The University of the State of New York

The State Education Department
State Review Officer
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No. 15-030

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, Lisa R. Khandhar, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., Maria C. McGinley, Esq., and Janna Wince, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2013-14 and 2014-15 school years. The parents cross-appeal the IHO's failure to address certain allegations 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

In this case, the student has continuously attended the Rebecca School since the 2009-10 school year (see Application of a Student with a Disability, Appeal No. 12-071 [finding that the district offered the student a free appropriate public education (FAPE) for the 2011-12 school year]; Application of the Dep't of Educ., Appeal No. 11-133 [finding that the district offered the student a FAPE for the 2010-11 school year]; see also R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *1 [S.D.N.Y. Sept. 27, 2013] [finding, in part, that the recommended 6:1+1

special class placement was appropriate to meet the student's needs for the 2010-11 school year], aff'd, R.B. v. New York City Dep't of Educ., 2014 WL 5463084 [2d Cir. Oct. 29, 2014]; see also R.B. v. New York City Dep't of Educ., 15 F. Supp. 2d 421 [S.D.N.Y. 2014] [finding, in part, that the recommended 6:1+1 special class placement with a 1:1 paraprofessional was appropriate to meet the student's needs for the 2011-12 school year], aff'd, R.B. v. New York City Dep't of Educ., 2015 WL 1244298 [2d Cir. Mar. 19, 2015]).[1]

On May 6, 2013, the parents executed an enrollment contract with the Rebecca School for the student's attendance during the 2013-14 school year beginning July 1, 2013 (see Parent Ex. C at pp. 1, 4, 6).

On May 9, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Exs. 2 at pp. 1, 13; 3 at p. 1). Finding that the student remained eligible for special education and related services as a student with autism, the May 2013 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school and the following related services: one 45-minute session per week of individual counseling, one 45-minute session per week of counseling in a small group, two 45-minute sessions per week of individual occupational therapy (OT), two 45-minute sessions per week of OT in a small group, one 60-minute session per month of parent counseling and training in a group, three 45-minute sessions per week of individual speech-language therapy, and two 45-minute sessions per week of speech-language therapy in a small group (see Dist. Ex. 2 at pp. 9-10, 12-13; 3 at p. 1). The May 2013 CSE also developed annual goals with corresponding short-term objectives to address the student's needs, and further recommended that the student participate in alternate assessments and adapted physical education (see Dist. Ex. 2 at pp 3-9, 11; 3 at p. 2). In addition, the May 2013 CSE recommended a coordinated set of transition activities and measurable post-secondary goals (see Dist. Exs. 2 at pp. 4, 11; 3 at p. 2).

In a letter dated June 17, 2013, the parents notified the district of their intentions to unilaterally place the student at the Rebecca School for the 2013-14 school year and to seek funding for the costs of the student's tuition at the Rebecca School from the district if the district did not "cure the procedural and substantive errors in the IEP and offer an appropriate program" (Parent Ex. E at p. 1). The parents further advised that they rejected the IEP and the "placement proposed" by the CSE at the "last IEP meeting" (id.). The parents indicated that the "program recommended" was not appropriate to meet the student's needs, the district did not provide them with an opportunity to meaningfully participate in the development of the IEP, and the CSE failed to recommend a placement with a "suitable and functional grouping" (id. at pp. 1-2). In addition, the parents noted that the district failed to timely offer a placement "such as to permit" the parents with an opportunity to visit the "proposed program and assess its appropriateness" (id. at p. 2). The parents also noted that, to date, the CSE failed to recommend a "school to implement [the student's] IEP" and that the "placement" could not implement the IEP (id.).

In a final notice of recommendation (FNR) dated June 18, 2013, the district summarized the special education and related services recommended in the May 2013 IEP, and identified the

[1] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 9).[2]

In a letter to the parents dated June 24, 2013, the district acknowledged receipt of the parents' June 17, 2013 letter (see Parent Ex. F). The district further acknowledged the parents' disagreement with the May 2013 CSE's recommendations, and requested that the parents provide "any updated materials" regarding the student to the CSE in order to address their concerns (id.). Upon receipt of any new materials or documentation, the district indicated that a CSE would "review the new materials" and would either contact the parents to discuss their concerns or schedule a new meeting (id.).

In a letter to the district dated June 27, 2013, the parents provided the district with a copy of the student's "most recent Rebecca School progress report," which the parents previously sent to the district on June 7, 2013 "right after [they] received it" (Parent Ex. G).

On July 1, 2013, the student began attending the Rebecca School for the 2013-14 school year (see Parent Ex. X at p. 1).

On January 17, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Dist. Exs. 10 at pp. 1, 12; 11 at p. 1). Having found that the student remained eligible for special education and related services as a student with autism, the January 2014 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school and the following related services: one 45-minute session per week of individual counseling services, one 45-minute session per week of counseling services in a small group, two 45-minute sessions per week of individual OT, two 45-minute sessions per week of OT in a small group, one 60-minute session per month of parent counseling and training in a group, three 45-minute sessions per week of individual speech-language therapy, and two 45-minute sessions per week of speech-language therapy in a small group (see Dist. Exs. 10 at pp. 8-9, 11-12; 11 at p. 1).[3] The January 2014 CSE also developed annual goals and corresponding short-term objectives to address the student's needs, and further recommended that the student participate in alternate assessments, adapted physical education, and travel training (see Dist. Exs. 10 at pp. 4-8, 10-11; 11 at p. 2). In addition, the January 2014 CSE recommended a coordinated set of transition activities and measurable post-secondary goals (see Dist. Exs. 10 at pp. 4, 10; 11 at pp. 1-2).

[2] At the impartial hearing, the parents testified that they visited the assigned public school site identified in the June 2013 FNR as soon as they received the FNR, sometime in June 2013 (see Tr. pp. 748-49). Other than the amended due process complaint notice described herein, the hearing record does not include any other evidence describing the parents' visit to the assigned public school site identified for the 2013-14 school year or any concerns related to the assigned public school site for the 2013-14 school year (see generally Tr. pp. 1-914; Dist. Exs. 1-18; Parent Exs. A-N; T-Z; AA-GG; IHO Exs. I-V; VII-XII; XIV-XVI).

[3] The student's eligibility for special education programs and related services as a student with autism for both the 2013-14 school year and the 2014-15 school year is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On April 30, 2014 and May 1, 2014, the parents executed an enrollment contract with the Rebecca School for the student's attendance for the 2014-15 school year beginning July 1, 2014 (see Parent Ex. J at pp. 1, 4, 6).

In a letter to the parents dated May 1, 2014, the district identified the particular school site to which the district assigned the student to attend for the 2014-15 school year (see Dist. Ex. 14).

On June 20, 2014, the parents visited the assigned public school site (see Parent Ex. K at p. 1). In a letter dated June 26, 2014, the parents advised the district that the "proposed IEP" was not appropriate to meet the student's needs because the 6:1+1 special class placement was not appropriate and too restrictive for the student, noting that the 6:1+1 special class "include[d] too few peers for [the student] to work on his social and emotional skills" (id. at p. 1). Additionally, the parents noted that the "IEP" did not "accurately reflect" the student's "strengths and challenges" consistent with the description provided to the CSE by the parents and Rebecca School staff attending the meeting (id.). The parents also indicated that the IEP did not include "individualized" parent counseling and training, and further described the "[t]ransitional goals" as "not specific" and "inappropriate" (id.). Additionally, the parents noted that the IEP failed to meet the student's individualized needs (id.). Next, the parents outlined their concerns with respect to the assigned public school site, including that the 6:1+1 special class placement was "overly restrictive" and that the class consisted of students "far below [the student's] level of functioning" (id.). In addition, the parents indicated that the assigned public school site could not meet the student's "significant sensory occupational therapy needs" because it lacked an OT gym and OT equipment (id.). The parents further described the assigned public school site as "extremely overcrowded," and noted that the "large crowds would create a completely inappropriate learning environment" for the student (id. at p. 2). Moreover, the parents indicated that the "rule against independent navigation of the school" was "too restrictive" and the student would "lose independence skills he ha[d] mastered" (id.). Next, the parents described the assigned public school site's "transitions work program" as "limited and not individualized for each student," and thus, they deemed the program to be too restrictive and further noted that it would "negatively affect" the student's independence skills (id.). Finally, the parents indicated that the speech-language therapy room was not an appropriate space for the student to receive speech-language therapy in light of his sensory needs (id.). As a result of the foregoing, the parents advised that the student would attend a 12-month school year program at the Rebecca School for the 2014-15 school year as a "component of his educational program" and that they would seek reimbursement or funding for the costs of the student's tuition from the district (id. [emphasis in original]).

On July 1, 2014, the student began attending the Rebecca School for the 2014-15 school year (see Parent Ex. X at p. 3).

A. Due Process Complaint Notice

In an amended due process complaint notice dated August 13, 2014, the parents alleged that the district failed to offer the student a FAPE for the 2012-13, 2013-14 and 2014-15 school years based upon approximately 148 separately enumerated allegations (see Dist. Ex. 17 at pp. 1,

3-17).[4] More specifically and as relevant to this appeal, the parents alleged that the May 2013 CSE and the January 2014 CSE impermissibly engaged in predetermination of the student's IEPs, and did not offer the parents a meaningful opportunity to participate in the development of the May 2013 IEP and the January 2014 IEP (id. at pp. 8, 12). Additionally, the parents argued that for both the 2013-14 and 2014-15 school years the district failed to provide them with prior written notice, and the district failed to provide the parents with notice of the January 2014 CSE meeting (id. at pp. 9, 11). The parents also asserted that both the May 2013 IEP and the January 2014 IEP contained generic annual goals that were not individualized to the student's needs, and did not include appropriate short-term objectives (id. at pp. 9, 13). In addition, the parents contended that both the May 2013 CSE and the January 2014 CSE failed to conduct functional behavioral assessments (FBA) and create behavioral intervention plans (BIP) for the student despite his interfering behaviors (id. at pp. 6, 11). Next, with respect to the 2013-14 school year, the parents argued that a 6:1+1 special class placement was not appropriate for the student because it was overly restrictive and did not adequately address the student's need for "1:1 support" to address his learning, attention, communication, and processing difficulties, as well as his behavioral and sensory needs (id. at p. 7). Similarly, for the 2014-15 school year, the parents argued that a 6:1+1 special class placement was an overly restrictive setting for the student and deprived him of access to typically developing peers (id. at p. 12). Next, with regard to both the 2013-14 and 2014-15 school years, the parents asserted that the core educational methodology used in a 6:1+1 special class placement was not appropriate to meet the student's needs and that the May 2013 CSE and the January 2014 CSE failed to consider what, if any, methodology was reasonably calculated to enable the student to make meaningful educational progress (id. at pp. 8, 16). Additionally, the parents argued that the May 2013 CSE and the January 2014 CSE did not adequately assess his needs to develop independent living skills, and failed to appropriately address the student's transition needs (id. at pp. 8, 14). Finally, the parents asserted that the assigned public school sites could not execute the May 2013 IEP or the January 2014 IEP (id. at pp. 9-11, 15-17). As relief, the parents requested to be reimbursed for the costs of the student's tuition at the Rebecca School for the 2012-13, 2013-14 and 2014-15 school years (id. at pp. 1, 18).

B. Impartial Hearing Officer Decision

On August 14, 2014, the IHO conducted a prehearing conference, and on October 15, 2014, the parties proceeded to an impartial hearing, which concluded on November 19, 2014, after six days of proceedings (see Tr. pp. 1-914: IHO Ex. III).[5] In a decision dated January 23, 2015, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years, and therefore, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for both school years (see IHO Decision at pp. 24-32).

[4] In an initial due process complaint notice dated July 21, 2014, the parents alleged that the district failed to offer the student a FAPE for the 2014-15 school year based upon approximately 93 separately enumerated allegations (see Dist. Ex. 16 at pp. 1, 3-11). In the amended due process complaint notice, the parents generally alleged identical violations related to the 2013-14 school year and the 2014-15 school year (compare Dist. Ex. 17 at pp. 6-11, with Dist. Ex. 17 at pp. 11-17).

[5] In an interim order dated October 20, 2014, the IHO dismissed the parents' allegations pertaining to the 2012-13 school year as barred by the statute of limitations (see IHO Ex. VII at p. 3; see generally IHO Exs. III-V).

With respect to the 2013-14 school year, the IHO initially found that the May 2013 CSE was properly composed (see IHO Decision at p. 25). Next, the IHO concluded that the vocational evaluation and transition services in the May 2013 IEP were "deficient," and noted that the CSE did not attempt to directly assess the student to determine his preferences (id. at pp. 25-26). In addition, the IHO described the recommended measurable post-secondary goals as "vague and not measurable," and further indicated that the coordinated set of transition activities was "equally vague, as it related to the vocational assessment" (id. at p. 26). The IHO also concluded that the annual goals in the May 2013 IEP were not measurable and that many of the annual goals lacked short-term objectives (id. at p. 27). Furthermore, the IHO found that even if the annual goals in the May 2013 IEP included short-term objectives, the short-term objectives were "in reality, goals, and not short-term objectives or measurable intermediate steps" (id.). Next, the IHO found that the evidence in the hearing record supported a finding that the May 2013 CSE impermissibly "predetermined" the 6:1+1 special class placement recommendation and ignored the parents' concerns about placing the student in a classroom with other students who exhibited "behavioral issues and who [were] non-verbal" (id. at p. 28). Although the IHO did not find that the 6:1+1 special class placement together with related services failed to provide the student with sufficient support, the IHO concluded that the 6:1+1 special class placement would be "unduly restrictive, and not likely to result in progress in his social interactions, and toward independence" (id.). Additionally, the IHO found that evidence in the hearing record supported the parents' contention that the 6:1+1 special class placement—"with its primarily TEACCH based methodology"—was geared toward students with "lower verbal and social skills than [the student]" (id. at pp. 28-29).[6] Likewise, the IHO determined that the evidence in the hearing record indicated that the student would not be functionally grouped in a 6:1+1 special class placement (id. at p. 29).

With respect to the assigned public school site for the 2013-14 school year, the IHO determined that it could not "satisfy the requirements" of the May 2013 IEP because it lacked sufficient sensory equipment, the student would not be functionally grouped, and the vocational program at the assigned public school site lacked transition services "outside the classroom" (see IHO Decision at pp. 29-30).

Regarding the 2014-15 school year, the IHO found that the January 2014 CSE was properly composed (see IHO Decision at p. 25). Next, the IHO concluded that the vocational evaluation and transition services in the January 2014 IEP were "deficient" (id. at pp. 25-26). With regard to the transition services in the January 2014 IEP, the IHO found that it lacked measurable post-secondary goals (id. at p. 26). Furthermore, the IHO found that the transition services—"which did not include any reference to an outside agency"—also did not provide a "results-oriented process" (id. at pp. 26-27). The IHO further concluded that although the annual goals in the January 2014 IEP related to reading, writing and mathematics were "adequate," the IEP lacked an annual goal to address the student's needs in decoding or comprehension (id. at p. 27). Additionally, the IHO determined that two annual goals related to OT and speech-language therapy lacked corresponding short-term objectives (id.). The IHO also found that the short-term objectives for "many of the related services goals [were] goals in themselves, and not short-term objectives or intermediate steps" (id.). With respect to methodology, while the IHO found that the

[6] Although not clearly defined in the hearing record, "TEACCH" typically refers to the "Treatment and Education of Autistic and Communication Related Handicapped Children" (see Tr. pp. 406-07).

absence of a recommendation for a specific methodology in the IEP did not result in a failure to offer the student a FAPE, the "TEACCH methodology, (the most commonly used methodology in the 6:1:1 programs)" would not be "effective" for this student" (id. at pp. 27-28). However, the IHO concluded that the parents expressed concerns about the methodology at the January 2014 CSE meeting, and the CSE should have considered the parents' concerns "when it recommended" that the student participate in a 6:1+1 special class "program, where the TEACCH methodology [was] commonly used" (id. at p. 28). The IHO also found that the evidence supported a finding that the January 2014 CSE impermissibly predetermined the 6:1+1 special class placement recommendation and ignored the parents' concerns about placing the student in a classroom with other students who exhibited "behavioral issues and who [were] non-verbal" (id.). Similar to the 2013-14 school year, while the IHO did not find that the 6:1+1 special class placement together with related services failed to provide the student with sufficient support, the IHO concluded that the 6:1+1 special class placement would be "unduly restrictive, and not likely to result in progress in his social interactions, and toward independence" (id.). Additionally, the IHO found that evidence in the hearing record supported the parents' contention that the 6:1+1 special class placement—"with its primarily TEACCH based methodology"—was geared toward students with "lower verbal and social skills than [the student]" (id. at pp. 28-29). Likewise, the IHO determined that the evidence in the hearing record indicated that the student would not be functionally grouped in a 6:1+1 special class placement (id. at p. 29). Lastly, the IHO determined that the assigned public school site could not "satisfy the requirements" of the January 2014 IEP because it did not have a sensory gym and the assigned public school site did not offer travel training (id. at pp. 29-30).

Next, the IHO concluded that the parents demonstrated that the Rebecca School constituted an appropriate unilateral placement for the 2013-14 and 2014-15 school years (see IHO Decision at pp. 30-31). In addition, the IHO further found that the parents cooperated with the CSE for both school years and that equitable considerations weighed in favor of the requested relief (id. at p. 31).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2013-14 and 2014-15 school years. First, the district asserts that the absence of formal vocational assessments did not result in a failure to offer the student a FAPE, the post-secondary goals in both IEPs were appropriate, the transition services recommended in both IEPs were "appropriate and well-informed," and the annual goals and short-term objectives in both IEPs were "appropriate." Next, the district alleges that the evidence in the hearing record supports findings that the "program recommendations" in both IEPs were "substantively appropriate." More specifically, the district argues that the absence of a specific methodology in both the May 2013 IEP and the January 2014 IEP did not result in the district's failure to offer the student a FAPE, the "program recommendations" in both IEPs were appropriate, and the IEPs addressed the student's sensory needs. Moreover, while the district contends that the parents' allegations with respect to the assigned public school sites for both school years are speculative, the district

alternatively argues that both assigned public school sites could have implemented the respective IEPs.[7]

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision. In a cross-appeal, the parents assert that the IHO did not render findings on particular allegations raised in the due process complaint notice, which would, however, result in findings that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years. More specifically, the parents allege that the May 2013 CSE failed to provide them with any prior written notice and that the January 2014 CSE failed to provide them with adequate prior written notice. Next, the parents allege that the May 2013 CSE and January 2014 CSE were required to conduct FBAs and develop BIPs for the student. Additionally, the parents assert that the district recommended a "more restrictive" 6:1+1 special class placement with "non-verbal and 'behavioral' students" because the district did not offer an 8:1+3 special class placement as part of a "'Full Continuum'" of services. Finally, the parents allege that the district failed to offer the student the service of a full-time, 1:1 classroom aide.[8]

In an answer to the cross-appeal, the district responds to the parents' allegations, and requests that it be dismissed in its entirety.[9]

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

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[7] The district does not appeal the IHO's finding that the Rebecca School constituted an appropriate unilateral placement for the student for both the 2013-14 and 2014-15 school years or the IHO's finding that equitable considerations weighed in favor of the parents' requested relief for both the 2013-14 and 2014-15 school years; as such, the IHO's determinations are final and binding on the parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[8] As neither party appeals the IHO's order dismissing the parents' allegations related to the 2012-13 school year as barred by the applicable statute of limitations, the IHO's determination is final and binding on both parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Similarly, as neither party appeals the IHO's findings that the May 2013 CSE and the January 2014 CSE were both properly composed, the IHO's determination is also final and binding on both parties and will not be further addressed (see IHO Decision at p. 25; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[9] As noted above, the parents' amended due process complaint notice included approximately 148 separately enumerated allegations in support of the contention that the district failed to offer the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years (see Parent Ex. B at pp. 1-17). The IHO's decision—while addressing several issues—did not address all 148 allegations (compare Parent Ex. B at pp. 1-17, with IHO Decision at pp. 1-32). To the extent that the parents do not appeal or now advance arguments related to issues in the amended due process complaint notice that the IHO did not address—other than those raised with specificity in the cross-appeal—as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2013-14 or the 2014-15 school years that remain at issue, these unaddressed issues are deemed abandoned and will not be considered in this appeal (compare Parent Ex. B at pp. 3-17, with IHO Decision at pp. 25-32, and Answer & Cr. Appeal ¶¶ 1-63).

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 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 parents 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. May 2013 CSE Process

1. Predetermination

The district asserts that the "program recommendations" in the May 2013 IEP were appropriate and thus, the IHO erred in finding that the May 2013 CSE impermissibly predetermined the 6:1+1 special class placement recommendation. A review of the evidence in the hearing record supports the district's contention.

The consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] [noting that "predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506-07 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]).[10] In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

With respect to the IHO's finding that the May 2013 CSE's recommendation for placement in a 6:1+1 special class placement was predetermined, the evidence in the hearing record supports a contrary conclusion (IHO Decision at p. 28). Here, the parents expressed concerns regarding the

[10] "'[T]he 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 [E.D.N.Y. Aug. 19, 2013] [noting 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]).

appropriateness of the 6:1+1 special class placement at a specialized school, including that students within the 6:1+1 special class were low functioning and that the district had never assigned the student to a "functionally grouped class" (Dist. Ex. 2 at p. 14). The May 2013 IEP further reflected the student's Rebecca School teacher disagreed with the program recommendation (see Tr. p. 618; Dist. Ex. 2 at p. 14). Moreover, the May 2013 CSE considered other placement options for the student, including a 12:1+1 special class placement at a community school and at a specialized school, in addition to an 8:1+1 special class placement at a specialized school; however, the May 2013 CSE rejected all placement options that did not provide a 12-month school year program as insufficiently supportive and further rejected a 12:1+1 special class placement or an 8:1+1 special class placement because the student required a smaller student-to-teacher ratio to meet his specific constellation of needs (see Dist. Ex. 2 at p. 14).

In addition, the evidence in the hearing record—including the parents' testimony—established that the parents actively participated throughout the May 2013 CSE meeting and that the CSE provided them with opportunities to offer input and present their concerns (see Tr. pp. 75-78, 84-85, 88, 91-93, 99-100, 102, 712-13, 721-22, 737-38). In this case, the May 2013 CSE meeting lasted approximately two hours, during which time the CSE afforded the parents an opportunity to voice their concerns with respect to the student's needs, including their concerns pertaining to the January 2013 OT evaluation and the January 2013 speech-language evaluation (see Tr. p. 712; Dist. Exs. 2 at p. 2; 3 at p. 1). Additionally, the May 2013 IEP reflected that the parents described the student's visual memory and decoding skills as "strong," although they noted that he had trouble reading words that were not phonetically regular (Dist. Ex. 2 at p. 2). The parents further advised the May 2013 CSE that the student was more available for learning after physical activities and sensory supports and that he had difficulty expressing what he understood and processed (id.). The May 2013 CSE further noted the parents' request for a goal to improve the student's handwriting, and that it discussed the concept of generating ideas for writing at length (see Dist. Ex. 2 at p. 2; see also Dist. Ex. 3 at p. 1). Similarly, the evidence in the hearing record reveals that the May 2013 CSE obtained input from the student's Rebecca School teachers with respect to his academic and social/emotional needs and with regard to the development of the IEP's management needs and annual goals (see Tr. pp. 83-85; see also Dist. Exs. 2 at pp. 2-3; 3 at p. 3). The May 2013 CSE also provided the parents with a copy of the meeting minutes immediately after the meeting (Tr. p. 77; Dist. Ex. 3 at p. 1).

Based upon the foregoing, the IHO's conclusion that the May 2013 CSE impermissibly predetermined the 6:1+1 special class placement recommendation for the 2013-14 school year must be reversed.

2. Prior Written Notice

In the cross-appeal, the parents assert that the hearing record is devoid of evidence that the district provided them with any prior written notice for the 2013-14 school year, and argue that such failure should result in a finding that the district failed to offer the student a FAPE for the 2013-14 school year. Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a];

8 NYCRR 200.5[a]).[11] In addition, a district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these safeguards (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).

While it is undisputed that the district did not provide the parents with prior written notice for the 2013-14 school year, the hearing record does not contain sufficient evidence to conclude that this omission alone, while a procedural violation, impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). Thus, the parents' allegations that the district's failure to provide them with prior written notice resulted in a failure to offer the student a FAPE for the 2013-14 school year must be dismissed.

B. May 2013 IEP

1. Present Levels of Performance

In this case, although the adequacy of the present levels of performance in the May 2013 IEP is not in dispute, a brief discussion thereof provides context for the discussion of the issues to be resolved—namely, whether the annual goals and short-term objectives and the 6:1+1 special class placement were appropriate to meet the student's needs for the 2013-14 school year.

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]).

[11] In this regard, the Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). Thus, a change from one school building to another, without more, is not a "change in educational placement" that triggers the district's obligation to provide the parents with prior written notice (see Concerned Parents, 629 F.2d at 753-54; see also Veazey, 121 Fed. App'x at 553; Weil v. Bd. of Elementary and Secondary Educ., 931 F.2d 1069 [5th Cir. 1991]).

According to the district school psychologist (school psychologist) present at the May 2013 CSE meeting, the CSE considered and relied upon the following evaluative information to develop the May 2013 IEP: a December 2012 psychoeducational reevaluation, a December 2012 Rebecca Interdisciplinary Transitions Program Report of Progress Update (December 2012 Rebecca School progress report), a January 2013 OT evaluation, and a January 2013 speech-language evaluation (see Tr. pp. 78-79; Dist. Exs. 4-7; see also Dist. Ex. 3 at p. 1).[12]

Consistent with the evaluative information, the May 2013 IEP reflected the testing results of the December 2012 psychoeducational reevaluation, which indicated that the student's overall nonverbal intelligence fell within the "very poor" range (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 5 at pp. 4-5). With respect to reading, the May 2013 IEP indicated that the student could read a modified version of a book written at the fourth grade level (id. at pp 1-2).[13] Also consistent with the evaluative information, the May 2013 IEP reflected that the student's comprehension of text had improved and he demonstrated growing independence in his ability to answer "wh" questions (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 2 at p. 2). Further, the May 2013 IEP noted that although the student required "repeated readings," he could answer questions with fewer text references and he could answer "why" questions when presented with three logical choices (see Dist. Ex. 2 at p. 2). The May 2013 IEP indicated that the student remained attentive during the class group read aloud, and although he might need verbal reminders, he could read a full page of text (id.). According to the May 2013 IEP, the student was provided with choices to determine the definition of vocabulary words and could draw pictures from the characters in stories (id.). In terms of decoding, the May 2013 IEP noted that, when confronted with an unfamiliar word, the student paused to sound it out or asked for help (id.). In regard to writing, the May 2013 IEP indicated the student required verbal prompts and reminders to write legibly, and with adult supports—such as sentence starters and teacher prompts—the student could write three to five logical sentences (id.). The May 2013 IEP also noted that with new text the student experienced more difficulty in organizing his writing; however, familiarity with the topic increased his ability to write logically (id.). Further, the May 2013 IEP noted that while the student appropriately used capitalization, he needed support with punctuation (id.).

Regarding mathematics, the May 2013 IEP indicated that the student was working on money skills within the context of shopping and budgeting (see Dist. Ex. 2 at p. 2). According to the May 2013 IEP, the student required support for adding and subtracting quantities higher than 20 and when making change using a combination of bills and coins (id.). For mathematical word problems, the May 2013 IEP indicated that the student needed minimal support to determine the operation between addition and subtraction, but benefited from the use of high affect to determine the operation to use (id.). The May 2013 IEP noted that the student could "skip count" by "2's and 5's,", but had not yet started working on multiplication (id.). The May 2013 IEP also described

[12] The school psychologist also testified that she believed the May 2013 CSE also relied on the student's IEP from the previous school year in the development of the May 2013 IEP because the CSE sometimes used it as a "reference point" (Tr. p. 79).

[13] According to the May 2013 IEP, the book was modified by limiting the text to 5 sentences per page and approximately 10 words per sentence (see Dist. Ex. 2 at p. 2).

the student's attention as dependent upon his motivation for the activity, and noted that, at times, he required adult support (id.).

The May 2013 IEP described the student's learning style "as multimodal, as he benefited from physical activities" (Dist. Ex. 2 at p. 2). According to the May 2013 IEP, the student benefited from visual cues, auditory prompts, tactile supports, and physical activity during academic activities (id.). The May 2013 IEP also reflected the parents' concerns regarding the student's academic needs, including his difficulty with decoding phonetically irregular words, expressing what he understood and processed, his need for physical activities and sensory supports for learning, the student's need to improve his handwriting and his ability to generate ideas for writing (id.).

With respect to the student's social development, the May 2013 IEP indicated that the student was beginning to initiate funny interactions with peers and would ask them to play games (see Dist. Ex. 2 at p. 2). According to the May 2013 IEP, the student's initiations with staff earlier in the school year were based on his wants and needs; however, the student's social initiations, as well as the student's repertoire of activities, had both "expanded" (id.). The May 2013 IEP further noted that the student could initiate conversations with peers and adults, and although he demonstrated an increased awareness of the feelings of others, the parents expressed concern that he could not be in a class with students with behavioral problems, as he would become anxious and "shut down" (id. at p. 3). Lastly, the May 2013 IEP indicated that the student used sensory supports and took four to five movement breaks throughout the day (id.).

2. Annual Goals and Short-Term Objectives

The district asserts that, contrary to the IHO's finding, the May 2013 IEP contained annual goals and short-term objectives that were both measurable and appropriate to address the student's needs. A review of the evidence in the hearing record supports the district's assertions.

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 instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (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]).

According to the school psychologist, the May 2013 CSE developed the annual goals based, in part, upon the January 2013 speech-language evaluation and the January 2013 OT evaluation, as well as the annual goals contained within each report (Tr. pp. 91-92; see Dist. Exs. 6; 7). She further testified that the May 2013 CSE developed annual goals related to academics

and related services during the meeting with the participation of the parents and the student's Rebecca School teacher who attended the meeting (see Tr. pp. 91-92; see also Dist. Ex. 3 at p. 2). The school psychologist also testified that the annual goals themselves focused on the conversation that took place during the May 2013 CSE meeting and the student's specific skill levels (see Tr. pp. 92-93). According to the school psychologist, with regard to language, the May 2013 CSE focused on expressive, receptive, and pragmatic language as ongoing areas of need for the student (id.). She further testified that the May 2013 CSE included an annual goal that reflected the parents' concern regarding the student's pronoun usage (see Tr. pp. 92-93; Dist. Ex. 2 at 8; see also Dist. Ex. 3 at p. 2). The evidence in the hearing record also indicates that no one in attendance at the May 2013 CSE meeting voiced any objections to the annual goals, and when asked, no one in attendance requested any additional annual goals (see Tr. p. 97; Dist. Ex. 3 at p. 2). Moreover, according to the May 2013 CSE meeting minutes, the CSE advised the parents that if they wished to send specific annual goals related to the student's OT needs to the committee from the Rebecca School, the CSE would consider them (see Dist. Ex. 3 at p. 2).

Consequently, the May 2013 CSE developed approximately 18 annual goals with approximately 38 corresponding short-term objectives to address the student's identified needs in the areas of reading, mathematics, writing, social skills, speech-language skills, and motor skills (see Dist. Ex. 2 at pp. 4-9). In addition, a review of the annual goals reveals that—contrary to the IHO's finding and consistent with State and federal regulations—the annual goals and short-term objectives included an evaluative criteria (i.e., 80 percent of the time; 80 percent accuracy over 5 consecutive weeks), an evaluation procedure (i.e., teacher observation, teacher made materials, role play, therapist observation and informal testing), and an evaluation procedure and schedules to measure progress toward meeting the annual goals (i.e., quarterly, monthly, weekly) (id.).

Lastly, the May 2013 CSE recommended that the student participate in the alternate assessment program, and therefore, pursuant to State regulation noted above, the May 2013 CSE also developed short-term objectives in the May 2013 IEP (see Dist. Ex. 2 at p. 11). In this instance, a review of the May 2013 IEP reveals that the May 2013 CSE developed short-term objectives for approximately 10 of the 18 annual goals in the following areas: reading, mathematics, writing, counseling, speech-language skills, and motor skills (id. at pp. 6-9). Although the remaining eight annual goals lacked corresponding short-term objectives, overall, the annual goals targeted the student's identified areas of need and provided sufficient information to guide a teacher in instructing the student and measuring his progress and the IHO's decision on this point must be overturned (see R.B., 2013 WL 5438605, at *13-*14; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 360 [S.D.N.Y. 2013] [finding that the "failure to designate specific methods of measurement for the annual goals and short-term objectives in the IEP did not result in the denial of a FAPE"]).

3. Consideration of Special Factors—Interfering Behaviors

The parents also argue in the cross-appeal that the May 2013 CSE should have conducted an FBA and developed a BIP for the student if the district "intended to put [the student] in a 6:1:1 class with non-verbal and behavioral students." As explained more fully below, the evidence in the hearing record does not support the parents' assertions.

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. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

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]).

According to State regulation, "[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]).[14] 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

[14] 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]).

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]).

Initially, it must be noted that according to the applicable State and federal regulations, the May 2013 CSE's obligation, if any, to conduct an FBA of the student or to develop a BIP for the student depends solely upon the student's needs—and not, as the parents contend, the needs of any other students within the recommended placement on the continuum of services. In this instance, it is undisputed that the May 2013 CSE did not conduct an FBA or develop a BIP for the student (see Dist. Ex. 2 at p. 3-4). However, there was no information before the May 2013 CSE about the student's behaviors that suggested such a need (see Dist. Ex. 4). The parents testified that the student did not require a behavior plan and the evidence in the hearing record demonstrates that he did not have a behavior plan in place at the Rebecca School (see Tr. pp. 87, 733, 844-45; Dist. Ex. 3 at p. 2). Furthermore, during the May 2013 CSE meeting, the student's Rebecca School teacher did not report any behavioral concerns that would impede the student's learning, or that of others (see Dist. Ex. 2 at p. 2). Although the school psychologist testified that the student exhibited behaviors somewhat typical of a student with autism—including concerns with social functioning, social engagement, relatedness, and repetitiveness—she further testified that the student was "not an aggressive individual" or "someone who lashed out at others" (Tr. p. 87). Additionally, the school psychologist testified that the student was not a "volatile individual" who presented as a concern to his own safety or the safety of other students; however, consistent with the parents' concerns noted in the May 2013 IEP, the school psychologist testified that the student might change his voice in terms of pitch and volume when dysregulated (Tr. p. 87; see Dist. Ex. 2 at p. 3). To otherwise address this behavior, the May 2013 CSE recommended the use of a calm, coregulating affect when the student was upset, and created an annual goal with a corresponding short-term objective targeting the student's ability to communicate "his emotiona[l] responses verbally, [and] in a regulated and logical manner to an adult (Dist. Ex. 2 at pp. 3, 7).[15]

[15] At the impartial hearing, the parents testified that, except for the student's sensory needs, he did not require a BIP and that the student's sensory diet effectively functioned as his behavior plan (see Tr. pp. 733, 846). The evidence in the hearing record shows that the May 2013 CSE noted the student's sensory needs in the present levels of performance, specifically that the student was more available for learning after physical activities and sensory supports, that the student used sensory supports multiple times throughout the day, and that he also took four to five movement breaks throughout the day (see Dist. Ex. 2 at p. 3). The May 2013 CSE also developed annual goals and short-term objectives to address the student's sensory needs, included an annual goal targeting the student's ability to tolerate a sensory motor processing diet and plan at least three times per day, and a second annual goal to improve the student's sensory process skills (id. at pp. 5, 9). In addition, the May 2013 CSE recommended that the student receive four 45-minute sessions per week of OT (id. at p. 10). Moreover, the May 2013 CSE recommended that the student receive sensory and movement breaks throughout the day and the use of a calm, coregulating affect when the student was upset as management supports (id. at p. 3).

Based upon the foregoing, the evidence in the hearing record supports a finding that the May 2013 CSE was not required to conduct an FBA or to develop a BIP for the student.

4. 6:1+1 Special Class Placement

The district asserts that the evidence in the hearing record supports a finding that the "program recommendations" in the May 2013 IEP were "substantively appropriate" and the IEP addressed the student's sensory needs. In the cross-appeal, the parents argue that the district recommended a "more restrictive" 6:1+1 special class placement with "non-verbal and 'behavioral' students" because the district did not offer an 8:1+3 special class placement. The parents further argue that the district should have recommended the services of a full-time, 1:1 classroom aide for the student in the absence of an FBA and BIP and also because the student would be "expos[ed]" to "non-verbal and behavioral students" who would not "be helpful" to the student's progress and the assigned public school site did not offer sensory gyms to assist the student's ability to self-regulate. A review of the evidence in the hearing record supports the district's allegations, and the IHO's finding must be reversed.

Turning first to the parents' argument in the cross-appeal, while neither the IDEA nor State or federal regulations preclude school districts from offering a special class placement with an 8:1+3 student-to-teacher ratio, the district correctly asserts that the parents misconstrue the student-to-adult ratio in the recommended 6:1+1 special class placement—as compared to an 8:1+3 student-to-adult ratio—as relevant to the analysis of the restrictiveness or LRE aspects of the student's educational placement. In circumstances such as those in this case, LRE is not defined by the particular special education student-to-adult staff ratio present in the placements considered by the CSE because it presents no difference in the degree of the student's access to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). Instead, as described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 639 [S.D.N.Y. 2011]). The level of access to nondisabled peers in the regular education environment, however, is of little moment in this case insofar as neither party has asserted that the student should be educated in a general education setting or otherwise mainstreamed with nondisabled peers. Thus, the parents' contention that 6:1+1 special class at a specialized school was more restrictive relative to an 8:1+3 student-to-adult special class or the 8:1+3 program at the Rebecca School must be dismissed.

Next, the parents' argument regarding the district's failure to recommend a 1:1 classroom aide is also unavailing. State guidance issued in January 2012 describes the considerations for determining if a student requires a one-to-one aide, as well as the roles and responsibilities of a one-to-one aide (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at pp. 1-5, Office of Special Educ. Mem. [Jan. 2012], available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). In pertinent part, the memorandum indicates that the "assignment of a one-to-one aide may be unnecessarily and inappropriately restrictive," noting that a goal for all students with disabilities is to "promote and

maximize independence" (id. at p. 1). "One-to-one aides may not be used as a substitute for certified, qualified teachers for an individual student or as a substitute for an appropriately developed and implemented behavioral intervention plan or as the primary staff member responsible for implementation of a behavioral intervention plan" (id.). In addition, while a "teaching assistant may assist in related instructional work, primary instruction must be provided to the student by a certified teacher(s)" (id.). A "teacher aide may assist in the implementation of a behavioral intervention plan, but may not provide instructional services to a student" (id.).[16] Significantly, however, the decision to recommend a 1:1 aide for a student must weigh factors that include, but are not limited to, the student's individual needs and the special class size recommended by the CSE—and not, as the parents contend, based upon the needs of any other students within the recommended special class placement (id.). Accordingly, the parents' argument must be dismissed.

Turning to the district's arguments on appeal, State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, . . . , with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]). To address the student's identified needs in academics, language, motor skills, sensory regulation, attention, and social/emotional functioning, the May 2013 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school with related services (see Tr. pp. 80-84; Dist. Exs. 2 at pp. 1-3, 12-13; 4 at pp. 1-9; 5 at pp. 5-7; 6 at pp. 2-4; 7 at pp. 2-7). In addition, the May 2013 CSE incorporated strategies and supports to address the student's management needs into the IEP including: visual support, verbal prompts, multimodal learning, small group instruction, language broken down into manageable chunks, use of high interest activities and high affect for alertness and engagement and motivation, graphic organizers and webs for writing, and additional time to process information (see Dist. Ex. 2 at p. 3).

In reaching the decision to recommend a 6:1+1 special class placement, the school psychologist testified that the May 2013 CSE considered the student's "significant needs," noting further that he required a "lot of support, in a very small, supportive, language based classroom setting," which could be provided in the 6:1+1 special class placement (Tr. pp. 100-01). The parents and the student's Rebecca School teacher disagreed with the May 2013 CSE's recommendation of a 6:1+1 special class placement (see Tr. pp. 102, 618-19; Dist. Ex. 2 at p. 14). The school psychologist testified that the based upon the 6:1+1 special class placements the parents "had viewed" in the past, the parents expressed concerns about the functional grouping of students in the recommended 6:1+1 special class placement, and the Rebecca School teacher believed that the student needed a "smaller student to teacher ratio" (Tr. p. 102). In addition, the May 2013 CSE documented other parental concerns in the IEP, including the following: that a "1:1" Developmental Individual Difference Relationship-based (DIR) model was "important" for the student's social development; the student's need for OT "within the school day" and not related services' authorizations (RSAs) "after school;" the student's need for "sensory support throughout

[16] See also "Teaching Assistants and Teacher Aides Compared," Office of Teaching Initiatives [Aug. 31, 2009], available at http://www.highered.nysed.gov/tcert/career/tavsta.html.

the school day, not just fidget toys and message (sic);" the student's need for "job training;" and the importance of "[s]ome interactions with typical peers" (Dist. Ex. 2 at p. 14).

At the impartial hearing, the parents testified that the student "sometimes" needed "one-to-one instruction" for academics (see Tr. pp. 737-38). According to the December 2012 psychoeducational reevaluation, the evaluator noted that the student "benefited greatly from the support" he received at the Rebecca School, and "at this time, placement in any larger of an academic setting or in an unfamiliar program that focuse[d] less on generalization of skills in a more natural environment would be greatly detrimental" to the student (Dist. Ex. 5 at p. 7). In addition, the evaluator indicated that the student needed a placement that allowed him to "realize his learning potential" and it was "imperative" that the student "remain enrolled in a program with a structured, supportive, and nurturing classroom" with a "small" classroom size and "multiple, cross-disciplined, trained instructors" (id.). According to the evaluator, the student also required "1:1 support by individuals" who knew him well and who were experienced in "techniques . . . emphasizing functional communication and the promotion of socially-appropriate, reciprocal interactions with children his age" (id.).[17]

In this instance, however, neither the parents' concerns, nor the Rebecca School teacher's opinion, nor the educational placement considerations set forth in the December 2012 psychoeducational evaluation report describe a level of support that the student needed that could not be provided in the recommended 6:1+1 special class placement—together with the strategies to address the student's management needs, annual goals to address his identified areas of need, and related services as indicated by the IHO in the decision. Furthermore, there is no evidence in the hearing record that the Rebecca School provided the student with a "1:1 classroom aide" at the time the May 2013 CSE developed the IEP, nor was there any information before the CSE that he had behavioral concerns to warrant such services (Tr. pp. 103-04).

Based on the foregoing, the evidence in the hearing record demonstrates that consistent with the student's needs as identified in the May 2013 IEP, the May 2013 CSE's decision to recommend a 12-month school year program in a 6:1+1 special class placement at a specialized school—together with strategies to address the student's management needs, annual goals to address his identified areas of need, and related services—was reasonably calculated to enable the student to receive educational benefits for the 2013-14 school year.

5. Methodology

Next, the district alleges that the failure to recommend a specific methodology in the May 2013 IEP did not contribute to a failure to offer the student a FAPE. Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86, 2013 WL 3814669 [2d Cir. 2013]; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational

[17] The evaluator further noted that "any less restrictive environment [for the student] would inevitably lead to regression" (Dist. Ex. 5 at p. 8).

judgment, are most pedagogically effective"]; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2, 2014 WL 53264 [2d Cir. 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11-*12 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012], aff'd, 528 Fed. App'x 64 [2d Cir. June 24, 2013]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 2014 WL 5463084, at *4; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also R.B., 2014 WL 5463084, at *4; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

In this instance, the school psychologist testified that in developing an IEP, the CSE focused on "specific skills and needs, not the exact way a teacher or provider [will] work with a student, but what skills and needs need[ed] to be worked on" (Tr. pp. 102-03). Likewise, the school psychologist noted the parents' concerns about the importance of "1:1 DIR" for the student's "social development" in the May 2013 IEP (id.; see Dist. Ex. 2 at p. 14). While the evidence in the hearing record indicates that the student benefited from the DIR methodology used at the Rebecca School, the hearing record does not contain sufficient evidence upon which to conclude that the student required a specific educational methodology in order to receive a FAPE (see generally Dist. Ex. 4; see also Dist. Ex. 5 at pp. 7-8).

6. Transition Services

The district also asserts that transition services in the May 2013 IEP were appropriate and that the lack of a formal vocational assessment of the student did not rise to the level of a failure to offer the student a FAPE for the 2013-14 school year. The district argues that the May 2013 CSE had sufficient information to develop transition services for the student. A review of the evidence in the hearing record supports the district's assertions, and therefore, the IHO's conclusion that the vocational evaluation and the May 2013 CSE's recommendation for transition services was deficient must be reversed.

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C.

§ 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).[18] An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see also A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).

In this instance, it is undisputed that the district did not conduct a formal vocational assessment of the student prior to developing the measurable post-secondary goals or coordinated set of transition activities (transition services) in the May 2013 IEP (see Tr. pp. 99-100, 148; see Dist. Ex. 2 at pp. 4, 11). The parents testified that although the May 2013 CSE invited the student to attend the CSE meeting, he did not attend in light of the parents' concerns that the CSE meeting would be too long for the student to sit through (see Tr. pp. 711-12; Parent Ex. B). The school psychologist testified that the district generally conducted the vocational assessment as part of the psychoeducational assessment; in this case, however, the district did not complete the formal vocational assessment of the student because the parents submitted a privately obtained psychoeducational report (see Tr. p. 148). Additionally, the school psychologist testified that the "standard" vocational assessment required a "higher level of reading" skills than the student possessed, and the "Reading Free" assessment used a "series of pictures, on a page," which required the student to "circle" preferences (Tr. pp. 148-49). However, the school psychologist testified that in her opinion, the "Reading Free" assessment was "minimally meaningful" (Tr. p. 149). The school psychologist also asked the parents specific questions about goals and expectations for the student, informally "mirroring" a formal vocational assessment, during the May 2013 CSE meeting (see Tr. pp. 99-100, 151-54, 807-08; Dist. Ex. 3 at p. 2).

Notwithstanding the lack of a formal vocational assessment in this case, a review of the evidence in hearing record shows that the May 2013 CSE had sufficient information to develop the measurable post-secondary goals for the student and a coordinated set of transition activities. According to the school psychologist, in order to develop the post-secondary goals she had a conversation "mainly with the parents, but [she] also include[d] the school" in terms of determining expectations for the future, and the necessary skills to be targeted as well as the parents' plans and ultimate goals for the student (Tr. pp. 98-100; Dist. Ex. 2 at pp. 4, 11). The May 2013 CSE discussed the student's vocational needs and the parents' concerns to develop the post-secondary goals and transition activities (see Tr. pp. 99-100; Dist. Ex. 2 at pp. 4, 11). With respect to long-term goals for living, working, and learning as an adult, the May 2013 IEP reflected the importance of job training and academic instruction as expressed by the parents and that they had not ruled out college attendance (see Tr. pp. 730-31; Dist. Ex. 2 at p. 4). The parents also noted that the

[18] Pursuant to State regulation, school districts shall ensure that "students age 12 and those referred to special education for the first time who are age 12 and over, shall receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][vii]).

student needed employment opportunities tied to his areas of interest in order for the work to be meaningful to him (see Tr. p. 730; Dist. Ex. 2 at p. 4). Regarding independent living skills, the May 2013 IEP indicated that the parents wanted the student to live and travel independently (see Dist. Ex. 2 at p. 4). Additionally, with respect to transition needs, the May 2013 IEP noted the parents' desire that the student do things he enjoyed and his continued need for academic instruction to support independent living when he turned 21 (see Tr. pp. 200-01, 732; Dist. Ex. 2 at p. 4).

To further address the student's post-secondary and transition services' needs, the May 2013 IEP indicated that the assigned school would be responsible for transition activities needed to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, employment and independent living, daily living skills, and further vocational assessment (see Dist. Ex. 2 at p. 11). To meet the student's identified post-secondary goals, the May 2013 CSE recommended the following: instructional activities to include the development of money skills for independently purchasing items, related services to address sexual education and functional telephone skills, and community experiences to facilitate travel training for independent travel and skills related to dealing with strangers (see Tr. pp. 99, 185-87, 201-03; Dist. Ex. 2 at p. 11). Further, the May 2013 IEP addressed the student's transition needs by facilitating his shopping skills related to purchasing groceries, and teaching him to identify and respond appropriately to emergency situations (see Dist. Ex. 2 at p. 11). Lastly, the May 2013 IEP recommended continued activities to identify employment opportunities in the student's field of interest, which, in this case, was music (id.).

Based on the foregoing, although the May 2013 CSE's failure to conduct a vocational assessment constituted a procedural violation, the hearing record does not contain sufficient evidence to conclude that such procedural inadequacy, alone, impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013], D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *9 [S.D.N.Y. Oct. 12, 2011]; see also Patterson v. D.C., 965 F. Supp. 2d 126, 131 [D.D.C. 2013]).

C. January 2014 CSE Process

1. Predetermination

The district asserts that the "program recommendations" in the January 2014 IEP were appropriate and thus, the IHO erred in finding that the January 2014 CSE impermissibly predetermined the 6:1+1 special class placement recommendation. Upon review and in light of the legal standard set forth previously, the evidence in the hearing record supports the district's contention.

According to the evidence in the hearing record, the parents voiced concerns about the functional levels of the other students in the recommended 6:1+1 special class placement, and noted that the student "must be functionally grouped" (Dist. Ex. 10 at p. 13). The January 2014 IEP further reflected that the student's Rebecca School teacher advised the CSE that the student

would "need more attention" than could be "provided in a 6:1:1 setting," and that the student would have a "hard time remaining focused and attentive" (id.). According to the January 2014 IEP, the parents and the Rebecca School teacher informed the CSE that a "2:1 ratio [was] most appropriate" for the student (id.). Moreover, the evidence in the hearing record further indicates that the January 2014 CSE considered, but rejected other placement options, including an 8:1+1 special class at a specialized school as well a 12:1+1 special class at a specialized school (id.). The January 2014 IEP also revealed that the CSE rejected "[a]ll programs that provide[d] services for 10 months" as "insufficiently supportive," and further noted that the student required a 12-month school year program to "prevent a significant regression of skills" (id.). Additionally, the January 2014 IEP reflected that the CSE considered but rejected special class placement options with 12:1+1 and 8:1+1 student-to-teacher ratios "as too large and insufficiently supportive to [meet] [the student's] specific constellation of needs" (id.).

In addition, the evidence in the hearing record—including the parents' testimony—established that the parents actively participated throughout the two-hour January 2014 CSE process and that the CSE provided them with the opportunity to provide input and present their concerns (see Tr. pp. 106-07, 755-59, 762-63; see also Dist. Exs. 10 at pp. 2-3; 11 at pp. 1-2). Based upon the foregoing, the IHO's conclusion that the January 2014 CSE predetermined the 6:1+1 special class placement recommendation must be reversed.

2. Prior Written Notice

In the cross-appeal, the parents allege that the district failed to issue an adequate prior written notice for the 2014-15 school year because it did not contain the requisite notice information about the student's vocational and transition supports and services. In light of the legal standard set forth previously and contrary to the parents' allegations, a review of the May 1, 2014 prior written notice shows that it comported with State regulation (compare Dist. Ex. 15, with 8 NYCRR 200.5[a][3]). Accordingly, the parents' assertion must be dismissed.

D. January 2014 IEP

1. Present Levels of Performance

Similar to the analysis for the May 2013 IEP, while the adequacy of the present levels of performance in the January 2014 IEP is not disputed, a brief discussion thereof provides context for the discussion of the issues to be resolved—namely, whether the annual goals and short-term objectives and the 6:1+1 special class placement were appropriate to meet the student's needs for the 2014-15 school year.

According to the school psychologist present at the January 2014 CSE meeting, the CSE considered and relied upon the following evaluative information in the development of the January 2014 IEP: a December 2012 psychoeducational reevaluation, a January 2013 OT report, a January 2013 speech-language evaluation report, the May 2013 IEP, and a December 2013 Rebecca School progress report (see Tr. p. 107; Dist. Exs. 2; 5-7; 11 at p. 1).

Consistent with the evaluative information and the May 2013 IEP, the January 2014 IEP reflected the testing results from the December 2012 psychoeducational reevaluation, which indicated that the student's overall nonverbal intelligence fell within the "very poor" range

(compare Dist. Ex. 10 at p. 1, with Dist. Ex. 2 at p. 1, and Dist. Ex. 5 at pp. 4-5). At that time, the January 2014 IEP indicated that in reading—as per teacher report—the student read at a third grade level, he demonstrated a "large repertoire of sight words," and his "ability to read fluently ha[d] increased" (Dist. Ex. 10 at p. 1). The teacher also reported that the student tried to "sound out unfamiliar words," and his "comprehension skills ha[d] increased with his sight word knowledge" (id.). According to the January 2014 IEP, the student required "less redirection back to the text" during the class read aloud time (id.). In terms of reading comprehension, the January 2014 IEP reflected the student's "growing" ability to independently answer fact-based questions; however, he required "more support with abstract and inferential questions" and continued to need "repeated readings of materials" (id.). Further, the January 2014 IEP noted that the student benefited from "visual support when reading" and the student was "working on using contextual cues and choices to answer more abstract questions" (id.). The January 2014 IEP also noted that while the student could "recall facts from a story," he could not consistently recall the facts in the correct sequence (id.). Additionally, the January 2014 IEP indicated that the student categorized words and activities with increasing fluidity, and he benefited from "verbal peer models" (id.).

With respect to writing, while the January 2014 IEP noted an improvement in the student's letter spacing and size, but that he needed "reminders to write smaller and space out his words" (Dist. Ex. 10 at p. 1). The January 2014 IEP also indicated that while the student used "both upper and lower case letters," and he could "use a period" independently, he could not independently use a "question mark or comma" (id. at p. 2). With "prompting and support," the student could write three to five sentences on the same topic, but he could not consistently write sentences that "flow[ed] fluidly" (id. at p. 2). Moreover, the January 2014 IEP reflected that while the student's ideas could be on the same topic, his ideas tended to be fragmented (id.). The student would, however, "usually answer a question with [one] sentence" (id.).

Consistent with the December 2013 Rebecca School progress report, the January 2014 IEP noted the student was currently working on "functional" mathematics skills, such as budgeting; money skills for shopping; making change; and the use of a calculator for addition, subtraction, and multiplication (compare Dist. Ex. 12 at pp. 4-5, with Dist. Ex. 10 at p. 2). The January 2014 IEP also noted that the student continued to work on solving "multi digit addition and subtraction problem[s] with regrouping," but he did not have a "solid concept of multiplication" (Dist. Ex. 10 at p. 2). However, the January 2014 IEP indicated that the student recognized the "decimal point in relation to money" (id.). Regarding word problems, the January 2014 IEP indicated that the student needed "scaffolding to complete novel problems in terms of identifying the correct operation" (id.).

The January 2014 IEP also provided information regarding the student's executive functioning abilities, and noted that the student "organize[d] his materials" and understood his "daily schedule," but that he "may need reminders to put his work away in his binder" (Dist. Ex. 10 at p. 2). Furthermore, the January 2014 IEP indicated the student's attention depended on the activity and his regulation, and he benefited from sensory supports prior to academic activities (id.). Additionally, the January 2014 IEP reflected the student had a "sensory diet, based on his needs, throughout the day" and he benefited from "movement breaks" (id.). The January 2014 IEP described the student's learning style as "multimodal," and further noted that although he benefited from "visual support," he was "also an auditory learner" (id.). According to the January 2014 IEP, the student also benefited from "adults using high affect when he [was] unsure about novel tasks"

(id.). The January 2014 IEP also reflected the parents' "ongoing" concern regarding the student's use of "correct pronouns" (id.).

In accordance with the December 2013 Rebecca School progress report, the January 2014 IEP indicated that socially, the student needed to improve his flexibility regarding a "wide range of situations and emotions" (compare Dist. Ex. 12 at p. 1, with Dist. Ex. 10 at p. 2). The January 2014 IEP noted that although the student remained "regulated for a lot of the day," he benefited from "adult support" and "sensory support" during periods of dysregulation (Dist. Ex. 10 at p. 2). As discussed at the January 2014 CSE meeting, the January 2014 IEP reflected the student's developing social skills and noted that the student "consistently greet[ed] people throughout the day" and he could "greet people in novel ways, with different phrases" (id.). In terms of peer relationships, the student independently initiated interactions "with preferred peers," but he required "more support and encouragement to engage" with less familiar peers (id.). Although the January 2014 IEP described the student was "very motivated by relationships," the IEP also noted the parents' concerns regarding the student's use of a high pitched voice, the importance of peer models "who [were] more social" than the student, the importance of "[c]ontinuing to improve language and social skills" and using "more idiomatic language," and the student's tendency to "shut down in a classroom with students with significant behavioral issues" (id. at pp. 2-3). Further, the January 2014 IEP noted that according to the parents, "DIR [m]ethodology work[ed] best" for the student (id. at p. 3).

Regarding the student's physical development, the January 2014 IEP noted the student required "movement based activities throughout the day" (Dist. Ex. 10 at p. 3). The January 2014 IEP also noted the parents' concerns regarding "puberty, sex education and health education" (Dist. Ex. 10 at p. 3).

2. Annual Goals and Short-Term Objectives

Turning to the district's appeal, the district asserts that the annual goals and short-term objectives in the January 2014 IEP appropriately addressed the student's needs, including his needs related to decoding and comprehension. Furthermore, the district argues that the January 2014 IEP also contained appropriate short-term objectives that corresponded to the annual goals. As set forth in greater detail below and in light of the legal standards previously set forth, the evidence in the hearing record supports the district's contentions.

The school psychologist testified that January 2014 CSE developed the annual goals in the January 2014 IEP based on input from the district special education teacher, the student's Rebecca School teacher, the Rebecca School social worker, and the parents (see Tr. pp. 112-13). She also testified that the January 2014 CSE discussed the student's "previous year's goals," as well as "what was happening at that time" and what was needed "moving forward" (id.). The January 2014 CSE meeting minutes reflect that the CSE discussed the student's reading skills, his attention and organization skills, his social skills, his management needs, and the parents' concerns (see Dist. Ex. 11 at p. 2). The January 2014 CSE meeting minutes further noted that the CSE developed the academic annual goals "at the table" based on information from the student's Rebecca School teacher, and the annual goals for writing and mathematics were based on the information presented at the CSE meeting (id.). According to the January 2014 CSE meeting minutes, the CSE discussed the related services annual goals from the previous year's IEP and modified them based on the

discussion (id.). The January 2014 CSE also developed an annual goal related to pronoun usage based on the parents' concern, and according to the Rebecca School teacher's request, the January 2014 IEP included an annual goal related to increasing the student's flexibility (id.).

Upon review of the IEP, the January 2014 CSE developed approximately 12 annual goals and approximately 36 short-term objectives to address the student's identified needs related to reading, mathematics, writing, motor, speech-language, sensory, and social skills (see Dist. Ex. 10 at pp. 4-8). Furthermore, a review of the annual goals reveals that—and consistent with State and federal regulations—the annual goals and short-term objective in the January 2014 IEP included an evaluative criteria (i.e., 80 percent accuracy), an evaluation procedure (i.e., teacher or provider observation, teacher made materials, student writing samples, and checklists), and an evaluation procedure and schedules to measure progress toward meeting the annual goals (i.e., weekly, quarterly) (id.).

Specifically, in the area of reading, the January 2014 IEP included an annual goal—with approximately 7 corresponding short-term objectives—that targeted the student's ability to develop his reading skills when given direct instruction and the use of visual or verbal prompts, as well as cues and repetition (see Dist. Ex. 10 at pp. 4-5). The corresponding short-term objectives targeted the following skills and abilities: recalling five to seven details or facts and ordering them in sequence from texts in the range of a second grade to third grade level, answering "wh" questions independently from texts in the range of a second grade to third grade level, identifying two to three key details to summarize a paragraph from texts in the range of a second grade to third grade level, finding the definition of a new word in a dictionary when given texts in the range of a second grade to third grade level, making a sentence with a vocabulary word from texts in a second grade to third grade level range in at least two different contexts, using contextual clues to define unfamiliar words when given texts in a first grade to second grade level range, and reading a text aloud in a second grade to third grade level range with appropriate intonation and pause to the punctuation (id. at pp. 4-5). Although the January 2014 CSE did not develop a specific annual goal related to decoding, the December 2013 Rebecca School progress report indicated that the "literacy program at the Rebecca School" focused primarily on "comprehension," and the school psychologist testified no one at the CSE meeting objected to the recommended annual goals (Tr. p. 114; see Dist. Ex. 12 at p. 4). In addition, although the January 2014 CSE did not develop a specific annual goal related to reading comprehension, a review of the IEP shows otherwise. Here, the annual goal targeting the student's reading skills listed numerous skills in the corresponding short-term objectives—detailed above—which would improve the student's reading comprehension skills (see Dist. Ex. 10 at pp. 4-5). For example, the targeted skills included recalling facts from given texts and ordering them in sequence, independently answering "wh" questions from given texts, and composing sentences using vocabulary words from given texts, among others (id.). Furthermore, the January 2014 CSE meeting minutes indicated that in developing the annual goals related to reading, the CSE discussed the student's instructional level with the Rebecca School teacher in attendance, who indicated that the grade level depended on the student's interests (see Dist. Ex. 11 at p. 2). In addition, when asked if there were additional reading goals, the parents indicated that they wanted the student to read for personal enjoyment; however, they did not request or mention the need for a specific annual goal related to decoding (id.).

Lastly, the January 2014 CSE recommended that the student participate in the alternate assessment program, and therefore, pursuant to State regulation noted above, the January 2014

CSE developed short-term objectives in the January 2014 IEP (see Dist. Ex. 10 at pp. 4-8, 12). Here, a review of the January 2014 IEP reveals that approximately 10 of the 12 annual goals included short-term objectives, namely, the annual goals related to reading, mathematics, writing, speech-language, sensory, motor planning, and social skills (id. at pp. 4-8). Although two of the annual goals in the January 2014 IEP lacked corresponding short-term objectives, overall, the annual goals in the January 2014 IEP addressed the needs of the student as identified in the present levels of performance detailed in the January 2014 IEP, and, contrary to the IHO's conclusion, the lack of short-term objectives for two annual goals did not result in the district's failure to offer the student a FAPE for the 2014-15 school year (see R.B., 2013 WL 5438605, at *13-*14; D.A.B., 973 F. Supp. 2d at 360 [finding that the "failure to designate specific methods of measurement for the annual goals and short-term objectives in the IEP did not result in the denial of a FAPE"]).

3. Consideration of Special Factors—Interfering Behaviors

In the cross-appeal, the parents argue that the January 2014 CSE should have conducted an FBA and developed a BIP for the student if the district "intended to put [the student] in a 6:1:1 class with non-verbal and behavioral students." Upon review and in light of the legal standards set forth previously, the evidence in the hearing record does not support the parents' contentions.

In this case, it is undisputed that the January 2014 CSE did not conduct an FBA or develop a BIP for the student (see Dist. Ex. 10).[19] However, similar to the 2013-14 school year, there was no information before the January 2014 CSE about the student's behaviors that suggested such a need (see Dist. Ex. 12 at pp. 1-2). For instance, the parents agreed that the student did not require a BIP at the time of the January 2014 CSE meeting (see Tr. pp. 842-43; Dist. Ex. 11 at p. 2). Similarly, according to the December 2013 Rebecca School report, the student generally displayed a "happy demeanor and [wa]s regulated for a lot of the day" (Dist. Ex. 12 at p. 1). The December 2013 Rebecca School progress report further indicated that the student continued to make progress in his ability to remain regulated when another person expressed negative emotions and in his ability to more appropriately attract another person's attention in order to share attention around a topic of interest (id. at p. 2). The school psychologist testified that the student was not an "aggressive student," nor did he pose a "behavioral problem" (Tr. pp. 110-11; see also Dist. Ex. 10 at p. 2). Although the school psychologist acknowledged that the student presented with "significant needs," she also testified that his needs did not warrant a BIP or a "one-to-one" paraprofessional (see Tr. pp. 110-11). In addition, the January 2014 CSE indicated in the IEP that when the student became upset or dysregulated, his voice pitch changed and became higher (see Dist. Ex. 10 at p. 2). To otherwise address this need, the January 2014 IEP noted that when his voice pitch became too high, encouraging the student to speak in a normal tone would calm his body down (id. at p. 3). In addition, the January 2014 IEP included strategies or supports as management needs—such as the assistance of a calm, coregulating adult when the student was upset and that the student should not be pushed to complete a task when dysregulated—to further assist the student (id. at pp. 2-3).

[19] As noted with respect to the alleged failures to conduct an FBA and to develop a BIP for the student for the 2013-14 school year, the applicable State and federal regulations only required the January 2014 CSE to conduct an FBA of the student or to develop a BIP for the student based solely upon the student's needs—and not, as the parents contend, the needs of any other students within the recommended placement on the continuum of services.

Based upon the foregoing, the evidence in the hearing record supports a finding that the January 2014 CSE was not required to conduct an FBA or to develop a BIP for the student.

4. 6:1+1 Special Class Placement

The district asserts that the evidence in the hearing record supports a finding that the "program recommendations" in the January 2014 IEP were "substantively appropriate" and the IEP addressed the student's sensory needs. In the cross-appeal, the parents argue that the district recommended a "more restrictive" 6:1+1 special class placement with "non-verbal and 'behavioral' students" because the district did not offer an 8:1+3 special class placement. The parents further argue that the district should have recommended the services of a full-time, 1:1 classroom aide for the student in the absence of an FBA and BIP and also because the student would be "expos[ed]" to "non-verbal and behavioral students" who would not "be helpful" to the student's progress and the assigned public school site did not offer sensory gyms to assist the student's ability to self-regulate. A review of the evidence in hearing record supports the district's allegations, and the IHO's finding must be reversed.

Turning first to the parents' cross-appeal, to the extent that the parents set forth the same continuum of services' and LRE argument pertaining to the January 2014 CSE's decision to recommend a 6:1+1 special class placement as opposed to a classroom with an 8:1+3 student-to-adult ratio, the parents' argument fails for the same reasons articulated above and thus, will not be repeated here. With respect to the parents' argument that the January 2014 CSE failed to recommend a 1:1 classroom aide—as detailed more fully above—the decision to recommend a 1:1 aide for a student must weigh factors that include, but are not limited to, the student's individual needs and the special class size recommended by the CSE—and not, as the parents contend, based upon the needs of any other students within the recommended special class placement (see Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at pp. 1-5, Office of Special Educ. Mem. [Jan. 2012], available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). And as discussed more fully below, based upon the information available to the January 2014 CSE, the evidence in the hearing record does not support a conclusion that the student required a 1:1 classroom aide or that the 6:1+1 special class placement was not appropriate to meet the student's needs.

State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, . . . , with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]). To address the student's identified needs in academics, language, motor skills, sensory regulation, attention, and social/emotional functioning, the January 2014 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school with related services (see Dist. Ex. 10 at pp. 1-2, 8-9, 11). According to the CSE meeting minutes, with input from the student's Rebecca School teacher, the January 2014 CSE discussed strategies and supports to address his management needs, which included sensory supports throughout the day, movement breaks, repetition and redirection, use of calculator, verbal peer models who were predictable, and the use of high affect to increase interest and motivation (id. at p. 3; see Dist. Ex. 11 at p. 2). Additionally, the January 2014 IEP recommended additional time for the student to process information, and when upset, to provide him with a calm, coregulating adult (see Dist. Ex. 10 at p. 3). Lastly, the

January 2014 IEP indicated that when dysregulated, the student should not be pushed to complete a task (id.).

In reaching the decision to recommend a 6:1+1 special class placement, the January 2014 CSE relied upon the very same evaluative information to develop the January 2014 IEP as the May 2013 CSE relied upon to develop the May 2013 IEP—except that the January 2014 CSE also had an updated, December 2013 Rebecca School progress report available in addition to the May 2013 IEP and a vocational interview (compare Tr. pp. 78-79, and Dist. Ex. 4 at pp. 1-11, with Tr. pp. 107-08, and Dist. Ex. 12 at pp. 1-14, and Dist. Ex. 15 at pp. 1-3). According to the December 2013 Rebecca School progress report, the student attended a classroom with a 9:1+3 student-to-adult ratio within the transitions program at the Rebecca School (see Dist. Ex. 12 at p. 1). A review of the December 2013 Rebecca School progress report does not, however, reflect that the student required individual support or staff support on a frequent or consistent basis during the school day—rather, the progress report reflected the student's growing independence and overall progress in the areas of shared attention and regulation, engagement and relating, emotional interactions, shared social problem solving, creating symbols and ideas, building logical bridges between ideas, and his academic skills (see generally Dist. Ex. 12).

At the impartial hearing, the school psychologist testified that the student required a "very small, supportive environment," which a 6:1+1 special class placement could provide (Tr. p. 118). The school psychologist described the 6:1+1 special class as a "language based program" and further testified that the student had "very significant language concerns" (id.). The evidence in the hearing record further indicates that the January 2014 CSE considered but rejected 8:1+1 special class placements and 12:1+1 special class placements as "insufficiently supportive," and similarly rejected options that did not provide a 12-month school year program (Tr. pp. 118-19; Dist. Exs. 10 at p. 13; 11 at p. 2). Although the school psychologist testified that the student required a "fair amount of teacher attention throughout the school day," she further explained that a 6:1+1 special class could provide that attention and the student did not require a "one to one paraprofessional" (Tr. p. 119). Additionally, the school psychologist testified that the parents and the Rebecca School teacher disagreed with the 6:1+1 special class placement recommendation, noting that they indicated the student needed a "2:1 ratio"—"meaning two students for every adult"—as the "most appropriate ratio" (Tr. pp. 119-20; see Dist. Ex. 10 at p. 13). In addition, the school psychologist testified that the parents "reiterated concerns about functional grouping" in a 6:1+1 special class placement (id.). The January 2014 CSE recorded both of these concerns in the IEP, and noted the following additional parental concerns: the student's access to "appropriate" nondisabled peers "each week;" the student needed "more attention" than could be "provided in a 6:1:1 setting" and the student would have a "hard time remaining focused and attentive;" "DIR methodology" was "most appropriate" for the student and "TEACCH" would not be appropriate; the student required OT during the "school day, not after school;" and the student needed "[s]ensory support" throughout the day (Dist. Ex. 10 at p. 13).

Based upon the foregoing, however, neither the parents' continued concerns about the functional grouping of the students in a 6:1+1 special class placement, nor the opinions that a "2:1 ratio" was the most appropriate for the student, nor the information in the December 2013 Rebecca School progress report describe a level of support that the student needed that could not be provided in the recommended 6:1+1 special class placement—together with the strategies to address the student's management needs, annual goals to address his identified areas of need, and

related services as indicated by the IHO in the decision. Consequently, the evidence in the hearing record demonstrates that the recommendations in the January 2014 IEP were reasonably calculated to enable the student to receive educational benefits for the 2014-15 school year.

5. Methodology

Next, the district alleges that the absence of a specific methodology in the January 2014 IEP did not result in a failure to offer the student a FAPE. In light of the legal standards set forth above, although the evidence in the hearing record indicates that the student benefited from the DIR methodology used at the Rebecca School, the hearing record does not contain sufficient evidence upon which to conclude that the student required a specific educational methodology in order to receive a FAPE (see generally Dist. Ex. 12; see also Dist. Ex. 5 at pp. 7-8).

6. Transition Services

Next, the district contends that the transition services in the January 2014 IEP were appropriate because it accurately reflected the student's strengths interests, needs, vocational experiences and long-term outcomes based on input from the parents and Rebecca personnel. As explained in greater detail below and in light of the legal standards set forth above, a review of the evidence in the hearing record supports the district's allegations, and the IHO's findings must be reversed.

In this case, at the January 2014 CSE meeting, the CSE conducted a Level I Vocational Interview-Parent/Guardian assessment (vocational interview) with the parents, and incorporated feedback from the student's Rebecca School teacher into the IEP (see Tr. pp. 108, 114-16, 830-31; Dist. Exs. 11 at p. 2; 15 at pp. 1-3). The January 2014 CSE used the information obtained in the vocational interview to develop the student's transition services and to address his post-secondary employment, education, and living needs (see Tr. pp. 108, 114-16, 151, 830-31; Dist. Exs. 11 at p. 2; 15 at pp. 1-3). At the impartial hearing, the parents testified that the January 2014 CSE invited the student to attend the January 2014 CSE meeting; however, the parents believed the student could not sit through a two-hour CSE meeting and they did not see any reason for him to attend the January 2014 CSE meeting because the student, himself, would object to attending the CSE meeting due to its prolonged length of time (see Tr. pp. 753, 828-29). At the impartial hearing, the school psychologist testified that she asked the parents a series of questions regarding the student's interests, likes, and strengths at the January 2014 CSE meeting (see Tr. pp. 108, 115-16, 830-31). Following the vocational assessment interview, the school psychologist testified that the January 2014 CSE then used the answers to develop the measurable post-secondary goals in the January 2014 IEP (Tr. p. 116).

Based on the results of the vocational interview, the January 2014 CSE determined that the parents sought employment for the student, eventual independent living, and independent travel skills (see Dist. Ex. 15 at pp. 1-2). Consistent with the vocational interview, the January 2014 IEP indicated that the student enjoyed jobs related to his demonstrated interests in music, ceiling fans, food, and people (compare Dist. Ex. 10 at p. 4, with Dist. Ex. 15 at p. 1). Further, the vocational interview report noted that the student's strengths included task completion, organization, memory, and a strong visual memory, and it further described him as "detail oriented" (Dist. Ex. 15 at p. 1). According to the vocational interview report, in order to reach his goals, the student needed to

work on the following skills: proper pronoun usage, workplace and phone etiquette, problem solving in unexpected circumstances, social pragmatic language skills, and asking questions at appropriate times (id.). Regarding independent living and as reflected in the January 2014 IEP, the vocational interview identified that the student needed instruction with respect to clothing care, meal preparation, travel training, financial management, consumer skills, interpersonal skills, safety, and problem solving skills (see Dist. Exs. 10 at p. 4; 15 at p. 2). Additionally, the January 2014 IEP noted the parents' concern that the CSE group the student with peers at his developmental level for educational and social activities and that the parents requested linkage to outside agencies that offered support once the student reached the age of 21 (id.).

To address the student's needs related to his transition to post-secondary activities, the January 2014 IEP designated the assigned school as the agency responsible for the needed activities to facilitate the student's movement from school to post-school activities in the area of instructional needs, related services, community experiences, employment and independent living, daily living skills, and further vocational assessment (see Dist. Ex. 10 at p. 10). To meet the student's post-secondary goals, the January 2014 CSE recommended instructional activities to include independent community purchases and money management, and related services to address phone and workplace etiquette, appropriate question use, and body and sex education (id.). The January 2014 CSE also recommended community experiences to address independent travel skills, skills to deal with strangers, and problem solving in unexpected circumstances (id.). Regarding employment and adult living objectives, the January 2014 CSE recommended that the student learn to make a budget and shop for his own food (id.). With respect to the acquisition of daily living skills, the January 2014 CSE recommended that the student develop skills to identify an emergency situation and how to respond to that situation (id.).

Based on the foregoing, the evidence in the hearing record supports a finding that the January 2014 IEP, in its entirety, provided instruction and experiences to enable the student to prepare for post-secondary activities, and included goals and services related to post-secondary employment and living.

E. Challenges to the Assigned Public School Sites

To the extent that the parents continue to advance arguments related to the assigned public school sites—with respect to the 2013-14 school year, the parents assert that the student would not be functionally grouped within the 6:1+1 special class placement and that the assigned public school site could not address the student's sensory needs. With respect to the 2014-15-school year, the parents argue that the assigned public school lacked appropriate vocational training. For the reasons explained more fully below, such claims are speculative and not supported by the evidence in the hearing record.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York

City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; 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 a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

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, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[20] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

[20] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y., 584 F.3d 412 at 420; see K.L.A. v. Windham Se. Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the May 2013 IEP and the January 2014 IEP because a retrospective analysis of how the district would have implemented the student's May 2013 IEP and the January 2014 IEP at the assigned public school sites was not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected both of the assigned public school sites that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the May 2013 IEP and the January 2014 IEP (see Parent Exs. E at pp. 1-2; K at pp. 1-2). Therefore, the arguments asserted by the parents with respect to the assigned public school sites are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school sites would not have properly implemented the May 2013 and January 2014 IEPs.[21]

[21] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 370-72 [E.D.N.Y. 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; 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]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 25 F. Supp. 3d 295, 300-01 [E.D.N.Y. 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 and 2014-15 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Rebecca School was an appropriate placement or whether equitable considerations supported the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 4, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER