The University of the State of New York

The State Education Department
State Review Officer
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No. 13-050

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Kule-Korgood, Roff and Associates, PLLC, attorneys for respondent, Michele Kule-Korgood, Esq., and Andrea M. Santoro, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO), which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund the costs of the student's attendance at the Rebecca School for the 2011-12 school year. The parent cross-appeals from the IHO's decision to the extent the IHO did not find the district failed to offer an appropriate educational program to the student on additional grounds asserted by the parent. 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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has received diagnoses of an autism spectrum disorder, an attention deficit hyperactivity disorder, and an intellectual disability (Parent Ex. J at p. 3). He presents with delays in the areas of cognitive functioning, attention, receptive and expressive language, adaptive skills, fine and gross motor skills, and sensory processing, is nonverbal, and exhibits interfering behaviors (Parent Ex. I; J; K; Dist. Exs. 11; 12; 15). Upon reaching school age, the student attended a public school program for one year, after which he attended a State-approved nonpublic school pursuant

to district recommendation for approximately five years (Tr. pp. 1023-25, 1028-29). In 2009, the parent disagreed with the continued recommendation for the student's placement at the nonpublic school and unilaterally placed him at the Rebecca School (Tr. pp. 1031-1036; Parent Ex. L at p. 1; N).[1] The student remained at the Rebecca School from the 2009-10 school year through all events relevant to this matter (Parent Ex. M; Dist. Exs. 14-16).

On January 26, 2011, the CSE convened to conduct an annual review and develop the student's IEP for the 2011-12 school year (Dist. Ex. 4). Finding the student remained eligible for special education services as a student with autism, the CSE developed an IEP that recommended placement in a 6:1+1 special class in a specialized school with 1:1 paraprofessional support, adapted physical education, and related services consisting of five individual 30-minute sessions per week of occupational therapy (OT) and speech-language therapy, and three individual 30-minute sessions per week of physical therapy (PT) (id. at pp. 1, 5, 13, 15). In addition, the CSE created a behavioral intervention plan (BIP) (id. at p. 16).[2]

By final notice of recommendation (FNR) dated June 14, 2011, the district identified the particular public school site to which the student had been assigned to attend for the 2011-12 school year (Dist. Ex. 5). After receiving the FNR, the parent visited the public school site and, by letter to the district dated June 20, 2011, rejected the IEP and assigned school (Parent Ex. P at p. 1). That same day, the parent signed a contract for the student's enrollment in the Rebecca School for the 2011-12 school year (Dist. Ex. 18 at p. 1).[3] During the 2011-12 school year, the student attended the Rebecca School in a classroom with four other students, a head teacher, two teacher assistants, and two paraprofessionals, one of whom was assigned to the student (Tr. pp. 787, 906-08).

A. Due Process Complaint Notice

By due process complaint notice dated May 11, 2012, the parent requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 1). Initially, regarding the development of the IEP, the parent asserted that her ability to participate in the CSE meeting was impeded by the CSE's failure to discuss the student's progress and the district's failure to provide her with the reports relied on until after the meeting's conclusion (id. at pp. 2-3). The parent also argued that the January 2011 CSE failed to obtain or consider sufficient evaluative information, and developed the January 2011 IEP based on district policies rather than the student's needs (id. at p. 2). The parent further contended that the January 2011 IEP contained an inadequate statement of the student's present levels of performance (id.). The parent next argued that the annual goals in the

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

[2] Although not at issue in this matter, the January 2011 IEP was amended by consent to specify that the student's transportation was recommended to be provided in an air-conditioned mini-wagon (Dist. Ex. 7; see Tr. pp. 534-35; Dist. Ex. 10).

[3] Copies of the contract were submitted by both parties (Parent Ex. Q; Dist. Ex. 18). The version submitted by the district is referenced because it includes a payment schedule not included in the version submitted by the parent (see Tr. pp. 840-41).

IEP were insufficient, inappropriate, vague and unmeasurable (id. at p. 3). The parent also asserted that the CSE failed to conduct a functional behavioral assessment (FBA) to ascertain the causes of the student's interfering behaviors, and that the behavioral intervention plan (BIP) developed by the CSE was inadequate to address the student's needs (id. at p. 2). In particular, the parent asserted that the student could not benefit from the BIP because he did "not have the necessary prerequisite skills" (id. at p. 3). Also with regard to the January 2011 IEP, the parent contended that the recommendation for placement in a 6:1+1 special class would not provide the student with a sufficient level of support to meet his academic, sensory, and behavioral needs (id.).

The parent also contended that although the CSE convened in January 2011, no particular public school assignment was made for five months (Dist. Ex. 1 at p. 3). The parent argued that the school assignment was defective in that it did not specify the particular classroom in which the student would be placed (id.). Furthermore, she asserted that the same assigned public school site had been recommended for the student in a prior year and that she had determined it to be inappropriate at that time (id.). The parent claimed that the assigned school was not capable of providing the student with a suitable peer group and would employ an inappropriate curriculum (id.). With regard to the physical environment of the assigned school, the parent contended that the student would be distracted and overstimulated by the visual and auditory stimuli present in the school and classroom, as well as the size of the lunchroom (id.). Finally, the parent asserted that the assigned school did not have adequate equipment to address the student's sensory needs, and "might not be able to provide" the related services specified in the January 2011 IEP (id.). For relief, the parent requested funding of the costs of the student's tuition at the Rebecca School, as well as the costs of a 1:1 paraprofessional, for the 2011-12 school year (id. at p. 4).

B. Impartial Hearing Officer Decision

A prehearing conference was held on June 21, 2012, after which an impartial hearing convened on July 20, 2012, and continued on four additional hearing dates before concluding on December 19, 2012 (Tr. pp. 1-1119; see IHO Ex. III). In a decision dated March 22, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, the parent's unilateral placement at Rebecca School was appropriate, and equitable considerations favored the parent's request for relief (IHO Decision at pp. 29-39).

With regard to the parent's claims concerning the adequacy of the January 2011 IEP, the IHO found that the CSE failed to discuss available evaluative information and the district failed to conduct an OT evaluation, leading to the inclusion of incorrect information in the IEP about the student's present levels of performance and inadequate goals (IHO Decision at pp. 31-32). In particular, the IHO found that the present levels of performance provided inaccurate information about the student's baseline levels and did not fully describe his sensory needs (id.). The IHO determined that the annual goals contained on the IEP were copied from a prior IEP, did not include any goals to address the student's needs relative to activities of daily living (ADLs), and implied that the OT goals were inadequate because they were not based on an OT evaluation (id. at pp. 31-33). As to the student's behavioral needs, the IHO found that the failure to conduct an FBA was inappropriate and led to the development of a BIP that did not identify all of the student's interfering behaviors, the causes of the student's behaviors, or specific strategies to be used to reduce the occurrences of the behaviors (id. at pp. 33-34). The IHO also found that the failure to include parent counseling and training on the IEP contributed to a denial of a FAPE in this instance

(id. at pp. 34-35). The IHO found that the likelihood the student would receive OT outside of the school day was inappropriate to address his sensory needs, given his need for sensory input throughout the day (id. at pp. 32-33). However, the IHO found that the parent's claims regarding notice, grouping, equipment, and the physical environment of the assigned public school site were not supported by the hearing record (id. at p. 33).

The IHO next found the parent's unilateral placement of the student at the Rebecca School was appropriate to meet the student's needs (IHO Decision at pp. 35-37). The IHO noted that the Rebecca School provided the student with services to address his sensory needs, as well as providing the parent with counseling and training (id. at pp. 35-36). In addition, the IHO found that the student made progress in a variety of areas—including the academic, sensory, communication, and social/emotional domains—while attending the Rebecca School (id. at pp. 36-37). Finally, the IHO found that equitable considerations favored the parent and rejected the district's arguments that the parent did not cooperate with the district, the parent did not provide sufficient notice of her claims, and the Rebecca School contract was illusory (IHO Decision at pp. 37-38). The IHO awarded the parent reimbursement and direct funding for the costs of the student's attendance at the Rebecca School—consisting of the costs of the student's tuition and for a 1:1 paraprofessional—for the 2011-12 school year (id. at p. 39).

IV. Appeal for State-Level Review

The district appeals, challenging the IHO's determinations that it failed to offer the student a FAPE for the 2011-12 school year and that equitable considerations favored the parent's request for relief.[4] The district asserts that the parent was able to participate in the CSE meeting, the CSE considered sufficient evaluative information to develop the January 2011 IEP, the IEP reflected the student's present levels of performance at the time of the meeting, the annual goals were based on available evaluative information and input from the student's teacher, the BIP adequately identified and addressed the student's behavioral needs, and the absence of parent counseling and training did not rise to the level of a denial of a FAPE. The district also contends that, although claims regarding the assigned public school site are speculative and should not be considered, the hearing record reflects that the assigned school could have implemented the January 2011 IEP in an appropriate functional peer grouping. The district further argues that the IHO erred in addressing issues not raised in the parent's due process complaint notice. Finally, the district asserts that equitable considerations do not favor the parent's request for relief because she never intended to place the student in a public school placement; the district also contends that the parent did not establish an entitlement to direct funding of the costs of the student's Rebecca School tuition.

The parent answers and cross-appeals, arguing to uphold the IHO's award and asserting additional grounds on which the IHO should have found a denial of a FAPE. Specifically, the parent asserts that the IHO did not address the recommendation for a 6:1+1 special class with the support of a 1:1 paraprofessional, which she asserts would not provide the student with a sufficient

[4] The district does not challenge the IHO's findings that the Rebecca School was an appropriate placement; accordingly, the IHO's determination on this issue is final and binding on the district and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

level of support. The parent also contends that the IHO erred in not addressing or dismissing certain of her claims with respect to the assigned public school site, including that the physical environment would overwhelm and overstimulate the student and that the school could not implement his BIP, provided instruction and used a curriculum beyond the student's abilities, would not provide a sufficient level of instruction in ADLs, did not have adequate sensory equipment, and could not implement certain goals.

The district answers the cross-appeal and asserts that the parent's cross-appeal regarding the sufficiency of a 6:1+1 special class placement should not be considered because it was not raised in the parent's due process complaint notice and, in any event, is without merit. The district also contends that, although the parent's claims regarding the assigned public school site are speculative and should not be addressed, the physical environment would not preclude the student from receiving benefit, the school was capable of implementing the student's BIP, could modify instruction and the curriculum used to meet the student's needs, could have met the student's ADL needs, either had or could acquire necessary sensory equipment, and could have implemented the goals on the IEP.

V. Applicable Standards

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

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

8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156 [2d Cir. 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954 [2d Cir. 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Parent Participation

The parent asserts that her participation in the development of the January 2011 IEP was significantly impeded because the CSE did not discuss the available evaluative information, what further evaluations might be necessary, or the student's progress toward his goals. To the contrary, the hearing record supports a finding that the parent was provided with, and took advantage of, the opportunity to participate during the CSE meeting. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

The hearing record reflects that the parent and the student's then-current teacher at the Rebecca School were able to participate in the January 2011 CSE meeting (Tr. pp. 501-02). In particular, the parent testified that a December 2010 Rebecca School progress report was discussed, including a discussion of the student's progress with respect to social interactions (Tr.

pp. 1043-44). The parent also testified that an October 2010 classroom observation was discussed (Tr. pp. 1046-47). The district school psychologist who attended the January 2011 CSE meeting testified that during the meeting, the CSE also discussed the student's communication and language function, his needs for sensory support, and the student's ability to relate to others (Tr. p. 518). The district school psychologist testified, consistent with the meeting minutes, that the student's teacher provided information regarding the student's current levels of functioning and the student's progress toward meeting the goals contained in the December 2010 Rebecca School progress report; the meeting minutes also reflect that the parent expressed agreement with some aspects of the present levels of performance (Tr. pp. 506, 508, 537; Dist. Ex. 6). The school psychologist indicated that the CSE developed the student's annual goals by making modifications to those contained in the December 2010 Rebecca School progress report, a process in which the parent and the student's Rebecca School teacher participated (Tr. pp. 541-42, 544-45). The student's Rebecca School teacher also indicated that the annual goals were discussed at the CSE meeting and that she provided input into the modifications that were made (Tr. pp. 940-41). The district school psychologist also testified that ADL goals were added at the parent's request; the minutes of the meeting indicate that the parent was asked her opinion with regard to the reading and math goals developed for the IEP (Tr. p. 504; Dist. Ex. 6). The meeting minutes also reflect that the parent ultimately disagreed with the recommendation for placement in a 6:1+1 special class (Dist. Ex. 6). The parent testified that when she expressed her disagreement with the placement recommendation, the meeting ended shortly thereafter and she felt as though she was not permitted an opportunity to explain why (Tr. p. 1049).[5]

Based on the foregoing, the hearing record shows the parent was afforded the opportunity to participate in the January 2011 CSE meeting and the fact that the parent was left with the impression that her objection to the placement recommendation was what caused the meeting to end, although unfortunate, did not significantly impede her ability to do so (see M.M. v. New York City Dep't of Educ., 2015 WL 1267910, at *6 [S.D.N.Y. Mar. 18, 2015]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *11-*12 [S.D.N.Y. Feb. 25, 2015]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *9 [S.D.N.Y. Dec. 3, 2014]; N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 586 [S.D.N.Y. 2013]).

B. Sufficiency of Evaluative Information

The parent asserts that the district failed to obtain sufficient evaluative information regarding the student's speech-language, gross and fine motor, sensory processing, and daily living skill deficits. 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]); additionally, a district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (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

[5] It is not surprising that a CSE meeting would end shortly after a placement recommendation was made; State guidance indicates that placement determination is the final step in developing an IEP ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 9-14, 57-59 [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). As part of an initial evaluation or reevaluation, a group, which includes the CSE, must review existing evaluation data (8 NYCRR 200.4[b][5][i]; see 20 U.S.C. 1414[c][1][A]). Based on that review, the CSE, with input from the student's parents, must determine whether and what additional data are needed (8 NYCRR 200.4[b][5][ii]; see 20 U.S.C. 1414[c][1][B]).

Upon review, although much of the information available to the January 2011 CSE was obtained from the parent or the student's private school, the available information regarding the student's functional, developmental, and academic needs was sufficient to enable the January 2011 CSE to develop an IEP.[6] A district may rely on appropriate privately obtained evaluations (M.H. v. The New York City Dep't of Educ., 2011 WL 609880, at *9-*10 [S.D.N.Y. Feb. 16, 2011]); and may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. March 29, 2013], aff'd, 554 Fed. App'x 56 [2d Cir. 2014]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]; see also C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 230 [S.D.N.Y. 2014] [holding that additional evaluations were not required when the CSE relied on a detailed Rebecca School progress report, conducted shortly before the CSE meeting, that "provide[d] a holistic assessment of the Student's needs across a wide variety of academic, social, and behavioral functions," and the student's parents and teacher participated in the CSE meeting]; Application of the Dep't of Educ., Appeal No. 14-098). The hearing record reflects that the January 2011 CSE considered several sources of evaluative information which, collectively, contained a significant amount of information regarding the student, including the student's IEP for the prior school year, a 2009 social history update, a 2009 psychoeducational evaluation report, an October 2010 classroom observation report, and a December 2010 Rebecca School progress report (Tr. pp. 499, 508, 575-76; Parent Ex. AA; Dist. Exs. 4; 6; 11; 12; 13; 15). In addition, the hearing record reflects, as discussed above, that the parent and the student's teacher from the Rebecca School actively participated in the January 2011 CSE meeting and provided "vital information" regarding the student's then-current functioning (Tr. pp. 501-02).

[6] This is not intended to excuse or minimize the district's apparent failure to evaluate the student in all areas of suspected disability with a variety of instruments as required by regulations; rather, to the extent the district failed to comply with State and federal regulations, the hearing record does not support a finding that the student was denied a FAPE thereby.

According to the September 2009 social history update, due to the parent's concern that her son was not making progress at the State-approved nonpublic school he attended, she was planning to enroll the student in the Rebecca School (Dist. Ex. 12 at p. 1). The parent provided descriptions of the student's communication, gross motor, pre-academic, social interaction, and ADL skills (id. at pp. 1-2). Specifically, the parent reported that the student was primarily nonverbal, although at times he communicated by using single words and the picture exchange communication system (PECS), ambulated with an unsteady gait, displayed limited social interaction skills, performed ADL activities with prompting, and required constant supervision (id.).

The September 2009 psychoeducational evaluation report provided background information about the student's medical history, then-current educational program, and indicated that the student was determined to be "untestable" using standardized assessments due to significant cognitive, social skills, and communication delays (Dist. Ex. 11 at p. 1). The parent reported that the student needed continual supervision at home, and also prompting/assistance to complete ADL activities (id.). Current behavioral observations in the report included that the student did not separate easily from the parent, who was "minimally successful" at eliciting the student's compliance with tasks (id. at p. 2). According to the examiner, the student "showed no interest" in the examiner or the testing stimuli, made no eye contact, did not appear to look at the test booklet or items, and closed his eyes when efforts were made to focus him on testing materials (id.). The report indicated that the student frequently engaged in self-stimulating behaviors such as rocking, hand flapping, finger flicking, staring at the lights, and screeching (id.). Continued attempts by the examiner and the parent reportedly resulted in "agitation," manifested by the student screeching, jumping up and down, and rolling to the floor (id.). The examiner further reported that the student exhibited difficulty remaining seated, and "roughly" pushed her in attempts to move past her (id.).

The examiner reported that attempts at conducting formal assessments of the student were discontinued "when it became apparent" that the student "could not or would not comply with the demands of the formal testing situation" (Dist. Ex. 11 at p. 2). The report contained descriptions of the student's skills reported by the parent, including that the student followed some one-step directions, and identified some colors and shapes, although he did not demonstrate these skills during the evaluation (id.). The examiner concluded that current evaluation results—consistent with the results of prior evaluations—suggested that the student performed in the severely delayed range of cognitive functioning, and exhibited significantly delayed receptive and expressive language skills (id.). Recommendations included that the student continue to receive speech-language therapy and OT (id. at p. 3).

A district social worker conducted an October 2010 classroom observation of the student at the Rebecca School in a class of six students, one head teacher, and two assistant teachers (Dist. Ex. 13 at p. 1). According to the report, while lying on a "Foof" pillow with his eyes closed, the student generally did not respond when a teacher attempted to interact with him by calling his name, singing him a song, and asking him to wake up (id. at pp. 1-2). The student correctly identified one out of two picture cards with teacher assistance, and followed the teacher's directions to sit on a ball, stomp his feet, and give a "high five" with prompting (id.). The observation report indicated that the student was "somewhat more withdrawn" on that day because his one to one support was absent (id. at p. 2). As a result, the hearing record indicates that the CSE placed little reliance on this document (Tr. pp. 524-25, 604, 1047-048).

In a Rebecca School progress report dated December 2010, staff indicated that the student attended a classroom setting with a ratio of 6:1+2 and received 1:1 paraprofessional support throughout the day to maintain regulation and attention (Dist. Ex. 15 at pp. 1, 12). According to the report, the student's attention was "very dependent" upon the activity and he was more attentive during highly motivating activities such as sensory play or when receiving proprioceptive input (id. at p. 1). The report also indicated that throughout the day the student presented as either "up-regulated" (needing constant movement activities), or "under regulated" (appearing extremely lethargic), and needed adult support to regain attention and modulate his actions (id. at pp. 1, 4). Rebecca School staff reported that the student experimented with various textures, smells, tastes; and used a variety of sensory materials/activities including jumping on a trampoline, walking up stairs, rubbing lotion, squishing a therapy ball, swinging on a swing, and receiving joint compressions to help maintain regulation (id. at pp. 1, 4-5).

Academically, the Rebecca School report indicated that the student demonstrated the ability to identify his own name in print in a field of two, match a picture of himself to his printed name, answer simple "who," "what," and "where" questions with various supports, show interest and attention during read aloud activities, identify numerals 1-5 in a field of 5 with prompting, match pictures of familiar people/objects, and with 1:1 support, demonstrate understanding of "first-then" and "now & later" (Dist. Ex. 15 at p. 3). The report further indicated that the student was "unable" to answer kindergarten level fact or inferential based questions on specific comprehension tasks (id.).

The Rebecca School report described the student as being primarily nonverbal, and that he communicated by using signs, gestures, vocalizations, word approximations, and PECS (Dist. Ex. 15 at pp. 1-2, 6-7). The speech-language pathologist described the student's ability to orient to his name and sounds in his environment, follow one and two-step related directions with verbal and gestural cues, identify preferred items from a field of six, and identify body parts (id. at p. 7). The student did not respond to yes/no questions, but selected a desired icon from a field of six on a communication board to make requests and answer simple questions (id.). According to the speech-language pathologist, the student used the communication board at mealtimes and across a range of preferred activities, both in the classroom and during speech-language therapy sessions (id.). Therapy sessions also focused on improving the student's production of consonant and vowel sounds, and awareness of his oral structures (id. at pp. 7-8). Regarding the student's social skills, the report indicated that although the student did not demonstrate pretend play skills, he was increasingly interested in initiating and playing games with adults, and occasionally initiated interactions with peers (id. at p. 2). The student at times approached familiar adults and peers to give affection, made eye contact with adults, conveyed empathy for others, and responded by smiling or stomping his feet when his name was called (id. at pp. 2, 6-7). According to the report, the student preferred to independently solve problems, and did not fully grasp shared problem solving (id. at p. 2).

Regarding the student's gross and fine motor skills, the Rebecca School report indicated that the student worked on increasing independence with self-care skills, and improving body awareness; developing muscle tone/strength, gradation of movement, and endurance; and sequencing motor plans (Dist. Ex. 15 at pp. 4-6). Specifically, during OT and PT sessions, therapists worked to improve the student's ability to don and doff his shoes, maneuver through his

environment (e.g., walking down stairs, climbing onto a swing), and expand his repertoire of gross motor activities including running, chasing, and jumping (id.).

The hearing record supports the parent's assertion that the 2009 psychoeducational evaluation report was not discussed at the January 2011 CSE meeting (Tr. pp. 513, 582-83, 1046). However, the school psychologist testified that she personally reviewed all of the documentary evidence available to the CSE (Tr. p. 576). In any event, while a CSE must "consider" the results of the most recent evaluation of a student (34 CFR 300.324[a][1][iii]; 8 NYCRR 200.4[d][2]), consideration does not require substantive discussion, that every member of the CSE read a particular document, or that the CSE accord the evaluation any particular weight (see T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993] citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; S.W. v. New York City Dep't of Educ., 2015 WL 1097368, at *10 [S.D.N.Y. Mar. 12, 2015]; P.G., 2015 WL 787008, at *17; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 578-82 [S.D.N.Y. 2013] [holding that the IDEA "does not require that the team review every single item of data available" or that all evaluative information considered be physically present at the CSE meeting]; see also Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]).[7]

Based on the above, the evidence in the hearing record demonstrates that the CSE had sufficient and recent evaluative information regarding the student's cognitive abilities, sensory processing, social/emotional functioning, academic achievement, ADL skills, motor skills, and communication skills (Parent Ex. AA; Dist. Exs. 4; 6; 11; 12; 13; 15). Thus, contrary to the IHO's determination, an independent review of the hearing record reflects that the evaluative information considered by the January 2011 CSE, coupled with the input from the parent and the student's teacher, provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs (including his sensory deficits) to develop an IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013] [holding that if the district has sufficient information to determine the student's needs, it is not required to conduct a reevaluation]; D.J. v. New York City Dep't of Educ., 2013 WL 4400689, at *4 [S.D.N.Y. Aug. 15, 2013] [holding that the district is not required to conduct every assessment that might provide useful information where it has sufficient information]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013] [noting the CSE's "discretion to determine that no new evaluation is necessary"]).[8]

[7] The parent cites to no authority for the proposition that considering the results of the most recent evaluation of the student required discussion of a report of the evaluation at a CSE meeting.

[8] Although not dispositive, the district school psychologist testified that she believed the available evaluative information was sufficient to develop the student's IEP and that it was not necessary to conduct additional evaluations (Tr. pp. 500-01, 514-15). Similarly, the Rebecca School occupational therapist who began working with the student in February 2011 opined that the December 2010 Rebecca School progress report provided sufficient information to understand the student's need and abilities relating to occupational therapy (Tr. pp. 762-63). To the extent the parent asserts that the CSE did not determine whether additional evaluative data was required, the hearing record reflects that none of the CSE members requested that additional evaluations be conducted (Tr. p. 516).

C. Present Levels of Performance

The parent asserts that the January 2011 IEP failed to sufficiently describe the student's present levels of performance, particularly with regard to his academic, communication, sensory, and motor abilities and needs, and did not sufficiently specify the management needs required to enable the student to benefit from instruction. In particular, the parent asserts that the present levels did not fully describe the student's sensory needs, by not providing statements of how often he required sensory input or what sensory tools should be employed, or communication abilities. The parent further contends that certain aspects of the student's functional performance changed between the time the IEP was developed and the time it was to be implemented, and that the district's failure to update them constituted a denial of a FAPE.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

It was reasonable for the January 2011 CSE to rely on the description of the student's present levels of performance provided by the Rebecca School progress report, prepared by those who interacted with the student on a daily basis, as well as the input of the student's teacher provided at the time of the CSE meeting. In particular, the district school psychologist indicated that she relied on the student's teacher to provide information regarding the student's functional levels, both academically and socially, as well as his management needs, in addition to relying "fully" on the Rebecca School progress report with respect to the student's related services needs (Tr. pp. 571-75). Minutes from the January 2011 CSE meeting, composed by the district school psychologist and the district representative (Tr. p. 502), show that a draft of the IEP present levels of performance was read aloud during the meeting, and "modified with teacher input" (Dist. Ex. 6). Specifically, the minutes indicate that the student's pre-kindergarten academic level was discussed and "agreed upon in all areas," and that the CSE reviewed the IEP academic management needs (id.; see Dist. Ex. 4 at p. 3). The minutes further reflect the CSE's discussion of the IEP social/emotional present levels of performance—which was revised to reflect the teacher's observation about the student's interaction with peers—to which the parent agreed (Dist. Ex. 6; see Dist. Ex. 4 at p. 4). Additionally, the CSE "discussed and revised" the IEP health and physical development present levels of performance (Dist. Ex. 6; see Dist. Ex. 4 at p. 5).

The January 2011 IEP reflected the results of the January 2009 psychoeducational evaluation that indicated the student's cognitive functioning was severely delayed (Dist. Ex. 4 at pp. 3-4; see Dist. Ex. 11 at p. 2). The IEP also reflected the CSE's discussion that the student was working on pre-academic skills and functioning at a pre-kindergarten level in reading and mathematics (Dist. Exs. 4 at p. 3; 6).

In the area of communication and social skills, the January 2011 IEP indicated—consistent with the information available to the CSE—that the student exhibited significant language delays, was nonverbal, and communicated his wants and needs using PECS, gestures, vocalizations, and signs (Dist. Ex. 4 at pp. 3-4; see Dist. Ex. 15 at pp. 1-2, 6-7).[9] According to the IEP, the student's social functioning was "constrained" by his communication limitations, and he did not demonstrate pretend play skills (Dist. Ex. 4 at p. 4). However, the student engaged with familiar adults in preferred activities, conveyed emotional interest and empathy for others, demonstrated an increased ability to reference peers, showed understanding that he shared space with others, and initiated interactions with both peers and adults (id.). The IEP indicated that the student was an independent problem solver, yet had not grasped the concept of shared problem solving (id.).

The January 2011 IEP health and physical development present levels of performance reflected that the student received a diagnosis of autism at two years of age, had various food allergies, and was administered medication at home to regulate his behavior (Dist. Ex. 4 at p. 5). The IEP also indicated that the student demonstrated low endurance for gross motor activities and postural insecurity, and resisted surfaces that did not offer a stable base of support (id.). The student was reported to continue to need the support of OT and PT services, and to potentially need assistance when using the bathroom (id.).

A review of the January 2011 IEP does not support the parent's assertion that the present levels of performance reflected an insufficient description of the student's sensory needs. In particular, the IEP reflected reports that the student presented with a "mixed sensory profile;" both up-regulated and needing constant movement activities, and under-regulated/lethargic with a low level of arousal, needing adult support to engage in an activity (Dist. Ex. 4 at pp. 3-5). In addition, the IEP noted that the student was hyper-responsive to auditory input, frequently put his hands over his ears to block out loud noises, and was sensitive to both bright lights and smells (id. at p. 5). The IEP further noted that the student was under-responsive to vestibular and proprioceptive stimulation, requiring intense input in order to respond (id.). According to the IEP, when provided with adequate sensory input, the student's engagement with others improved (id.). Reports reflected in the IEP indicated that the student was "sensory seeking" and enjoyed deep pressure, which calmed him down and helped him stay regulated and focused (id. at p. 3). He benefitted from receipt of sensory input and visual support, and learned in a quiet environment with 1:1 support (id.). According to the IEP, the student demonstrated self-stimulatory behaviors such as flicking his fingers and jumping up and down while making loud vocalizations, and that at times he experienced agitation when changes were made to his environment (id. at pp. 3-4). Management strategies provided in the IEP included sensory input, sensory tools, verbal and visual prompts, and movement breaks throughout the day (id.). Another management strategy noted to be beneficial to the student in the IEP included the provision of sensory supports throughout the school day (id. at p. 4). While the parent may have preferred that the IEP provide more specificity regarding the student's specific skills, the frequency with which the student would receive sensory input, and the specific types of sensory tools used, under the circumstances of this case, the present levels of performance reflect the evaluative information available to the January 2011 CSE and accurately described the student's needs and abilities, such that the level of detail the parent desired was not required in order to provide the student with a FAPE (P.G. v. New York City Dep't of

[9] Although the parent asserts that it was not appropriate to use PECS with the student, the student's Rebecca School teacher did not recall whether she informed the CSE that its use would be discontinued (Tr. pp. 934, 982).

Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]). The district school psychologist testified that the IEP did not list specific sensory tools and that the IEP was "purposefully left open and fluid, because we recognize that students change and their needs change" (Tr. pp. 550-53). It was appropriate for the CSE to anticipate the need for flexibility with respect to the provision of sensory supports to the student, absent any indication in the hearing record that the student could not receive educational benefits without the level of specificity preferred by the parents with respect to the sensory aspects of the student's program.

However, even having found that the present levels of performance were appropriate when developed, the parent contends that the student's present levels of performance changed between the time the January 2011 IEP was developed and the time it was to be implemented, making them no longer appropriate at the time the IEP was to be implemented. While I have examined the entire hearing record and considered the testimony of Rebecca School personnel with regard to the manner in which the parent alleges the IEP did not accurately reflect the student's needs, the hearing record does not reflect the district was made aware of information obtained subsequent to the development of the January 2011 IEP indicating that the student's needs had changed sufficiently such that the present levels were no longer appropriate. In particular, the Rebecca School occupational therapist who testified at the impartial hearing did not begin working with the student until after the CSE meeting and her testimony regarding the student's presentation was all stated in terms of the student's then-current functioning, rather than as of the time of the CSE meeting (Tr. pp. 724, 728-31, 734-36). The Rebecca School program director provided testimony regarding the student's social/emotional, sensory, communication, and academic functioning, but her testimony reflected the student's functioning either at the time of her testimony or as of the beginning of the 2011-12 school year, not at the time of the January 2011 CSE meeting (Tr. pp. 785-87, 792, 794-98). Furthermore, the program director indicated that she had not at any time contacted the district to express these concerns (Tr. pp. 862-64). The student's Rebecca School classroom teacher during the 2010-11 and 2011-12 school years also provided a description of the student's functioning, generally stated in terms of his functioning during the 2011-12 school year; there is no indication that to the extent her testimony differed from the information contained in the January 2011 IEP, it related to the student's needs and abilities at the time of the CSE meeting or that it was presented to the district at any time prior to the impartial hearing (Tr. pp. 885-86, 889-906, 930-32, 938). The teacher also indicated that she used several of the strategies stated in the IEP to address the student's management needs (Tr. p. 943).[10] In addition, as noted by the district school psychologist, the student's rate of progress was very slow and although his functioning evolved, it was "not a drastic change over time" (Tr. p. 538). Furthermore, the parent did not request that the CSE reconvene to modify the IEP when she rejected the recommended

[10] The parent provides no authority for the proposition that information not available to the CSE, presented to the district for the first time through testimony at the impartial hearing, can establish that the IEP was not appropriate as of the time it was drafted or that the district was required to modify the IEP. Rather, case law establishes that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE" (C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; D.A.B. v New York City Dep't of Educ., 973 F. Supp. 2d 344, 361 [S.D.N.Y. 2013]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 342 n.19 [S.D.N.Y. 2013]; see S.W., 2015 WL 1097368, at *10; see also, R.E., 694 F.3d at 188 [holding that an "IEP must be evaluated prospectively as of the time it was created"]).

program in June 2011 but only indicated her intention to seek public funding for the costs of the student's unilateral placement (Tr. pp. 539, 1095; Parent Ex. P at p. 1).

In sum, a review of the information considered by the January 2011 CSE and discussed at the CSE meeting as detailed above (Parent Ex. AA; Dist. Exs. 4; 6; 11; 12; 13; 15), shows that the district adequately and accurately reflected the student's present levels of performance, including the student's sensory needs (P.G., 959 F. Supp. 2d at 511-12). Accordingly, the hearing record does not support a finding of a denial of a FAPE on this basis.

D. Annual Goals

The parent asserts that the January 2011 IEP failed to provide sufficient goals to address the student's needs relating to social/emotional skills, ADLs, and safety. Generally, the parent asserts that the goals lacked baselines and were not sufficiently measurable. The parent further contends that certain of the goals were inappropriately difficult and not achievable for the student. In addition, the parent asserts that those goals provided by the Rebecca School were intended to be used for six-month periods and thus were not appropriate for an IEP intended to be implemented beginning in July 2011.

Briefly, the IEP contained annual goals in the areas of reading, math, OT, PT, communication, and ADLs (Dist. Ex. 4 at pp. 6-12). The parent has raised no specific objections to the academic (reading and math), speech-language, or PT annual goals. Accordingly, these goals are not further addressed, other than to note they relate to areas identified as areas of need by the CSE and the district school psychologist indicated the academic goals were updated from the student's prior IEP with the assistance of the parent and the student's teacher (Tr. pp. 541, 544-46).[11]

To the extent the parents assert that the goals lacked baselines, neither the IDEA nor State or federal regulations require that this be an element of the annual goals contained in a student's IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572 [2d Cir. 2014]).[12] With regard to the alleged insufficient measurability of the goals, although the parents are correct that many of the annual goals themselves provided little guidance with regard to the manner in which the student's progress was to be measured, courts

[11] To the extent there was testimony from the student's Rebecca School teacher that the goals would not be appropriate to address the student's needs for the 2011-12 school year (Tr. pp. 923, 925-29), she also indicated that the reading goal was in an area that was still being worked on with the student, although at a different level (Tr. pp. 945-46). The parent has not asserted any deficiencies with respect to these goals on appeal and the hearing record contains no indication that the teacher shared this information with the district at any point. Furthermore, as with the other goals, goals contained in the December 2010 Rebecca School progress report appear to have been the basis for many of the short-term objectives for the reading and math annual goals (compare Dist. Ex. 4 at p. 6, with Dist. Ex. 15 at p. 9), the speech-language annual goals (compare Dist. Ex. 4 at pp. 10-11, with Dist. Ex. 15 at pp. 10-11), and the PT annual goals (compare Dist. Ex. 4 at pp. 8-9, with Dist. Ex. 15 at p. 10). The district school psychologist acknowledged that the related services goals were taken "directly from the [December 2010 Rebecca School progress] report" (Tr. pp. 544, 632).

[12] Rather, as noted by the district special education teacher and school psychologist who testified at the impartial hearing, a teacher would generally conduct an assessment of new students to determine their baseline abilities relative to their annual goals (Tr. pp. 481-82, 561-62).

generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. 2013]). Although the annual goals should themselves have included the required elements, each of the annual goals included in the IEP contained between two and six corresponding short-term objectives identifying subordinate elements of the annual goal to be worked on (Dist. Ex. 4 at pp. 6-12). Together, almost all of the annual goals or their short-term objectives provide the evaluative criteria (e.g., with 80% accuracy, 4/5 opportunities) and evaluation procedures (e.g., teacher/provider observations, class activities, teacher-made materials) by which the student's progress would be measured (id.).[13] Furthermore, while none of the goals or short-term objectives specified the evaluation schedule, the frequency with which the student's progress would be assessed, the IEP indicated that the student's progress would be reported to the parents three times over the course of the school year (id.). Although not compliant with State regulation (8 NYCRR 200.4[d][2][iii][b], [c]), this can be taken to mean that the student's progress would be assessed no fewer than three times during the school year, and the parent has not asserted at any time that the student required assessment of his progress at a greater rate. Although not consistent with best practices the goals, as elaborated upon by the short-term objectives, are sufficient to guide a teacher in providing the student with instruction and any deficiencies do not rise to the level of a denial of a FAPE (B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *11 [S.D.N.Y. Dec. 3, 2014]; N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359-63 [E.D.N.Y. 2014]; R.B., 2013 WL 5438605, at *13-*14).

With regard to the parent's complaints regarding the contents of specific annual goals, the parent asserts that the short-term objectives contained in the annual goal for sensory processing were inappropriate. One required the student to "attend to a classroom activity for 15 minutes in 4/5 opportunities" after receiving proprioceptive and vestibular input (Dist. Ex. 4 at p. 7), which the parent asserts is "too long" for the student to attend. However, the December 2010 Rebecca School progress report contains an identical goal, except requiring the student to attend for 10 minutes (Dist. Ex. 15 at p. 10). The district reasonably chose to expand upon a then-current goal of the student's, which addressed an acknowledged need. The other sensory processing goal required to student to engage in activities designed to provide him with proprioceptive and vestibular input, with "minimal to moderate" adult assistance, in 9 of 10 opportunities (Dist. Ex. 4 at p. 7), which the parent asserts could not have been achieved in that frequency with minimal assistance. However, the goal calls for "minimal to moderate assistance," and the December 2010 Rebecca School progress report contained an identical goal, except for containing evaluative criteria of four of five opportunities (Dist. Ex. 15 at p. 10). Aside from the testimony of the student's occupational therapist—who, as noted above, did not begin working with the student until after the January 2011 CSE meeting—that she considered these goals to be overly difficult (Tr. p. 751), there is no indication in the hearing record, or argument from the parent, that these

[13] The one goal regarding ADLs did not include either evaluation procedures or an evaluation schedule; however, it is fairly inferable from the short-term objectives that the goal was intended to be measured by observation.

goals were so beyond the student's abilities as to preclude him from receiving benefit from their implementation.

The parent also contends that both short-term objectives relating to the student's annual goal to improve his visual-spatial skills were unrealistic "given their intended frequency." These goals required to student to "string beads on a pipe cleaner with minimal assistance in 9/10 opportunities" and "to independently use a range of purposeful gestures . . . to be intentional during OT sessions in 9/10 opportunities" (Dist. Ex. 4 at p. 8). Both were identical to Rebecca School goals that required performance in four of five opportunities (Dist. Ex. 15 at p. 10), and while the student's occupational therapist testified that these goals could not be completed in 9 of 10 opportunities (Tr. pp. 752-53), the hearing record does not indicate that the goal accordingly was not appropriately directed at one of the student's areas of needs.

Similarly, the parent objects to a short-term objective to an annual goal designed to address the student's motor planning needs, which called for the student to "support himself with his arms while his lower extremities are resting on a physioball for 20 seconds in 9/10 opportunities" (Dist. Ex. 4 at p. 7), similar to a Rebecca School goal that required the student to perform that action in four of five opportunities (Dist. Ex. 15 at p. 10). Again, aside from the testimony of the student's occupational therapist that the student was "not strong enough to hold himself up for 20 seconds anyway and . . . [t]hat is not an activity that he would participate in" (Tr. p. 752), the hearing record contains no indication that this goal was not appropriate to meet the student's needs.

As noted above, the short-term objectives specifically complained of were essentially identical, other than minor changes to the evaluative criteria, to Rebecca School goals on which the student was working at the time of the January 2011 CSE meeting. Despite testimony that these goals were not appropriate for the student, there is no indication in the hearing record that these opinions were conveyed to the CSE at any time. The parent's argument that it was inappropriate for the CSE to recommend that the student continue working on Rebecca School goals that were developed to be used only for a six-month period of time is based on testimony by the director of the Rebecca School and the student's classroom teacher (see Tr. pp. 822-23, 923-25). However, this assertion is without support in the hearing record, as nothing indicates that any of the goals had been met as of the time of the CSE meeting, and it was appropriate for the CSE to recommend the continuation of goals the student had not met (see J.M. v. New York City Dep't of Educ., 2013 WL 5951436, at *20 [S.D.N.Y. Nov. 7, 2013]; Application of the Dep't of Educ., Appeal No. 12-079). Furthermore, although information not available to the CSE at the time of the January 11 CSE meeting is not directly relevant to whether the district offered the student a FAPE, I note that these goals were, for the most part, continued on Rebecca School progress reports issued subsequent to that meeting.[14]

[14] The December 2011 Rebecca School progress report indicated that the student was still working on both of the sensory processing short-term objectives, and a June 2012 Rebecca School progress report indicated that the student had met one, but not both, of the objectives (Parent Ex. M at p. 9; Dist. Ex. 16 at p. 8). Perhaps reflecting the occupational therapist's opinion that the student could not perform the bead-stringing goal with minimal assistance even one out of ten times (Tr. p. 752), that goal was removed from a December 2011 Rebecca School progress report, although the purposeful gesture goal was continued and was noted as having been met on a June 2012 Rebecca School progress report (Parent Ex. M at p. 11; Dist. Ex. 16 at p. 9). Surprisingly, given the opinion of the student's occupational therapist, the motor planning goal was continued unchanged on the December 2011

The parent correctly contends that the IEP contained no goals directly labelled as addressing the student's social/emotional needs; however, her contention that "social-emotional skills are a core deficit, given [the student's] autism diagnosis" is without support in the hearing record. Rather, and as discussed above, the hearing record reflects that the student's social/emotional needs were primarily related to his communication deficits, which were addressed by speech-language goals, and his sensory needs. As noted by the district school psychologist, the IEP contained "goals related to maintaining a regulated state, being able to engage with others, using gestures and to be intentional in his communication with other[s]" (Tr. pp. 546-47). In particular, the IEP included a pragmatic language goal, which included short-term objectives for the student to "respond to social greetings," "sustain verbal and or nonverbal reciprocal interactions," and initiate communication "when working 1:1 with an adult . . . to draw another person into an activity" (Dist. Ex. 4 at p. 10). The receptive language goal contained in the IEP included a short-term objective for the student to respond to his name (id.). Additionally, the OT sensory processing goal discussed above included a short-term objective to assist the student in remaining regulated (id. at p. 7). Furthermore, as discussed in detail below, the IEP included additional supports to address the student's interfering behaviors, including a 1:1 paraprofessional and a BIP.

The parent also asserts that the IHO correctly determined that the IEP contained no goals to address safety. Although the IHO was correct that the IEP contained no annual goals directly addressing safety, she did not specifically premise her finding of a denial of a FAPE on this basis and none of the evaluative information available to the CSE indicated that the student had particular needs relating to "ADL goals for safety issues" (IHO Decision at p. 32). While the student's Rebecca School teacher indicated that the IEP should have included goals to address safety in the bathroom, classroom, and community, she provided no further detail other than to indicate that the student required 1:1 assistance to prevent him from "possibly eat[ing] things that are unhealthy or dangerous for him . . . And for body awareness and safety in the community as well" (Tr. pp. 886, 908-09, 929).[15] Inasmuch as the January 2011 IEP provided for the additional support of a 1:1 paraprofessional on a full-time basis, the hearing record does not support a finding that the IEP failed to offer the student a FAPE on the basis that it did not include a goal specifically directed at safety concerns.

The fact that a goal may not be perfectly tailored to a student's abilities does not make it so inappropriate as to deny the student a FAPE. Based on the above, the district adequately addressed the student's needs by way of the annual goals and short-term objectives contained in the January 2011 IEP (N.S., 2014 WL 2722967, at *9; B.K., 12 F. Supp. 3d at 359-62; J.L., 2013 WL 625064, at *13).

Rebecca School progress report (Dist. Ex. 16 at p. 9). However, it was modified on the June 2012 progress report "[d]ue to [the student's] lack of interest in the physioball" (Parent Ex. M at p. 10).

[15] The Rebecca School program director and the student's Rebecca School teacher testified that the student required instruction in ADLs to provide assistance with toileting, hand washing, and tooth brushing (Tr. pp. 808, 896); the January 2011 IEP provided short-term objectives to address the student's abilities to clean himself after toileting and brush his teeth (Dist. Ex. 4 at p. 12).

E. Special Factors—Interfering Behaviors

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

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]).

If the CSE determines that a BIP is necessary for a student, "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . .; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]). Implementation of a student's BIP is required to include "regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP," with the results of the progress monitoring documented and reported to the student's parents and the CSE (8 NYCRR 200.22[b][5]).

Here, where the parties do not dispute that the student engaged in behaviors which interfered with his instruction and the CSE determined that the student required a BIP to address these behaviors (Dist. Ex. 4 at pp. 4, 16), it was a violation of State regulations to not conduct an FBA on which to base the BIP (8 NYCRR 200.1[r], [mmm]). Additionally, a review of the BIP indicates that although it addressed the student's primary behavioral needs, it was not developed in compliance with State regulations. The district school psychologist testified that the BIP was based off the BIP included in the student's April 2010 IEP, and a comparison indicates that the two documents are identical (Tr. p. 523; compare Parent Ex. AA at p. 16, with Dist. Ex. 4 at p. 16). The BIP reported the student's interfering behaviors as engaging in self-stimulatory behaviors, requiring frequent sensory and movement breaks, demonstrating difficulties with communication, dropping to the floor and refusing to engage if denied "his wants," and being distracted by food

(Dist. Ex. 4 at p. 16).[16] The BIP indicated that strategies to be employed to address the student's behaviors included 1:1 support, movement breaks, and deep pressure, vestibular, and proprioceptive input (id.). The BIP also noted that the student was "motivated by preferred adults and peers" and required 1:1 support to reduce self-stimulatory behaviors and sustain engagement (id.). However, the BIP lacked the required specificity regarding baseline measures of the student's behaviors; the intervention strategies to prevent the behaviors, teach alternative and adaptive behaviors, and provide consequences for the behaviors; and the schedule to be used to measure the effectiveness of the intervention strategies employed (id.; see 8 NYCRR 200.22[b][4]).

Nonetheless, the district's failures to conduct an FBA and develop a BIP in conformity with State regulations do not automatically render the IEP deficient, as the January 2011 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190). Here, the evaluative information available to the CSE reflected the student exhibited self-stimulatory behaviors including distractibility related to food, rocking, jumping up and down, rolling on the floor, hand flapping, finger flicking, staring at lights, and screeching (Dist. Exs. 4 at pp. 2, 16; 11 at p. 2, 15 at p. 1). The parent asserts that the failure to list each of the student's behaviors on the BIP, identify the functions of each of these behaviors, and identify the strategies to be used with each behavior, constituted a denial of a FAPE. However, although the BIP did not specifically address each of the student's interfering behaviors, the January 2011 IEP indicated the student exhibited self-stimulatory behaviors including flicking his fingers and jumping up and down while making loud vocalizations, distractibility related to food, and dropping to the floor (Dist. Ex. 4 at pp. 3, 16).[17] The IEP also identified the student's difficulties with sensory regulation and communication (Dist. Ex. 4 at p. 4). The parent correctly notes that the IEP did not reflect that the student engaged in rocking behavior despite its inclusion the September 2009 psychoeducational evaluation report (compare Dist. Ex. 4 at pp. 2, 16, with Dist. Ex. 11 at p. 2). However, this behavior was not reflected in the December 2010 Rebecca School progress report, nor did the parent or any of the witnesses from the Rebecca School testify that the student engaged in rocking behavior at the time of the January 2011 CSE meeting (Dist. Ex. 15; see Tr. pp. 723-1108). To the contrary, the school psychologist testified that the behaviors not noted on the IEP "never even came up" during the CSE meeting and that the BIP addressed those behaviors which most interfered with the student's behaviors rather than all those reflected in the evaluative information, and the meeting minutes reflect that the BIP was discussed and no changes were requested (Tr. pp. 657, 695-96; Dist. Ex. 6). Thus, while the January 2011 IEP did not specifically reflect all of the student's self-stimulatory behaviors as identified in the evaluative reports available to the CSE, the IEP noted that the student

[16] Engaging in self-stimulatory behaviors, dropping to the floor, and being distracted by food are reasonably viewed as interfering behaviors; however, the student's need for frequent sensory and movement breaks is more in the nature of a management need, while his difficulty communicating his needs relates to the student's communication deficits.

[17] The school psychologist opined that the functions of the student's self-stimulatory behaviors was "obvious" (Tr. p. 700); however, State regulations do not provide an exemption from compliance with standards for conducting an FBA and developing a BIP on the basis that district staff considers them unnecessary.

exhibited self-stimulatory behaviors and provided strategies to address them (Dist. Exs. 4 at pp. 1-2; 3 at pp. 1-2, 5).

The BIP did not explicitly link intervention strategies to particular behaviors; however, a review of the BIP reflects, as the district school psychologist testified, that the sensory supports provided were "global" in nature (Tr. p. 530; Dist. Ex. 4 at p. 16). For example, the school psychologist indicated that the BIP recommended sensory input and individual support as strategies because the student required both (Tr. p. 530). Specifically, sensory supports would assist the student in remaining regulated in order to be available for instruction (Tr. p. 533). However, she indicated that the recommendation for 1:1 support was more closely linked to the student's dropping to the floor behavior (Tr. pp. 530-31). In addition, the January 2011 IEP recommended strategies and supports to address the student's behaviors in addition to those specifically mentioned in the BIP. For example, the IEP indicated the student needed to have sensory supports throughout the school day the student's engagement with others improved when provided sensory input (Dist. Ex. 4 at pp. 3-5).

Additionally, the January 2011 CSE recommended environmental modifications and human/material resources to address the student's behavioral and management needs, including sensory input, tools, and supports, movement breaks, a 1:1 paraprofessional, as well as speech-language therapy, OT, and PT (Dist. Ex. 4 at pp. 3-5). The CSE also developed annual goals and short-term objectives that focused on the student improving his self-regulation, attention, self-stimulatory behavior, and communication skills (id. at pp. 7, 10-11).

Based on the foregoing, I find that the CSE's failure to follow certain requirements in conducting an FBA or developing the BIP, while a procedural violation, does not rise to the level of a denial of a FAPE in this instance (C.F., 746 F.3d at 80; M.W., 725 F.3d at 139-41; A.C., 553 F.3d at 172-73).[18]

F. 6:1+1 Special Class Placement

The parent asserts that a 6:1+1 special class would not have provided the student with sufficient support, particularly with respect to his sensory needs.[19] State regulations describe a 6:1+1 special class as intended for "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]). In addition to the support inherent in such an environment, the January 2011

[18] The parent's claim that the BIP could not be implemented at the assigned public school site because the school did not offer instructional lunch is speculative for reasons discussed below and, in any event, is without support in the hearing record. While the BIP called for the student to remain focused in the presence of food (Dist. Ex. 4 at p. 16), it did not indicate that the student was expected to remain focused during lunch periods in particular, and a more reasonable reading would be for the student to remain focused during periods of instruction. With regard to the claim that the BIP could not be implemented because classrooms in the assigned school did not permit food (Tr. p. 227), the BIP did not require the presence of food (Dist. Ex. 4 at p. 16).

[19] Although the district correctly notes that it is unclear to what extent the parent's claims relate to the specific 6:1+1 classroom in the assigned public school site defended by the district at the impartial hearing, the claim raised in due process complaint notice is sufficiently broad to encompass the adequacy of the placement recommendation made in the January 2011 IEP.

CSE recommended a significant level of related services and the additional support of a full-time 1:1 paraprofessional, and set forth a number of modifications and resources necessary to address the student's management needs (Dist. Ex. 4 at pp. 1, 3-5, 13, 15). With regard to the student's sensory needs, as detailed above the January 2011 IEP adequately specified these needs and provided appropriate services and goals to address them, including daily OT, OT goals, and modifications and resources including sensory input and movement breaks (id. at pp. 3-5, 7, 15-16). Furthermore, at the time of the January 2011 CSE meeting, the student was attending a 6:1+2 class with a 1:1 paraprofessional at the Rebecca School, and the hearing record does not reflect that the student required such a high degree of intervention that his 1:1 paraprofessional, in addition to the special education teacher and classroom paraprofessional, would not be able to address his management needs. The parent relies on testimony from the student's teacher opining that a 6:1+1 special class placement with a 1:1 paraprofessional would not be appropriate; specifically, the teacher opined that such a placement would be insufficiently supportive because it was important for the student to be in a classroom where all the staff "have gotten to know him, [and] everybody is on the same treatment plan" (Tr. pp. 911-12). Furthermore, she testified that "[i]n the classrooms that I've been in and observed, . . . I don't think there's enough access to a separate quiet space, especially during lunchtime or eating time. I don't think that there's a physical sensory support in my experience" (Tr. p. 913). The teacher also expressed concern regarding the level of support the student would receive if "his paraprofessional needs to step out of the room to use the bathroom, to go on a lunch break or is absent" (Tr. p. 912). However, these concerns all relate to implementation of the IEP, rather than the appropriateness of a 6:1+1 special class placement itself. The hearing record does not contain an indication that such a placement could not meet the student's sensory needs, other than for reasons as to the quality of the specific classroom in which the student would be placed, which are speculative and not addressed for reasons stated below. As noted by the district school psychologist, a 1:1 paraprofessional would provide the student with "individual prompting and support all day long" to address his sensory needs and distractibility, as well as assist him in maintaining a regulated state (Tr. pp. 556-57). Accordingly, because the hearing record demonstrates that the CSE adequately addressed the student's sensory needs in the January 2011 IEP, the parent's cross-appeal on this issue is dismissed.

G. Parent Counseling and Training

Pursuant to State regulations, a district is required to provide parent counseling and training to the parents of students with autism "for the purpose of enabling parents to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]).[20] Accordingly, the failure to provide for parent counseling and training on the January 2011 IEP constituted a violation of State regulations. However, as noted by the Second Circuit, the presence or absence of parent counseling and training in an IEP does not necessarily have a direct effect on the substantive adequacy of the plan (see R.E., 694 F.3d at 191). Moreover, districts are required to provide parent counseling and training pursuant to State regulations and, therefore, "remain accountable for their failure to do so no matter the contents of the IEP" (id.; see F.L., 553 Fed. App'x at 7 & n.3; M.W.,

[20] Parent counseling and training is defined by State regulation 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]).

725 F.3d at 141-42).[21] Thus, while failing to provide parent counseling and training in an IEP constitutes a procedural violation of the IDEA in this instance, and while in some cases it may contribute to a denial of a FAPE, "particularly when aggregated with other violations" (R.E., 694 F.3d at 191), the hearing record in this matter, taken as a whole, does not indicate that the district's failure to include parent training and counseling in the IEP constituted a denial of a FAPE by impeding the student's right to a FAPE, significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or causing a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *2 [2d Cir. Mar. 19, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169-70 [2d Cir. 2014]). In particular, the hearing record does not contain evidence that the parent had specific needs relating to her ability to provide follow-up interventions to the student at home such that, without these services, the student would not receive a FAPE. Rather, the only evidence in the hearing record on this issue indicates that the Rebecca School assigned a social worker to work with the parent to provide "help and support as well as to get carryover between the home and the school" (Tr. pp. 810-11). The Rebecca School also provided training to the parent regarding provision of a sensory diet to the student at home (Tr. pp. 815-16). To the extent that the parent asserts claims regarding the specific parent counseling and training provided at the assigned public school site, those claims are speculative for the reasons discussed below.

H. Cumulative Impact of Procedural Violations

Courts have cautioned that SROs must consider whether procedural violations, although not rising to the level of a denial of a FAPE when considered individually, cumulatively resulted in a denial of a FAPE (Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 439-40 [S.D.N.Y. 2014]). Although the district did not comply fully with the IDEA, the procedural violations in this instance—the failures to conduct an FBA, develop a BIP in accordance with State regulations, or include parent counseling and training on the January 2011 IEP—did not, considered cumulatively, impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see T.M., 752 F.3d at 169-70; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 147; R.E., 694 F.3d at 190).

I. Assigned School and Implementation Claims

With regard to the parents' challenges to the assigned public school site, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself, as "[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 R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. 2014]; F.L., 553 Fed. App'x at 8-9 [holding that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed.

[21] The parent testified, and the January 2011 CSE meeting minutes reflect, that parent counseling and training was discussed in some fashion at the CSE meeting (Tr. pp. 1090-91; Dist. Ex. 6).

App'x 81, 87 [2d Cir. 2013] [holding 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"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; D.N. v. New York City Dep't of Educ., 2015 WL 925968, at *7 [S.D.N.Y. Mar. 3, 2015]; J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015]; see also R.B., 2015 WL 1244298, at *2-*3; C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the determination of the type of educational placement their child will attend, the IDEA confers no rights on parents with regard to school site selection]; 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]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]).[22] Here, the parent rejected the recommended program and enrolled the student at the Rebecca School for the 2011-12 school year in June 2011, prior to the time the January 2011 IEP was scheduled to be implemented (Parent Ex. P at p. 1; Dist. Ex. 18). Accordingly, as the student never attended the assigned public school site pursuant to the January 2011 IEP, any conclusion that the district would not have implemented the student's IEP would necessarily be based on impermissible speculation and the parent's cross-appeal must be dismissed (R.B., 589 Fed. App'x at 576; R.E., 694 F.3d at 195).[23]

VII. Conclusion

Having found that the district offered the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find them to be without merit or that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

[22] However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]). The district is required to implement the written IEP and parents may compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

[23] In particular, courts have been clear that claims regarding the physical environment of an assigned school, grouping, availability of specific equipment at the school, and whether the school can implement the related services required by the IEP, are speculative when the student never attended the assigned public school pursuant to the challenged IEP (F.L., 553 Fed. App'x at 9; R.E., 694 F.3d at 195; D.N., 2015 WL 925968, at *7; E.E. v. New York City Dep't of Educ., 2014 WL 4332092 at *3, *10 [S.D.N.Y. Aug. 21, 2014]; B.K., 12 F. Supp. 3d at 371-72).

IT IS ORDERED that the IHO's decision dated March 22, 2013, is modified by reversing so much thereof as found the district failed to offer the student a FAPE and directed the district to fund the costs of the student's attendance at the Rebecca School for the 2011-12 school year.

Dated: **Albany, New York**
April 10, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER