuition at McCarton for the 2007-08 school year (Parent Ex. B). At the commencement of the impartial hearing, the parties agreed that the unappealed July 24, 2008 IHO decision formed the basis for the student's pendency (stay-put) placement (Interim IHO Decision at p. 2; Tr. pp. 3-4).

[2] The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 148-49, 345-46; see 8 NYCRR 200.1[d], 200.7).

[3] Although the student was receiving between 15-16 hours per week of home-based ABA instruction at the time of the impartial hearing, in this proceeding, the parents only seek an award of reimbursement for the cost of ten hours per week of home-based ABA instruction (Tr. pp. 518-19, 601; Parent Exs. C at p. 7; G at p. 1).

[4] The June 2011 CSE terminated the provision of two weekly 30-minute sessions of speech-language therapy in a group of six (Dist. Ex. 2 at p. 19).

site that was listed in the June 2011 FNR; however, upon her arrival, she discovered that the school was under construction and that neither students nor personnel were in attendance at that time (see Tr. p. 583; Parent Ex. G at p. 1; see Parent Ex. H).

In a letter to the district dated July 8, 2011, the student's mother indicated that the assigned public school site listed in the June 2011 FNR was under construction (Parent Ex. G at p. 1). The student's mother further advised that under the circumstances, the student would continue to attend McCarton for the 2011-12 school year (id.). Furthermore, the student's mother informed the district that she planned to seek an award of reimbursement for the student's tuition at McCarton, in addition to an award of reimbursement for ten hours per week of ABA instruction (id.).

On September 27, 2011, the student's mother again visited the assigned public school site that was listed in the June 2011 FNR (Tr. p. 585; Parent Ex. F at p. 1). By letter to the district dated September 29, 2011, the student's mother indicated that she had visited the assigned public school site, and she listed the reasons why she deemed it to be an inappropriate educational setting for the student (Parent Ex. F at p. 1). The student's mother reiterated that she planned to enroll the student in McCarton for the 2011-12 school year and that she also intended to request reimbursement from the district for the cost of his tuition and related services (id. at pp. 1-2).

In an amended due process complaint notice dated September 20, 2011, the parents requested an impartial hearing (Parent Ex. C). The parents due process complaint contained at least enumerated 60 allegations of defects related to the provision of a free appropriate public education (FAPE) to the student and with respect to the appropriateness of the June 2011 IEP and the assigned public school site (id. at pp. 2-7). Among the alleged defects, the parents argued that: (1) the district did not conduct a "triennial evaluation" of the student; (2) the district did not meaningfully consider the student's need for assistive technology; (3) the district failed to assess the student for an appropriate educational methodology; (4) the district failed to meaningfully consider the student's private evaluations in drafting the June 2011 IEP; (5) the parents were not in receipt of the June 2011 IEP; (6) the 6:1+1 special class with 1:1 paraprofessional services in the June 2011 IEP and the assigned public school site were not reasonably calculated to provide the student with meaningful educational benefits; (7) the district did not address and accommodate the student's need for 1:1 support, nor did it provide him with consistent 1:1 teaching support throughout the school day; (8) the district failed to comply with State and federal guidelines for the provision of individualized parent counseling and training when developing the June 2011 IEP; (9) the district failed to conduct a functional behavioral assessment (FBA) of the student; (10) the district failed to prepare an appropriate BIP for the student, despite his interfering behaviors; (11) the district failed to develop a transition plan for the student; (12) the district failed to offer the student any extended-day or home-based programming; (13) the district failed to recommend the provision of special education transportation to the student; (14) the students in the proposed classroom were grouped primarily by age and not by their functioning levels and/or classifications; and (15) the assigned public school site could not fulfill the student's related services mandates (id. at pp. 2-7).

Furthermore, the parents alleged that the student's unilateral private placement comprised of McCarton and his home-based services was appropriate to address the student's special education needs (Parent Ex. C at p. 7). The parents also maintained that they provided the district with appropriate notice and that they cooperated with it in good faith; therefore, no equitable

considerations existed that could preclude or diminish an award of relief (id.). As a remedy, the parents requested, among other things, tuition reimbursement for McCarton for the 2011-12 school year, in addition to reimbursement for the costs of ten hours per week of home-based ABA services (id.).

B. Impartial Hearing Officer Decision

On August 9, 2011, an impartial hearing convened and following seven, nonconsecutive days of proceedings, concluded on June 21, 2012 (Tr. pp. 1-617). By decision dated January 28, 2013, upon a finding that the district did not offer the student a FAPE during the 2011-12 school year, the IHO directed the district to reimburse the parents for the cost of the student's tuition at the McCarton School, in addition to the cost of ten hours per week of home-based ABA services (IHO Decision at pp. 13-15, 17). Regarding the provision of a FAPE to the student during the 2011-12 school year, the IHO found, in part, that although the district relied on the evaluative data prepared by McCarton personnel in order to create the June 2011 IEP, the district did not offer the student 1:1 programming similar to what the student received at McCarton (id. at p. 12). Additionally, the IHO found that the BIP attached to the June 2011 IEP was deficient, and further indicated that although it was "adopted entirely from years of work that [McCarton] performed with the Student," he also found that the district had stripped the BIP of the content that McCarton personnel had deliberately developed, which rendered the BIP "virtually useless outside the context of the intensive ABA environment" (id.). He further determined that no one found fault with the ABA instruction provided at McCarton and that there was no opinion to support its removal (id.). In addition, while the IHO noted testimony from the special education teacher of the proposed classroom that the student was appropriate for group instruction, he also indicated that the student could expect between five to seven hours of 1:1 teaching from either the teacher or the paraprofessionals (id.). Lastly, the IHO found that the lack of a transition plan contributed to a denial of a FAPE to the student (id.).

Regarding the appropriateness of the parents' unilateral private placement, the IHO determined that McCarton constituted an appropriate educational setting for the student, in part, because the student was making progress and appropriately grouped with other students (IHO Decision at pp. 14-15). The IHO relied on observations by the district's social worker beginning in a gym class that the student seemed comfortable and happy, benefited from individualized prompting to keep up with instruction, was able to transition back to his classroom, was acquainted with his routines and that he seemed motivated to do his academic assignments (id. at p. 13). The IHO also concluded that the student's home-based ABA program was also appropriate, because it encompassed life skills which the student required in order to become more independent (id.). Lastly, the IHO did not find any equitable considerations that barred the parents' request for relief (id. at p. 17).

IV. Appeal for State-Level Review

The district appeals, and argues, among other things, that it offered the student a FAPE during the 2011-12 school year, that the student's home-based program was neither necessary or appropriate for him, and that equitable considerations should bar or diminish the parents' request for relief. In support of its position that it provided the student with a FAPE during the 2011-12 school year, the district raises the following claims: (1) the absence of a transition plan from the

June 2011 IEP did not rise to the level of a denial of a FAPE to the student; (2) the district had sufficient information regarding the student's social/emotional needs in order to develop an appropriate BIP, without a formal FBA; (3) a 6:1+1 special class placement combined with the provision of 1:1 behavioral management paraprofessional services was appropriate to meet the student's special education needs; (4) the provision of a home-based program was not necessary in order to offer the student a FAPE; (5) the inclusion of ABA instruction on the June 2011 IEP or within the proposed special 6:1+1 classroom was not necessary in order to provide the student with a FAPE; (6) the June 2011 CSE developed appropriate goals and short-term objectives to address the student's identified special education needs; (7) the omission of the provision of parent counseling and training from the June 2011 IEP did not rise to the level of a denial of a FAPE to the student; (8) the district afforded the parents a meaningful opportunity to participate in the development of the June 2011 IEP; and (9) any alleged delay in mailing the June 2011 IEP to the parents did not amount to a denial of a FAPE to the student. With respect to the appropriateness of the assigned public school site, the district argues that any findings with respect to the appropriateness of the assigned public school sites are speculative, because the parents never availed themselves of a district public school. In any event, the district further maintains that had the student enrolled in a district school, the June 2011 IEP would have been appropriately implemented.

Next, although the district does not appeal the IHO's finding that McCarton was an appropriate educational setting to address the student's special education needs, the district contends that the provision of a home-based program was not necessary or appropriate for the student to make progress during the school day at McCarton. The district further alleges that to the extent that the IHO made an award for unspecified related services in addition to the cost of the student's home-based ABA programming, such an award of relief was unduly vague and should be annulled. Lastly, the district asserts that in this instance, equitable considerations should preclude an award of relief, because the parents never seriously considered enrolling the student in a district public school. Moreover, the district argues that the parents failed to afford the district adequate or appropriate notice of their concerns surrounding the June 2011 IEP. For relief, the district requests an order annulling the IHO's decision.

The parents submitted an answer in which they admit and deny the various allegations raised in the petition. The parents also cross-appeal the IHO's decision on the basis that additional matters, raised in their due process complaint notice and undecided by the IHO, support a finding of a denial of a FAPE.

More specifically, the parents allege that the district denied the student of a FAPE, that the student's private home-based ABA program was both necessary and appropriate and that equitable considerations favor their claim for relief. The parents contend that the district engaged in impermissible predetermination, to the extent that the June 2011 CSE failed to consider the student's need for a home-based program or fully discuss his need for other special education services or educational methodologies. The parents further submit that the district's failure to timely furnish them with a written IEP resulted in a denial of a FAPE, because it hampered their ability to make an informed decision regarding the student's program. Next, the parents argue that the district relied solely on the documentation gathered by McCarton and did not conduct its own testing. The parents further assert that the district failed to conduct a formal FBA of the student, and ignored the procedures outlined in its Standard Operating Procedures Manual (SOPM).

Additionally, they claim that the district's failure to prepare a formal FBA of the student constituted a serious procedural error that amounted to a denial of a FAPE to the student. As a result, the parents further allege that the June 2011 CSE did not discuss the resultant BIP, which they maintain was inappropriate to address the student's behavioral needs. Next, the parents claim that the June 2011 CSE's failure to expressly include the provision of parent counseling and training on the IEP amounted to a denial of a FAPE. The parents also argue that the June 2011 CSE failed to make a provision on the IEP for assistive technology, and that the evidence gathered at the impartial hearing did not reflect that the assigned public school site was "ready, willing and able" to address the student's assistive technology needs.

Regarding the assigned public school site, the parents allege that the hearing record does not demonstrate that the district offered the student a public school capable of implementing the June 2011 IEP, because the assigned public school site listed on the June 2011 FNR was closed and under construction during summer 2011. In any event, the parents argue that the student would not have been appropriately grouped with other students in the proposed 6:1+1 special classroom. The parents further contend that the special education teacher of the proposed 6:1+1 special class did not take her students out into the community, which, in turn, limited her students' ability to work on life skills and their independence. Additionally, the parents allege that it is not appropriate for the district to assign the student the same 1:1 paraprofessional, as opposed to rotating staff members to work with him on an individual basis. Next, the parents assert that the assigned public school site has a history of difficulty fulfilling students' related services mandates prescribed by their IEPs. The parents also raise concerns regarding the provision of special education transportation at the assigned public school site, because it was omitted from the placement referral form and from the June 2011 FNR.

The parents also maintain that the instant matter has been rendered moot, because they have received all of the requested relief in accordance with the student's pendency entitlements. Next, the parents assert that despite notice of the defects surrounding the June 2011 IEP, the district failed to cure those defects.[5] The parents also request that I recuse myself from this matter on the basis that the Office of State Review is "insufficiently staffed," and unable to render a decision in accordance with the guidelines set forth by the IDEA and State regulations. The parents also request that an adverse inference be drawn against the district due to its failure to comply with their subpoenas' directives.

[5] State regulation provides that within 15 days of the receipt of the due process complaint notice, the district shall convene with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, which shall include a representative of the school district who has decision-making authority on behalf of the school district and may not include an attorney of the school district unless the parents are accompanied by an attorney, where the parents discuss their complaint, and the school district has an opportunity to resolve that complaint (8 NYCRR 200.5[j][2][i]). Where the parties are unable to reach agreement during the resolution period, the impartial due process hearing may occur, which was the case in the instant matter (8 NYCRR 200.5[j][2][v]). Notwithstanding the parents' complaint that the district failed to cure the alleged defects of which they had received notice during the ten-day notice period or during the resolution session, there is no indication in the hearing record that the district's failure to remedy the alleged defects at that time constituted a procedural violation that impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

As relief, the parents request an order dismissing the instant appeal, and seek additional findings in their favor that the district failed to offer the student a FAPE during the 2011-12 school year.

The district submitted an answer to the cross-appeal. With respect to the issues raised in the parents' cross-appeal, the district submits that the parents have waived or abandoned any claims raised in their cross-appeal that were not argued in their closing brief or addressed by the IHO. Regardless of this assertion, the district makes the following allegations in response to claims enumerated in the cross-appeal: (1) the June 2011 CSE did not predetermine the June 2011 IEP; (2) the June 2011 CSE provided the parent with ample opportunity to participate in the development of the student's IEP; (3) the timing of the delivery of the June 2011 IEP did not result in a denial of a FAPE to the student; (4) the June 2011 CSE had before it adequate evaluative data upon which to base the IEP; (5) the June 2011 IEP did not require the explicit inclusion of 1:1 ABA instruction in order to provide the student with a FAPE; (6) home-based services were not necessary in order to provide the student with a FAPE; (7) the June 2011 CSE's failure to conduct a formal FBA did not rise to the level of a denial of a FAPE to the student; (8) the June 2011 CSE's failure to include parent counseling and training on the IEP did not rise to the level of a denial of a FAPE; (9) the student was entitled to the provision of assistive technology and special education transportation; (10) the district notified the parents of the assigned public school site in a timely manner; (11) the student would have been functionally grouped for instructional purposes within the proposed 6:1+1 special class; (12) the student would have received his related services mandate at the assigned public school site; and (13) personnel employed by the assigned public school site were qualified to implement the June 2011 IEP.

Additionally, the district notes that because the parties jointly attempted resolution of this matter, the parents cannot argue on appeal that the district failed to remedy alleged defects surrounding the June 2011 IEP. The district also argues that the parents' request for recusal has no basis in the hearing record and should not be entertained. Next, the district claims that the instant matter is not moot, because the IHO did not make a provision for the student's home-based program in the March 26, 2012 order on pendency. Lastly, with respect to the parents' request that an adverse inference be drawn against the district for want of compliance with the subpoenas, the district maintains that the parents did not seek an adverse inference at the impartial hearing, and therefore, have failed to properly preserve this request for review. Regardless, the district maintains that the hearing record does not support the parents' request for an adverse inference.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits

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

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

Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Preliminary Matters

1. Parents' Request for Recusal

Regarding the parents' request that I recuse myself, I note that State regulations provide that an SRO must have no personal, economic, or professional interest in the hearing which he or she is assigned to review (8 NYCRR 279.1[c][4]) and must be "independent of, and may not report to, the office of the State Education Department which is responsible for the general supervision of educational programs for children with disabilities" (8 NYCRR 279.1[c][3]). An SRO shall

recuse himself or herself and transfer the appeal to another SRO if he or she was substantially involved in the development of a state or local policy challenged in the hearing; was employed by a party or a party's representative in the hearing; or engaged in the identification, evaluation, program or placement of the student who is the subject of the hearing (8 NYCRR 279.1[c][4]).[6] The statutory and regulatory schemes for state-level review in New York were held not to violate federal law (Bd. of Educ. of Baldwin Union Free Sch. Dist. v. Sobol, 160 Misc. 2d 539, 543-44 [Sup. Ct. Nassau Co. 1994]).

Here, I am not personally familiar with the parties in this case, nor do I have any personal, economic, or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Moreover, the New York State Education Department is not a party in this matter. To the extent that the parents' counsel opines that I am biased in favor of the district, they offer no evidence to support such an assertion. Moreover, with regard to allegations that decisions from the Office of State Review have been untimely due to staffing, such contentions are not relevant to a recusal inquiry. Additionally, recusal in such a context makes little sense insofar as it would only have the opposite effect and exacerbate any delay. Having given the parents' request due consideration, I find that I am able to impartially render a decision and that the provisions of 8 NYCRR 279 do not require recusal in this instance.

2. Parents' Request for an Adverse Inference against the District

Next, with respect to the parents' request that an adverse inference be drawn against the district due to noncompliance with January 2012 subpoenas that were issued by the parents' counsel (see Answer and Cross-Appeal Ex. C), I initially note that the IDEA does not "specify what particular remedies, including penalties or sanctions, are available to due process hearing officers or to decision makers in State-level appeals. The specific authority of hearing officers and appeal boards, including the types of sanctions that are available to them, generally will be set forth in State law or regulation" Letter to Armstrong, 28 IDELR 303 [OSEP 1997]. IHOs and SROs may nevertheless assert appropriate discretionary controls over the due process and review proceedings; however, in New York they have not been expressly granted contempt powers (Application of the Bd. of Educ., Appeal No. 02-056; Application of a Child with a Disability, Appeal No. 02-049). In this case, I find that the hearing record was otherwise adequate to for the IHO to understand and address the issues, and that the hearing had already commenced and time for discovery had elapsed by the time the parents raised any non-compliance before the IHO (see 34 CFR 300.512[a][3], [b][1]; 8 NYCRR 200.5[j][3][xii][a]), and there was no evidence that the parents had taken any other action to enforce the subpoenas either at the impartial hearing or since that point. Therefore, I find no abuse of the IHO's discretion in not drawing an adverse or negative inference against the district in this instance, nor do I find it necessary at this juncture direct the district to submit the additional documentation for consideration.

[6] The third criterion for recusal extends to cases in which an SRO has been involved with "other similarly situated children in the school district which is a party to the hearing" (8 NYCRR 279.1[c][4][iii]).

B. CSE Process and Adequacy of the June 2011 IEP

1. CSE Process

In this case, the IHO determined that the district did not offer the student a FAPE during the 2011-12 school year (IHO Decision at pp. 13-14). The IHO failed to address a number of the claims raised by the parents. As explained in greater detail below, a thorough and independent review of the hearing record reveals that at the time that it was created, no procedural or substantive deficiencies existed with respect to the June 2011 IEP that resulted in a denial of a FAPE to the student. Therefore, for the reasons set forth below, the IHO's conclusion that the district denied the student a FAPE during the 2011-12 school year must be reversed.

Turning to the procedural claims surrounding the development of the June 2011 IEP, I will first consider the parties' dispute whether the district afforded the parents a meaningful opportunity to participate in the creation of the student's IEP at the CSE meeting and whether the district engaged in impermissible predetermination of the June 2011 IEP. As set forth in greater detail below, the hearing record demonstrates that the district provided the parents with ample opportunity to participate in the development of the June 2011 IEP and that the district did not predetermine the June 2011 IEP.

To the extent that the parties dispute the amount of parent participation afforded to the parents surrounding the creation of the June 2011 IEP, the hearing record reflects that the student's mother, a district school psychologist, a district special education teacher, a district social worker and an additional parent member attended the June 2011 CSE meeting (Tr. p. 52, see Tr. p. 570; Dist. Ex. 2 at p. 2).[7] In addition, McCarton personnel took part in the June 2011 CSE meeting via telephone, namely, the supervising teacher of the student's classroom, occupational therapist, and speech-language therapist (Tr. pp. 52, 55, 333-34, 372; Dist. Ex. 2 at p. 2).[8] According to the district social worker, the supervising teacher participated for the duration of the June 2011 CSE meeting, while the student's related services providers were both present for a discussion of their respective specialties (Tr. pp. 55, 345). The hearing record demonstrates that the June 2011 CSE meeting lasted one and a half to two hours in length (Tr. p. 56). At the beginning of the June 2011 CSE meeting, the district social worker provided the student's mother with a folder that contained the documentation upon which the meeting was to be based, and the hearing record further reveals that the student's McCarton providers had copies of the "package" that they provided to the June 2011 CSE in addition to a copy of the June 2011 classroom observation conducted by the district social worker (Tr. pp. 56-57). Additionally, as explained below, there is also no evidence to suggest that anyone on the June 2011 CSE precluded the student's mother from participating fully in the meeting (M.W. v. New York City Dep't. of Educ., 2012 WL 2149549 at * 11 [E.D.N.Y., 2012]). Rather, the hearing record further suggests that the district solicited input from the

[7] Although not specified on the June 2011 IEP, the district special education teacher also served in the role of district representative at the June 2011 CSE meeting (Tr. pp. 52-53, 84).

[8] The June 2011 IEP also refers to the participation at the meeting of the student's McCarton "Head Teacher" (Tr. p. 333; Dist. Ex. 2 at p. 2). However, the hearing record indicates that this individual's title is actually "supervising teacher" of the student's classroom, and in that role, she supervises the student's head teacher at McCarton as well as all of the ABA therapists in the classroom (Tr. p. 301). For the sake of clarity in this decision, the participant in the June 2011 CSE from McCarton will be referred to as the supervising teacher.

student's McCarton providers, because they were "well acquainted" with his needs (Tr. pp. 54-55, 61, 106, 334-35, 337; see Tr. p.66). There is also evidence in the hearing record to suggest that the student's mother and supervising teacher were able to voice their concerns regarding the appropriateness of the proposed program (Tr. pp. 132, 347-48, 350-51, 578-79).[9]

Regarding the parents' allegation that the June 2011 CSE engaged in impermissible predetermination of the student's educational program, because the district did not fully consider the student's need for a home-based program or fully discuss his need for other services or other educational methodologies, the consideration by district personnel of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

According to the hearing record, each participant at the June 2011 CSE had before them a copy of the student's previous year's IEP, on which the June 2011 CSE relied as a main source of the proposed goals and functional levels, and "went over [them] individually and … read to the school" (Tr. p. 91). The district social worker explained that the June 2011 CSE reviewed the "draft copy of the IEP" with the meeting participants, and amended and adjusted the IEP where appropriate (Tr. pp. 65-66). For example, the description of the student's educational needs was derived from McCarton evaluative material, and the district social worker noted that no objections were raised to that description (Tr. p. 66). Although the district did not agree to the student's mother's request for the provision of 1:1 instruction to the student, I note that while the district's obligation to permit parental participation in the development of the student's IEP should not be trivialized, the IDEA does not require districts to accede to the parents' program demands (Tr. p. 579; Blackmon v. Springfield Bd. of Educ., 198 F.3d 648 at 657-58 [8th Cir. 1999]; citing Rowley, 458 U.S. at 205-06). Moreover, the hearing record demonstrates that the June 2011 CSE considered placement of the student in a 12:1+1 special class in a specialized school; however, the June 2011 CSE opted against that program recommendation, having determined that the student required additional support (Dist. Ex. 2 at p. 18). Likewise, the June 2011 CSE rejected placement of the student in an 8:1+1 special class in a specialized school due to the student's need for

[9] When questioned by the IHO regarding whether the district heard her concerns regarding the appropriateness of the 6:1+1 special class placement for the student and whether a different program would have been recommended for the student in light of her concerns, the supervising teacher testified that she did not "have a feeling one way or the other" (Tr. p. 351).

additional support (id.). The hearing record further shows that although the June 2011 CSE considered placing the student in a 6:1+1 special class in a specialized school, without the support of a 1:1 behavioral management paraprofessional, the June 2011 CSE rejected this program option, because of the student's need for additional support (Tr. p. 74; Dist. Ex. 2 at p. 18). Additionally, there is evidence in the hearing record to suggest that McCarton representatives in attendance agreed with the "basic outline," of the district program recommendation, i.e., the principle of the small class, for the student; however, the student's McCarton providers raised concerns regarding whether the student would receive sufficient support and with respect to his need for "intensive instruction and attention" (Tr. pp. 74-75, 132, 347-48). Furthermore, notwithstanding the parents' contention that the June 2011 CSE's failure to consider the student's need for a home-based program evidences predetermination in this instance, the hearing record reveals that the student's mother asked for consideration of 1:1 support, but did not ask for consideration of a home-based program to be incorporated into the student's IEP during the June 2011 CSE meeting (Tr. pp. 76; 572-73). Based on the foregoing evidence, I find that the evidence does not support a conclusion that the district predetermined the student's program for the 2011-12 school year, but instead shows that the student's mother meaningfully participated and contributed to the development of the student's IEP during the June 2011 CSE meeting.

2. Transmittal of the June 2011 IEP

The parents argue that the district failed to deliver a written copy of the student's IEP to them in a timely manner which resulted in a denial of a FAPE to the student, because they did not have all of the necessary information before them in order to make an informed decision about the student's program. Conversely, the district argues that, assuming that there was a failure to provide the June 2011 IEP to the parents in a timely fashion constituted a violation of the IDEA, it did not rise to the level of a denial of a FAPE in this instance because the parents had actual notice of the contents of the IEP and rejected those recommendations prior to the time that the district would have been required to implement the student's IEP had he attended the district's recommended placement. The IDEA requires that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]). There is no legal authority requiring districts to produce an IEP at the time that the parents demand, districts must only ensure that a student's IEP is in effect by the beginning of the school and that the parents are provided a copy (J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

In this case, the hearing record reflects that the district issued the FNR prior to the beginning of the 2011-12 school year (Dist. Ex. 9; Parent Ex. G) and that through their attorneys, the parents rejected the June 2011 IEP by letter dated June 30, 2011, which contained 60 allegations supporting their claim that the June 2011 IEP was inappropriate to meet the student's special education needs (Parent Ex. A; see Parent Ex. P at p. 1), prior to the time the district became obligated to implement the June 2011 IEP (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]).[10] I note that the IDEA does not require districts to maintain classroom

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

openings for students enrolled in nonpublic schools (see Application of the Dep't of Educ., Appeal No. 12-070; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 11-008; see also S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]). The parents participated in the CSE at which the participants were provided with a draft copy of the IEP which was amended and adjusted where appropriate (Tr. pp. 65-66). Thereafter, the hearing record indicates that on July 1, 2011, the district sent the June 2011 IEP to the parents (Tr. pp. 97-98; Dist. Ex. 2 at p. 2).[11] Although it is unclear from the hearing record precisely when the parents received a copy of the student's IEP from the district, the evidence suggests that the district delivered the June 2011 IEP on or about first day of the 12-month 2011-12 school year, which in this case began on July 5, 2011 (Tr. pp. 92-93, 580; 590; Dist. Ex. 2 at p. 3). In addition, while the hearing record in this case does not describe the district's business practices for delivering IEPs to parents, the district social worker testified that in this case, she came into the office a few days after the beginning of the school year to make sure that "things were completed" (Tr. p. 98).[12] I also note that the parents had no difficulty articulating their challenges to the IEP in their original due process complaint (Parent Ex. A), which was prepared before the July 1 copy of the IEP was mailed. In view of the foregoing, even assuming for the sake of argument that the district committed a procedural violation by delaying transmittal of the finalized copy of the IEP until July 1, 2011, the evidence in the hearing record does not show that such a delay impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2; Application of the Dep't of Educ., Appeal No. 10-070).

3. Sufficiency of Evaluative Data

Turning next to the parties' dispute whether the evaluative information upon which the June 2011 CSE relied formed a sufficient basis for its program recommendation, 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

[11] To the extent that the parents allege that the date of the CSE meeting was too close to the beginning of the school year, the hearing record demonstrates that on May 26, 2011, the district advised the parents of the date of the CSE meeting (Tr. p. 83; Dist. Ex. 2 at p. 2). The district school psychologist testified that the date of the CSE meeting had been "switched," because the district school psychologist experienced a medical emergency (Tr. p. 83).

[12] According to the district social worker, the two-week delay between the date of the CSE meeting and the delivery of the written IEP was due in part to the district's need to give time and attention to other students (Tr. p. 99).

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 S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; 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 [13]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).

According to the district social worker, the June 2011 CSE considered the following documents during the June 2011 meeting: a December 2010 McCarton School Educational Progress report, a January 2011 McCarton School OT progress report, a December 2010 McCarton School Speech and Language progress report, the student's 2010-11 IEP, his McCarton IEP and the district's June 10, 2011 classroom observation report (Tr. pp. 56-60, 99-100; Dist. Exs. 1 at pp. 2-3; 3; 4; 5; 7; 8). In addition to reviewing documentary information, McCarton personnel who worked with the student also participated in the June 2011 CSE meeting (Tr. pp. 55-56).

The December 2010 McCarton educational progress report indicated that during the 2010-11 school year, the student received 1:1 instruction in an ABA classroom with four other students, and daily 60-minute speech-language therapy and 45-minute OT sessions (Dist. Ex. 4 at p. 1). According to the December 2010 educational progress report, the student exhibited high distractibility, delays in play, social interaction, adaptive behaviors, and communication (Dist. Ex. 4 at p. 1). The student's varying attention, eye contact, and impulsivity affected all areas, and the information before the June 2011 CSE reflected that the student required constant individualized adult intervention in order to follow directions, attend to tasks, play appropriately and learn new skills (Dist. Ex. 4 at p. 1; 7 at p. 1). According to the report, the student continued to make progress when provided with individualized teaching using fast paced instruction, a consistent predictable routine, continuous positive reinforcement, highly visual strategies, and graduated guidance during

[13] Regarding the parents' claims that the district relied solely on McCarton reports in order to create the June 2011 IEP, the district social worker admitted that she could not recall the last time that the district conducted a triennial evaluation of the student; however, the evaluative information that was before the June 2011 CSE was obtained within six months of the meeting (Tr. p. 87; Dist. Exs. 3; 4; 5; 7). Additionally, a CSE is not required to use evaluative information from its own sources only in the preparation of an IEP and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80). In any event, I will order the district to conduct evaluations of the student to determine his individual needs, the extent of his educational progress and achievement, if it has not done so already (8 NYCRR 200.4[b][5]).

activities (Dist. Ex. 4 at p. 1). According to the December 2010 educational progress report, the student learned best when tasks were structured with scaffolded support, and he required frequent reinforcement and visual supports to remain engaged and refrain from exhibiting self-stimulatory behaviors (id. at p. 3). Off-task behaviors included self-stimulatory behaviors which interfered with his learning such as non-contextual speech, hand flapping, exaggerated arm and hand movements and tapping (id. at p. 1). Although the December 2010 educational progress report reflected that the student's attention skills had improved, they continued to vary, and the report depicted the student as highly distractible and further noted that he required adult assistance to transition in a timely manner (id. at p. 4). The December 2010 educational progress report described the student's participation in 1:1 teaching sessions and in a group setting, his ability to work for 15-20 minutes while earning tokens towards a break, and his academic strengths and weaknesses and his academic strengths and weaknesses (id. at pp. 1, 3-5).

Information that the June 2011 CSE considered also described the student's communication needs (Dist. Ex. 4 at pp. 2-3, Dist. Ex. 7). The student exhibited significant expressive and receptive language delays but continued to make steady progress, especially in receptive abilities (Dist. Ex. 4 at p. 2). According to the December 2010 speech and language progress report, the student's expressive language goals focused on providing him with a reliable means to communicate (Dist. Ex. 7 at p. 3). According to the information before the June 2011 CSE, the student had been successful communicating using an augmentative communication device (ACC), and was using an iPad formatted with Proloquo and iTalk software (Dist. Ex. 4 at p. 2;. 7 at p. 3). The December 2010 educational progress report noted that although the student was quickly improving in his ability to use the iPad, he continued to require some nonverbal prompts to negotiate the device (Dist. Ex. 4 at p. 2). Similarly, the student's speech-language therapist described the student's intelligibility as "severely impaired," and she further indicated that the use of the device was necessary for the student to convey messages to listeners (Dist. Ex. 7 at p. 3). Further, the student struggled with speech clarity, which prevented him from clearly answering questions and prevented accurate assessment of progress (Dist. Ex. 4 at p. 3). However, the December 2010 educational progress report revealed that the student had made progress with regard to the following skills: following a novel two-step direction; following directions containing propositions; following multiple component sequenced instruction; identifying pictures which represented a location or an activity; selecting non-examples; and associating objects and activities with seasons and holidays (id. at pp. 2-3). Speech-language therapy sessions focused on increasing the student's ability to attend to structured language tasks, improving his ability to understand and follow directions, improve his language processing, expand his receptive vocabulary and improve his temporal sequencing (Dist. Ex. 7 at p. 1). According to his speech-language therapist, the student had made progress in all areas of speech and language (Dist. Ex. 4 at p. 1). For example, the student's speech-language therapist reported that the student showed progress following three-step related directions and she noted that he could attend to desired tasks for three to five minutes with minimal adult redirection (Dist. Ex. 7 at p. 2). The student also showed progress with respect to his receptive vocabulary, his understanding of linguistic concepts such as size, space, quantity and descriptive words, and his ability to sequence familiar events (id.). Improvement was also noted with respect to the student's social communication skills, including with respect to eye contact, his requesting and protesting skills, as well as his use of carrier phrases (id. at p. 4).

The June 2011 CSE also reviewed information regarding the student's ADL and self-help skills, as well as social, leisure and community skills (Dist. Ex. 4 at pp. 6-11; 5 at pp. 6-7; 7 at pp. 4-6). In addition, the June 2011 CSE also considered information that described the student's fine and gross motor, and sensory processing skills (Dist. Ex. 5). During OT sessions, the student worked on improving sensory processing skills, improved motor planning, improved functional shoulder, arm and hand control for fine motor and prewriting skills, and improved self-help skills to increase at home and school (id. at pp. 2-6). The results of a January 2011 administration of the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2) was included in the information before the June 2011 CSE, which according to the January 2011 OT progress report, was used to assess the student's then-current level of functioning (id. at p. 1). Results of the BOT-2 revealed that the student had progressed with respect to his fine motor integration, manual dexterity, balance and strength; however, the examiner did not find any change with respect to the student's upper limb coordination or running speed and agility (id. at p. 2). The report further indicated that the student had regressed in the areas of fine motor precision and bilateral coordination (id.). In the area of ADL skills, the student engaged in activities to improve his ability to complete basic dressing, meal preparation and hygiene tasks (Tr. pp. 339-40; Dist. Exs. 4 at pp. 6-8; 5 at pp. 6-7). Finally, with respect to community skills, the student participated in chores, grocery shopping, using the subway as a means of transportation and dining in a restaurant (Tr. pp. 339-40; Dist. Ex. 4 at pp. 7-8).

In addition to reviewing documentary information, McCarton personnel who worked with the student shared information regarding the student's specific academic skill performance, which included teacher estimates of the student's approximate grade levels in reading, writing and math that was reflected in the present levels of performance section of the June 2011 IEP (Dist. Ex. 2 at p. 3). McCarton personnel also provided the June 2011 CSE with information reflected in the IEP about the student's social interaction and play skills, inattentiveness, and behaviors that interfered with learning (Tr. p. 335; Dist. Ex 2 at pp. 5, 20). The June 2011 IEP also included information provided by the McCarton speech-language pathologist regarding the student's then-current receptive, expressive, and pragmatic language skills (Dist. Ex. 2 at p. 3). The student's occupational therapist also provided information about the student's gross and fine motor, sensory processing and functional skills, which was also detailed in the June 2011 IEP (Tr. p. 383; Dist. Ex. 2 at p. 6).

"Both the IDEA and New York law prohibit school districts from using a 'single measure or assessment as the sole criterion for determining ... an appropriate educational program for the child.' 20 U.S.C. § 1414[b][2][B]; 8 NYCRR 200.4[b][6][v]" (E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *9 [S.D.N.Y. Sept. 29, 2012]; F.B. v. New York City Dep't of Educ., 2013 WL 592664 at *7-*8 [S.D.N.Y. Feb. 14, 2013]; S.F., 2011 WL 5419847, at *10); however, in this case, as described above, the hearing record shows that the June 2011 CSE appropriately reviewed a variety of sources to ascertain information about the student's academic, language, gross and fine motor, sensory processing, community, ADL, and social/emotional skills and developed the student's June 2011 IEP based on this information (Tr. pp. 56-62; Dist. Exs. 3; 4; 5; 7). Based upon the evidence, the parents' assertions regarding the sufficiency of the evaluative data and its consideration by the June 2011 CSE are not supported by the hearing record (see J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10 [S.D.N.Y. Aug. 5, 2013]).

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

The district also maintains that the June 2011 IEP's provision of a 6:1+1 special class setting with a behavior management paraprofessional was appropriate to address the student's educational needs. State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with State regulation regarding students with intensive needs, for the 2011-12 school year, the June 2011 CSE recommended placement of the student in a 6:1+1 special class in a specialized school, combined with the provision of a 1:1 behavior management paraprofessional and related services (Dist. Ex. 2 at p. 1).

Testimony by the district social worker revealed that the June 2011 CSE agreed that in order for the student to be able to learn, he needed a small class setting (Tr. p. 74). However, the student's mother maintained that McCarton personnel asserted that the June 2011 IEP's provision of a 6:1+1 special class setting with a behavior management paraprofessional was not appropriate to address the student's educational needs (Tr. p. 575). On the other hand, the district social worker testified that a 6:1+1 special class placement was appropriate for the student because it constituted a small class setting, that created curriculums for students whose learning profiles were similar to the student at bar, and seemed appropriate as opposed to a community school setting (Tr. p. 74). She further indicated that the 6:1+1 special class placement was appropriate for the student, given his need for a small student to teacher ratio (id.). The district social worker added that the recommendation for placement in the 6:1+1 special class setting would support the student's areas of deficit, while the addition of 1:1 support was appropriate for transition and would provide the student with the structure to which he was accustomed (Tr. pp. 71, 78). In addition, the district social worker opined that the recommended related services were also appropriate to help the student benefit from instruction in the classroom (Tr. p. 78).[14]

With respect to the parents' claim that the district failed to assess and accommodate the student's need for 1:1 instruction in order to obtain educational benefits from his program, the district social worker noted that in the district 6:1+1 special class was administered and supervised by a licensed, special education teacher and included a paraprofessional (Tr. pp. 118-19). According to the district social worker, the special education teacher supervised the support staff in the 6:1+1 classroom, and she further opined that "in that sense, it parallel[ed] the McCarton program," because that was how McCarton administered their program with respect to the staffing ratio (Tr. p. 119).

[14] The June 2011 CSE also recommended the provision of assistive technology to the student, specifically, the June 2011 IEP prescribed the use of a Dynavox for him; however, according to the June 2011 IEP, the student did not require assistive technology service (Tr. pp. 124, 127; Dist. Ex. 2 at p. 6). The district social worker testified that she believed that this constituted a "clerical error," because the June 2011 IEP contained a goal which related to the use of assistive technology (Tr. pp. 72, 127-28; Dist. Ex. 2 at p. 10). In any event, there is no showing in the hearing record that this clerical error that resulted from the memorialization of the June 2011 IEP (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].

The evidence also shows that the student's McCarton providers who took part in the June 2011 CSE meeting agreed that the student required a small class setting in order to obtain meaningful educational benefits, and they communicated to other members of the June 2011 CSE that the student would not be adequately supported with a 6:1+1 setting (Tr. p. 132). According to the district social worker, this discussion helped the June 2011 CSE to conclude that the provision of the "dedicated 1:1 para[professional]" for the student would be appropriate (id.). In addition to the provision of a 1:1 paraprofessional, the June 2011 IEP provided the student with four 1:1 OT sessions per week, and five 1:1 speech-language therapy sessions per week (Dist. Ex. 2 at p. 19).

Furthermore, a review of the June 2011 classroom observation conducted by the district social worker shows that the student could function in a group setting with the provision of 1:1 prompting (Tr. pp. 59-60; Dist. Ex. 3). The district social worker testified that during the classroom observation, she observed the student participating in a few different settings, including a group adapted physical education activity, 1:1 instruction at his desk and during snack time (Tr. p. 60; Dist. Ex. 3 at p. 2). During the observation, the student participated in a group warm-up and game, during which time he received prompting from his 1:1 instructor (Dist. Ex. 3 at p. 1). The district social worker found that the student appeared to enjoy the activity and transitioned to the next activity without difficulty (Tr. p. 60; Dist. Ex. 3 at p. 1). She further testified that the student seemed familiar and well-acquainted with his routines and motivated when asked to complete his academic assignments (Tr. p. 60). Specifically, the district social worker reported that the student participated in 1:1 math, reading and writing instruction, during which time, he responded correctly to many of the tasks, and could maintain his focus with redirection (Dist. Ex. 3 at pp. 1-2). The report further reflected that the student followed directions and enjoyed praise (id.). The district social worker further characterized the student as someone who presented with a comfortable demeanor and smiled a lot (Tr. p. 60). Upon discussion of her June 2011 classroom observation with the June 2011 CSE, the supervising teacher at McCarton who confirmed that the district social worker's observation was a reflection of a "typical time" for the student (Tr. pp. 60-61; Dist. Ex. 3 at p. 2).

Furthermore, the June 2011 IEP reflected that at McCarton, the student was one of the class leaders (Tr. p. 123; Dist. Ex. 2 at p. 5). The district social worker clarified that McCarton personnel tried to convey the message that the student was "a student that the others looked up to" (Tr. p. 123). Likewise, the December 2010 McCarton progress report indicated that the student was progressing in his social skills with peers (Dist. Ex. 4 at p. 10). The report further revealed that the student participated in group settings, with 1:1 support (id. at pp. 9-10). Specifically, the McCarton progress report revealed that the student could function at a near independent level in his computer group, and that his on task behavior in his read-aloud group had improved dramatically (id. at p. 10).

Although McCarton reports stated that providing instruction in a 1:1 model was necessary for the student to make meaningful progress, they also reflected that the student could learn in group situations (Dist. Exs. 3 at pp. 9-10; 5 at p. 7; 7 at p. 6). For clarity, the evidence shows that McCarton does not provide the student with a 1:1 environment per se in the sense that the student required exclusion from placement with other same-aged peers. Instead, the student's special class setting at McCarton during the 2011-12 school year consisted of a group of five students, a head teacher, and five assistant teachers (Tr. pp. 302-303, 318-19). I disagree with the IHO's conclusion

that although the district adopted "nearly every piece of evaluative data used in preparing the Student's IEP from" McCarton, but rejected the substance of McCarton's programming, namely the provision of 1:1 instruction (IHO Decision at p. 12), because the district offered the student 1:1 adult support all day in addition to the 6:1+1 classroom setting (Dist. Ex. 2 at p.19). Additionally it is clear that a CSE must consider parents' suggestions or input offered from privately retained experts; however, the CSE is not required to merely adopt such recommendations for different programming (see, e.g., G.W. v Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; Dirocco v Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]). Moreover, the IDEA does not require the district to offer the student what some may view as the "best opportunities" for the student (Watson, 325 F. Supp. 2d at 144) or "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132). I further note that despite the parents' preference for McCarton, evidence of the alleged appropriateness of a private school placement does not establish that the program offered by a school district is inappropriate (M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011]; Application of the Dep't of Educ., Appeal No. 11-141; Application of a Student with a Disability, Appeal No. 08-043; see, e.g., M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *8 [S.D.N.Y. Mar. 12, 2002]; Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037 [3d Cir. 1993]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 06-054; see also, B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal., Feb. 14, 2013] [noting that even if the services requested by the parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, so long as the IEP is reasonably calculated to provide the student with educational benefits]).

Here, an overall review of the hearing record suggests that the student required adult support to manage his behaviors that interfered with learning so he could benefit from instruction, which would have been provided in the district's recommended 6:1+1 special class placement with 1:1 paraprofessional services (Tr. p. 74; see J.A. v. New York City Dep't of Educ., 2012 WL 1075843, *9-*10 [S.D.N.Y. Mar. 28, 2012] [resolving conflicting views over the quality and extent of adult support services that must be provided to a student]). Lastly, while I can certainly appreciate the parents' view that intense 1:1 ABA services to be their preferred option for educating the student, it does not necessarily follow that the parents may select one particular method to the exclusion of other approaches (E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321 at *25-*26 [S.D.N.Y. Mar. 15, 2013] [declining to reject the district's view of 6:1+1 special class instruction with an individual paraprofessional support and adopt the contrary view of the parents' privately hired expert advocating for 1:1 ABA instruction]; Dirocco, 2013 WL 25959, at *23; F.L. v. New York City Dept. of Educ., 2012 WL 4891748, *9 [S.D.N.Y. Oct. 16, 2012]; E.S., 742 F.Supp.2d at 436, aff'd, 2012 WL 2615366 [2d Cir. July 6, 2012] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] ... deference to the district and its trained educators").

Finally, while arguing on the one hand that the student required greater attention and individualization in the form of 1:1 instruction, the parents also assert on the other hand that

the district failed to hit the precise mark because in developing the student's program recommendation, the June 2011 CSE also failed to address the student's need for greater self-sufficiency, independence, and generalization. A review of the June 2011 IEP reveals that none of the short-term objectives required any prompts/supports, or required the reduction or elimination of prompts/use of manipulatives in order to be achieved (Dist. Ex. 2 at pp. 7-16). Additionally, some of the student's short-term objectives varied the setting in which they would be achieved, for example in a group setting, across a variety of contexts, within structured activities, and within the classroom setting (id. at pp. 10, 12-13, 15-16). The June 2011 IEP further recommended the "systematic generalization of skills across people, materials, settings, and contexts," in addition to providing the student with opportunities to generalize skills across a variety of contexts (id. at p. 4). In addition, the June 2011 CSE recommended that the student receive frequent variation of work tasks and materials (id.). The district social worker further opined that although there would be three adults in the 6:1+1 special class placement, the long-term goal was "to stay back," and help the student promote independence and the ability to function and work on his own (Tr. p. 112). Accordingly, the parents' claims that the June 2011 CSE failed to plan for greater self-sufficiency and generalization is not supported by the evidence and lacks merit.

5. Methodology

Regarding the parents' assertion that the June 2011 CSE failed to select any "core" educational methodology for the student, and the IHO's finding that there was "no informed opinion in this [hearing] record that supports removing the ABA therapy," generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (IHO Decision at p. 12; Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045; see also K.L. v New York City Dep't of Educ., 2012 WL 4017822 at *12 [SDNY Aug. 23, 2012] affd, 2013 WL 3814669 [2d Cir. July 24, 2013]).

The district social worker admitted that in developing the student's IEP, the June 2011 CSE did not recommend a particular modality; however, she further testified that the June 2011 CSE considered the methodology used at McCarton and that the CSE tried to incorporate similar management strategies (Tr. p. 187).[15] According to the district social worker, the June 2011 CSE discussed learning styles, levels of instruction, management needs, in addition to what supports and what kind of behavioral strategies worked for the student (Tr. pp. 190-91). A review of the

[15] Regarding the parents' allegation that the district failed to adequately assess the student for his amenability to the TEACCH educational methodology, the district social worker explained that she did not know of any test or assessment to test a student's amenability to a particular educational approach or methodology (Tr. pp. 191-92), nor does either parties suggest the existence of such an evaluation. Instead, the parents' methodological contentions appear to rest on a presumption that a CSE is required to accept and institute whatever private methodological approaches that have previously been used in a student's private school programing until the district conducts an evaluation showing that another method should be attempted. The parents point to no such evaluation requirement, and I have found none under either state or federal law.

June 2011 IEP shows that it included information about the student's learning style to help guide instruction such as that the student benefitted from placement in a small well-structured classroom, visual prompting for attention, repetition of directions, and redirection to task when needed in addition to positive reinforcement for attending and waiting for instruction, appropriate behavior and engaging with others and the provision of a 1:1 behavior management paraprofessional (Dist. Ex. 2 at p. 5). Other supports were incorporated into the June 2011 IEP to help the student "navigate his classroom experience" included the provision of a highly structured, predictable learning environment, a consistent positive reinforcement schedule, the provision of systematic visual, verbal, and physical prompting, tasks broken down into small steps, chunking of material in manageable units, frequent repetition and review, functional application of skills, systematic generalization of skills across people, material, settings and context, the provision of opportunities to generalize skills across a variety of contexts, frequent variation of work tasks and materials in addition to the provision of frequent breaks to improve the student's ability to attend (Tr. pp. 63, 67-68; Dist. Ex. 2 at p. 4). There is no evidence that supports the conclusion that the IEP should be designed in a manner to place restrictions on the student's special education teacher with respect to selection of teaching strategies and, accordingly, there is no reason in this case to depart from the general principle that the student's teacher or special education provider who is charged with the responsibility of carrying out the student's IEP should be afforded the discretion to make such methodological selections in his or her professional judgment. Because "'[p]arents ... do not have a right under the IDEA to compel a school district to provide a specific program or employ a specific methodology' in educating their child" (Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491 [W.D.N.Y. Sept. 26, 2012] report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; F.L., 2012 WL 4891748, at *14; L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063 at *11 [E.D.N.Y. Jan. 13, 2011]; see also A.S., 10-cv-00009 slip opn. at pp. 25-27), and under the circumstances in this case, where the June 2011 IEP offered specific information about the student's learning style and supports to address his needs, I cannot conclude that the lack of a particular methodology on the student's IEP resulted in a denial of a FAPE to the student.

6. Home-Based Services

Next, to the extent that the parties dispute that the student required home-based services in order to receive a FAPE, several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also Application of the Dep't. of Educ., Appeal No. 11-031).

The hearing record establishes that during the 2011-12 school year, the student received between 15-16 hours per week of privately funded, home-based ABA instruction, provided by three therapists (Tr. pp. 507, 518-19). I note that the hearing record offers no indication that the district solicited input from the student's home-based providers, or that any data or progress reports from the home-based providers were reviewed by the June 2011 CSE. The student's mother conceded that she did not request the provision of a home-based program to be incorporated into

the student's IEP (Tr. pp. 572-73). Likewise, the district social worker explained that the June 2011 CSE did not include home-based services as a component of the student's June 2011 IEP because the CSE believed the proposed program to be appropriate and that it would represent a full educational program for the student during the school day (Tr. p. 76). The student's ABA therapist opined that the student benefitted from his home-based ABA program, and although some programs on which she was working overlapped with the program he received at McCarton, she testified that the overlap in programs helped with generalization, which she noted was an area of concern for students with autism (Tr. p. 523). The hearing record indicates that the focus of the student's home-based program was to improve his community, leisure, and ADL skills, some of which were addressed during the school day at McCarton (Tr. pp. 517-21).

The parents alleged that the district failed to recommend a home-based or extended-day program for the student despite his need for generalization, acquisition of skills and continued progress; however, the hearing record reflects that the June 2011 CSE considered information when developing the student's IEP that reflected progress that the student had made while enrolled in McCarton during the 2010-11 school year (Dist. Exs. 4; 5; 7). There is also no indication in the hearing record that the student required home-based programming in order to make progress during the in-school portion of the school day. For example, the supervising teacher testified that she believed that McCarton met all of the student's needs during the school day (Tr. p. 344). Furthermore, I note testimony from the student's mother, who also indicated that generalization was a component of the student's home-based services (Tr. p. 592). According to the student's mother, the student's home-based therapist was working with the student on swimming, and that the student needed a teacher to help him learn to shower and to try to eat new foods (id.). The student's mother further indicated that because of her full-time work schedule, she did not have the time to work with the student on such skills (id.). She added that the student was "enjoying his life," and that she, the student's father and sister were working with his ABA therapist to figure out what they could do to enhance the student's life and carry it over into the weekends (Tr. pp. 592-93). The student's mother also noted that the student's need for home-based programming also arose out of his continued need for assistance with respect to bathing and toileting (Tr. p. 594). She further testified that without the student's home-based "intervention," the student lacked the "functional leisure skills" that typically developing students had (Tr. p. 595). For example, the student's mother stated that if the student were "left to his own devices," the student would probably sit on the couch and twirl his pen (Tr. p. 594). Under the circumstances, while it is understandable that the parents, whose son has substantial needs, desire greater educational benefits through the auspices of special education, it does not follow that the district must be made responsible for them (Application of the Dep't. of Educ., Appeal No. 12-086). The IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567 [citations omitted]).

The evidence described above shows that the district satisfied the more modest requirement of developing an IEP likely to produce "progress, not regression" (Walczak, 142 F.3d at 130 [2d Cir. 1998]), and I find that the lack of extended-day ABA services on the student's June 2011 IEP did not result in a denial of a FAPE to the student.

7. Special Factors - Interfering Behaviors

The parents allege that the June 2011 CSE failed to develop an appropriate FBA in conformity with the district's Standard Operating Procedures Manual (SOPM) and an appropriate BIP.[16] However, as explained more fully below, the procedures for conducting FBA's and developing BIPs are clearly set forth in State regulation (8 NYCRR 200.4[d][3][i], 200.22[a], [b]) and in this case, I find that the district had obtained and considered information sufficient to identify the student's interfering behaviors and the strategies/goals used by McCarton to address the behaviors, which were reflected in the June 2011 IEP.

a. Development of the FBA

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ.

[16] Here, the district's SOPM was not included in the hearing record. However, defects arising out of the Standard Operating Procedures Manual that do not also constitute violation of State or federal law and policy do not appear to constitute a deprivation of a FAPE warranting tuition reimbursement (see, e.g., M.P.G., 2010 WL 3398256 at *9-*10). In addition, I note at the outset of this discussion that the student was attending McCarton at the time of the June 2011 CSE meeting and conducting an FBA to determine how the student's behavior related to that environment has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at McCarton and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]).

[Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

State regulations call for the procedure of using an FBA when developing a BIP, and the Second Circuit has explained that when required "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all (R.E., 694 F3d at 190). However, the failure to comply with this procedure does not automatically render a BIP deficient (M.W. v. New York City Dep't. of Educ., 2013 WL 3868594, at *6-7 [2d Cir. Jul. 29, 2013]); R.E., 694 F.3d at 190; A.C., 553 F.3d at 172; A.H., 2010 WL 3242234, at *4; see F.L., 2012 WL 4891748, at *8; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *11 [S.D.N.Y. Aug. 23, 2012]; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796, at *9 [S.D.N.Y. Sept. 26, 2012]; M.W., 869 F. Supp. 2d at 333; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8-*9 [S.D.N.Y. Dec. 8, 2011]; C.F., 2011 WL 5130101, at *9).

As discussed previously, the June 2011 CSE reviewed the student's McCarton educational, speech-language, and OT progress reports, and the June 2011 classroom observation report (Tr. pp. 56-60). Descriptions of the student's behaviors that interfered with learning from these reports included that he exhibited varying levels of attention in class that required ongoing redirection, and engaged in non-contextual vocalizations and hand movements such as tapping (Dist. Ex. 2 at p. 20; 4 at p. 1). Similarly, the student's speech-language therapist reported that the student exhibited high rates of self-stimulatory behaviors and aggressive behaviors (i.e., biting scratching others, and banging and/or hitting objects (Dist. Ex. 7 at p. 1). Information before the June 2011 CSE indicated that the student's aggressive behaviors occurred when the student was highly frustrated, denied access to a preferred item, and/or his rigid routine was changed or interrupted (id.). According to the district social worker, the interfering behaviors that were targeted in the June 2011 IEP were "pretty in control and pretty infrequent" (Tr. p. 169).

Although she social worker conceded that the June 2011 CSE did not prepare a "formal written down FBA" the June 2011 CSE discussed the frequency, duration and antecedents of the student's interfering behaviors, which formed the basis for the BIP (Tr. p. 68-69, 105, 168). More specifically, the district social worker indicated that the data with respect to the student's behaviors was contained in the McCarton reports and gleaned from the conversations with the supervising teacher and related services providers that ensued during the June 2011 CSE meeting (Tr. pp. 102, 169). She further testified that the June 2011 CSE reviewed the McCarton behavior reduction plan and discussed what would be appropriate in terms of interfering behaviors (Tr. pp. 100-01).

In light of the circumstances of this case, particularly where the evaluative information before the June 2011 CSE is consistent with the resultant IEP, where the IEP identifies the student's major interfering behaviors and provides services and supports to address them, and where it was not possible to conduct the FBA in the public school setting in which the BIP would have been implemented due to the then-current placement of the student in a private school, I find that any deficiencies in the procedures the district implemented to prepare an FBA does not amount to a finding that the district failed to offer the student a FAPE. I further note that, as set forth below, State regulations require in pertinent part that a CSE consider developing a BIP when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1]). Here, because the student has not attended the district's recommended program, the district has not had an opportunity to determine how the student's impeding behaviors would have persisted after shifting to the public school environment despite consistently implemented general school-wide or class-wide interventions, yet the CSE proceeded to develop a BIP for the student.[17]

b. Adequacy of the BIP

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

[17] While the IDEA does not preclude a CSE from initially formulating a BIP, it is not unusual for a classroom teacher or other special education provider to formulate or modify a BIP over the course of a school year when a BIP is called for in the implementation of the student's IEP (see, e.g., Application of a Child with a Disability, Appeal No. 05-107). As noted above, if the district creates a BIP for the student, the CSE is thereafter required to review the BIP at least annually (8 NYCRR 200.22[b][2]). I note that in this instance, the special education teacher of the proposed 6:1+1 special class testified that if necessary, she would conduct an FBA and use observations to continue collecting information about the student to address his behaviors (Tr. p. 285; see, e.g., J.C.S., 2013 WL 3975942, at *13).

"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]).[18] 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]).

A BIP attached to the June 2011 IEP described the behaviors that interfered with the student's learning such as varying levels of attention that required ongoing redirection throughout the day, non-contextual vocalizations and hand movements, such as tapping (Dist. Ex. 2 at p. 20).[19] In addition, the BIP noted that when the student's routine was altered or he was frustrated, the student might object by banging his desk and/or objects and that he would usually scream as well (id.). According to the BIP, when the student was faced with a challenging task from which he wished to escape, the student might bite, scratch, pinch or hit an object or attempt to do so with a teacher; however, the student was not aggressive toward peers (id.). The expectations in providing the student with a BIP were that the student would increase his attention to instruction, work tasks and school activities, reduce self-stimulatory behavior, increase frustration tolerance, appropriately express his wants, needs and feelings, and refrain from aggression towards objects and teachers (id.). A review of the June 2011 IEP shows that it adequately planned for how the student's behaviors would be addressed and identified strategies to change the behaviors including positive reinforcement for appropriate behavior through the use of a token economy system, loss of the student's reinforcement opportunities where the student engaged in an interfering behavior, teaching appropriate ways to communicate frustration, modeling and redirection (id.). Additional supports were also incorporated into the BIP to help the student change the interfering behaviors such as instruction from a special education teacher, collaboration between home and school, the

[18] 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]).

[19] Although the parents argue that the BIP was drafted after the June 2011 CSE meeting, which in turn precluded any meaningful input from the student's mother or teacher, I note that the supervising teacher testified that the CSE "definitely discussed" the student's behaviors (Tr. p. 335). Moreover, there is no legal requirement that an IEP or BIP be presented at the time of the CSE meeting, nor at any time before the school year begins (F.L., 2012 WL 4891748, at *8). Furthermore, the IDEA does not require parental presence during the actual drafting of the IEP (E.G., 606 F.Supp.2d 384 at 388-89).

1:1 behavior management paraprofessional services, the use of a positive reinforcement schedule as well as the use of a token economy system (id.).[20]

The IEP also offers additional information that clarifies that the student's interfering behaviors are not constant. According to the June 2011 IEP, the student was progressing in his social skills with his peers (Dist. Ex. 2 at p. 5). Although the student could initiate greetings with adults, the IEP further indicated that he could not yet do so with peers; however, the student could greet a peer with prompting (id). The June 2011 IEP also reflected that the student could engage in two exchanges given support (id.). Additionally, the June 2011 IEP indicated that the student could make eye contact; however, the IEP further stated that his eye contact remained variable, and often required prompting (id.). According to the June 2011 IEP, the student would make and sustain eye contact during requests of highly preferred items (id.). The June 2011 IEP further revealed that the student enjoyed being at school and in close proximity to his peers during physical activities; however, the student needed frequent redirection to attend and benefitted from the repetition of directions (id.). The June 2011 IEP also noted that the student had difficulty waiting appropriately and often required redirection to attend (id.). The student's teacher described him as "class leader," and further reported that the student had done well at school (id.). Furthermore, the June 2011 IEP noted that the student could independently initiate conversation with peers using his device, and that he could engage and take turns with a peer during peer games/activities (id.). The June 2011 IEP also characterized the student as "a happy child," who enjoyed being at school and talking to his friends (id.).

Accordingly, while the lack of information with respect to the frequency, intensity and duration of the student's behaviors constituted a procedural violation of State regulations, where, as here the hearing record demonstrates that the student's interfering behaviors were nevertheless sufficiently addressed by the June 2011 IEP, these technical violations did not in this instance result in a denial of a FAPE to the student. (A.C., 553 F.3d at 172; E.M. v. New York City Dept. of Educ., 2011 WL 1044905, at *9 [S.D.N.Y. Mar. 14, 2011]; Application of a Student with a Disability, Appeal No. 12-069; Application of the Dep't of Educ., Appeal No. 11-141). As described above, the June 2011 IEP also contained social/emotional management needs designed to address the student's behavioral needs (Dist. Ex. 2 at p. 5). Moreover, the June 2011 IEP contained annual goals and short-term objectives designed to improve the student's ability to communicate and to improve organization and self-regulation by inhibiting non-purposeful movements (id. at pp. 13-14).[21] Therefore, in this case, where the district formulated a BIP based

[20] With respect to the IHO's finding that the BIP was "stripped of the content that was deliberately developed by [McCarton] and [was] rendered virtually useless outside the context of the intensive ABA environment," while the strategies and supports built into the BIP were recommended to address the individual needs of the student in this case, there is nothing in the hearing record to demonstrate that the strategies in BIP attached to the June 2011 IEP could only be effectively used at McCarton (IHO Decision at p. 12).

[21] While the parents challenged the IEP goals in their due process complaint, the IHO did not address this issue and other than one unclear reference in their Answer they have not advanced any arguments on appeal and I have treated this issue as abandoned. Notwithstanding, had they advanced an argument, I note that in large part goals do not meet the procedural requirements insofar as they are overly general; however, they are supported by sufficiently detailed corresponding short-term objectives (see Dist. Ex. 2 at pp-7-16) and the deficiencies would not support a finding of a denial of a FAPE (see M.Z. v New York City Dep't of Educ., 2013 WL 1314992 at *6 [S.D.N.Y. Mar. 21, 2013]; A.D., 2013 WL 1155570, at *10-*11; J.L. v City Sch. Dist. of City of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; Tarlowe, 2008 WL 2736027, at *9). I remind the district to ensure

on information from the evaluative reports available to the CSE and input from the student's mother, and developed management needs designed to target the student's interfering behaviors, I find that, the lack of information regarding the frequency, duration, intensity of function of the student's behavior in the BIP did not in this instance result in a loss of educational opportunity for the student or rise to the level of a denial of a FAPE (R.E., 694 F.3d at 190-91; S.H., 2011 WL 6108523, at *8-*9; C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y. Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]). Based on the foregoing, the IHO's conclusion that the BIP was so useless as to deny the student a FAPE must be reversed.

8. Transition Plan

Regarding the district's contention that its failure to develop a "transition plan" for the student to facilitate his transfer from a nonpublic school to a district school did not amount to a denial of a FAPE in this instance, I note that the IDEA does not specifically require a school district to formulate a "transition plan" as part of a student's IEP when a student transfers from one school to another (see A.D. v New York City Dep't of Educ., 2013 WL 1155570, at *8-9 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y., Oct. 16, 2012]; A.L. v. New York City Dept. of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dept. of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011] aff'd sub nom. R.E., 694 F.3d at 195; see also).[22, 23]

Here, there is no quarrel between the parties that the June 2011 CSE did not develop a transition plan for the student to facilitate his transition from McCarton to a 6:1+1 special class in

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that it complies with the procedures for developing both annual goals and short-term objectives.

[22] Distinct from the "transition plan" at issue in this case, the IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student had not yet attained the age of 15 at the time of the June 2011 CSE meeting (see Dist. Ex. 2 at p. 1).

[23] I also note that also distinct from the "transition plan" at issue in this case, the parents do not assert that the district failed to recommend "transitional support services" pursuant to State regulations governing the provision of educational services to students with autism. That particular State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

a specialized school in the event that the parents had enrolled the student in the district's assigned public school site (Tr. p. 602; see Dist. Ex. 2). However, the district social worker explained that the June 2011 CSE included the provision of 1:1 paraprofessional services to aid the student's transition to the assigned public school site (Tr. pp. 77, 110).[24], [25] Under the circumstances, even assuming there was a transition plan requirement that was applicable to this case, I find that the June 2011 CSE designed the IEP with services in mind to address the student's needs relating to transitioning to a new environment and any such deficiency alone, in light of the array of other services provided on the IEP, is not sufficient to conclude that the IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]).

Based on the foregoing, no violation of the IDEA or State regulations has been identified due to the lack of a transition plan in the student's IEP, and even if there was such a requirement, it would not result in a denial of a FAPE in this instance. Therefore, the IHO's finding that the June 2011 CSE's failure to create a transition plan for the student, must be reversed.

9. Parent Counseling and Training

Turning next to the parties' claims regarding whether the omission of parent counseling and training from the June 2011 IEP resulted in a denial of a FAPE to the student, State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M., 583 F. Supp. 2d at 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [State regulation][26] to provide parent counseling, they remain

[24] To the extent that it could be argued that there was any change at all in the restrictiveness of the settings between McCarton and the public school program, such change from a special class in a specialized private school to a special class in a specialized public school with no change in access to regular education peers would appear to have been de minimus, which further diminishes a need to recommend transitional support services on the student's IEP (8 NYCRR 200.1[ddd]).

[25] In this case, a significant amount of retrospective testimony was elicited about transitioning the student to the public school, and while it conveys a sense of what occurs in the public school setting after a student arrives from another school, is not relevant for purposes of IEP analysis in this case (Tr. pp. 271, 284, 420-21, 492, 499-500).

[26] 8 NYCRR 200.13[d].

accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (M.W., 2013 WL 3868594 at *7; R.E., 694 F.3d at 191). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

In the instant matter, it is undisputed that the June 2011 CSE did not include the provision of parent counseling and training in the June 2011 IEP, which violated the requirement for setting forth this related service in the student's IEP and the student's mother testified that during the June 2011 CSE meeting, no one from the district offered her parent counseling or training (Tr. p. 602; Dist. Ex. 2). However, the hearing record suggests that parent counseling and training was programmatic in the specialized school setting and was offered at the assigned public school site (Tr. pp. 415, 458-60).[27] Although the special education teacher of the proposed 6:1+1 special class was "not aware" whether any parent counseling and training workshops took place during summer 2011, she testified that during the balance of the school year, the parent coordinator employed at the assigned public school site sent information home to parents regarding "things" available for parents to do in relation to their children (Tr. pp. 280-81). She also testified that she met with parents two or three times during the school year, offered to meet them to discuss their concerns at school and at home, and encouraged parents to communicate with her by telephone and via a daily communication notebook (Tr. p. 217). Furthermore, the assistant principal testified that parent counseling and training was available to parents of students enrolled in the assigned public school site during summer 2011 on an as-needed basis (Tr. pp. 415-16, 458). She further explained that "[they] had students [whose] parents … didn't understand exactly how to work on certain specific skills" (Tr. p. 416). For example, the assistant principal clarified that a parent could come to the assigned public school site and actually view the strategies employed by personnel at the school, so that parents could employ the same strategies at home (Tr. p. 459). Specifically, the assistant principal recalled one training session during which time that the assigned public school site's speech teachers worked with parents on the use of devices (Tr. pp. 416, 459-60). Lastly, the assistant principal testified that the assigned public school site also had a "newsletter," that was posted on teachers' doors, and sent home to the parents (Tr. pp. 423-24). According to the assistant principal, the school newsletter identified what teachers were teaching, their units of study, what skills were being taught and any activities planned on the calendar (Tr. p. 423).

Based upon the foregoing, I find that although the June 2011 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; F.L., 2012 WL 4891748, at *9-*10; C.F., 2011 WL 5130101, at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 2010]; M.M., 583 F. Supp. 2d at 509; M.W v. New York City Dep't of Educ., 2012 WL 2149549, at *13 [E.D.N.Y. June 13, 2012]).

[27] Contrary to the parents' assertion, State regulations do not require "individualized" parent training and counseling (see 8 NYCRR 200.13[d]).

To be clear, however, the fact that the district views parent counseling and training as "programmatic" and therefore unnecessary continues to remain a procedural violation, and while not amounting to a denial of a FAPE in this proceeding, compliance with the procedures is nevertheless mandated. In light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I will order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).

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

C. Challenges to the Public School Site

I will next turn to the parties' contentions surrounding the appropriateness of the assigned public school site Initially, 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., 2012 WL 4891748, at *14-*16; Ganje, 2012 WL 5473491, at *15 [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], 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 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C., 906 F. Supp. 2d at 273 [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago 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, continued 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., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 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]).[28]

Again, as recently 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. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]). In view of the forgoing and under the circumstances of this case, I find that 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 student's May 2011 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186 [2d Cir. 2012]; K.L., 2013 WL

[28] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

3814669 at *6; R.C., 2012 WL 5862736, at *16) . In this case, the district developed the student's 2011-12 IEP and offered the student a timely placement.[29]

Consequently, as further described below, the district correctly argues that because the parents rejected the proposed IEP, and enrolled the student in McCarton, the district was not required to show that every day or every change at the assigned public school site would be reasonably calculated to provide the student with a FAPE, or that there would have been no delays in implementing the IEP, including the related services.

However, I have reviewed the evidence in the hearing record in order to discuss what alternative findings could be made, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site. As further explained below, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation, that is, deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011] aff'd 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L., 812 F. Supp. 2d at 502-03).

1. Construction at the Public School Site

The parents allege that the assigned public school site was not operational during summer 2011, and that the hearing record does not demonstrate that a district public school site was available to implement the student's June 2011 IEP. However, the hearing record demonstrates that the district had a program available to the student at the start of the school year and the parents rejected the district's program (Dist. Exs. 2; Parent Exs. A; G). Thus, the district established that it offered the student a FAPE, by demonstrating that it had an IEP in place that it was prepared to implement, had the student attended the public school program. In any event, notwithstanding the parents' allegation that the evidence does not support a finding that the district was prepared to implement the June 2011 IEP, while the hearing record is unequivocal that the assigned public school site listed in the June 2011 FNR was under construction at the time of the student's mother's visit, the remaining evidence demonstrates that the student's June 2011 IEP would have been implemented accordingly had the student enrolled in the district assigned public school (Tr. pp. 222-23, 401-02; Parent Exs. G; H). Although the assigned public school site listed in the FNR was not the particular school location in which the student would have been enrolled had he attended a district school during summer 2011, a future change in a school building does not amount to an actionable claim pursuant to the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *16 [S.D.N.Y. Aug. 23, 2012]). Here, the assistant principal confirmed that the assigned public school was under construction; however, students assigned to that particular location were housed in an alternative district public school for summer 2011, which was two blocks away from the assigned public school identified in the June 2011 FNR (Tr. pp. 401-02, 407-08). According to the student's mother, when she arrived at the assigned public school site specified

[29] The district offered the student a placement on June 16, 2010 (Parent Ex. M at p. 1). This date was prior to the start of the 12-month school year, and therefore in conformity with State and federal regulations (34 CFR 300.323[a]; 8 NYCRR 200.4[e][(1][ii]).

in the June 2011 FNR, she found that it was under construction and she attempted to contact the individual listed on the FNR to no avail (Tr. pp. 582-83; Parent Ex. G). She testified that she met with one of the construction workers, who she described as "helpful;" however, the student's mother did not understand that the proposed class was housed at a different location for summer 2011 (Tr. p. 583). Furthermore, although the district offered the parents the opportunity to visit the assigned public school site, neither the IDEA or State regulations confer upon the parents a right to visit the recommended school and classroom. In general, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116, 300.327, 300.501[c]). The U.S. Department of Education's Office of Special Educational Programs (OPSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013). Consequently, although the parents may have wished to visit the assigned public school site listed on the June 2011 FNR, the fact that they were unable to do so while it was closed during summer 2011 did not result in the denial of a FAPE.

Moreover, the assistant principal testified that all parents of students who attended the assigned public school site listed in the June 2011 FNR were notified by letter that the location was closed for summer 2011 (Tr. p. 445). She further explained that a sign was posted on the main entrance of the assigned public school site to advise parents of the alternate location for summer 2011 (Tr. pp. 401, 486, 489-90, 500). According to the assistant principal, security personnel and custodial staff stationed at that building were also instructed to advise visitors to go to the alternate location where the proposed 6:1+1 special classroom was housed for summer 2011 (Tr. pp. 401, 489). She further indicated that security personnel and custodial staff had copies of the note advising parents to visit the alternate assigned public school site (Tr. p. 489). In light of the foregoing, the parents' claims that the assigned public school site was not operational was addressed by the district in a reasonable fashion and did not result in a denial of a FAPE in this instance.

2. Functional Grouping

With respect to the parties' dispute whether the student would have been suitably grouped for instructional purposes had he attended the assigned public school site, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical

development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

According to the special education teacher of the proposed classroom on July 5, 2011, there were five students enrolled in her class, ranging in ages from ten to 12, and all the students were classified as students with autism (Tr. pp. 221-22). The special education teacher opined that upon a review of the student's June 2011 IEP, functionally, socially, academically and behaviorally, the student would have appropriately fit into the grouping of her classroom at the beginning of the 2011-12 school year (Tr. pp. 234-35). Likewise, the assistant principal testified that the student's present levels of performance as set forth in the June 2011 IEP were similar to those of the students in the proposed classroom during the 2011-12 school year (Tr. pp. 427-28). More specifically, the hearing record reflects that the academic functioning levels of the students ranged from kindergarten to first grade, while the students' verbal abilities and behavioral needs varied (Tr. p. 223). Regarding verbal abilities of the students in the proposed classroom, one student was described in the hearing record as "very verbal," two students who were characterized as "selective verbally," one who spoke in "fragments" and another who did not have much language (Tr. p. 223). According to the hearing record, the student in the instant case had "limited verbal ability" (Tr. pp. 281-82). In terms of behavior, the special education teacher noted that she had some students who were able to attend to a task and exhibited very minor behaviors that affected the way that they were learning, while one student could have tantrums and could be a little more violent when having to accomplish a certain type of task or sit for a certain amount of time (Tr. p. 224). However, the special education teacher of the proposed classroom further noted that she was able to accommodate the various behavioral needs within her class (Tr. pp. 224-25).

Accordingly, upon review of the hearing record, I find that assuming that the student had attended the public school, the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned district school for the recommended program beginning July 2011.

3. Staff Training

The parents assert that the hearing record offers no information regarding the educational backgrounds of the paraprofessionals employed at the assigned public school site. A State has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized

that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]), and that the purposes of the IDEA may nevertheless be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is provided by personnel who are not certified (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]; Carter, 510 U.S. at 14 [noting that in a tuition reimbursement case, the lack of services by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Neither the IDEA nor federal or State regulations require as a general matter that the duties or training of district staff be specified in a student's IEP (20 U.S.C. § 1414[d][1][A]; 34 CFR 300.320; 8 NYCRR 200.4[d][2]; see Ganje, 2012 WL 5473491, at *11, adopted at 2012 WL 5473485 [Nov. 9, 2012] [holding that the relevant inquiry is whether the appropriately certified or licensed providers can implement the IEP, not whether they have specific training in the student's particular disabilities]. Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE, but rather the issue is a fact-specific inquiry. I also note, however, that the precise extent to which each distinct state requirement is adopted for purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 821 F.Supp.2d 1197, 1201 n.3 [S.D.Cal. Sept. 26, 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730 [2d Cir.2007]]).

According to the hearing record, either the special education teacher and the paraprofessionals in the classroom provided students with 1:1 instruction (Tr. pp. 262-63). She explained how students enrolled in the proposed 6:1+1 special classroom during the 2011-12 school year received between five to seven and a half hours per week of individual instruction (Tr. pp. 264-65). Further review of the evidence indicates that the paraprofessionals were supervised by a "head teacher," and that the district program was supervised and administered by a licensed special education teacher (Tr. pp. 118-19; see Tr. pp. 132-33). More specifically, the special education described a "staff matrix," which delineated responsibilities, and the special education teacher instructed and facilitated the classroom staff as to what they should be doing with students during the school day (Tr. p. 208). The assistant principal explained that paraprofessionals were responsible for assisting the teacher and to assist in in the instruction of the students (Tr. p. 413). Accordingly, given that a licensed special education teacher supervised the classroom paraprofessionals while they provided 1:1 instruction to students, I cannot conclude that the provision of 1:1 instruction to students from a paraprofessional would have deprived the student of a FAPE.

Moreover, notwithstanding the parents' allegations that the paraprofessional staff employed at the assigned public school site lacked the qualifications to implement the student's IEP, the hearing record supports a contrary conclusion. The hearing record reveals that the district and its personnel in this case are subject to State standards, and the special education teacher from the assigned classroom testified as to her qualifications and certifications (Tr. pp. 205-06; see Tr. p. 424). Moreover, the assistant principal testified that the classroom paraprofessional had a Bachelor's degree and was working towards her Masters' degree at the time of the impartial hearing (Tr. p. 415). Had the student attended the public school, this evidence and the evidence below describing the special education teacher's various classroom techniques shows that the district had

appropriately certified personnel and it does not support the conclusion that the district's staff was unable implement the student's IEP, I find that the parents' assertions with regard to the district staff's qualifications and certifications to be without merit.

4. Classroom Teaching Methodology

Next, to the extent that the parents submit that the classroom teaching methodology utilized in the proposed 6:1+1 special classroom was not appropriate to meet the student's special education needs, the special education teacher of the proposed 6:1+1 class testified that she employed the TEACCH[30] methodology in her class, as well as the Balanced Literacy program (Tr. pp. 212, 261, 424). According to the special education teacher, the TEACCH methodology focused on class activities designed for a student's individual needs and skills, with a focus on increasing his independence (Tr. p. 212). Specifically, the proposed classroom used workstations that had activities tailored to students' skills, and the special education teacher further testified that she utilized visual cues (Tr. p. 212). While counsel for the parents questioned whether the student was able to participate in a group, the special education teacher of the proposed class opined that based on her review of the June 2011 IEP, it would be appropriate for the student to be part of a group for a certain amount of time (Tr. pp. 261-62). However, she added that she would initially observe the student to assess his ability to function in a group setting (Tr. p. 262). In the event that she determined that the student was unable to participate in a group for a long duration of time, she would work on the student's ability to do so and build upon that (id.). After the initial five to ten minutes of group time, the students would then break into smaller groups or work 1:1 with the teacher or a paraprofessional (id.).

In addition, the special education teacher of the proposed class testified that she used differentiated instruction with her students, and incorporated tools such as graphic organizers, visual cues, video clips, auditory input and "sentence strips" (Tr. p. 210). She also testified that she worked on generalization with her students (Tr. p. 211). Although the parents also submit that the proposed classroom was not appropriate for the student, because the classroom teacher did not take her students out into the community or on public transportation, the special education teacher of the proposed classroom testified that she worked on ADL skills with students, such as dressing and undressing and personal hygiene (Tr. pp. 270-71). She added that she took her students on a field trip during summer 2011 (Tr. p. 287).

Although the special education teacher of the proposed class testified that she did not employ components of ABA in her classroom, there is nothing in the hearing record to suggest that ABA was the exclusive educational methodology from which the student could attain educational benefits and make meaningful progress (Tr. p. 213).[31] Based on the above, even if the student has become accustomed to ABA during the time he has spent at McCarton, the hearing

[30] TEACCH is an acronym for Treatment and Education of Autistic and other Communication Handicapped Children.

[31] In any event, the district social worker testified that certain aspects of ABA strategies were incorporated into the IEP and were frequently used within the specialized school setting within the TEACCH methodology (Tr. p. 192).

record does not support a conclusion that the district's use of the TEACCH methodology at the assigned public school site would have amounted to a denial of a FAPE.

5. Related Services and Implementation of Assistive Technology

Lastly, although the parents submitted evidence during the impartial hearing that they argue demonstrates that the assigned public school site had a history of difficulty delivering related services to students, data indicating that a school has not always delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding (Parent Ex. I; see M.S, 734 F. Supp. 2d 271 at 278-79; see K.L., 2012 WL 4017822 at *15). Here, the hearing record suggests that had the student enrolled in the assigned public school site, the district would have met his related services mandates. The special education teacher of the proposed 6:1+1 special classroom testified that students received their mandated services (Tr. p. 283). Similarly, the assistant principal testified that during summer 2011, students in attendance at the assigned public school site received their mandated speech-therapy and OT on site (Tr. p. 421). She further surmised that during summer 2011, the student would have received his full related services mandate on site, because during summer 2011, a student with a similar related services mandate was in attendance at the assigned public school site, and personnel at the school were able to fulfill his related services mandate on site (Tr. p. 427). Accordingly, notwithstanding the parents' claims that given its history of fulfillment problems with respect to the delivery of related services, there is nothing in the hearing record to suggest that the assigned public school site could not address the student's related service needs.[32]

Furthermore, a review of the hearing record does not substantiate the parents' claim that the assigned public school site was not ready, willing and able to implement the student's assistive technology device. According to the special education teacher of the proposed special 6:1+1 class, if the student's communication device was necessary to have with him for communication and expression, then it would be with the student at all times throughout the school day (Tr. pp. 241-42). She added that the student's communication device would have been used through academics to respond to questioning, give ideas or initiate conversations with other students, whether "it be a prompting or structured sentence" (Tr. p. 242). Furthermore, the special education teacher testified that if the student came to classroom with a device, with which she was unfamiliar, such as an iPad, she would work with the assigned public school's speech-language therapist on how best to use it within the classroom setting and throughout the day to benefit the student (Tr. pp. 283-84). Accordingly, the hearing record does not reflect that personnel employed at the assigned school site were unable to address the

[32] Furthermore, there is nothing in the hearing record to support the parents' allegations that the student's special education transportation needs would not have been fulfilled had he enrolled in the assigned public school site. The June 2011 IEP called for the provision of special education transportation; however, this service was not provided for per the Placement Referral Form (compare Dist. Ex. 2 at p.1, with Parent Ex. LL). However, although not indicated on the Referral Form, the district social worker testified that the student would receive special education transportation had he enrolled in the assigned public school site, because it was prescribed by the June 2011 IEP, and because "the program [wa]s IEP driven" (Tr. pp. 179-80).

student's assistive technology needs.

VII. Conclusion

Based on the hearing record evidence, I find that the recommended 6:1+1 special class in a specialized school with related services was reasonably calculated to provide the student with educational benefits in the least restrictive setting and, therefore, offered him a FAPE during the 2011-12 school year. Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to reach the issue of whether McCarton was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13).

As a final matter, I note that even though the district offered the student a FAPE, the district has been required to fund the student's placement at McCarton and requested extended day services for the entirety of the 2011-12 school year as a result of its obligation to provide the student with his pendency (stay-put) placement for the duration of these and prior proceedings, the underlying basis for which was described in the interim decision issued by the IHO (IHO Interim Decision). In addition to the interim order on pendency, the parents indicated in their answer that all of the student's McCarton tuition and costs for the student's home-based services for the 2011-12 school year, have been paid or were expected to be paid pursuant to the student's pendency rights (IHO Interim Decision; Answer at p. 2). As all of the reimbursement relief sought by the parent has been achieved by virtue of pendency, the challenged June 2011 IEP has expired by its own terms, and planning for the 2012-13 and 2013-14 school years should already be well underway or completed, I find that the parties' dispute regarding the 2011-12 school year is no longer a live controversy and has been rendered moot, the discussion of the parties' arguments on the merits above has been rendered academic, and "it is not capable of repetition because each year a new determination is made based on [the student's] continuing development" (M.S. v. New York City Dept. of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated January 28, 2013 is modified by reversing the portion that concluded that the district failed to establish that it offered the student a FAPE in the LRE for the 2011-12 school year.

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

IT IS FURTHER ORDERED that that if it has not done so already or unless the parties otherwise agree, the CSE shall reconvene within 45 days and, in compliance with State regulations, and consider whether it is necessary to conduct a reevaluation of the student; and

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

Dated: **Albany, New York**
August 14, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER