The University of the State of New York

The State Education Department
State Review Officer
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No. 13-219

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail M. Eckstein, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondent, Lauren A. Baum, 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) daughter and ordered it to reimburse the parent for the cost of the student's tuition costs at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The parent cross-appeals from the decision of the IHO and from the IHO's failure to address issues raised in the due process complaint notice. 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

On May 23, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (fifth grade) (see Dist. Ex. 3 at pp. 1, 12-14, 16-18; see also Tr. pp. 425-26; Dist. Exs. 7 at pp. 1-5; 18 at pp. 1-2).[1] Finding that the student remained eligible for

[1] On December 12, 2011, the parent completed a 2012 Application for Admission at Cooke (see Dist. Ex. 20 at pp. 1, 7). On March 29, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year beginning September 2012 (see Parent Ex. R at pp. 1-2). However, at the time of the May 2012 CSE meeting, the student was attending the Rebecca School, where the parent had unilaterally

special education and related services as a student with autism, the May 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with the following related services: three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of individual physical therapy (PT), three 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of OT in a small group, and one 30-minute session per week of individual counseling (see Dist. Ex. 3 at pp. 1, 12-14).[2] In addition, the May 2012 CSE found that the student required strategies and supports to address behaviors that impeded her learning or that of others, as well as a behavior intervention plan (BIP) (id. at p. 3). The May 2012 CSE also recommended the services of a full-time, 1:1 crisis management paraprofessional to "assist with addressing and decreasing" the student's interfering behaviors noted in the May 2012 IEP (id. at pp. 3, 13). The May 2012 CSE also determined that the student would participate in the alternate assessment due to her significant cognitive delays, and recommended her participation in adapted physical education (id. at pp. 15-16). In addition, the May 2012 IEP included annual goals and corresponding short-term objectives, recommended strategies to address the student's management needs, and a recommendation for special transportation (id. at pp. 2-12, 16, 18).

By final notice of recommendation (FNR) dated June 7, 2012, the district summarized the special education and related services recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 12).

On June 11, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during summer 2012 beginning July 2012 (see Parent Ex. Q at pp. 1-2; see also Parent Ex. S at pp. 1-2).

In a letter dated June 15, 2012, the parent's attorney notified the district that although the parent received a "placement offer" for the student and had "just been given the opportunity to visit," the parent was "still considering the appropriateness of the program" and would advise the district of her response (Parent Ex. G at p. 1). However, the parent's attorney also notified the district that in the "interim," the parent would place the student at Cooke and seek reimbursement for the costs of the student's tuition at Cooke (id.). In addition, the parent's attorney requested that the district provide the student with round-trip transportation to Cooke (id.).

On June 15, 2012, the parent visited the assigned public school site, and by letter dated June 18, 2012, notified the district that it was not appropriate for the student (see Parent Ex. F at p. 1). Based on a tour, the parent indicated that the observed 6:1+1 special class would not provide

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placed the student for "kindergarten" through "fourth grade" (2011-12 school year) (see Tr. pp. 425-26, 511-12; Dist. Ex. 20 at p. 2). The Commissioner of Education has not approved Cooke or the Rebecca School as schools with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]).

[2] Although the student's eligibility for special education and related services as a student with a disability is not contested by the parties, her disability category or classification as a student with autism is in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). In this case, the student has been eligible for special education and related services as a student with autism since she transitioned to receive services under the CSE at the initial "turning-five meeting" (see Tr. pp. 440-42).

the student with "appropriate peers" because "[o]ne-half "of the students were nonverbal, "[o]ne-half" of the students were assigned to 1:1 paraprofessionals for the purpose of redirection or monitoring behavior, and a "majority" of the students were either diagnosed as having autism or had autism as an "educational classification" (id.).[3] The parent indicated that the student required "verbal peers" for appropriate interactions and to serve as "appropriate models for language, social skills and behavior" for the student (id.). The parent also indicated that the students in the observed 6:1+1 special class learned academics individually in "small cubicles separated by large cardboard partitions," which did not foster social interactions or group learning (id. at 2). Given that the classroom contained five other students, the parent further noted that the "class group" was not "large enough" to allow the student to "foster appropriate advancement socially or academically" (id.). Next, the parent indicated that because the student was not "autistic," the methodology used in the observed classroom was not appropriate for the student (id.). In addition, the parent noted that the assigned public school site did not have a sensory gym or the "necessary sensory equipment" to accommodate the student's sensory needs (id.). The parent expressed concern about the assigned public school site's ability to provide the student with all of her required related services, noting that the administrator informed her of the need at times to issue related services' authorizations (RSAs) to fulfill mandates (id.). The parent indicated that the size of the student population in the building would overwhelm the student with "noise and confusion" (id.). The parent also noted that the 6:1+1 "placement category" did not offer the student "sufficient high functioning peer role models" (id.). Finally, the parent notified the district of her intentions to place the student at Cooke for summer 2012 and to seek reimbursement for the costs of the student's tuition at Cooke, as well as seeking the provision of round-trip transportation for the student's attendance at Cooke during summer 2012 (see id. at pp. 2-3). Although the parent noted that she remained willing to consider any "appropriate placement" offered, she further indicated that the student would continue to attend Cooke from September 2012 through June 2013 "unless [she] receive[d] . . . a placement that [she] deem[ed] to be appropriate" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 2, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. C at pp. 1-6). Subsequently, the parent amended the July 2012 due process complaint notice on September 17, 2012 and again, on October 29, 2012 (see Parent Exs. A at pp. 1-14; B at pp. 1-7).[4] The parent's October 2012 due process complaint notice incorporated the

[3] According to the June 18, 2012 letter, although the assigned public school site had four 6:1+1 special classes, the parent indicated that she was shown a 6:1+1 special class as the particular classroom the student would attend based upon the age range of the students within that classroom (see Parent Ex. F at p. 1). The parent based her rejection of the assigned public school site on her observations of that one particular 6:1+1 special class (see id. at pp. 1-2).

[4] On October 1, 2012, the parent made a second visit to the assigned public school site (see Parent Ex. D at p. 1). By letter dated October 25, 2012, the parent again rejected the assigned public school site based upon the same reasons identified, nearly verbatim, in the June 18, 2012 letter (compare Parent Ex. D at pp. 2-3, with Parent Ex. F at pp. 1-2). In addition, the parent described her experience scheduling the second visit to the assigned public school site (see Parent Ex. D at pp. 1-2). As a result of the visit in October 2012, the parent indicated that the observed 6:1+1 special class identified as the classroom the student would have attended based upon her age and "IEP" was not appropriate (id. at p. 2). At this time, the parent indicated that the observed 6:1+1 special class was not appropriate because it was "full" with four boys and two girls, the students were "barely verbal," and "[o]ne-half" of the students could not read and did not know the alphabet; therefore, the students in the classroom

allegations set forth in the July 2012 and September 2012 due process complaint notices, and set forth additional allegations upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year (compare Parent Ex. A at pp. 1-14, with Parent Ex. B at pp. 1-7 and Parent Ex. C at pp. 1-6).

Generally, the parent alleged that the district failed to offer the student a FAPE for the 2012-13 school year because the May 2012 CSE was not properly composed; the May 2012 CSE failed to consider "sufficient, current, appropriate evaluative and documentary materials" in making its recommendations and annual goals; and the May 2012 CSE failed to provide the parent with an opportunity to meaningfully participate in the decision-making process (Parent Ex. A at p. 1). More specifically, the parent asserted that the May 2012 CSE: failed to include an additional parent member, failed to review and discuss all of the evaluative information available, failed to provide all of the evaluative information available to all of the CSE participants, failed to ask the student's service providers to participate in the May 2012 CSE meeting or consult the student's service providers about the related services recommendations or annual goals, ignored the parent's concerns expressed at the meeting about the student's eligibility classification of autism, and ignored concerns expressed at the meeting that the recommended "staffing ratio" would not provide the student with appropriate peers or peer models (id. at pp. 2-4). In addition, the parent asserted that while the May 2012 CSE reviewed the student's previous IEP with respect to progress on the annual goals, the May 2012 CSE did not consult with the parent or the student's teacher—or adequately consider the student's progress—in the development of the annual goals in the May 2012 IEP (id. at p. 3).

Next, the parent alleged that the May 2012 IEP: failed to fully, adequately, or appropriately reflect or address the student's present levels of performance, including the failure to include functional levels for the student's mathematics and writing skills or describe the student's fine and gross motor skills; failed to provide special education or related services tailored to the student's needs; failed to adequately describe the individual support the student required to stay on task, complete assignments, and make progress; failed to fully and adequately represent the student's academic and social/emotional management needs; failed to include promotional criteria; and failed to include an appropriate "transition plan" to assist the student's transfer into the recommended "program and school setting" (see Parent Ex. A at pp. 4-6). The parent also asserted that the May 2012 IEP did not include a sufficient number of annual goals, and the annual goals included in the May 2012 IEP were vague, not measureable, did not include baselines upon which to measure progress, and could not be met with in the 6:1+1 special class placement recommended in the May 2012 IEP (see id.). In addition, the parent asserted that the annual goals in the May 2012 IEP addressing academics failed to specify "grade level materials" to be used to measure "mastery" of the annual goals (id. at p. 5). The parent also alleged that the functional behavior assessment (FBA) and BIP were completed without input from the parent or the student's teacher, the FBA did not accurately reflect the student's behaviors and antecedent causes of the behaviors,

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would not be appropriate "speech or academic role models" for the student (id.). The parent also indicated that the area in the classroom designated for "speech" would not allow the student to "concentrate on her speech therapy" because it was separated by a "curtain" (id.). The parent also noted that the 6:1+1 "placement category" was "too restrictive" in light of the student's desire to be social (id. at p.3).

and the BIP was not appropriate (noting the student did not require a BIP in the "appropriate school setting with adequate individual support") (id. at p. 4).

Finally, with respect to the assigned public school site, the parent's October 2012 due process complaint notice repeated the issues and concerns set forth in the parent's letters dated June 18, 2012 and October 25, 2012 (compare Parent Ex. A at pp. 6-11, with Parent Ex. D at pp. 2-3 and Parent Ex. F at pp. 1-2). In addition to these concerns, the parent indicated that given the other students' levels of need, the student would not receive sufficient individualized attention to make progress, and the parent did not receive information about the other students' academic functioning or a class profile (see Parent Ex. A at p. 7). Moreover, the parent noted that based upon her observations, the student would not receive appropriate instruction at her academic level or that would allow her to make progress (id. at pp. 7-8). In the October 2012 due process complaint notice, the parent also added concerns about the student's participation at recess and lunch at the assigned public school site, noting that the student would not receive appropriate support from appropriately trained staff (id. at p. 9). The parent further indicated that the assigned public school site failed to allow her to make a timely visit to determine its appropriateness at the start of the school year in September 2012 (see id. at pp. 10-11).

Regarding the student's unilateral placement, the parent asserted that Cooke offered a program that appropriately addressed the student's needs and allowed her to make progress academically and socially (see Parent Ex. A at pp. 11-12). The parent further indicated that Cooke provided the student with appropriate peer models and appropriate peers "with whom to practice skills," Cooke's student population was not "limited to students classified as autistic," and Cooke did not "rely upon a methodology utilized for students on the autism spectrum" (id. at p. 12). The parent also noted that the student did not require a 1:1 paraprofessional at Cooke (id.).

As relief, the parent requested payment of the costs of the student's tuition at Cooke for the 2012-13 school year (see Parent Ex. A at pp. 12-13; see also Tr. pp. 252-53). In addition, the parent requested the provision of transportation services for the 2012-13 school year, and a determination that the Rebecca School was the student's pendency (stay-put) placement during these proceedings (see Parent Ex. A at pp. 13-14; see also Tr. pp. 252-53).

B. Impartial Hearing Officer Decision

On August 1, 2012, the parties proceeded to an impartial hearing, which concluded on July 29, 2013, after nine days of proceedings (see Tr. pp. 1-699).[5] In a decision dated October 25, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, Cooke was an appropriate unilateral placement, equitable considerations weighed in favor of the parent's requested relief, the student was entitled to transportation services during the 2012-13 school year, and the parent was entitled to reimbursement of the costs of the student's tuition at Cooke for the 2012-13 school year upon proper proof of payment (see IHO Decision at pp. 9-22).[6]

[5] On August 1, 2012 during the resolution period, the IHO conducted a pendency hearing, and on August 6, 2012, the IHO conducted a prehearing conference (see Tr. pp. 1-14; IHO Ex. I).

[6] The IHO declined to order the district to reimburse the parent's for the costs of transportation allegedly incurred as a result of a bus strike during the 2012-13 school year (see IHO Decision at p. 21; Parent Ex. HH at pp. 1-4).

Initially, the IHO addressed the parent's allegation that the May 2012 CSE ignored the concerns expressed at the meeting regarding the student's eligibility classification as a student with autism (see IHO Decision at pp. 10-12). The IHO concluded that the May 2012 CSE discussed the parent's request to change the student's eligibility classification and informed the parent that she would need to provide "appropriate medical or similar support" in order to modify the student's eligibility classification (id. at p. 11). Therefore, although the May 2012 CSE rejected the parent's request, such rejection did not support a finding that the parent was not provided with an opportunity to meaningfully participate in the development of the student's IEP (id.). Next, the IHO found that while the district did not present sufficient evidence to establish that the student's eligibility classification was appropriate, such insufficiency did not require a conclusion that the May 2012 IEP was "substantively defective" or that the insufficiency—as a procedural violation—rose to the level of a denial of a FAPE (id. at pp. 11-12). In addition, the IHO indicated that the hearing record did not contain sufficient evidence upon which to conclude that the student's eligibility classification of autism was not correct (id. at p. 12).

Next, the IHO addressed the parent's issues related to the adequacy of the evaluative information considered by the May 2012 CSE and the adequacy of the annual goals in the May 2012 IEP (see IHO Decision at pp. 13-14). The IHO found that the May 2012 CSE relied upon a "comprehensive progress report prepared in December 2011," as well as input from the student's teacher—who provided "updated information" about the student's progress academically, socially, and emotionally, and who provided information with respect to progress on "various goals" related to these areas that occurred after the issuance of the December 2011 progress report (id. at p. 13). The IHO also found that the December 2011 progress report provided "sufficiently timely and detailed" information about the student's related services, and therefore, the May 2012 CSE had an "adequate basis" upon which to make recommendations (id.). The IHO noted that although the student's related services' recommendations remained unchanged from the previous IEP, the parent did not dispute these recommendations at the May 2012 CSE meeting (id.). Finally, the IHO found that "considered as a whole," the May 2012 IEP provided "sufficient information concerning the totality of the student's strengths, deficits and functioning levels" (id.).

Turning to the annual goals in the May 2012 IEP, the IHO concluded that any objections to the adequacy with respect to the "details" of the annual goals and short-term objectives were "at best de minimus," and the parent's testimony "substantially acknowledged" this characterization when asked why she failed to raise objections to the annual goals upon receipt of the IEP (IHO Decision at pp. 13-14). The IHO also rejected the parent's assertions that the annual goals were not appropriate due the student's "mastery of certain objectives in September 2012," because the annual goals were written to be implemented in a "different type of program," and because the annual goals were not written in the same "form" as the student's teacher would have used (id. at p. 14). The IHO further found that although the annual goals were drafted after the May 2012 CSE meeting, this procedural defect did not rise to the level of a denial of a FAPE (id.).[7]

Next, the IHO addressed the issues concerning the 6:1+1 special class placement and the recommendation for the services of a full-time, 1:1 crisis management paraprofessional (see IHO

[7] The IHO concluded in a footnote that although she deemed the parent's allegation regarding the composition of the May 2012 CSE as abandoned, even if it constituted a procedural violation, it did not in this instance result in a finding that the district failed to offer the student a FAPE (see IHO Decision at pp. 10-11 n.5).

Decision at pp. 14-16). Here, the IHO concluded that the district failed to offer the student a FAPE because the May 2012 CSE—"without justification" or based upon the students' needs—made a "restrictive program more restrictive" by adding the services of a full-time, 1:1 crisis management paraprofessional to the 6:1+1 special class placement recommendation (id. at p. 14). The IHO indicated that the student demonstrated a "substantial desire for and would benefit from interaction and communication with verbal and social peers," and thus, the 1:1 crisis management paraprofessional would "likely" undermine these interactions (id. at pp. 14-15). The IHO also found that the May 2012 CSE recommended the 1:1 crisis management paraprofessional as a "substitute" for "transitional support services"—which the CSE did not recommend—based upon the student's past difficulties during transitions or changes in the environment and in an effort to assist the student "during a transitional period" if the student entered a "different and more structured environment" (id.). Unable to recommend a paraprofessional as an "aid for transition," the IHO found that the May 2012 CSE asked the parent and the student's teacher to describe the behaviors the student exhibited during transitions (id. at p. 15). The IHO then noted that while the May 2012 CSE did not discuss how long the paraprofessional would be provided, the May 2012 CSE recommended the services of a full-time, 1:1 crisis management paraprofessional and developed a "BIP/FBA specifying the various behaviors" after the conclusion of the meeting (id.). According to the IHO, the district special education teacher testified that the BIP did not include a "plan" regarding how to address the identified behaviors, which the IHO found supported a finding that the 1:1 crisis management paraprofessional was "not necessary" for the student (id.). Based upon the foregoing, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year (id.).

In view of the IHO's determination that the district failed to offer the student a FAPE, the IHO declined to address the parent's "other claims, procedural and substantive" with respect to the "6:1:1 program," except to note testimony that the IHO found "credible" (IHO Decision at p. 16). In addition, the IHO declined to address issues raised by the parent about the assigned public school site, other than to note that the parent credibly testified about what she was told and what she observed during the visits (see id.).

Turning to the unilateral placement, the IHO found that the parent sustained her burden to establish that the unilateral placement was appropriate, and provided the student with "educational instruction specially designed to meet the unique needs of the student" (IHO Decision at pp. 16-20). In this case, the IHO found that the student attended Cooke in a classroom with 12 students, 1 teacher, 1 assistant teacher, and 2 paraprofessionals (id. at p. 17). According to the hearing record, the student received instruction in large and small groups organized upon the student's levels for guided reading, writing, word study and mathematics (id.). At Cooke, the student used technology, including an iPad, and was provided with sensory breaks and related services, and made progress in her communication skills, social skills, and academic skills (id. at pp. 18-19). Although the student exhibited difficulties with transitions at the beginning of each Cooke program, staff appropriately addressed these difficulties and appropriately addressed a "very limited number of incidents of physical aggression" that occurred (id. at p. 19).

With respect to equitable considerations, the IHO concluded that the parent cooperated in the development of the May 2012 IEP and in the "designation of an appropriate placement" (id. at pp. 20-21). In addition, the IHO gave no weight to the fact that the parent executed an enrollment contract with Cooke prior to the May 2012 CSE meeting, as she disclosed that unilateral enrollment

at the meeting (id. at p. 21). As a result, the IHO determined that equitable considerations did not preclude or limit the parent's request for tuition reimbursement (id.).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE, that Cooke was an appropriate placement, that the student was entitled to special education transportation, and that equitable considerations weighed in favor of the parent's requested relief. The district contends that the IHO erred in finding that it failed to establish the appropriateness of the student's eligibility classification of autism. The district also argues that the IHO erroneously concluded that the services of a full-time, 1:1 crisis management paraprofessional—as a substitute for transitional support services—made the recommended 6:1+1 special class "'more restrictive,'" and further, that the IHO misinterpreted and misapplied LRE considerations in reaching this conclusion. The district further asserts that the IHO improperly made factual findings regarding testimonial evidence presented by the parent and witnesses from Cooke and the Rebecca School. To the extent that the IHO addressed issues raised regarding the assigned public school site, the district contends that the alleged deficiencies must be dismissed as speculative, and moreover, the district had no obligation to demonstrate that the student would have been appropriately grouped had she attended the assigned public school site. In addition, the district asserts that the IHO erred in finding that Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for tuition reimbursement.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's conclusions that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's requested relief.

In a cross-appeal, the parent alleges that the IHO erred in finding that any "procedural violations" did not result in a failure to offer the student a FAPE, and the hearing record demonstrated that the district's procedural errors cumulatively resulted in an IEP that was not substantively appropriate. The parent also alleges that the IHO erred in finding that the May 2012 CSE relied upon adequate evaluative information to develop the student's May 2012 IEP. The parent argues that the IHO ignored evidence that the May 2012 CSE "unilaterally and improperly" performed an FBA without input from the student's providers, the FBA did not appropriately represent the student's behaviors, and the May 2012 CSE lacked evaluative information to support the student's eligibility classification of autism. Next, the parent contends that the IHO erred in finding that the May 2012 CSE's rejection of the parent's request to change the student's eligibility classification did not constitute a failure to provide the parent with the opportunity to meaningfully participate in the development of the student's May 2012 IEP. The parent asserts that the IHO erred in finding that the hearing record did not contain sufficient evidence to establish that the student's eligibility classification of autism was not correct and that any "procedural error" related to the student's eligibility classification did not result in a failure to offer the student a FAPE. In addition, the parent asserts that the IHO erred in finding that the parent was not deprived of a meaningful opportunity to participate in the May 2012 CSE meeting and in the development of the student's IEP because the IHO failed to address "other claims," including that the May 2012 CSE did not consult with the parent or the student's teacher regarding the development of the

annual goals, in the preparation of an FBA or in the development of a BIP, and did not discuss the recommendation of a 6:1+1 special class placement. The parent further argues that the IHO erred in dismissing or in failing to address the parent's "other claims" related to the "substantive inadequacy" of the May 2012 IEP. The parent alleges that the IHO also erred in finding that the May 2012 IEP adequately described the student's needs because it failed to include functional levels and failed to accurately reflect the student's behaviors or antecedent causes of the behaviors. In addition, the parent contends that the IHO erred in finding that the parent's objections to the annual goals in the May 2012 IEP were insignificant, and the IHO ignored evidence that the annual goals were developed after the May 2012 CSE meeting without input from the parent or the student's teacher and the implementation of the annual goals required the use of a particular methodology. The parent also asserts that the IHO erred in failing to issue findings that the FBA and BIP were not appropriate. In addition, the parent contends that the IHO erred in failing to address issues raised regarding the assigned public school site, including the site's inability to: implement the student's May 2012 IEP, address the student's sensory or related services' needs, have a seat available for the student, use an appropriate instructional methodology, and functionally group the student with appropriate peers. Finally, the parent asserts that the IHO erred in denying her request for reimbursement of the costs of the student's transportation incurred during a bus strike.

In an answer to the parent's cross-appeal, the district responds to the parent's allegations and argues to uphold the IHO's findings that the "procedural violations"—either individually or cumulatively—did not result in the failure to offer the student a FAPE, the May 2012 CSE relied upon sufficient evaluative information to develop the student's May 2012 IEP, the May 2012 IEP adequately described the student's needs, the parent's objections to the annual goals were not significant, the May 2012 CSE's rejection of the parent's request to change the student's eligibility classification did not deprive the parent of the opportunity to meaningfully participate in the development of the IEP, and the parent was not entitled to reimbursement for the costs of the student's transportation costs during the bus strike. In addition, the district asserts that the FBA and BIP were appropriate, and the annual goals in the May 2012 IEP were appropriate even if written after the May 2012 CSE meeting. The district further argues that the IHO properly dismissed or did not consider the parent's "other substantive claims" because the IHO properly found that the May 2012 IEP, as a whole, provided sufficient information about the student's strengths, deficits and functioning levels. Finally, the district contends that the IHO properly failed to consider the issues raised by the parent regarding the assigned public school site, and alternatively, the parent failed to properly assert these issues in the form of a cross-appeal and must be dismissed.[8, 9]

[8] The parent submitted a reply to the district's answer to the cross-appeal, arguing that the issues regarding the assigned public school site—including the district's failure to sustain its burden to establish that it was appropriate—are properly raised regardless of whether specifically identified as a "cross-appeal."

[9] Since neither party appealed the IHO's finding that the May 2012 CSE was properly composed, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

V. Applicable Standards

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

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

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

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

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

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

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

VI. Discussion

A. Preliminary Matters

1. Unaddressed Issues and Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. In this case, the parent's October 2012 due process complaint notice included the following allegations that the IHO did not address in the decision and the parent does not otherwise advance on appeal in the answer and cross-appeal: the May 2012 CSE failed to review and discuss all of the evaluative information available; the May 2012 CSE failed to provide all of the evaluative information available to all of the CSE participants; the May 2012 IEP failed to provide special education or related services tailored to the student's needs; the May 2012 IEP failed to adequately describe the individual support the student required to stay on task, complete assignments, and make progress; the May 2012 IEP failed to fully and adequately represent the student's academic and social/emotional management needs; the May 2012 IEP failed to include promotional criteria; and the May 2012 IEP failed to include an appropriate "transition plan" to assist the student's transfer into the recommended "program and school setting" (compare Parent Ex. A at pp. 1-6, with IHO Decision at pp. 9-16).

A party appealing from an IHO's decision must "clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and orders to which exceptions are taken" and this includes clearly identifying which particular issues the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). Moreover, although the parent's answer and cross-appeal include general statements—such as the IHO erred in finding that any "procedural violations" did result in a failure to offer the student a FAPE, the hearing record demonstrated that the district's procedural errors cumulatively resulted in an IEP that was not substantively appropriate, the IHO erred in dismissing or in failing to address the parent's "other claims" related to the "substantive inadequacy" of the May 2012 IEP—such statements, alone, and without any legal or factual arguments or further explanation as to why the unaddressed issues identified above would rise to the level of a denial of a FAPE, are insufficient to resurrect any issues in the parent's October 2012 due process complaint notice that the IHO did not address for a determination in this appeal. Under these circumstances, it is not this SRO's role to research and construct the appealing or cross-appealing party's arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]).

Thus, while the entire hearing record has been carefully reviewed to consider those claims that the parent has specifically identified in the answer and cross-appeal (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]), I will not sift through the parent's October 2012 due process complaint notice, the hearing record, and the IHO's decision for the purpose of asserting claims on the parent's

behalf and I find the answer and cross-appeal insufficient with respect to those issues that the parent has not taken the care to identify in the answer and cross-appeal (8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 12-032); Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127). Based on the foregoing, I decline to review the issues identified above that the IHO did not address and which the parent does not otherwise advance on appeal or construct arguments upon which to adjudicate these issues. [10,11]

B. CSE Process

1. Parental Participation

The parent contends that the IHO erred in finding that she was not deprived of the opportunity to meaningfully participate in the development of the student's May 2012 IEP as a result of the May 2012 CSE's rejection of her request to change the student's eligibility classification, and because the IHO failed to address other claims—including that the May 2012 CSE did not consult with the parent or the student's teacher regarding the development of the annual goals, the FBA, or the BIP, and the May 2012 CSE did not discuss the 6:1+1 special class placement recommendation. The district rejects the parent's contentions. Based upon a review of the hearing record, the parent's contentions must be dismissed.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional

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[10] The same argument and rationale apply to the issues raised in the parent's October 2012 due process complaint notice regarding the assigned public school site, which the IHO declined to address in the decision (compare Parent Ex. A at pp. 6-11, with IHO Decision at p. 16). Thus, the issues that remain viable on appeal with respect to the assigned public school site, which the parent advances in the answer and cross-appeal, are the following: the assigned public school site's inability to implement the student's May 2012 IEP, to address the student's sensory or related services' needs, to have a seat available for the student, to use an appropriate instructional methodology, and to functionally group the student with appropriate peers (compare Parent Ex. A at pp. 6-11, with Answer & Cr. Appeal ¶¶ 64-72).

[11] Two district court decisions reviewed the scope of a respondent's right to cross-appeal issues that were not addressed by the IHO (J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9-*10 [S.D.N.Y. Nov. 27, 2012] [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also D.N. v. New York City Dep't of Educ., 2012 WL 6101918 [S.D.N.Y. Dec. 10, 2012] [notice of appeal filed Jan. 3, 2013] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). However, these two decisions do not suggest that such conclusory allegations—as included in the parent's answer and cross-appeal—provide a basis upon which the SRO is required to construct legal or factual arguments on a party's behalf when the party has not elected to do so in order to resolve issues that the IHO did not address.

disagreement is not an IDEA violation"]; Sch. for Language & Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). Moreover, the IDEA "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

In this instance, the hearing record demonstrates that the May 2012 CSE discussed the student's eligibility classification, the annual goals, the FBA and BIP, and the staffing ratio of the 6:1+1 special class placement, and the parent—as well as the Rebecca School staff attending the meeting—had the opportunity to express their concerns related to these issues. Therefore, the May 2012 CSE's failure to ultimately adopt recommendations consistent with the parent's concerns or suggestions, or those of the Rebecca School staff, did not deprive the parent of an opportunity to meaningfully participate in the development of the student's May 2012 IEP (see E.F., 2013 WL 4495676, at *17-*18).

With respect to the student's eligibility classification, the parent testified that she disagreed with the autism designation and "brought it up" at the May 2012 CSE meeting (see Tr. pp. 440-41, 505; see also Tr. pp. 614-18). The parent further testified that she raised this issue "regularly" because the student had never been diagnosed as having autism (Tr. p. 441). The parent also testified that she suggested changing the student's eligibility classification to either speech or language impairment or other health-impairment, but was advised by the district school psychologist attending the May 2012 CSE meeting that an evaluation would be necessary in order to change the student's classification (see Tr. pp. 441-43, 474). The district special education teacher who attended the May 2012 CSE meeting, although unable to recall a specific conversation about the student's eligibility classification, testified that medical documentation would be necessary in order to change the student's classification and she generally deferred the issue of a student's eligibility classification to the school psychologist (see Tr. pp. 155-56, 205-08). Based upon this evidence, although the May 2012 CSE did not change the student's eligibility classification, the parent had the opportunity to express her concerns about the autism designation and the May 2012 CSE listened to those concerns; as such, the hearing record supports the IHO's conclusion that the parent was not deprived of an opportunity to meaningfully participate in the development of the student's May 2012 IEP because the CSE ultimately rejected her suggestion to change the student's eligibility classification (see E.F., 2013 WL 4495676, at *17-*18).

Turning next to the parent's assertion regarding the annual goals in the May 2012 IEP, the district special education teacher testified that the May 2012 CSE relied upon the December 2011 Rebecca School Interdisciplinary Report of Progress Update (December 2011 progress report)—as well as updated information from the student's then-current special education teacher at the Rebecca School (Rebecca School teacher)—to develop the annual goals (see Tr. pp. 151-52, 188-

91, 230-32). Specifically, the district special education teacher testified that the district school psychologist read aloud each "long-term goal" (i.e., annual goal) and "short-term goal" (i.e., short-term objective) in the December 2011 progress report and asked the Rebecca School teacher whether the annual goals and short-term objectives required modifications or whether the annual goals and short-term objectives continued to be relevant based upon the student's needs (see Tr. pp. 152-53, 230-32, 644). The district school psychologist also asked the Rebecca School teacher whether the annual goals remained appropriate, whether the student had met the annual goals, and whether the frequency or support indicated in the annual goals required modifications (sees Tr. pp. 230-32, 438-39). With respect to the annual goals and short-term objectives actually typed into the May 2012 IEP, the district special education teacher testified that if the student already met a goal in the December 2011 progress report, that specific goal was not included in the IEP; similarly, if a goal in the December 2011 progress report was "still in progress," that specific goal would be "typed into the IEP" or if a goal in the December 2011 progress report needed modifications, then "than would be reflected" in the IEP as well (Tr. pp. 231-32).

However, while the parent testified that the district school psychologist read the goals from the December 2011 progress report and asked the Rebecca School teacher whether the student had achieved the goals, the parent also testified that this process "went very quickly goal by goal by goal" and the district school psychologist did not "add in new goals" or otherwise modify the annual goals (Tr. pp. 438-40). With respect to the Rebecca School teacher's reporting of the student's progress on the goals in the December 2011 progress report, the parent testified that she relied on the Rebecca School teacher to "explain" the student's progress, and the progress noted at the meeting with respect to the annual goals was generally consistent with what she had observed (Tr. pp. 477-79). The parent also testified that "most of the meeting"—which lasted for approximately one hour—focused on the "specific goals" the student had either achieved or not achieved (Tr. pp. 450, 479). According to the Rebecca School teacher, she was asked about the goals in the December 2011 progress report and whether the student had achieved those goals, and she answered questions posed to her about the goals (see Tr. pp. 604-06, 627-28) In addition, the Rebecca School teacher testified that she "could say whatever" she wanted to at the May 2012 CSE meeting and felt "free" to express her opinions or concerns, however she believed that "what she said" did not matter (Tr. pp. 651-52). Nonetheless, the Rebecca School teacher acknowledged in testimony that specific annual goals in the May 2012 IEP were worded differently than the goals in the December 2011 progress report and were also not directly related to the use of a specific methodology (see Tr. pp. 627-38).

Here, while the hearing record suggests that annual goals ultimately included in the May 2012 IEP may not have been discussed during the May 2012 CSE meeting—or were drafted after the May 2012 CSE meeting—the weight of the evidence in the hearing record indicates that the parent attended the May 2012 CSE meeting and listened to the discourse between the district school psychologist and the Rebecca School teacher regarding the annual goals and the student's progress therein, and any failure to discuss the particular annual goals included in the May 2012 IEP or any failure to draft the annual goals at the May 2012 CSE meeting did not significantly impede the parent's opportunity to participate in the decision-making process or in the development of the student's IEP (see Tr. pp. 156, 189-90, 231-32; see also E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that annual goals be drafted at the CSE meeting]).

Next, the parent alleges that the May 2012 CSE's failure to consult with the parent or the student's teacher regarding the development of the FBA and the BIP deprived her of the opportunity to meaningfully participate in the development of the student's IEP. Initially, the district special education teacher testified that a "large discussion" about the student's social/emotional functioning and behaviors occurred near the conclusion of the May 2012 CSE meeting (see Tr. pp. 157-58). She also testified that the parent informed the May 2012 CSE about the student's behaviors, as well as "certain triggers" of the behaviors—such as struggling with her environment and noises—which caused the student to become "anxious or frustrated" (Tr. p. 158). The May 2012 CSE also discussed the "environmental triggers or conditions and then interventions" associated with the student's behaviors (Tr. pp. 159-60).

The district special education teacher also testified that the parent requested the services of a 1:1 paraprofessional at the May 2012 CSE meeting to assist in the student's transition from the Rebecca School to the public school and due to the parent's concern with a change in the "new environment" (see Tr. pp. 194-97; see also Tr. pp. 446-48; Dist. Exs. 7 at pp. 4-5; 18 at p. 2). Because the May 2012 CSE was unable to recommend paraprofessional services except for the limited purposes of "health," "crisis management," and "orientation mobility and transportation," the services of a crisis management paraprofessional represented the most analogous designation available to the May 2012 CSE in order to address the parent's concerns and her request for a paraprofessional for the student (see Tr. pp. 195-96; see also Tr. p. 222). The special education teacher also testified that in order to recommend a crisis management paraprofessional on the IEP, the student would need a BIP, which was drafted after the May 2012 CSE meeting based upon the information gathered at the meeting (see Tr. pp. 199-202; see also Dist. Exs. 3 at p. 3; 6; 7 at pp. 1-2). The special education teacher testified similarly about how the FBA had been completed (see Tr. pp. 200-02; Dist. Ex. 7 at pp. 1-2).

In addition, the district special education teacher testified that when the parent was asked at the May 2012 CSE meeting why she wanted the services of a paraprofessional for the student, the parent "described possible behaviors," which the special education teacher expected to be representative of "current behaviors or possible behaviors" of the student (Tr. pp. 196-97). She further testified that the May 2012 CSE inquired about what behaviors would "warrant a crisis management para[professional]," and the behaviors noted in the May 2012 IEP—as well as in the CSE meeting minutes—constituted the behaviors identified at that time (Tr. pp. 228-29; see Dist. Exs. 3 at p. 3; 4 at pp. 4-5; 5 at pp. 1-2; 6; 18 at p. 2). According to the parent's testimony, the May 2012 CSE discussed "what kind of things could happen if [the student] became upset and got dysregulated" as well as noting behaviors that had occurred "on occasion in the past"—which were some of the behaviors "listed" in the FBA and BIP (Tr. pp. 444-47; see Dist. Exs. 5-6).[12] The parent also testified, however, that if the student became dysregulated in a "new environment and confused," the identified behaviors "could occur" (Tr. pp. 446-47).

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[12] The Rebecca School teacher who attended the May 2012 CSE meeting testified that the student required a paraprofessional for transitions because the student had a "history of really struggling with transitions and would become very emotional, very anxious, and also aggressive" (Tr. pp. 622-24). She further testified that when the student transitioned into her classroom at the beginning of the 2011-12 school year, the student's behaviors—such as "grabbing hair" or "grabbing shirts" or "crying"—continued for approximately one to two months (Tr. pp. 623-27).

Based upon the foregoing, the hearing record indicates that although the FBA and BIP were drafted after the May 2012 CSE meeting, the May 2012 CSE discussed the information included within both documents at the meeting, and the failure to discuss the particular documents or draft the documents at the meeting did not deprive the parent of the opportunity to meaningfully participate in the development of the student's IEP.[13]

Finally, the parent also contends that May 2012 CSE's failure to discuss the recommended 6:1+1 special class placement deprived her of the opportunity to meaningfully participate in the development of the student's IEP. On this issue, the district special education teacher testified that the May 2012 CSE did discuss the 6:1+1 special class placement recommendation, as well as other placement options and staffing ratios, and the district school psychologist spent a "lot of time" describing the staffing ratios in the classroom settings and "what would be appropriate for certain students" (see Tr. pp. 154, 164, 184). Referring to CSE meeting minutes, the special education teacher testified that the May 2012 CSE considered, but rejected: a 12:1 special class or a 12:1+1 special class in a community school, an 8:1+1 special class or a 12:1+1 special class in a specialized school with related services, and a 12:1+4 special class in a specialized school with related services (see Tr. pp. 166-67, 222-23; Dist. Ex. 7 at p. 4). She further testified that the parent disagreed with the May 2012 CSE's recommended 6:1+1 special class (see Tr. pp. 167-68).

The parent testified that once the May 2012 CSE reached the decision to recommend a 12-month school year program for the student, the district school psychologist indicated that the district provided "several different programs" (Tr. pp. 443-44). The parent testified that according to the district school psychologist, neither an 8:1+1 "program" nor a 12:1+1 "program" was appropriate for the student because the programs served students with "behavior management needs" (id.). With regard to a 12:1+4 "program," the district school psychologist also noted it would not be appropriate for the student as it served students with "physical disabilities," and therefore, the 6:1+1 "program" would be the "most appropriate" for the student (id.). The parent testified that she did not believe the 6:1+1 special class would be appropriate for the student, but since there was "nothing else" the school psychologist "deemed appropriate" she indicated that she would be "willing" to consider it (Tr. p. 444).

Here, the hearing record demonstrates that although the parent may have disagreed with the level of discussion with respect to the recommended 6:1+1 special class placement or how other placement options were summarily noted and rejected, the hearing record does not contain evidence indicating that the parent asked further questions about the 6:1+1 special class placement or was not allowed to do so, such that she was deprived of the opportunity to meaningfully participate in the development of the student's May 2012 IEP.

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[13] As noted above, the parent acknowledged circumstances in which the student would engage in interfering behaviors, but the parent also testified that she was "surprised" to see a BIP when she received the May 2012 IEP, as it had not been discussed at the May 2012 CSE meeting, nor would she have "agreed to it" (Tr. p. 503). She further testified, however, that she did not call the district to reconvene a CSE meeting in order to "remove it" and thought that the May 2012 CSE included the BIP so the student could have a 1:1 paraprofessional (Tr. pp. 503-04).

C. May 2012 IEP

1. Eligibility Classification

The district contends that the IHO erred in finding that it failed to establish the appropriateness of the student's eligibility classification of autism. The parent argues that the IHO ignored evidence that the May 2012 CSE did not have evaluative information that supported the eligibility for special education under the regulatory criteria for autism. In addition, the parent asserts that the IHO erred in finding that the hearing record did not contain sufficient evidence to establish that the student's eligibility classification of autism was not correct and that any procedural error related to the student's eligibility classification did not result in a failure to offer the student a FAPE. For the reasons explained below, a review of the hearing record reveals no reason to disturb the IHO's conclusions on this issue.

With respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR § 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]).

State regulation defines autism, in relevant part, as a "development disability significantly affecting verbal and nonverbal communication and social interaction, . . . , that adversely affects a student's educational performance," and which may include other characteristics, such as "repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences" (8 NYCRR 200.1[zz][1]). Notably, the regulatory definition does not require that a student be diagnosed as having autism or an autism spectrum disorder (see 8 NYCRR 200.1[zz][1]). A review of the hearing record indicates that the student's delays in communication, social skills, sensory regulation, and the ability to transition were well documented (see generally Dist. Ex. 8 at pp. 1-21). Moreover, the student's difficulties with verbal communication, social skills, behavior, sensory regulation, and transitions all adversely affected her ability to learn within a classroom setting (id.). Accordingly, the student's needs related to language and auditory processing, as well as her academic, social, and behavioral profile within the school setting, are consistent with the regulatory definition of the eligibility classification of autism. Moreover, as noted above the special education programs and related services recommended in the May 2012 IEP to address a student's individual needs is often of

more import than the student's actual eligibility classification (see Fort Osage, 641 F.3d at 1004; Draper, 480 F. Supp. 2d at 1342). As described more fully below, the hearing record demonstrates that the May 2012 IEP addressed the student's needs in the areas of academics, sensory regulation, language skills, motor skills, activities of daily living (ADLs), social/emotional functioning, and behavioral functioning, thus enabling the student to be involved in and progress in the general education curriculum.

2. Evaluative Information and Present Levels of Performance

The parent alleges that the IHO erred in finding that the May 2012 CSE relied upon adequate evaluative information to develop the student's May 2012 IEP, and further erred in finding that the May 2012 IEP adequately described the student's needs because it failed to include functional levels and failed to accurately reflect the student's behaviors or antecedent causes of the behaviors. The district rejects the parent's contentions. A review of the hearing record does not support the parent's contentions; thus, there is no reason to disturb the IHO's conclusions.

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]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [indicating that based upon 20 U.S.C. § 1414 (c)(1)(A), a CSE is required in part to "'review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers'"]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). In addition, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'"

about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *8 [S.D.N.Y. Feb. 14, 2013]).

Overall, the hearing record establishes that although the May 2012 CSE primarily relied upon a December 2011 progress report from the Rebecca School—as well as input from the parent and the Rebecca School staff attending the May 2012 CSE meeting to develop the May 2012 IEP—the December 2011 progress report and input from staff provided it with sufficiently comprehensive functional, developmental, and academic information about the student and her individual needs to enable it to develop the May 2012 IEP. Further, the hearing record also establishes that the May 2012 CSE adequately described the student's needs in the May 2012 IEP based upon the evaluative information available.

In this case, the hearing record indicates that prior to the May 2012 CSE meeting, the district special education teacher, the district school psychologist, and the district social worker—who all attended the May 2012 CSE meeting—met to review the student's December 2011 progress report from the Rebecca School and the student's IEP from the previous school year, as well as any relevant information in the student's file, such as a classroom observation or psychoeducational testing (see Tr. pp. 149-51, 178-80, 186-87, 227; Dist. Exs. 9-11; Parent Ex. J at pp. 9). The special education teacher testified that she and her two colleagues typically met prior to a student's CSE meeting to discuss the student and "ensure that [they] were all familiar with the previous documents and the documents that would be used at the meeting" (Tr. p. 227). Reviewing the student's IEP from the previous year provided them with information about the student's "previous recommendation and abilities," and allowed them to have a "bigger picture" of the student (Tr. p. 228). The district special education teacher also testified that if the student's file included a classroom observation or psychoeducational evaluation report, such documents would only be reviewed or discussed at a CSE meeting if the documents were "recent"—and in this case, she believed that although both of these documents existed in the student's file and were reviewed with her colleagues at the meeting held prior to the May 2012 CSE meeting, the documents were most likely not specifically reviewed or discussed at the May 2012 CSE meeting because they were not recent (see Tr. pp. 179-80; see also Dist. Exs. 9 at pp. 1-18 [student's IEP for 2011-12 school year]; 10 at pp. 1-4 [social history update, dated April 2011]; 11 at pp. 1-3 [classroom observation, dated November 2010]; Parent Ex. J at pp. 1-9 [2011 psychological evaluation report]).[14] Finally, the special education teacher testified that all of the documents in the student's educational file were available at the May 2012 CSE because the "hard file" was at the meeting, which the parent confirmed in her testimony (Tr. pp. 238-39, 438).

In a letter dated May 21, 2012, the parent requested copies of "any documents" the CSE planned to discuss at the meeting (see Parent Ex. H at p. 1). The parent testified that in response

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[14] Although the evidence indicates that the student's 2011 psychological evaluation report was not specifically reviewed at the May 2012 CSE meeting, the parent testified that the district school psychologist "referred to it" during the discussion of the student's eligibility classification (Tr. pp. 434-44). A review of the May 2012 IEP also indicates, however, that testing results from the 2011 psychological evaluation were incorporated into the present levels of performance and individual needs section of the IEP (compare Dist. Ex. 3 at p. 1, with Parent Ex. J at pp. 1, 8-9).

to this request, she was provided with a copy of the December 2011 progress report from the Rebecca School (see Tr. p. 427). According to the hearing record, the following individuals attended the May 2012 CSE meeting: a district school psychologist (who also served as the district representative), a district special education teacher, a district social worker, the parent, the student's Rebecca School teacher (via telephone), and a Rebecca School social worker (see Dist. Ex. 4).[15]

A review of the December 2011 progress report from the Rebecca School reveals that it contained information regarding the student's functioning and goals in all of the student's areas of need, including: learning style; academics; sensory processing; social/emotional and behavioral functioning; receptive, expressive, and pragmatic language; and fine and gross motor skills (see Dist. Ex. 8 at pp. 1-22). More specifically, the December 2011 progress report indicated the student was interested in adults and peers and initiated conversations (id. at pp. 1-2). According to the December 2011 progress report, the student engaged in behaviors such as pushing, hair pulling, screaming, and crying as a result of "unexpected changes and challenges" or changes in routine, but was learning to use "co-regulating strategies" to better understand and cope with her emotions (id. at pp. 1, 3-4). The progress report also indicated the student demonstrated progress in initiation such that she was more expressive regarding her interests, opinions, and ideas (id. at p. 2). The December 2011 progress report also indicated that student increased her symbolic thinking as shown in her play skills and approach to structured academic tasks (id.). At that time, the progress report noted the student's ability to read approximately "1,000 sight words," but her sight word skills continued to exceed her auditory and reading comprehension skills (id. at p. 3). The December 2011 progress report indicated that the student followed oral and written directions and responded well to verbal prompts (id. at p. 4). The progress report also indicated the student could count up to five with 1:1 correspondence using manipulatives, but inconsistently identified coins; in addition, the student could identify some groups of objects, including "'more' and 'less,'" but struggled with concepts such as "'same' and 'different'" (id.). The December 2011 progress report noted the student was working on several ADL skills, including eating and self-care skills (id. at p. 5).

According to the December 2011 progress report, the student primarily used verbal language to communicate (see Dist. Ex. 8 at p. 7). At that time, the student demonstrated delays related to communication, social interaction, and articulation, as well as receptive, expressive and pragmatic language (id.). In addition, the progress report noted that the student exhibited delays related to strength, coordination, sensory processing, and play skills (id. at p. 6). The student also demonstrated needs in the areas of motor play ideation and initiation, problem solving and multi-tasking with a motor context, peer play, and shared problem-solving (id.). Finally, the progress report noted that the student's counseling services focused on needs related to social skills, emotional functioning, interactive skills, and creating and exploring emotional ideas (id.).

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[15] The student's Rebecca School teacher testified that she held State certifications in both special education and general education, and she was the student's teacher during the 2011-12 school year (see Tr. pp. 599-602). The student's Rebecca School teacher testified that during the May 2012 CSE meeting, she had the December 2011 progress report, noting that she had drafted a "majority" of the report (see Tr. p. 602). In addition, the Rebecca School teacher testified that the May 2012 CSE did not provide her with additional documents, nor did the May 2012 discuss additional documents at the meeting (see Tr. pp. 602-03).

However, in addition to relying upon the information provided in the December 2011 progress report to develop the student's IEP, the hearing record indicates that the May 2012 CSE also included anecdotal information provided by the student's Rebecca School teacher who participated in the May 2012 CSE meeting in the May 2012 IEP (see Tr. pp. 151-52, 157-58, 191, 241; see generally Dist. Ex. 8 at pp. 1-18).[16] According to the district special education teacher, the district school psychologist led the May 2012 CSE meeting with introductions, the Rebecca School teacher then provided the May 2012 CSE with a "narrative of how [the student] was doing academically, socially in school," including "possible levels, her strengths, weaknesses, her likes and her interests," and the May 2012 CSE then reviewed annual goals (Tr. pp. 151-52; see Dist. Exs. 7 at pp. 1-3; 18 at pp. 1-2; see also Tr. pp. 477-80). More specifically, the special education teacher testified that the Rebecca School teacher and the parent provided information regarding the student's needs related to academics, language, motor skills, social/emotional and behavioral functioning, and sensory regulation (Tr. pp. 157-58, 241-42; Dist. Exs. 7 at pp. 1-5; 18 at pp. 1-2; see also Tr. pp. 438-48). In addition, the parent provided information to the May 2012 CSE regarding the student's language skills, auditory processing, frustration tolerance, and interfering behaviors (see Tr. pp. 157-61, 446-47; Dist. Exs. 7 at pp. 1-3; 18 at pp. 1-2). In addition, the parent testified that the district school psychologist.

Based on the foregoing, the evaluative information available to the May 2012 CSE included the student's academic and language skills, adaptive behavior skills, motor skills, sensory regulation, her challenges with behavior, and social/emotional functioning, and therefore, the parent's assertion that the May 2012 CSE did not rely upon sufficient evaluative information is not supported by the hearing record and must be dismissed (see J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10 [S.D.N.Y. Aug. 5, 2013]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see also Application of a Student with a Disability, Appeal No. 11-041).

Next, the parent contends that because the May 2012 IEP failed to include functional levels and failed to accurately reflect the student's behaviors or antecedent causes of the behaviors, the IHO erred in finding that the May 2012 IEP adequately described the student's needs. However, a review of the May 2012 IEP in conjunction with the evaluative information available to the May 2012 CSE demonstrates that the CSE carefully and accurately described the student's present levels of academic achievement, social development, and physical development, and further, that the description of the student's needs was consistent with the evaluative information and input from the Rebecca School teacher and parent at the time of the meeting.

The May 2012 IEP shows that it contained information from the December 2011 progress report, as well as additional information about the student's achievement and functional performance levels provided verbally to the May 2012 CSE (compare Dist. Ex. 3 at pp. 1-4, with Dist. Exs. 7 at pp. 1-3; 8 at pp. 1-9). For example, the present levels of performance in the May 2012 IEP included information from the December 2011 progress report regarding the student's current levels in academics, language processing, sensory regulation, social/emotional functioning and behavioral functioning (compare Dist. Ex. 3 at pp. 1-4, with Dist. Ex. 8 at pp. 1-9). In addition, the May 2012 IEP described the student's instructional or functional level in reading as a first grade

[16] The district special education teacher testified that the Rebecca School teacher remained on the telephone for the entire length of the May 2012 CSE meeting (see Tr. pp. 150-51).

level, and similarly described the student's instructional or functional level in mathematics as a kindergarten level (see Dist. Ex. 3 at p. 17).

At the impartial hearing, the district special education teacher testified that the May 2012 CSE developed the present levels of performance based on the evaluative information and discussions at the May 2012 CSE, which included input from the parent and Rebecca School teacher (see Tr. p. 157). More specifically, the special education teacher testified that the May 2012 CSE discussed the student's needs in the areas of social/emotional functioning, auditory processing, speech/language, behavior, anxiety, and frustration tolerance (see Tr. pp. 157-58). According to May 2012 CSE meeting minutes, the Rebecca School teacher provided information regarding the student's academic performance and social skills, which were reflected in the May 2012 IEP (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 7 at pp. 2-3 and Dist. Ex. 18 at pp. 1-2). The May 2012 IEP also incorporated information provided through discussions at the meeting regarding the student's academics, language processing, sensory regulation, social/emotional skills, and behavioral skills (compare Dist. Ex. 3 at pp. 1-4, with Dist. Ex. 7 at p. 1-3 and Dist. Ex. 18 at pp. 1-2).

Furthermore, the May 2012 IEP described the student's mathematics skills related to 1:1 correspondence, numerals, and money concepts based on the December 2011 progress report and input from the Rebecca School teacher (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 7 at p. 2 and Dist. Ex. 8 at p. 4). The May 2012 IEP also provided information regarding the student's physical development related to motor skills, postural control, reaction time, and navigating the school (see Dist. Ex. 3 at p. 2). Moreover, the May 2012 IEP fully described the student's primary needs in the areas of language processing, sensory regulation, social/emotional functioning, and behavioral functioning, as well as mathematics, reading, and motor needs (see Dist. Ex. 3 at pp. 1-2).[17]

Regarding the parent's assertion that the May 2012 IEP failed to accurately reflect the student's behaviors or antecedent causes of the behaviors, the hearing record does not support the parent's position. As noted previously, the May 2012 CSE engaged in a "large discussion" about the student's social/emotional functioning and behaviors toward the end of the meeting in response to the parent's request for a 1:1 paraprofessional (see Tr. pp. 157-58). During that discussion, the parent informed the May 2012 CSE about the student's behaviors, as well as "certain triggers" of the behaviors—such as struggling with her environment and noises—which caused the student to become "anxious or frustrated," which were noted in the May 2012 CSE meeting minutes and then reflected in the May 2012 IEP (see Tr. p. 158; compare Dist. Ex. 7 at pp. 4-5 and Dist. Ex. 18 at p. 2, with Dist. Ex. 3 at p. 3). In addition, while the hearing record indicates that the May 2012 CSE also discussed the "environmental triggers or conditions and then interventions" associated with the student's behaviors and the May 2012 IEP does not appear to fully describe or identify the antecedent causes of the student's listed behaviors, a review of the FBA and BIP reveals the inclusion of such information regarding the environment triggers or actions that occur before the targeted behaviors (see Tr. pp. 159-60; compare Dist. Ex. 3 at pp. 1-4, with Dist. Ex. 5 at pp. 1-2). Moreover, the May 2012 IEP incorporates accommodations and strategies to address the student's academic, social/emotional and behavioral management needs, and sensory regulation, including: visual and verbal cues, redirection, manipulatives, sensory input, sensory breaks, extra time to

[17] Although not the student's most significant area of need, the May 2012 IEP did not however describe the student's needs, if any, in the areas of writing (see Dist. Ex. 3 at pp. 1-4).

process, movement activities, calm but firm tone, transition songs and warnings, consistent routine, close adult support, and assistance with processing through writing (see Dist. Ex. 3 at p. 3).

Based on the above, the hearing record demonstrates that the evaluative information available to and considered by the May 2012 CSE, along with input from CSE members, was sufficient to develop an appropriate IEP for the student. Moreover, the hearing record shows that the May 2012 IEP adequately and accurately reflected the evaluative information and directly incorporated information from the December 2011 progress report, as well as the input of CSE participants (compare Dist. Ex. 3 at pp. 1-4, with Dist. Ex. 7 at pp. 1-5 and Dist. Ex. 8 at pp. 1-9). Accordingly, the evaluative information considered by the May 2012 CSE and the input from the CSE participants during the meeting provided the May 2012 CSE with sufficient functional, developmental, and academic information about the student and her individual needs to enable it to develop her IEP (D.B., 2011 WL 4916435, at *8; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

3. Consideration of Special Factors—Interfering Behaviors

The parent asserts that the FBA did not appropriately represent the student's behaviors, and argues that the IHO erred in failing to issue findings that the FBA and BIP were not appropriate. The district alleges that the FBA and BIP were both appropriate, and even if the development of the FBA was not proper, such procedural error would not result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of

Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

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

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

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

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

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

(8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's

behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[18] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the parties do not dispute that the district did not conduct an FBA prior to the date of the May 2012 CSE meeting or that the FBA was completed after the conclusion of the May 2012 CSE meeting; however, as noted above, the district's failure to conduct an FBA prior to the May 2012 CSE meeting does not, by itself, automatically render the IEP or the corresponding BIP deficient. While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). This is especially true under the circumstances of this case where the hearing record indicates that at the time of the May 2012 CSE meeting, the student was attending the Rebecca School—and the parent was contemplating removing the student from the Rebecca School and instead, unilaterally placing the student at Cooke for the 2012-13 school year—and thus conducting an FBA to determine how the student's behavior related to the student's school environment at the Rebecca School would have at the very least diminished, or nearly inconsequential, value where, as here, the May 2012 CSE was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; Cabouli, 2006 WL 3102463, at *3; J.C.S., 2013 WL 3975942, at *13).

Nevertheless, as previously noted, the May 2012 CSE specifically engaged in a discussion of the student's social/emotional functioning and behaviors when the parent requested a 1:1

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

paraprofessional for the student to assist in her transition from the Rebecca School to the public school (see Tr. pp. 157-58). According to the testimony, the scope of the discussion included identifying the student's behaviors, as well as identifying environment triggers or conditions and interventions (see Tr. pp. 158-60; see also Tr. pp. 194-97, 446-48; Dist. Exs. 7 at pp. 4-5; 18 at p. 2). The district special education teacher testified that the May 2012 CSE also discussed the antecedents of the student's behaviors, such as confusion, frustration, and anxiety (Tr. p. 160). As noted in the CSE meeting minutes and in the May 2012 IEP, the student's behaviors that interfered with her learning included grabbing, hitting, banging on glass, pulling at hair or clothing, choking, and elopement (see Dist. Exs. 3 at p. 3; 7 at p. 4-5; 18 at p. 2). As a result of these identified behaviors, the May 2012 CSE determined the student required strategies and supports to address her behaviors that interfered with learning needs, and required a BIP (see Dist. Ex. 3 at p. 3). Both the written FBA and BIP were prepared after the conclusion of the meeting (see Tr. pp. 158-60, 199).

According to the FBA itself, the district school psychologist who attended the May 2012 CSE meeting created the FBA on the same date as the CSE meeting; it also appears that the BIP was developed on the same date as the CSE meeting (compare Dist. Ex. 5 at p. 2 and Dist. Ex. 6, with Dist. Ex. 3 at p. 17). The FBA noted the following as the "observational data . . . collected:" a "recent school report," input from the student's teacher at the CSE meeting, input from the parent at the CSE meeting, and a psychological evaluation (Dist. Ex. 5 at p. 1). The FBA identified the targeted behaviors as the following: banging on glass, choking, grabbing, hitting, pulling hair or clothing, and running off (id.). The school psychologist noted that the frequency, duration, and intensity of the behaviors were all variable and occurred in the classroom and school environment (id.). The FBA indicated the antecedents of the behaviors were confusion, unsure feelings about the environment, loud noises, and changes in schedule (id.). The FBA indicated that the environmental conditions that may affect the student's behaviors were new adults or peers entering the room, changes in the expected routine, loud or busy environments, and unclear expectations (id.). The FBA reflected that the purpose of the student's behavior as the student processing and expressing frustration (id.). The FBA also reflected that the student missed instructional time and educational experiences as a result of her behaviors (id. at p. 2). The FBA indicated that previous interventions of consistent routines, preparation for changes, close adult support, time to discuss changes with adults, and explanations in writing had been helpful to address the student's behaviors (id.). The FBA indicated interventions that should be implemented, which included time to process information, use of a calm and firm tone, transition songs and time warnings, consistent routines, close adult support, and use of writing to assist the student in processing information (id.). The school psychologist noted in the FBA that the student liked movement activities, including dance, music, and singing, as well as socializing, which the district could also use to provide the student with positive reinforcement (id.). The FBA noted that the expected behavior changes would be a decrease in the frequency, duration, and intensity of the behaviors, which the district would measure by teacher and staff observation reports (id.).

With respect to the BIP, the district relied upon information gathered at the May 2012 CSE meeting in its development (see Tr. pp. 158-60, 199). The BIP identified three target behaviors, which included pulling on hair or clothing, choking, and running away from adult supervision (see Dist. Ex. 6). The BIP identified the classroom teacher and the paraprofessional as individuals responsible for implementing the BIP (id.). The BIP indicated that the district must report progress regarding the target behaviors to the parent at least every 10 weeks (id.). The BIP also noted that

the expected behavior changes as decreasing the duration, frequency and intensity of the behavior, and finally, that the student's progress would be measured by teacher or staff observations (id.).

Based upon the foregoing and contrary to the parent's assertion, the FBA—and for that matter, the BIP—accurately described the student's behaviors, including the antecedents to those identified behaviors. Moreover, the FBA and BIP reflected the May 2012 CSE discussion regarding the student behaviors and related factors (compare Dist. Exs. 5-6, with Dist. Ex. 7). However, because the BIP did not include positive behavioral supports and interventions for the student to address her behaviors, it fails to conform to State regulations; similarly, the BIP did not comply with procedures for including a baseline measure of the student's problem behaviors or the schedule to measure the effectiveness of the interventions, as required by State regulation (see 8 NYCRR 200.22 [b][4][i][iii]; Dist. Ex. 6).

Notwithstanding all of the foregoing, the absence of an appropriate FBA or BIP might not result in a denial of FAPE if the CSE addressed the student's interfering behavior and created an IEP based upon information provided by the student's teachers, providers, parents and classroom observation conducted by the district (see R.E., 694 F.3d at 190-91; T.Y., 584 F.3d at 419; see also M.Z., 2013 WL 1314992, at *5, *8 [finding that, even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"]). In this case, the recommendation for the services of a full-time, 1:1 crisis management paraprofessional, as well as strategies recommended to address the student's management needs and the annual goals in the May 2012 IEP rescue any inadequacies in either the FBA or the BIP, and any deficiencies therein would not result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year (see A.C., 553 F.3d at 172-73 [concluding that the failure to conduct a FBA did not make the IEP legally inadequate because the IEP noted (1) the student's attention problems, (2) the student's need for a personal aid to help the student focus during class, and (3) the student's need for psychiatric and psychological services]; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]).

The May 2012 IEP incorporated supports to assist the student in changing her behavior, including a 1:1 crisis management paraprofessional (Tr. p. 165). Moreover, the May 2012 CSE recommended the student have a 1:1 crisis management paraprofessional to assist the student regarding her social/emotional needs (Tr. p. 165). Additionally, the May 2012 IEP included a description of the student's social/emotional present levels of performance and health and physical development, based on the documentation available to the May 2012 CSE, as well as multiple academic, social/emotional, and health and physical management strategies for use in the classroom (see Dist. Ex. 3 at pp. 2-3). The May 2012 IEP also included annual goals and multiple corresponding short-term objectives that addressed the student's behavior, sensory processing, and related academic needs (id. at pp. 4, 7, 11-12). In addition, as set forth in detail above, the May 2012 IEP contained accommodations and strategies to target the student's social/emotional, behavioral and related academic needs, which adequately addressed these needs (see id. at p. 3).

Accordingly, in this case the May 2012 CSE's failure to completely comply with State procedural regulations regarding the development of the FBA and the BIP did not result in a failure to offer the student a FAPE for the 2012-13 school year because the May 2012 CSE otherwise recommended appropriate management needs designed to target the student's interfering

behaviors, as well as recommending the services of a full-time, 1:1 crisis management paraprofessional, to adequately and appropriately address the student's social/emotional needs and behaviors.

4. Annual Goals and Short-Term Objectives

The parent alleges that the IHO erred in finding that her objections to the annual goals in the May 2012 IEP were insignificant, and in rejecting her contention that the annual goals were not appropriate because the annual goals required the use of a particular methodology and were written for implementation in a different program. The district rejects these assertions, and contends that the annual goals in the May 2012 IEP were appropriate even if written after the May 2012 CSE meeting. A review of the hearing record does not support the parent's assertions, and thus, there is no reason to disturb the IHO's conclusions.

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

Turning first to the parent's contention that the annual goals in the May 2012 IEP were not appropriate because the annual goals required the use of a particular methodology and therefore, could not be implemented at the assigned public school site, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]).

Next, the May 2012 IEP contained approximately 17 annual goals and 49 corresponding short-term objectives that focused on the student's areas of need related to communication, play skills, social/emotional functioning, reading, mathematics, ADL skills, sensory regulation, fine

and gross motor skills, language processing, and articulation (see Dist. Ex. 3 at pp. 4-12). In addition, a review of the May 2012 IEP demonstrates that the annual goals and short-term objectives relate to the student's identified areas of need, and consistent with regulations, included appropriate evaluative criteria, evaluation procedures and schedules to measure progress toward meeting the annual goals—and as such, were measurable (see id.). For example, an annual goal in the May 2012 IEP targeting the student's language processing skills indicated that within one year, with guidance and support, the student would improve her expressive language skills related to communicative effectiveness as measured by teacher or provider observations one time per quarter (id. at p. 10). The annual goal included two corresponding short-term objectives, one of which related to the student's independent use of pronouns, locatives, adjectives, and verbs during play and semi-structured activities when requesting, commenting, and asking or answering questions in 10 instances per session (id.). The second short-term objective related to the same annual goal indicated that the student would use a variety of words and phrases when engaged in reciprocal interaction with an adult or peer in 10 instances per session (id.). Similarly, another annual goal in the May 2012 IEP targeting the student's literacy skills indicated that the student would increase her literacy with guidance and support as measured by teacher observation, class activities, and teacher made materials one time per quarter (id. at p. 5). The annual goal included six corresponding short-term objectives related to reading non-fiction books, reading directions and signs, answering comprehension questions, the use of symbolic representation related to a story, reading aloud with affect, and writing sight words—all of which included criteria from which to measure progress (id. at p. 6). A review of the remaining annual goals and corresponding short-term objectives reveals similarities with respect to targeting the student's identified areas of need described in the present levels of performance, as well as with respect to the required evaluative criteria, or measurability (see id. at pp. 4-12).

As detailed above, the district special education teacher testified that the May 2012 CSE relied upon the December 2011 progress report from the Rebecca School—as well as updated information from the student's Rebecca School teacher—to develop the annual goals (see Tr. pp. 151-52, 188-91, 230-32). In addition, the parent testified that the district school psychologist read the goals from the December 2011 progress report and asked the Rebecca School teacher whether the student had achieved the goals, the parent also testified that this process "went very quickly goal by goal by goal" and the district school psychologist did not "add in new goals" or otherwise modify the annual goals (Tr. pp. 438-40). However, the hearing record does not contain evidence that the parent expressed any disagreement with the Rebecca School teacher's assessment of and reporting of the student's progress on the annual goals in the December 2011 progress report, but rather, she relied upon the Rebecca School teacher's explanations (see Tr. pp. 477-79). In addition and as noted by the IHO, the hearing record indicates that although the annual goals and short-term objectives in the May 2012 IEP were drafted after the CSE meeting, the parent, upon receipt of the May 2012 IEP, did not write to the district or otherwise express concerns or disagreement with the annual goals in the May 2012 IEP, except as set forth in her multiple due process complaint notices (see Tr. pp. 503-05; IHO Decision at pp. 13-14).

Thus, overall, the hearing record supports a finding that the annual goals in the May 2012 IEP targeted the student's identified areas of need—and appropriately addressed the student's educational needs and considered her significant developmental delays, her need for sensory regulation, and her need to develop communication skills and fine and gross motor skills—and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress

several times over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F., 2013 WL 4495676, at *18-*19; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S., 454 F. Supp. 2d at 146-47; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).[19]

5. 6:1+1 Special Class Placement and LRE Considerations

The district argues that the IHO erroneously concluded that the services of a full-time, 1:1 crisis management paraprofessional—as a substitute for transitional support services—made the recommended 6:1+1 special class "'more restrictive,'" further, that the IHO misinterpreted and misapplied LRE considerations in reaching this conclusion. The parent disagrees with the district's assertions, and contends that the IHO correctly determined that the May 2012 CSE's recommendation for the services of a 1:1 crisis management paraprofessional was not based upon the student's needs, noting further that she did not request the services of a 1:1 crisis management paraprofessional for the entirety of the 2012-13 school year. An independent review of the hearing record leads to the conclusion that the May 2012 CSE's recommendation of a 6:1+1 special class with a 1:1 crisis management paraprofessional was appropriate to meet the student's special education needs and did not offend LRE principles.

Initially, the district correctly asserts that the IHO, in reaching the conclusion regarding the appropriateness of the 6:1+1 special class placement with the services of a full-time, 1:1 crisis management paraprofessional, misinterpreted or misapplied LRE considerations. The term LRE does not refer to the student-to-adult ratio in the classroom. In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004], aff'd 2005

[19] To the extent that the parent's answer and cross-appeal continue to assert that the annual goals were not appropriate because they lacked baselines upon which to measure progress, the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable." As discussed above, the annual goals in the May 2012 IEP met the applicable standards and were specifically designed to meet the student's needs that resulted from her disability, enabled her to be involved in and make progress in the general education curriculum, and met the student's other educational needs resulting from her disability.

WL 1791553 [2d Cir. July 25, 2005]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc], 200.4[d][4][ii][b]; see 34 CFR 300.116). As such, to the extent that the IHO concluded that the recommendation of a 1:1 crisis management paraprofessional—as an additional adult in the 6:1+1 special class placement—made the 6:1+1 special class placement "more restrictive" and thus, not appropriate, this finding must be reversed.

According to State regulation, a 6:1+1 special class placement is designed for those students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with State regulation regarding students with highly intensive needs, the May 2012 CSE appropriately recommended a 6:1+1 special class placement with a 1:1 crisis management paraprofessional to address the student's significant delays in academics, communication, sensory regulation, social/emotional and behavioral functioning, and motor skills (see Dist. Ex. 3 at p. 12).

In reaching the decision to recommend a 6:1+1 special class placement, the district special education teacher testified—as detailed previously—that the May 2012 CSE explored other placement options for the student, including the options of a 12:1 special class, a 12:1+1 special class, an 8:1+1 special class, and a 12:1+4 special classes either with or without related services and in both community school settings and specialized school settings for the student, but rejected these options as not sufficiently supportive to address the student's needs (see Tr. pp. 154, 164-67, 184, 222-23; Dist. Exs. 3 at p. 18; 7 at p. 4). The district special education teacher also testified that based upon the information presented about the student and her needs at the May 2012 CSE meeting—and based upon her understanding of the 6:1+1 special class placement option—the 6:1+1 special class was appropriate to meet the student's needs (see Tr. pp. 154-55, 162-65). More specifically, the special education teacher testified that a 6:1+1 special class primarily served students who required a "lot of support academically," who required "one-on-one attention from the teacher and the para[professional]," and who did not display "really aggressive behaviors" (Tr. pp. 163-64). For this student, the special education teacher believed the 6:1+1 special class was appropriate because although the student demonstrated "definite strengths," she also demonstrated "certain areas" where the student "really needed support" (Tr. pp. 164-65). The special education teacher testified that the student required "this type of small intensive classroom," where she could receive "enough of the one-on-one support without being overwhelmed by a large amount of peers within her immediate environment" (id.). In addition, the special education teacher testified that because the student exhibited behaviors in response to "different types of environmental triggers," the May 2012 CSE's recommendation of a 1:1 crisis management paraprofessional was necessary (Tr. p. 165). The special education teacher explained that if the student, "at one point or at multiple points during the day or the week," experienced social/emotional issues, they could be addressed by the paraprofessional (id.).

Additionally, to the extent that the IHO found that the May 2012 CSE's decision to recommend a 1:1 crisis management paraprofessional was a substitute for transitional support services and not based upon the student's needs, the hearing record does not support such a conclusion. As detailed above, the parent specifically requested the services of a 1:1 paraprofessional to assist in the student's transition from the Rebecca School to the public school

(see Tr. pp. 194-97; see also Tr. pp. 446-48; Dist. Exs. 7 at pp. 4-5; 18 at p. 2).[20] To the extent that the parent's request led to a discussion of the student's social/emotional functioning and identified behaviors that occurred due to changes in the environment, or during transitions—such as grabbing, hitting, banging on glass, pulling at hair or clothing, choking, and elopement—the recommendation of a 1:1 crisis management paraprofessional to address these specific behaviors, as well as the recommendations in the May 2012 IEP for accommodations and management strategies, was appropriate under the circumstances (see Tr. p. 160; Dist. Ex. 3 at p. 3; 7 at p. 4).[21] Moreover, such supports are appropriately implemented within a 6:1+1 special class, which State regulation describes as designed to address highly intensive management needs (8 NYCRR 200.6[h][4][ii][a]). As such, the May 2012 CSE's recommendation for a 1:1 crisis management paraprofessional was appropriate and based upon the student's needs.

Furthermore, in addition to the May 2012 CSE's recommendations for a 6:1+1 special class and a 1:1 crisis management paraprofessional, the May 2012 CSE also recommended related services of speech-language therapy, counseling, and OT, and PT to further address the student's needs (see Dist. Ex. 3 at pp. 12-13). Additionally and as set forth above, the May 2012 CSE multiple annual goals and short-term objectives in the IEP were aligned to the student's needs, as well as being specific and measurable, and that comprehensively addressed the areas of academics, communication, play skills, social/emotional functioning, ADL skills, sensory regulation, fine and gross motor skills, language processing, and articulation (see id. at pp. 4-12).

Based upon the foregoing, the hearing record establishes that contrary to the IHO's conclusion, the May 2012 CSE's recommended 6:1+1 special with a 1:1 crisis management paraprofessional, together with accommodations and related services, was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

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

[21] Both the parent and the IHO improperly use the term "transitional support services," which pursuant to State regulation refer to "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). In April 2011, the Office of Special Education issued an updated guidance document entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). Here, there is no indication in the hearing record that the parties contemplated the student being placed in a general education program or any less restrictive program than a special class setting, triggering the district's obligation to potentially recommend transitional support services for the student. Moreover, given the regulatory definition of transitional support services, the IHO's finding that the May 2012 CSE improperly substituted the services of a 1:1 crisis management paraprofessional—as a direct service to the student—for transitional support services is without basis in law and must be reversed.

D. Challenges to the Assigned Public School Site

Finally, the parent contends that the IHO erred in failing to address whether the assigned public school site would be able to implement the student's May 2012 IEP, address the student's sensory or related services' needs, have a seat available for the student, use an appropriate instructional methodology, and functionally group the student with appropriate peers. The district asserts that the IHO properly declined to address issues raised related to the assigned public school site, as such arguments are speculative given that the student did not attend the assigned public school site. For reasons explained more fully below, the parent's contentions must be dismissed.

Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13, 2013 WL 1234864 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. However, since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City

Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x. at 87, 2013 WL 3814669 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective (see, e.g., C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, 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'" (id., quoting R.E., 694 F.3d at 187 n.3).

In this instance, the parent rejected the district's placement by letter dated June 15, 2012—before receiving notification of the assigned public school site and before visiting the assigned public school site—and notified the district of her intentions to place the student at Cooke for the 2012-13 school year and to seek reimbursement from the district (see Parent Ex. G at p. 1). Upon visiting the assigned public school on June 15, 2012, the parent then sent an additional letter, dated June 18, 2012, rejecting the assigned public school for reasons based upon her observations and conversations (see Parent Ex. F at pp. 1-5).[22] Under such circumstances, where the parent rejected the May 2012 IEP prior to the time the district became obligated to implement it, claims that the

[22] The parent revisited the assigned public school site in October 2012, and sent another letter, dated October 25, 2012, detailing the reasons for her continued rejection of the assigned public school site (see Parent Ex. D at pp. 1-5).

district would have failed to implement the May 2012 IEP would require a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned public school site and would not be an appropriate inquiry and the district would not be otherwise obligated to establish that the assigned public school site would have been able to implement the student's May 2012 IEP (K.L., 530 Fed. App'x at 87, 2013 WL 3814669; R.E., 694 F3d at 186, 195; A.M., 2013 WL 4056216, at *13; R.C., 906 F. Supp. 2d at 273). In R.E., the Second Circuit also acknowledged that some information is inherently speculative in noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP (R.E., 694 F.3d at 187, 192). Generally, the identification of the particular students in a proposed classroom is the same type of information as the identification of a specific teacher of the classroom, to the extent that, like a teacher, a district cannot guarantee that a particular student will not relocate or otherwise become unavailable (see R.E., 694 F.3d at 187; Cerra, 427 F.3d at 194 [noting that the IDEA does "not expressly require school districts to provide parents with class profiles"]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [explaining that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). However, in an abundance of caution, this decision will address the parent's claims related to whether the student would have been grouped appropriately with the other students observed at the assigned public school site.

In this case, the parent asserts that the district failed to establish that the assigned public school site had a seat available in an appropriate classroom with peers of similar age, needs, and functional levels, resulting in a failure to offer the student a FAPE for the 2012-13 school year. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]). Upon review of the hearing record, assuming that the student had attended the assigned public school site, the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned school for the 2012-13 school year.

According to the district special education teacher's testimony, students at the assigned public school site were grouped by similarity of academic abilities and social/emotional functioning (see Tr. pp. 214-17). The assistant principal at the assigned public school site (assistant principal) testified that the students within the 6:1+1 special classes were typically comprised of students with autism classification, but noted that the district populated the special classes at the assigned public school site according to the age and the functioning levels of the students based

on their IEPs (see Tr. pp. 50-55, 61). During summer 2012, the assigned public school site had three different 6:1+1 classrooms available and populated based upon "age and functionality"—with speech-language therapy, OT, PT, and counseling available as related services—and similarly, in fall 2012, the assigned public school site had four 6:1+1 classrooms available and populated based upon "age and functionality"—with speech-language therapy, OT, PT, and counseling available as related services (see Tr. pp. 54-62). Due to the relatively lower number of related services' providers, some students ring fall 2012 may have received related services' authorizations (RSAs) to enable them to receive their mandated related services at a location other than the assigned public school site (see Tr. p. 62). In addition, the assistant principal clarified that both the students and the teachers in the 6:1+1 special classes changed between summer and fall 2012 because some of the teachers left and some students did not return in September 2012 from the summer program (see Tr. p. 61). The assistant principal also testified that based on her previous review of the students' IEPs in the 6:1+1 special classes at the assigned public school site and her knowledge of this particular student, the student would have been grouped with similarly functioning peers (see Tr. pp. 96- 100). Moreover, the assistant principal testified that if the student had enrolled at the assigned public school site in summer 2012 at a time when the 6:1+1 special classrooms were fully populated, the district would have "opened up another classroom because we have the space here," the district would "get teachers," and the "students could be moved" (Tr. pp. 127-28). [23]

Based upon the evidence in the record, and assuming for the sake of argument that the student had attended the public school site, the district would have been able to suitably group the student for instructional purposes within the 6:1+1 special class (see M.P.G., 2010 WL 3398256, at *10-*11 [noting that the student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T., 716 F. Supp. 2d at 290-92 [holding the district did not fail to offer a FAPE where the age range within a student's proposed class exceeded 36 months because the student could have been functionally grouped with other similarly-age students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R., 615 F. Supp. 2d at 294). In addition, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation, that is, deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. Aug. 19, 2011]).

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[23] This activity of altering the student grouping when the district receives the students in its classrooms is a function of the regulatory scheme established by the State with respect to classroom operation and the district must constantly balance its obligations with respect to all students, but this regulation is not designed to provide an individualized parental veto over the selection of the most appropriate peers for their own child (see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). While I am not unsympathetic to what are clearly the concerns of loving parents, where, as here, the claims are based upon the parent's June 15, 2012 and October 1, 2012 visits to the assigned public school site, similar functional grouping arguments based upon similar facts involving a unilateral placement have been rejected as impermissibly speculative (R.B., 2013 WL 5438605, at *17; N.K., 2013 WL 4436528, at *9), and the parent's grouping argument therefore fails.

VII. Conclusion

Having determined that, contrary to the IHO's decision, the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE for the 2012-13 school year in the LRE, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Cooke was an appropriate placement (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 25, 2013, is modified by reversing that portion which determined that the district failed to offer the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated October 25, 2013, is modified by reversing that portion which directed the district to reimburse the parent for the costs of the student's tuition at Cooke for the 2012-13 school year.

Dated: **Albany, New York**
February 24, 2014

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JUSTYN P. BATES
STATE REVIEW OFFICER