The University of the State of New York

The State Education Department
State Review Officer
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No. 15-060

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, Cynthia Sheps, Esq., of counsel

New York Legal Assistance Group, attorneys for the respondent, Ya-wen Chang, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2012-13 school year. The parent cross-appeals from the portion of the IHO's decision which rejected her claims regarding the appropriateness of the district's assigned public school site as impermissibly speculative. 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 September 2010 (see Tr. pp. 189, 346; see also Application of a Student with a Disability, Appeal No. 13-069; Application of a Student with a Disability, Appeal No. 12-088).[1] The student was the subject of prior State-level appeals related to the 2010-11 and 2011-12 school years (Application of a

[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).

Student with a Disability, Appeal No. 13-069; Application of a Student with a Disability, Appeal No. 12-088). As a result, the parties' familiarity with the factual background, including the student's educational history and the prior due process proceedings, is assumed, and they will only be repeated herein to the extent relevant to this matter (see id.).

On May 10, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Exs. 5 at p. 14; 13 at p. 1). Finding that the student remained eligible for special education as a student with autism, the May 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school with the following related services: one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a small group, two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of OT in a small group, two 30-minute sessions per week of individual physical therapy (PT), and two 30-minute sessions per week of individual counseling (see id. at pp. 10-11, 15).[2] In addition, the May 2012 IEP included multiple supports for the student's management needs, as well as 14 annual goals with corresponding short term objectives (id. at pp. 2-10).

On May 17, 2012, the parent executed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year, beginning July 2, 2012 (see Parent Ex. G at pp. 1, 4).

In a final notice of recommendation (FNR), dated June 14, 2012, the district summarized the 6:1+1 special class and related services recommended in the May 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. E at p. 1).

By letter from the parent's counsel to the district, dated June 15, 2012, the parent indicated that the district failed to "timely offer [the student] an appropriate program for the 2012-13 school year" (Parent Ex. F). The parent further advised that, because she had not received a "notice of recommended placement," she intended to "re-enroll" the student at the Rebecca School for the 2012-13 school year and to seek public funding for the costs of the student's tuition (id.). At that time, the parent also requested the provision of round-trip transportation services for the student's attendance at the Rebecca School (id.).[3]

On June 25, 2012, the parent visited the assigned public school site (see Parent Ex. D). The parent's counsel sent a letter to the district dated July 5, 2012 indicating that, based upon the parent's observations during that visit, the "recommended school" was not appropriate for the student (Parent Ex. D). In particular, the parent indicated that the assigned public school site "lacked a sensory gym and adequate sensory equipment to address [the student's] deficits" (id.). In addition, the parent indicated that, because "all the children in the school, approximately 100"

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The parent thereafter received the FNR on June 16, 2012 (see Parent Ex. D).

ate lunch together during the summer months, it would be "extremely difficult" for the student's "sensory issues" (id.). The parent also indicated that, without a class profile, she could not "understand how [the student] would fit into his potential class" (id.). Finally, the letter indicated that the parent was "specifically told that the students were compiled into classes solely by age and not by developmental ability or skill" (id.). As a result, the parent advised the district that she would "continue" the student's enrollment at the Rebecca School and seek reimbursement for the costs of the student's tuition (id.). The parent also continued to request round-trip transportation services for the student (id.).

A. Due Process Complaint Notice

In a due process complaint notice, dated June 21, 2013, the parent, through her attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at pp. 1-2). First, the parent alleged that the May 2012 IEP failed to include parent counseling and training (id. at p. 2). Next, the parent alleged that the May 2012 IEP did not sufficiently describe the student's "sensory needs or particularize the equipment necessary" to address those needs at school (id.). The parent also noted that while "PT was no longer necessary" for the student, the May 2012 IEP continued to include a recommendation for this related service (id.). The parent indicated that the student "needed more individualized attention than could be offered" in the recommended 6:1+1 special class placement and that the "staffing ratio" would not meet the student's needs (id.). The parent also indicated that the May 2012 CSE recommended "this ratio" because it was the "'most appropriate' out of the types of programs" the CSE could offer (id.). The parent further alleged that, although she indicated at the May 2012 CSE meeting that the student "benefited from . . . the Developmental Individual Differences Relationship-based model" (DIR), the May 2012 IEP failed to include a specific "teaching methodology" to implement the annual goals and the May 2012 IEP also lacked a "critical component of an effective program" (id.).

With respect to the assigned public school site, the complaint noted that the parent observed "several 6:1:1 classes," which—as she was told—were "all grouped solely by age rather than ability level" (Parent Ex. A at pp. 2-3). The parent also indicated that the assigned public school site used "Applied Behavior Analysis (ABA) and independent work stations," whereas the student required "significant adult support and encouragement in order to make progress" (id. at p. 3). Further, the parent noted that the assigned public school site lacked a "sensory gym" and that she observed "almost no sensory materials . . . in the classrooms or in the OT/PT room" (id.). The parent also noted that, during the "summer session," the "entire school, with upwards of 100 children," ate lunch together, which would result in "significant difficulties in regulation" for the student (id.). Finally, the parent indicated that no one mentioned the "availability" of parent counseling and training during the visit (id.).

With regard to the student's unilateral placement, the parent indicated that the Rebecca School used the DIR model and that a "low student-teacher ratio insure[d] adequate small group and individualized instruction" for the student throughout the day (Parent Ex. A at p. 3). The parent further indicated that the "collaboration and consultation between teachers and related service providers" resulted in a "cohesive therapeutic environment" and that, during the 2012-13 school year, the student attended a "7:1:3 classroom" and made progress in, among other things,

his sight word vocabulary, his ability to read short sentences and ask for assistance, and in his ability to interact with others (id.).

In order to resolve this matter, the parent requested that the district directly fund the student's tuition costs at the Rebecca School for the 2012-13 school year and provide round-trip transportation services for the student (see Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

On December 27, 2013, the IHO conducted a prehearing conference, and on January 28, 2014, the parties proceeded to an impartial hearing, which concluded on June 12, 2014, after four days of proceedings (see Tr. pp. 1-380). In a decision dated April 15, 2015, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief (see IHO Decision at pp. 7-23).[4]

First, the IHO found that, although the May 2012 IEP failed to include a recommendation for parent counseling and training, this procedural violation alone did not constitute a failure to offer the student a FAPE (IHO Decision at pp. 11-12). Second, the IHO found that, contrary to the parent's contention, a CSE is "not required to specify methodology on an IEP" and that the "precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher" (id. at pp. 12-13). Next, the IHO determined that, based upon the evidence in the hearing record, the "CSE's proposed program" was not reasonably calculated to provide the student with meaningful educational benefits (id. at p. 13). More specifically, the IHO found that, given the evaluative information available to the May 2012 CSE, the student presented with "'sensory processing challenges that resulted in him seeking quite a lot of vestibular and proprioceptive input through the day . . . or in other words, a 'sensory-seeking profile'" (id. at pp. 13-14). The IHO also found, however, that the May 2012 IEP "lacked an adequate program to address the student's sensory needs" (id. at p. 14). The IHO also noted that, while the May 2012 CSE described the student in the IEP as "'very sensory seeking throughout the day and requir[ing] consistent support,'" the May 2012 CSE did not find that the student required a behavioral intervention plan (BIP) (id. at pp. 14-15). Next, the IHO noted that, absent supports previously recommended for the student—such as the services of a "1:1 transitional paraprofessional to assist [the student's] transition from his private school environment to a public school setting" and adapted physical education—and without a BIP, the student "needed the provision of a structured, systematic sensory diet and access to a safe and appropriately equipped sensory gym in order to properly address his sensory integration difficulties" (id.). In further support of this conclusion, the IHO relied heavily upon the parent's testimony and testimony from the student's OT provider and classroom teacher at the Rebecca School for the 2012-13 school year (id. at pp. 15-16).

[4] The actual record close date occurred nearly eight months after the parties submitted their closing briefs as a consequence of several extensions granted by the IHO (compare IHO Exs. I-II, with IHO Decision; see IHO Exs. XV-XXIII). A guidance document issued by the Office of Special Education in August 2011 reminds IHOs that "[a] record is closed when all post-hearing submissions are received by the IHO" ("Changes in the Impartial Hearing Reporting System," Office of Special Education Mem. [Aug. 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf). An IHO may not grant an extension for any reason after the record close date (8 NYCRR 200.5[j][5][iii]).

Turning next to the appropriateness of the assigned public school site, the IHO rejected the parent's contention that it was not appropriate and could not meet the student's educational needs as speculative arguments because the student never attended the assigned public school site (see IHO Decision at pp. 16-19).

With regard to the unilateral placement, the IHO concluded that the Rebecca School provided the student with "specifically designed, individualized instruction to meet his unique educational needs," and further noted that the student made progress (see IHO Decision at pp. 19-22). With regard to equitable considerations, the IHO determined that the evidence in the hearing record supported an award of tuition reimbursement or direct payment for tuition at the Rebecca School for the 2012-13 school year (id. at pp. 22-23). Consequently, the IHO ordered the district to reimburse the parent and to directly pay the Rebecca School for the costs of the student's tuition for the 2012-13 school year (id. at p. 24).

IV. Appeal for State-Level Review

The district appeals, and argues that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year.[5]

As an initial matter, the district alleges that, while the IHO did not address the parent's claim that the recommended 6:1+1 special class in a specialized school was insufficiently supportive of the student's needs, the claim is without merit and the 6:1+1 special class was appropriate to address the student's need for individualized attention. The district also asserts that, to the extent the parent asserted in her due process complaint notice that the inclusion of PT on the student's IEP was not appropriate, such claim is without merit because the May 2012 CSE had no information before it indicating that the student no longer demonstrated a need for the service.

Regarding the student's sensory needs, the district asserts that the IHO erred in finding that, with the absence of a 1:1 transitional paraprofessional, adapted physical education, and a BIP from the student's educational program, the May 2012 IEP was not reasonably calculated to provide the student with educational benefits because the student "needed the provision of a structured, systematic sensory diet and . . . [a] sensory gym" (see IHO Decision at pp. 13, 15). The district asserts that the May 2012 CSE adequately addressed the student's sensory needs by recommending: the support of a 6:1+1 special class; management strategies and interventions, including specific supports, materials, and strategies intended to address the student's sensory needs; adapted physical education; and annual goals and short-term objectives targeting the student's ability to process and integrate sensory information. The district further argues that the IHO erred in finding that the student required a sensory gym to make meaningful educational progress. The district asserts that the student's needs could be met in a regular gym, which could provide adequate opportunities for sensory activities. The district argues that the district was not required to provide sensory equipment "similar to the sensory equipment at Rebecca" in order to

[5] In a footnote, the district affirmatively asserts that it does not appeal the IHO's findings that the Rebecca School was an appropriate unilateral placement or that equitable considerations weighed in favor of the parent's requested relief (see Pet. ¶ 4 n.3). As such, these determinations of the IHO have become final and binding on the district and will not be further reviewed in this appeal (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]).

maximize the student's potential. Lastly, in regard to the lack of a BIP, the district argues that the May 2012 CSE properly recommended management needs, annual goals, and short-term objectives that provided appropriate support for the student's behavioral needs, as well as his sensory needs.

In an answer and cross-appeal, the parent responds to the district's petition by variously admitting or denying the allegations raised by the district, and asserts that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year. The parent also argues that the IHO erred in his determination that the parent's claims regarding the assigned public school site were speculative.[6]

In an answer to the parent's cross-appeal, the district alleges that the IHO correctly found that the parent's allegations regarding the public school placement were speculative. The district specifically alleges that the parent's challenges to the assigned public school sites were not challenges to that school's capacity to provide the services mandated by the IEP.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist.,

[6] The parent does not assert a cross-appeal challenging the IHO's determinations that the failure to include parent counseling and training in the May 2012 IEP was a procedural violation of the IDEA that did not deny the student a FAPE or that the CSE was not required to specify methodology on an IEP. As such, this determination of the IHO has also become final and binding on the district and will not be further reviewed in this appeal (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]).

346 F.3d 377, 381 [2d Cir. 2003]). 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).

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]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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]), 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]).

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). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. May 2012 IEP

1. 6:1+1 Special Class Placement

Although not addressed by the IHO, the district maintains that the parent's allegation that the recommended 6:1+1 special class placement would not provide the student with sufficient adult support to meet the student's needs is without merit. The parent denies the district's assertions and further asserts that the members of the May 2012 CSE who actually had knowledge of the student objected to the 6:1+1 special class recommendation and that the student had previously failed to achieve progress in a 6:1+1 district special class. When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO]). In reviewing the hearing record in this case, I find that an adequate record for review of these issues was developed over the course of the impartial hearing and, therefore, in the interests of judicial economy, I decline to exercise my discretion to remand this matter to the IHO in this instance.

While the parent has not challenged the sufficiency of the evaluative information available to the May 2012 CSE or the student's present levels of performance summarized in the May 2012 IEP, a review of the student's needs is necessary to facilitate review of the issues to be resolved. According to the evidence in the hearing record, the following individuals attended the May 2012 CSE meeting: a district school psychologist, who also served as the district representative; a district special education teacher; a district social worker; an additional parent member; the parent; a social worker from the Rebecca School; and, by telephone, the student's then-current teacher from the Rebecca School (Tr. p. 75; Dist. Exs. 5 at p. 17; 13 at p. 1). In developing the May 2012 IEP, the CSE considered the student's March 21, 2011 IEP and a December 2011 Rebecca School interdisciplinary report of progress update (Rebecca School progress report) (Tr. pp. 83-86, 326; see generally Dist. Exs. 4; 6).[7] Additionally, the hearing record indicates that the May 2012 CSE considered information provided by the student's teacher and the ensuing discussion that took place at the CSE meeting (Tr. pp. 83-84, 99-102; Dist. Ex. 13 at pp. 1, 4).

Consistent with the December 2011 Rebecca School progress report, and testimony presented at the impartial hearing, the May 2012 IEP present levels of performance indicated that the student demonstrated needs in the areas of academics, motor skills, sensory regulation, and

[7] The district school psychologist testified that the May 2012 CSE specifically reviewed the Rebecca School progress report but could not recall the extent to which the CSE reviewed the May 2011 IEP (Tr. pp. 85-86). Additionally, the school psychologist stated that he did not recall whether the May 2012 CSE reviewed a January 5, 2011 psychological evaluation report (Tr. pp. 85-86; see generally Dist. Ex. 7).

social/emotional functioning (compare Dist. Ex. 6 at pp. 1-6, with Dist. Ex. 5 at pp. 1-3; see Tr. pp. 93-102). The May 2012 IEP noted that the student primarily communicated in two to five word phrases but used complete sentences when motivated (Dist. Ex. 5 at p. 1). The May 2012 IEP indicated the student answered "why" questions about concrete situations when provided with open-ended verbal prompts, but not about abstract scenarios or emotions (id.). Regarding reading, the May 2012 IEP noted the student attended to preferred texts for 10 minutes, read 85 words that were emotionally relevant, and was working on reading simple sentences (id.). The May 2012 IEP noted that, based on teacher observation, the student relied on sight word skills for reading, as the student was not a phonetic reader (id.). The May 2012 IEP also indicated the student demonstrated listening comprehension skills by following two-step directions and reading comprehension skills by answering fact-based "who and what" questions without choices (id.). The May 2012 IEP stated the student answered "where, how and why" questions about familiar stories when provided with verbal choices (id.). With regard to mathematics, the May 2012 IEP indicated the student used manipulatives to complete simple addition equations, and that he struggled with labeling groups up to 10 and with the concept of "less" (id.). While indicating the student's progress with self-regulation and anxiety, the May 2012 IEP also noted the student was easily distracted, which had a negative impact on the student's academic progress, and that at times he "shie[d] away" from participating (id.).

Socially, the May 2012 IEP stated the student enjoyed interacting with adults, reading familiar stories, and engaging in playful interactions and activities that involved movement (Dist. Ex. 5 at pp. 1-2). The May 2012 IEP noted the student needed support during challenging peer interactions, during times of dysregulation, and during back and forth interactions (id. at p. 2). The May 2012 IEP noted that, when the student felt upset, he benefitted from information presented using decreased verbal language, breaks, and adult modeling of co-regulating strategies (id.). The May 2012 IEP stated that the student needed more time and prompts when he transitioned to non-preferred activities, interacted with unfamiliar people in the community, and when limits were set in social situations (id.). The May 2012 IEP also indicated that the student was a fun and energetic student and that his behavior did not impede his learning or that of others (id. at pp. 2-3).

Regarding the student's motor and sensory development, the May 2012 IEP indicated the student was "very sensory seeking" throughout the day (Dist. Ex. 5 at p. 2). Additionally, the May 2012 IEP stated the student required "consistent sensory support" and needed "to engage in meaningful interactions with peers and staff over a range of emotions and activities, while maintaining self-regulation" (id.). Further, the May 2012 IEP noted the student needed support related to attention, arousal, motor planning and sequencing, organization, visual motor coordination, gross and fine motor skills, and visual spatial processing (id.). Although the student demonstrated a number of needs in the area of motor development, the May 2012 IEP indicated the student's daily living skills were at an independent level and that he only required assistance with tasks using fine motor skills (id. at p. 1).

As previously noted, the May 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school (Dist. Ex. 5 at p. 10). 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" (8 NYCRR 200.6[h][4][ii][a]). The May 2012 CSE recommended supports for the student's management needs, including provision of smaller choices within activities, approaching

the student in a playful manner, sensory input, verbal cues, time warnings for transitions, and support with interactions with peers (Dist. Ex. 5 at pp. 2-3). In the present levels of performance section, the May 2012 IEP also described additional environmental and human or material resources that benefited the student, including presentation of verbal choices, decreased use of verbal language, provision of breaks, modeling of co-regulating strategies, and use of prompts (id. at pp. 1-2). The May 2012 CSE also recommended annual goals and short-term objectives to address the student's needs in mathematics, reading, communication, social/emotional, sensory, and motor skills, including goals targeted at the student's ability to maintain regulation in social situations with moderate adult support, accept co-regulation strategies, and sustain interactions (id. at pp. 1-10). The annual goals included reference to yet additional management needs and strategies (id.). Additionally, the May 2012 CSE recommended related services, including speech-language therapy, OT, PT and counseling to further support the student's needs (id. at pp. 10-11). Given the student's highly intensive management needs and need for individualized attention, the May 2012 CSE's recommendation for a 6:1+1 special class was consistent with State regulation (8 NYCRR 200.6[h][4][ii][a]).

According to the evidence in the hearing record, in reaching the decision to recommend a 6:1+1 special class placement, the May 2012 CSE considered other placement options for the student (Dist. Exs. 5 at p. 16; 13 at p. 3). The May 2012 CSE considered 12:1 and 12:1+1 special classes in a community school but found that those placements would not offer the student the twelve-month program the student required or the academic, social/emotional and speech-language support the student needed (id.). Similarly, the May 2012 CSE considered 8:1+1 and 12:1+1 special classes in a specialized school but rejected those placement options because they would not offer the student the level of support required for the student to meet his annual goals (id.). The May 2012 CSE also considered but rejected a 12:1+4 special class in a specialized school because it was "too restrictive" to meet the student's needs (id.).

The district school psychologist and the parent both testified that, at the May 2012 CSE meeting, the student's then-current teacher and the social worker from the Rebecca School disagreed with the 6:1+1 special class recommendation (Tr. pp. 105-07, 326-27, 338-40). The May 2012 CSE meeting minutes also reflect that the parent wanted the student to remain in a class "similar to" his class at the Rebecca School and that the Rebecca School social worker and teacher stated that the student would benefit from a higher student-to-adult ratio than a 6:1+1 special class (Dist. Ex. 13 at pp. 1, 4). According to the minutes, the student attended an 8:1+3 special class at the Rebecca School at the time of the CSE meeting (id. at p. 1). The parent testified that the student

struggled in a district 6:1+1 special class during the 2009-10 school year (Tr. p. 326).[8] The parent also testified that she told the May 2012 CSE that the student needed an environment with more support than the 6:1+1 special class could provide because he benefited from adult feedback, verbal praise, and positive reinforcement (id.).

At the impartial hearing, the district school psychologist opined that a 6:1+1 special class was appropriate to meet the student's needs because such a placement was developed and structured to address students' cognitive, academic, social, and communication skills (Tr. pp. 103-04). Further, the school psychologist stated the 6:1+1 special class placement supported students' ability to participate in classroom and school activities (id.). The school psychologist also testified that a 6:1+1 special class offered a "very intensive individual program," with "continual adult supervision," developed to provide a "substantial amount of individualized attention and instruction" to the students (Tr. pp. 131-32).

Based upon the foregoing, the evidence in the hearing record demonstrates that, consistent with the student's needs and with State regulations, a 12-month school year program in a 6:1+1 special class at a specialized school with related services, strategies to address the student's management needs, and annual goals, offered the student adequate individualized support and was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.[9] While the parent may have preferred the 8:1+3 class ratio of the student's class at the Rebecca School, districts are not required to replicate the identical setting used in private schools

[8] A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent or future IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [December 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P, 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). In this instance, however the alleged negative experience of the student in the public school program was sufficiently distant in time from the May 2012 CSE meeting (as, at the time of the meeting, the student was attending Rebecca for a second school year) that it carries less weight in the analysis of the May 2012 IEP. Further, the hearing record does not contain the student's IEP for the 2009-10 school year or any objective evidence of progress or a lack thereof during that time frame.

[9] During the course of the impartial hearing addressing the 2011-12 school year, the parent stipulated that the May 2011 IEP both procedurally and substantively offered the student a FAPE (see Application of a Student with a Disability, Appeal No. 13-069). Comparing the May 2011 IEP with the May 2012 IEP, it appears that the two documents recommended similar educational placements and related services, save the inclusion of 1:1 transitional paraprofessional services in the May 2011 IEP (compare Dist. Ex. 4, with Dist. Ex. 5). Each school year must be evaluated individually, and that the parent's earlier stipulation regarding the prior school year does not bind the parent for the subsequent school year, but the precise nature of the parent's disagreement and concern is unclear in the record as to what change in circumstances, if any, occurred that caused a shift in the parent's perspective regarding the appropriateness of the recommended placement and services—that is, one cannot tell from the parent's arguments whether a plan for a 6:1+1 special class that includes 1:1 paraprofessional support would be objectionable or if the parent is now taking the position that that under no circumstances could a 6:1+1 special class ever be appropriate, without regard to the presence of a paraprofessional.

(see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).

2. Sensory Needs

Next, the district contends that the IHO erred in finding that the May 2012 IEP lacked an adequate program to address the student's sensory needs. The district argues that that the May 2012 CSE specifically acknowledged the significance of the student's sensory needs and their effect upon his functioning in the classroom.

As an initial matter, in finding the May 2012 IEP inadequate to address the student's sensory needs, the IHO relied on the testimony of the staff from the Rebecca School who worked with the student during the 2012-13 school year, including the student's occupational therapist and his head teacher, as well as the testimony of the parent (IHO Decision at pp. 13, 15-16; see Tr. pp. 214, 218, 220-21, 225-27, 234-35, 256, 262-64, 274, 278-82, 328-29). Generally, the appropriateness of an IEP is evaluated prospectively, as of the time of its drafting (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013], citing R.E., 694 F.3d at 186–87). Thus, in the same way that a deficient IEP may not be rehabilitated by retrospective testimony regarding services that do not appear in the IEP, a substantively appropriate IEP "may not be rendered inadequate through testimony and exhibits that were not before the CSE," particularly when that testimony is in regards to subsequent events or seeks to alter the information available to the CSE (see C.L.K. 2013 WL 6818376, at *13). In this case, of the three witnesses whose testimony the IHO relied upon in finding the district failed to provide the student with a FAPE, only the parent was present at the May 2012 CSE meeting to discuss the student's needs (see Tr. pp. 75, 337-38; Dist. Ex. 5 at p. 17). Additionally, the occupational therapist and teacher who provided opinions at the impartial hearing had not yet worked with the student at the time of the May 2012 CSE meeting and did not participate or offer such viewpoints to the CSE participants (see Tr. pp. 216, 259-60, 269-70).[10] Thus, by relying on this testimony, the IHO essentially engaged in a "Monday morning quarterbacking" analysis of the student's IEP, which approach has been rejected by the courts (see, e.g., J.M. v. New York City Dep't of Educ., 2013 WL 5951436, at *19 n.13 [S.D.N.Y. Nov. 7, 2013]).

In addition to the testimony of the Rebecca school witnesses who worked with the student during the school year following the CSE meeting, the IHO also relied on documentary evidence that was available to the CSE, including the May 2012 IEP itself, the student's May 2011 IEP, and the December 2011 Rebecca School progress report (IHO Decision at pp. 13-14; see generally Dist. Exs. 4-6). Addressing the student's sensory needs, the December 2011 Rebecca School progress report indicated that, while the student demonstrated progress regarding self-regulation during interactions with familiar adults, the student became dysregulated during peer interactions, such as when he was required to wait or when limits were set in social situations (Dist. Ex. 6 at p. 1). The December 2011 Rebecca School progress report also indicated that, when the student

[10] Further, the occupational therapist admitted that she believed that the student "changed a lot" between years (Tr. p. 159), suggesting that her statements of the student's needs may reflect subsequent changes to the student's present levels of academic performance and special needs since she began working with the student in January 2013—information that would not have been available to the CSE—and thus could not be relied upon to find the May 2012 IEP inadequate (C.L.K., 2013 WL 6818376, at *13).

became dysregulated, he might scream or cry, and the staff supported the student by providing choices, decreasing verbal language, offering a break, and modeling co-regulating strategies such as taking deep breaths (id. at pp. 1, 7). Additionally, the December 2011 Rebecca School progress report noted that, with the support offered by staff, the student co-regulated after approximately five minutes (id. at p. 7).

The December 2011 Rebecca School progress report noted that the occupational therapist focused on sensory cool-down activities and co-regulation and on engaging in meaningful interactions with peers and staff over a range of emotions and activities throughout the day (Dist. Ex. 6 at p. 5). Further, the December 2011 Rebecca School progress report included goals related to the student's ability to process and integrate sensory information, which described types of sensory input used, including deep pressure, a scooter board, and active vestibular input through the use of swings and proprioceptive activities that were part of the student's sensory diet (id. at p. 10). The report also noted that the student's sensory diet included therapeutic "brushing" of the arms, legs, and back and joint compression to the extremities (id. at p. 10).

Additionally, the district school psychologist testified that the Rebecca School staff who were working with the student at the time of the CSE meeting shared information at the May 2012 CSE meeting regarding the student's need to self-regulate (Tr. pp. 140-141). As summarized above, and consistent with the information in the December 2011 Rebecca School progress report, the May 2012 IEP described the student's sensory needs in the present levels of performance and management needs sections of the document (compare Dist. Ex. 6 at pp. 1, 5, 7, 10, with Dist. Ex. 5 at pp. 1-2). In addition, the May 2012 CSE included an annual goal to increase the student's ability to maintain regulation in the classroom, throughout the day and during challenging situations (Dist. Ex. 5 at p. 4; see Tr. pp. 141-42). To achieve the goal the May 2012 IEP indicated the student would maintain regulation when provided with moderate adult support through verbal and visual reminders and would, when dysregulated, accept co-regulating strategies such as deep breathing or hand squeezes (Dist. Ex. 5 at p. 4). Further, the May 2012 IEP included an annual goal to improve the student's ability to process and integrate sensory information in order to understand and effectively interact with people and objects in the home and school environments (id. at p. 7; see Tr. pp. 141-42). To support the student's achievement of this goal, the May 2012 IEP specified the use of sensory input, such as deep pressure, use of a scooter board, as well as vestibular and proprioceptive activities consistent with the student's sensory diet (Dist. Ex. 5 at p. 7).

The IHO found that the May 2012 IEP inadequately addressed the student's sensory needs because it lacked recommendations for either a 1:1 transitional paraprofessional, adapted physical education, or a BIP (IHO Decision at pp. 14-15). Absent these supports, the IHO found that the student needed—and that the May 2012 IEP failed to include provision for—"a structured, systematic sensory diet and access to a safe and appropriately equipped sensory gym" (IHO Decision at p. 15). Initially, to the extent that the IHO relied on the lack of paraprofessional services, a BIP, and adapted physical education as partial bases to support his ultimate conclusion that the student had been denied a FAPE, this was error as the parent did not include such claims in her due process complaint notice and, therefore, they were outside the permissible scope of the impartial hearing (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see, e.g., R.E., 694 F.3d at 187 n.4; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013

WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]). Moreover, the IHO's determination that the May 2012 IEP did not include adapted physical education was factually inaccurate (Dist. Ex. 5 at p. 13; see Tr. p. 136). Next, the IHO inappropriately conflated the interfering behaviors typically addressed by a BIP with the student's sensory needs (see 8 NYCRR 200.4[d][3][i], 200.22[b]). In any event, even if the hearing record reflected that the student's behaviors relating to his sensory needs interfered with his learning or that of others, as described below, the May 2012 IEP sufficiently addressed the student's sensory needs (see generally Dist. Ex. 5).

The particularity with which the parent and, seemingly, the IHO expected the May 2012 IEP to describe the specific strategies to address the student's sensory needs is essentially a dispute over the best methodological approach(s) that a teacher or special education provider would use on a daily basis to address the student's sensory needs.[11] 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., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational 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 [2d Cir. June 8, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11-*12 [W.D.N.Y. Sept. 26, 2012], 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]).[12] As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576, citing 34 CFR 300.39[a][3] and 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., 589 Fed. App'x at 576; 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"]).

As described above, the hearing record supports the district's assertion that the May 2012 IEP specifically identified the student's sensory needs and included provision for appropriate

[11] The district frames this same question as one of maximization, correctly noting that the "IDEA does not require that an IEP furnish every special service necessary to maximize each handicapped child's potential" (A.H. v. New York City Dep't of Educ., 394 Fed. App'x 718, 721 [2d Cir. Aug. 16, 2010] [internal quotations omitted], quoting Rowley, 458 U.S. at 199). While there is merit to the the district's argument, the parent's claim is, in essence, that the May 2012 IEP should have included more specificity regarding the manner in which such sensory supports would be delivered. Therefore, the dispute appears to be more generally a methodological issue.

[12] The IHO acknowledged these principals in finding that the May 2012 CSE was not required to specify the DIR methodology on the student's IEP (see IHO Decision at p. 12).

special education services and supports to address those needs. Although the May 2012 IEP did not specify every piece of equipment to address the student's sensory and co-regulation needs, the hearing record does not support a finding that the student only received educational benefit using particular methods of sensory input (see Dist. Ex. 6 at pp. 1-2, 5, 7, 10). Rather, information from the December 2011 Rebecca School report indicated that the student benefitted from a variety of methods of sensory input (e.g. deep breathing, deep pressure, movement activities, "rough and tumble" games), many of which are included in the May 2012 IEP (deep breathing, hand squeezes, deep pressure, use of a scooter board, physical games) (compare Dist. Ex. 5 at pp. 1-4, 7, with Dist. Ex. 6 at pp. 1-2, 5, 7, 10). As for the sensory gym, the evidence in the hearing record reflects that sensory input, including the vestibular and proprioceptive input called for by the May 2012 IEP, could be provided in a variety of locations and in a variety of ways (Parent Ex. 6 at p. 5; see Tr. pp. 254-56). The December 2011 Rebecca School progress report reflected that the student's therapy services could be provided in the occupational therapist's office, the student's classroom, the hallway, the sensory gym, and in the community (Dist. Ex. 6 at p. 5). The district school psychologist further testified that a regular gym was also capable of providing an environment in which sensory activities took place (Tr. pp. 137-38).

Absent evidence that particular methods of delivering sensory input in a particular environment were necessary for the student to receive educational benefits, as well as evidence that this information was available to the May 2012 CSE, the hearing record supports the conclusion that the approaches utilized by the Rebecca School and preferred by the parent were simply one methodology by which the student's sensory needs could be met. Accordingly, the IHO's determination that the May 2012 IEP failed to adequately address the student's sensory needs is reversed. The parent's' claims regarding the lack of observed sensory equipment during a visit are further discussed below.

3. Parent Counseling and Training

The IHO held that the district committed a procedural violation of the IDEA by failing to include provisions for parent counseling and training in the May 2012 IEP but that such violation, alone, did not support a finding of a denial of a FAPE (IHO Decision at pp. 11-12). The district agrees with the IHO's conclusion that the absence of parent counseling and training did not, by itself, deny the student a FAPE. The parent does not specifically appeal or articulate an argument challenging this holding, apart from generally denying the district's allegation, but in light of the circumstances of this case, I hereby reiterate the caution acknowledged by the IHO and previously communicated to the district (see IHO Decision at pp. 12-13 n.6, citing Application of a Student with a Disability, Appeal No. 15-001) and similarly order that, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice, in the parent's native language, on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

C. Challenges to the Assigned Public School Site

The parent cross-appeals the IHO's determination that her claims relating to proper implementation of the student's May 2012 IEP at the assigned public school site were speculative. Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[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 E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015]; R.B., 589 Fed. App'x at 576; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). The Second Circuit has explained that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[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 [2d Cir. May 21, 2013]) and 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). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . 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. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at *3). However, the Second Circuit has also held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 2015 WL 4256024, at *6-*7 [2d Cir. July 15, 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 2015 WL 4256024, at *7; see Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6-7 [S.D.N.Y. July 31, 2015] [noting that " the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *6-*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at *12-*13 [S.D.N.Y. July 6, 2015] [noting the preference of the courts for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*13 [S.D.N.Y. June 16, 2014]).

In view of the foregoing, the parent cannot prevail on her claims regarding the implementation of the May 2012 IEP at the assigned public school site. It is undisputed that the parent rejected the district recommended program and instead chose to enroll the student in a nonpublic school of her choosing, prior to the time the district became obligated to implement the

May 2012 IEP (see generally Parent Exs. D; F; G). The only information regarding the school's purported inability to provide the services included on the May 2012 IEP comes from the parent's observations during her visit on June 25, 2012, and her recollections of statements made by an individual whose role the parent identified as "either a secretary or a unit coordinator" (Tr. pp. 331-32). This evidence provides support only for what the parent believed might occur at the assigned school, rather than evidence that the assigned school was incapable of implementing the student's IEP. Accordingly, the parent's claims based on her observations and her conversation with an individual at the school regarding the environment and classrooms at the assigned public school site generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP]).

The parent's claims regarding the sensory gym and sensory equipment available at the assigned public school site are more fully discussed above. To the extent it may be necessary to address them here, a lack of a sensory gym and/or specific equipment may not form the basis for a finding of a denial of a FAPE where there is no indication of a need therefor in the IEP and, if needed, no proof that the assigned public school would unable to obtain it prior to the student's attendance (see E.P. v New York City Dep't of Educ., 2015 WL 4882523, at *7 [E.D.N.Y. Aug. 14, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436-47 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 372 [E.D.N.Y. 2014]).

Regarding the question of the number of students who attended the lunch period during the summer, the parent described a "noise factor," which she opined would require the student to cover his ears, preventing him from socializing or eating (Tr. p. 333). Again, the student's IEP does not describe a particular environment in which the student must eat lunch (see E.P., 2015 WL 4882523, at *8 [noting that the teacher at the public school could have let the student eat in the classroom to avoid the overstimulating cafeteria])'. Therefore, this allegation is also not a permissible challenge to the ability of an assigned school to implement the student's IEP (M.O., 2015 WL 4256024, at *7; Y.F., 2015 WL 4622500, at *6).

Next, the parent's objection to the district's failure to provide her with a class profile (see Tr. p. 332) is without merit because, as noted by the Second Circuit, the IDEA does "not expressly require school districts to provide parents with class profiles" (Cerra, 427 F.3d at 194; see E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012], N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013] [noting that a district is not required to provide parents with details "about the specific group of students with which their child will be placed"]). And with regard to functional grouping of the students in the proposed classroom, the alleged statements of the "secretary or…unit coordinator" that students were grouped by "age and not skill" (Tr. pp. 331-32) do no overcome the speculative nature of grouping claims when a student never attends the assigned public school site (M.C., 2015 WL 4464102, at *7; R.B., 15 F. Supp. 3d at 436; B.K., 12 F. Supp. 3d at 371; N.K., 961 F. Supp. 2d at 590; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Such claims are inherently speculative as the district cannot guarantee the composition of the class that the student would have attended (M.S. v. New York City Dep't of

Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]; cf. R.E., 694 F.3d at 187, 192 [noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP]).

Accordingly, as the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the student's IEP at the assigned public school site based on availability of a sensory gym and sensory equipment, the environment in the lunchroom, or the composition of the proposed classroom would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parents' claims related thereto (M.O., 2015 WL 4256024, at *7; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

VII. Conclusion

In summary, a review of the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2012-13 school year. Moreover, the parent's arguments pertaining to the assigned public school site are without merit. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED

THE CROSS-APPEAL IS DISMISSED

IT IS ORDERED that the IHO's decision, dated April 15, 2015, is modified by reversing those portions which found that the district denied the student a FAPE for the 2012-13 school year and which ordered the district to pay for the costs of the student's tuition at the Rebecca School for the 2012-13 school year; and

IT IS FURTHER ORDERED that the district shall ensure that when the CSE next convenes with respect to the student's IEP, that the inclusion of parent counseling and training shall be considered for inclusion on the IEP and prior written notice shall be issued thereafter consistent with the body of this decision.

Dated: **Albany, New York**
August 28, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER