The University of the State of New York

The State Education Department
State Review Officer
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No. 18-146

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Mount Vernon City School District

Appearances:
Law Offices of Gerry McMahon, LLC, attorneys for petitioners, by Geraldine A. McMahon, Esq., and Danielle L. McGee, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Thomas Scapoli, Esq.

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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for their son to attend an out-of-district public school at public expense for the 2017-18 school year. Petitioners also appeal the IHO's refusal to determine the student's pendency placement for the 2018-19 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior State-level appeal which concerned the 2016-17 school year (see Application of the Bd. of Educ., Appeal No. 17-097). Accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed and will not be repeated here in detail, except as is relevant herein.

Briefly, the student attended an 8:1+2 special class at an out-of-district public school for the 2014-15 and 2015-16 school years (first and second grades) pursuant to IEPs and received the related services of speech-language therapy, occupational therapy (OT), parent counseling and training, and, for the second year, a social skills group (Parent Ex. P at pp. 1, 13, 16; Dist. Ex. 3 at

pp. 1, 11-12, 14; see Dist. Ex. 4 at p. 1).[1] For the 2016-17 school year (third grade), a CSE recommended an 8:1+2 special class placement in the district, along with related services (Parent Ex. DD at pp. 1-2, 13-15);[2] however, the student continued to attend the special class at the out-of-district public school as his stay-put placement during the pendency of the prior administrative proceedings (see Application of the Bd. of Educ., Appeal No. 17-097; see also Parent Ex. LL at p. 1; Dist. Ex. 10 at p. 1).

In May 2017, a board certified behavior analysist (BCBA) conducted a private independent educational review of the student and recommended that he remain in his then-current out-of-district public school program and placement (Parent Ex. LL at pp. 1, 19).[3]

A CSE convened on June 15, 2017 to conduct the student's annual review and develop an IEP for the 2017-18 school year (fourth grade) (see Dist. Ex. 10).[4] Finding that the student remained eligible for special education as a student with autism,[5] the June 2017 CSE recommended that the student attend a 12-month school year program in a district 8:1+2 special class placement, attend adapted physical education twice per week and a "mainstream physical education" class once per week with the support of a teaching assistant or aide, and receive the related services of individual speech-language therapy once per six-day cycle, small group speech-language therapy twice per six-day cycle, individual OT twice per six-day cycle, individual parent counseling and training once per month, and a social skills group twice per week (id. at pp. 1, 13-16).[6] The CSE

[1] While the CSEs recommended that the student attend 8:1+2 special classes at the out-of-district public school placement, there is some indication in the hearing record that there were additional adults assigned to the classroom the student attended, and the class is sometimes referred to as an 8:1+4 special class (see Tr. pp. 518-20, 728; Parent Ex. R at p. 4).

[2] Both the district's exhibit 8 and the parents' exhibit DD represent similar copies of the IEP developed on June 24, 2016 (compare Dist. Ex. 8, with Parent Ex. DD; see Tr. pp. 107-09). Although both exhibits were admitted into evidence at the impartial hearing (see Tr. pp. 37, 109), the district originally omitted the parents' exhibit DD from the record submitted to the Office of State Review. The omission was corrected upon request. For purposes of this decision, the parents' exhibit is cited.

[3] The May 2017 educational review report included a document review, parent interview, and direct observations of the student in his then-current school setting; no new testing was conducted (see Parent Ex. LL).

[4] The June 2017 CSE meeting was recorded, and the audio recordings are part of the hearing record (Parent Ex. PP). The parents take issue with the IHO's citation to other sources of information regarding the content of that meeting, alleging instead that the audio recordings represented the best evidence of what was said at the meeting. However, for the purposes of this decision, while the audio recordings have been reviewed and relied upon, where evidence is available elsewhere in the hearing record that is consistent with the content of the audio recordings, such as in testimony or in the written summary of the CSE meeting, those sources have been cited instead or in addition to the audio recordings. While the audio recordings provide a verbatim representation of the meeting, it is at times difficult to identify who is speaking and the lack of a written transcript of the recording makes citation to particular points in the meeting difficult.

[5] 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]).

[6] For the summer portion of the 12-month school year, the June 2017 CSE recommended that the student attend the district 8:1+2 special class and receive related services of individual speech-language therapy once per week, small group speech-language therapy once per week, and individual OT twice per week (Dist. Ex. 10 at p. 14).

recommended that the student attend lunch and recess with typically developing peers, along with the one physical education class per week and "one extra period during the day such as art, physical education, or an academic period as appropriate" (id. at pp. 2, 15). The June 2017 CSE also developed 22 annual goals for the student and recommended supports to address the student's management needs, as well as supplementary aids and services/program modifications/ accommodations, testing accommodations, and door-to-door transportation (id. at pp. 9-16). According to the meeting information summary attached to the IEP, the parents were not in agreement with the CSE's "recommendation for placement, but [were] in agreement for [extended school year] and related service recommendations" (id. at p. 2).

A. Due Process Complaint Notice

By amended due process complaint notice dated January 2, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (Parent Ex. GGG at pp. 18-19).[7] The parents alleged that the June 2017 CSE "reduced [the student's] specialized services, supports, and programming" and developed an IEP that was not reasonably calculated to enable the student "to make meaningful educational progress" (id. at p. 12). According to the parents, the June 2017 CSE's recommendation of an 8:1+2 special class was not appropriate because the student required additional adult support in the classroom in order to make progress (id. at p. 13). The parents also alleged that the CSE "ignored critical information" about the student's present levels of educational performance so as to justify its reduction in the amount of "services and supports so that it could implement the IEP in-district" at the district elementary school (id. at pp. 12-13). The parents further alleged that the district failed to conduct its own evaluations or observations but instead presented information to the CSE provided by the out-of-district public school staff and the parents' private consultant, as well as the parents' input regarding the student's progress (id. at p. 13). The parents contended that the district ignored their private consultant's recommendation that the student remain in the out-of-district public school and that her report was not included on the IEP as having been reviewed by the CSE (id. at pp. 13, 17). The parents argued that the June 2017 CSE ignored information that the student's classroom in the out-of-district program often had four to six adults present, that the student received 2:1 or 1:1 instruction at times, that the student required significant 1:1 instruction, direct support throughout the school day, and dedicated 1:1 staffing for all mainstreaming opportunities, and that the student made progress in the out-of-district program (id. at pp. 13, 16). The parents also contended that the CSE ignored input from the out-of-district public school staff that the student required instruction during and after the school day to ensure generalization of skills to the community and failed to recommend services to achieve goals that required generalization of skills (id. at pp. 13-14).

The parents claimed that, despite the June 2017 CSE's proposal to move the student to a less supportive 8:1+2 special class in a district public school, the CSE failed to recommend other appropriate supports such as: a teacher aide or assistant teacher; 1:1 instructional time; sensory-based services or supports such as sensory breaks and access to a sensory diet and sensory room; extended school day services; any direct services or consultation by a BCBA; any home-based parent counseling and training; or a transition plan to assist the student with returning to an in-district school (Parent Ex. GGG at pp. 13-15, 16). The parents asserted that the CSE failed to

[7] The parents originally submitted a due process complaint notice dated July 28, 2017 (Dist. Ex. 1).

recommend appropriate social skills services, as the recommended social skills group did not include nondisabled peers and the IEP incorrectly stated the student's need for the group to be made up of students from the grade below and the grade above the student, rather than students below and at the student's grade level (id. at p. 14). The parents also alleged that the recommended in-district program was not the student's least restrictive environment (LRE) (id. at p. 15). The parents asserted that the district did not respond to the parents' request for information about the recommended program and the particular classroom to which the district assigned the student to attend and that they were denied meaningful participation in the development of the student's IEP (id. at pp. 15-16). The parents argued that the district members of the CSE unilaterally determined the recommendation that the student "move to an 8:1+2 setting" (id. at p. 16). The parents also claimed that the district refused to allow the parents or the parents' private consultant to observe the recommended district program (id. at pp. 16, 18-19). The parents objected to a statement in the June 2017 IEP indicating that they agreed with the CSE's recommendations for the student's summer program and related services (id. at p. 16).

The parent also raised claims pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) (section 504) (Parent Ex. GGG at p. 19). As relief, the parents requested "[c]ontinued placement" at the out-of-district public school for the 2017-18 school year, including extended school day services, as well as compensatory educational services for the hours of extended school day services the student missed (id. at p. 19).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on December 21, 2017, which concluded on June 4, 2018,[8] after seven days of proceedings (Tr. pp. 1-1156). The IHO issued an interim order dated May 9, 2018, denying the parents' request that their expert (the private BCBA) observe the recommended district special class (Interim IHO Decision at p. 6).[9, 10] Further, by email dated July 13, 2018, the IHO declined to issue a pendency order determining the student's stay put placement during the 2018-19 school year (Req. for Rev. Ex. A at p. 1).

In a decision dated November 18, 2018, the IHO concluded that the district offered the student a FAPE for the 2017-18 school year by demonstrating that the June 2017 IEP was

[8] The IHO's decision indicates on the cover page that the last day of the hearing was June 24, 2018 (IHO Decision at p. 1); however, the hearing transcript and body of the IHO's decision reflect that the last day of the hearing was June 4, 2018 (Tr. p. 1011; IHO Decision at pp. 4, 6).

[9] The pagination of the interim decision, not including the cover page, begins at page "0."

[10] In the interim decision, the IHO refers to letter briefs submitted by the parties in support of their respective positions relating to the parents' request that the private BCBA observe the district program (Interim IHO Decision at p. 0; see also Tr. p. 924). No such letter briefs were submitted with the hearing record to the Office of State Review. As discussed below, State regulation specifically requires that "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]" be a part of the hearing record (8 NYCRR 200.5[j][5][vi][b]). While the Office of State Review endeavors to identify any deficiencies in the hearing record and request that the district correct them in a timely manner (and in this instance, requested that the district correct record deficiencies on two occasions), the district is reminded that it carries the responsibility to file a complete copy of the record before the IHO with the Office of State Review (8 NYCRR 279.9[a]). Under the circumstances of this case, I decline to exercise my discretion to take remedial action against the district for the outstanding record deficiency (8 NYCRR 279.9[b]).

reasonably calculated to address the student's educational needs in light of his circumstances (IHO Decision at p. 14). The IHO found that the June 2017 IEP included a description of the student's functioning based on testing, as well as input from the student's teacher and related services providers, and revealed that the CSE considered the views of those who worked with the student in developing the IEP (id. at p. 13). The IHO considered the attributes of both the out-of-district public school program and the recommended district program and found the programs "similar" (id. at p. 10). The IHO noted attributes of the district program recommended for the student by the June 2017 CSE, including adapted physical education, speech-language therapy, OT (including sensory input, tools, and provision of sensory breaks), parent counseling and training, a social skills group, use of applied behavioral analysis (ABA) methods (as part of a program developed in collaboration with the Carbone Clinic and utilizing BCBAs), use of "Direct Instruction" (a curriculum that uses guided practice and step-by-step instruction), and access to "an after school program to address specific skills" (id. at pp. 10-11). The IHO noted that the district's recommended 8:1+2 special class included two teaching assistants able to provide instruction under the supervision of the teacher, as well as "curriculum and instruction us[ing] discreet steps with visual supports and repetition" (id. at p. 10).

The IHO noted testimony of the district's assistant director of pupil services that the student's management needs could have been addressed in an 8:1+2 special class (IHO Decision at p. 11). The IHO addressed whether the student would receive adequate support when moving to an 8:1+2 special class, weighing the student's success at the out-of-district public school against the testimony of the district's staff who believed an 8:1+2 special class was sufficient given the student's level of functioning (see id.). In particular, the IHO indicated that the evidence showed that the 8:1+2 special class ratio would be adequate for the student when "mainstreaming" in that "two teaching assistants travel" with the students to support them in settings with nondisabled peers (id.). Next, the IHO noted that the June 2017 IEP addressed the student's social needs through a social skills group during the school day, rather than in an after-school program (id. at pp. 11-12). The IHO stated his concern that the June 2017 IEP did not specifically list the student's need for ABA methodology or the recommendation for parent counseling and training but found "that the parents were aware of what the program had to offer," including the program's use of ABA (id. at p. 13). The IHO found that, although it was unclear that the parents understood what the parent counseling and training would have entailed, this "drawback in the district's case," on its own, did not amount to a denial of a FAPE (id.). With regard to the district's inability to "demonstrate that community outings would have been utilized in the district's program," the IHO relied on a finding from a prior SRO decision concerning this student, which determined that a failure to implement community outings would not amount to a material deviation from the student's IEP as to constitute a denial of a FAPE (id. at p. 12). While the IHO expressed sympathy toward the parents regarding their desire to continue the student's attendance at the out-of-district public school, he nonetheless determined that the district's program could have "successfully addressed [the student's] needs in a different manner, in a way that [the student] would likely also have shown growth" (id.). In so finding, the IHO determined that "the district's program appear[ed] reasonably calculated to address [the student's] learning needs successfully" and that, based on the testimony, it appeared that the June 2017 IEP could have been implemented at the district elementary school (id. at pp. 10-11, 12). Based on the foregoing, the IHO found the district offered the student a FAPE for the 2017-18 school year and denied the parents' request for funding of the student's attendance at the out-of-district public school (id. at p. 14).

IV. Appeal for State-Level Review

The parents appeal the IHO's determination that the district offered the student a FAPE for the 2017-18 school year. Initially, the parents allege that the IHO erred by finding that he lacked jurisdiction to issue an order regarding the student's stay-put placement for the 2018-19 school year. Next, the parents seek review of the appropriate legal standard applicable to the facts of the case since the parents did not unilaterally place the student at the out-of-district school. Turning to the merits, the parents allege that the IHO erred by engaging in a comparison of the student's program at the out-of-district public school with the June 2017 IEP to be implemented at the recommended district elementary school and by concluding that the June 2017 IEP was reasonably calculated to address the student's educational needs in light of his circumstances. The parents also contend that the IHO's decision was not well-reasoned, was not supported by the evidence in the hearing record, and failed to appropriately cite to legal authority. The parents further contend that the IHO misstated evidence—such as by referring to the ratio of the student's classroom in the out-of-district school as a 10:1+4 rather than an 8:1+4 special class[11] and by indicating that the main focus of the after-school program at the out-of-district school was social skills—and ignored testimony that the district did not conduct new testing of the student and that the recommended district placement did not offer extended school day services. The parents further allege that the IHO relied on retrospective testimony to conclude that the district could implement the June 2017 IEP. The parents also contend that the IHO failed to cite any legal authority for his conclusion that the district's failure to notify them of parent counseling and training was not a denial of a FAPE. Additionally, the parents argue that the IHO erred in his determination that the district's failure to demonstrate that the student would be provided with opportunities to generalize skills into the community did not rise to the level of a denial of a FAPE.[12]

The parents also assert that the IHO erred in failing to address all of their claims as set forth in their due process complaint notice. The parents specifically allege that the IHO failed to determine: whether the recommended 8:1+2 special class without 1:1 support was appropriate; whether the district offered sufficient mainstreaming opportunities based on the student's needs and abilities consistent with LRE mandates; whether the student required extended school day services in order to receive a FAPE; whether the parents' "right to meaningfully participate" was violated; and whether the student was offered appropriate sensory-based goals, services and accommodations. For relief, the parents request that the IHO's decision be reversed and that it be

[11] As elsewhere in his decision the IHO referenced the class as having an 8:1+4 ratio (see IHO Decision at p. 12), it appears, as the district argues, that the reference to 10 students was a typographical error (see id. at p. 11). As there is no indication that the reference to the class as having up to 10 students had any bearing on the IHO's ultimate determinations, this characterization will not be further discussed.

[12] The parents also allege that the IHO erred by identifying an interim index of the parents' exhibits in the final list of evidence, and by attaching to his decision an outdated statement regarding the parents' right to appeal, which referenced old regulations and an incorrect timeframe for appealing the IHO's decision. The issue of the exhibit list is discussed below but regarding the required statement of the parties' right to appeal (8 NYCRR 200.5[j][5][v]), the IHO is reminded that Part 279 of the Practice Regulations was amended, effective January 1, 2017, relating to procedures concerning appeals of IHO determinations. Notwithstanding the IHO's attachment of the outdated statement of the parties' right to appeal, the parents have not alleged that this error caused any harm to the student in this instance and the parents were not prevented from timely initiating this appeal. Accordingly, the error shall not be further discussed.

determined that the district failed to demonstrate that the June 2017 IEP was appropriate or that the district's elementary school could implement the IEP. Regarding pendency, the parents request a finding that the out-of-district school is the student's stay-put placement. Finally, the parents request that the district be directed to place the student at the out-of-district public school.[13]

In an answer, the district responds to the parents' claims and argues that the IHO's decision should be upheld. With regard to the issues that the parents allege the IHO did not address, the district contends that the IHO did address their claims and/or that the claims are without merit.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the

[13] The parents raised claims in their amended due process complaint notice that were not addressed by the IHO and the parents have not appealed from the IHO's failure to address these claims or otherwise asserted them on appeal as additional bases for reversing the IHO's determination that the district offered the student a FAPE. For example, the IHO did not address the parents' claims that the CSE failed to recommend direct services or consultation by a BCBA, failed to recommend home-based parent counseling and training, or failed to recommend a transition plan for the student to return to an in-district placement (compare Parent Ex. GGG at pp. 13-15, with IHO Decision at pp. 10-13). The regulations governing practice before the Office of State Review require that "[a] request for review shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[a]). Furthermore the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Accordingly, issues not identified in the request for review have been abandoned and will not be further discussed.

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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]).[14]

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

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

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

The parents have included with their request for review the following documents: an email from the IHO to the parties dated July 13, 2018 regarding the pendency issue, a memorandum of law in support of the parents' motion for an order on pendency dated July 11, 2018, and a letter brief in opposition to the parents' motion dated July 11, 2018 (Req. for Rev. Ex. 1), as well as the parents' final exhibit list dated May 18, 2018 (Req. for Rev. Ex. 2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). However, the documents included with the parents' request for review were or should have been included as part of the hearing record or attached to the IHO's decision and, therefore, do not represent additional evidence presented for the first time on appeal. State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "all briefs, arguments or written requests for an order filed by the parties for

[14] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][b], [c], [e]-[f]). Accordingly, the parties' submissions and the IHO's email regarding the pendency issue should have been part of the hearing record.[15] Further, State regulation requires the IHO to "attach to the decision a list identifying each exhibit admitted into evidence," identifying "each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]). Here, while the IHO's decision did not attach the required exhibit list, the IHO transmitted evidence lists to the district with a certification indicating that the lists set forth the documents which were admitted into evidence during the impartial hearing (Nov. 19, 2018 IHO Certification). In their request for review, the parents note that multiple versions of the parents' list of exhibits were included in the hearing record, none of which, the parents' maintain, was the final version attached to their request for review.[16] While the exhibit lists certified by the IHO—and in particular the list of the parents' exhibits—appear incomplete and/or inaccurate, a review of the hearing record as a whole, including the transcript of the proceedings and the various versions of the parents' exhibit list, provides a sufficient record of the exhibits received into evidence during the impartial hearing. Based on the foregoing, except to the extent the exhibits attached to the request for review are duplicative of documentation already in the hearing record, they have been considered as documentation required to be a part of the hearing record.

2. Pendency

The parents argue that the IHO erred by refusing to make a pendency determination regarding the 2018-19 school year on the ground that he lacked jurisdiction. The district contends that the IHO correctly declined to make a pendency determination.

The parents' second motion for an order on pendency was submitted on July 11, 2018, after the last day of hearing on June 4, 2018, but before the IHO rendered his final decision on November 18, 2018.[17] In an email to the parties dated July 13, 2018, the IHO declined to make a decision on pendency noting that the parties were currently in agreement and the student was receiving services at least through September 2018 (Req. for Rev. Ex. 1 at p. 1). The IHO surmised that the parties

[15] Review of the hearing record as submitted by the district reveals that the IHO received into evidence earlier submissions by the parties regarding pendency, both dated March 7, 2018, as IHO exhibits I and II (Tr. pp. 142, 349). While these exhibits were not originally included with the hearing record submitted by the district to the Office of State Review, upon request, the district did provide the exhibits. Further confusing the matter, the IHO also marked and received into evidence three different documents as IHO exhibits I through III—the IHO's May 9, 2018 interim decision, the district's October 29, 2018 post-hearing brief, and the parents' October 29, 2018 post-hearing brief, respectively—duplicating the IHO exhibit delineations I and II. It does not appear that the July 2018 submissions regarding pendency were received into evidence as exhibits; for ease of reference, these will be cited by reference to the exhibit to the parents' request for review (Req. for Rev. Ex. A).

[16] The parents correctly note that there are multiple copies of the parents' exhibit list that were submitted with the hearing record to the Office of State Review. The document submitted with the parents' request for review purported to be the final exhibit list does indicate the parents' offered exhibits A through MMM, however it does not delineate the parent exhibits that were withdrawn (e.g., Parent Exs. K, O).

[17] The hearing record contains no explanation for the delay of over five months between the last day of the hearing on June 4, 2018, and the record close date on November 8, 2018, in part, because the IHO failed to include any documentation in the hearing record relating to extensions of time to the decision timeline granted at the request of the parties, as required by State regulations (8 NYCRR 200.5[j][5][i], [iv], [vi][c]).

may cease to be in agreement in September 2018 but that the 2018-19 school year would likely be submitted to a different IHO and, only if the parents had not challenged the 2018-19 IEP by September 2018, would he consider pendency for the 2018-19 school year (id.).

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163[2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; T.M., 752 F.3d at 170-71; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the

child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Initially, the district's argument that the IHO did not have authority to rule on the issue of the student's pendency placement based upon the scope of the parents' due process complaint notice is without merit. The student's right to pendency automatically attached as of the filing of the due process complaint notice on July 28, 2017 (see Dist. Ex. 1; see also 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Child's Status During Proceedings, 71 Fed. Reg. 46710 [2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]), and therefore, a request for pendency is not required to be contained in a due process complaint or made "at any particular point in the proceedings" (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]; see E. Lyme, 790 F.3d at 455; M.R. v. Ridley Sch. Dist., 744 F.3d 112, 123-25 [3d Cir. 2014]; Murphy, 297 F.3d at 199-200).

Next, the district argues that the IHO properly refrained from determining pendency since the parent's allegations were speculative—based on the district's anticipated failure to implement pendency—and, accordingly, there was no dispute for the IHO to resolve. Considering the focus on maintaining the status quo during the proceeding and the time-sensitive nature of a pendency determination, an IHO may and should promptly address a parent's pendency claims, whenever raised ("Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5, and 200.16 of the Regulations of the Commissioner of Education, as Amended Effective February 1, 2014," at p. 7, Office of Special Educ. [Rev. Sept. 2016] [noting that, if there is a dispute regarding a student's pendency placement, it is incumbent upon the IHO "to render a written decision regarding pendency as soon as possible and prior to determining any other issue"], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf). Here, one of the district's own arguments against the IHO issuing a pendency determination—i.e., that the district should not be responsible for the student's pendency placement into the 2018-19 school year—reflects a dispute about pendency, which the IHO should have decided (see, e.g., Letter to Chassy, 30 IDELR 51 [OSEP 1997] [noting that "if the public agency and the parents are unable to agree on the child's current educational placement or on another placement for the child, the determination of what constitutes the child's current educational placement . . . generally is made by the hearing officer or by an appropriate State or Federal court"]). The parents should not have to wait for a lapse in the student's services in order to seek a determination where the district is unambiguously stating that it deems the student's pendency placement to have changed.

The parties are in agreement that the student's stay-put placement as of the commencement of the proceedings in this matter was the out-of-district public school and included the after-school

social skills group (Tr. pp. 146-47). The only dispute pertains to a question of the duration of the student's pendency.[18] The IDEA's stay-put provision explicitly states that "during the pendency of any proceedings conducted pursuant to [20 U.S.C. § 1415]," the student shall remain in his then-current educational placement "until all such proceedings have been completed" (20 U.S.C. § 1415[j] [emphasis added]; see also Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). Once a pendency placement has been established, it can only be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Schutz, 290 F.3d at 484-85; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; L.P., 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366). The stay-put placement is "not necessarily coterminous with the limits of the school year" and, instead, spans the "time necessary to review and adjudicate the merits of a single 'complaint' regarding evaluation or placement of the child" (Zvi D., 694 F.2d at 908; cf. M.R., 744 F.3d at 125-28; Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 1038-39 [9th Cir. 2009] [finding that the "automatic" nature of the stay continues to apply in any of the statutory proceedings, including to appeals at the circuit court level and to hold otherwise would not "follow the general policy behind IDEA, which is to keep from disturbing the child throughout the statutory process"]).[19]

There being no other pendency changing event in July 2018, the IHO should have issued an order on pendency establishing that the student's pendency placement would continue until the proceedings completed.

3. Legal Standard

Before turning to the merits of the parents' appeal, review of the parents' contentions that the IHO erred in applying a Burlington/Carter tuition reimbursement analysis in his decision is warranted. The student was initially placed at the out-of-district public school by the district for the 2014-15 and 2015-16 school years pursuant to IEPs (Parent Ex. P at pp. 1, 13, 16; Dist. Ex. 3 at pp. 1, 11-12, 14). For the 2016-17 school year, the district recommended an 8:1+2 special class in a district elementary school (Parent Ex. DD at pp. 1-2, 13-15), but the parents disagreed with this recommendation and filed a due process complaint notice that requested as relief that the student "remain in his current program at [the out-of-district public school] fully supported by [the district]" (Parent Ex. FF at p. 4). The student continued to attend the out-of-district public school as his stay-put placement during the pendency of the prior administrative proceedings (see Application of the Bd. of Educ., Appeal No. 17-097; see also Parent Ex. LL at p. 1; Dist. Ex. 10 at p. 1). For the 2017-18 school year, the parents again rejected the CSE's recommendation and sought continued placement of the student at the out-of-district public school for the 2017-18

[18] The district represents that the parents filed a due process complaint notice regarding the student's IEP for the 2018-19 school year and that the district "paid for the student to participate in the after school program for the entire 2018-2019 school year, rendering any pendency claim moot" (Answer at p. 2 n.1). Notwithstanding the district's representation, because there is no evidence in the hearing record to establish the district's representations and, further, in order to put the issue to rest, the issue is briefly discussed.

[19] Contrary to the district's argument to the IHO (Req. for Rev. Ex. A at p. 17), the district remained obligated to ensure that the student received the pendency placement notwithstanding that the CSE developed an IEP for the student for the 2018-19 school year that, at the time, the parents had not yet challenged (see Letter to Watson, 48 IDELR 284 [OSEP 2007]).

school year (Parent Ex. GGG at p. 19). In their request for review, the parents request an order directing the district to place the student at the out-of-district public school without specifying a particular school year, undoubtedly because the 2017-18 school year has concluded.

The confusion about the appropriate legal standard is circumscribed to the remedy sought by the parents. In general, before reaching such an issue, the IHO was tasked with making a decision on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The IHO accomplished this analysis and, since it is determined herein that the IHO correctly concluded that the district offered the student a FAPE for the 2017-18 school year, it is unnecessary to consider the remedy sought by parent. Briefly, however, the facts of this case support the parents' observation that the request for relief is not tuition reimbursement. After Burlington/Carter analyses became prevalent in case law, Congress codified the reimbursement obligations of public agencies for private, parentally selected programs, providing in a subsection entitled "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency" (20 U.S.C. § 1412[a][10][C]). Given that it was the district, not the parents, that placed the student at the out-of-district school; that the out-of-district school was a public school, not a private school or facility; and that the student has continued attending this school without the parents undertaking the requisite financial risk of a unilateral placement, the matter does not fall into the Burlington/Carter framework. Instead, this matter is more akin to a request that the district prospectively place the student at the out-of-district public school for the 2017-18 school year. The IHO's questioning of the appropriate standard is understandable. At the time of the parents' initial due process complaint notice, the 2017-18 school year had just begun (see Dist. Ex. 1). The IHO's decision was issued during the 2018-19 school year (see IHO Decision at p. 14). What was a request for prospective relief for the 2017-18 school year at the time of the due process complaint notice, could no longer be awarded simply due to the length of the proceedings. Even if the parents were entitled to relief in this matter, the 2017-18 school year has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to revise the student's program and should have developed a new IEP for the student for the 2018-19 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). An award of prospective placement could, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

To address the parents' inquiry more directly, however, assuming that it was found that the district denied the student a FAPE and that a prospective award was warranted, it would not be error to examine the appropriateness of the parents' preferred prospective placement by applying an analysis similar to that applied in examining the appropriateness of a unilateral placement (see Application of a Student with a Disability, Appeal No. 16-060); to wit, whether the parents' preferred school placement was "reasonably calculated to enable the child to receive educational

benefits" (Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003]).

As the district argues, however, the question is largely academic in this matter given that the district offered the student a FAPE. There being no past harm to remediate in this matter, no relief, prospective or otherwise is warranted, but, if the parents do not agree with the CSE's recommendation for the student's program for the 2018-19 school year, they may obtain appropriate relief by challenging that IEP in a separate proceeding (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]), which, according to the district, the parents have already done.

B. Student's Needs

Although the student's needs are not directly in dispute, a discussion thereof provides context for the disputed issues to be resolved.[20]

The hearing record reflects that the June 2017 CSE considered the following evaluative information: a December 2015 psychoeducational evaluation report, which included the results from psychological testing administered in November 2015, a February 2016 OT reevaluation report, an April 2016 speech-language reevaluation report, results of a May 2017 administration

[20] The parents do assert on appeal that the IHO ignored evidence that the district did not conduct any current testing and relied on staff from the out-of-district public school to reach its recommendations; however, the parents do not allege that the resultant June 2017 IEP inaccurately described the student's needs. To the extent the parents' argument could be read as alleging that the 2015 and 2016 evaluative information conducted by the district was untimely, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (20 U.S.C. § 1414[a][2][b][i]-[ii]; 34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]); accordingly, notwithstanding that the district did not conduct new standardized assessments of the student in 2017 (see Tr. p. 312), this is not a violation of the IDEA. Moreover, as described herein, the district had newer information about the student, including information provided by the parents and the out-of-district school staff, and, contrary to the parents' implication, the district's reliance on these sources of information was entirely appropriate. 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]). When a student has not been attending a district public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the school the student was attending (see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [indicating that based upon 20 U.S.C. § 1414(c)(1)(A), a CSE is required in part to "'review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers'"]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013] [upholding a district's reliance upon information obtained from the student's nonpublic school personnel, including sufficiently comprehensive progress reports, in formulating the IEP]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at *23 [S.D.N.Y. March 29, 2013]). Accordingly, to the extent the parents' request for review might be read as raising any arguments regarding the evaluative information conducted by the district or available to the June 2017 CSE, such arguments are without merit.

of the Receptive One Word Picture Vocabulary Test, Fourth Edition (ROWPVT-4), a 2016-17 annual review report written by the students' classroom teacher (with results from the Brigance Comprehensive Inventory of Basic Skills II), and the May 2017 independent educational review report (see Tr. pp. 734-36, 928-29; Parent Exs. LL; OO; PP; Dist. Exs. 4; 6; 7; 10 at pp. 3-8).[21]

An assessment of the student's intellectual functioning was completed in November 2015 (Dist. Ex. 4). The evaluator stated that, due to significant discrepancies between the student's Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) index scores, a full-scale IQ was not included in the resultant December 2015 psychoeducational evaluation report as it would not be an appropriate measure of the student's abilities (id. at p. 2). According to WISC-V index scores, the student performed: below the first percentile in the areas of verbal comprehension, working memory, and processing speed; at the 7th percentile on the visual spatial index; and at the 21st percentile on the fluid reasoning index (id.). The evaluator indicated that the student's inconsistent abilities on the various subtests could be attributed in part to significant echolalia observed during much of the evaluation, and she opined that the WISC-V scores were likely artificially low (id.). On an adaptive functioning measure completed by the student's then-current teacher, the student's overall adaptive behavior scores fell within the extremely low to borderline ranges (id. at p. 4).

According to the April 2016 speech-language reevaluation report, the student exhibited moderate delays in receptive and expressive language skills that directly affected his ability to access the curriculum and "manage the language mediated aspects of learning" (Dist. Ex. 6 at pp. 2, 6-9). Regarding the student's pragmatic language skills, the speech-language pathologist reported that the student had difficulty evaluating moods/emotions and, although he was familiar with conversational turn-taking, he did not use strategies when he became "stuck" (id. at p. 3).

The CSE meeting information summary and the present levels of performance section of the June 2017 IEP included a detailed description of the student's then-current academic functioning levels (see Dist. Ex. 10 at pp. 1-2, 6-9). According to results of the Brigance Comprehensive Inventory of Basic Skills II completed around the time of the 2017 annual review, the student was able to read grade level words with accuracy and fluency (Parent Ex. OO at pp. 1-2; Dist. Ex. 10 at p. 7 see Tr. pp. 928-29). Reading comprehension was an area of weakness, and the teacher noted that the student struggled to use text to answer questions correctly when given a short reading passage of three to five sentences (Parent Ex. OO at p. 2; Dist. Ex. 10 at p. 7). The student was better able to answer questions related to an oral reading passage when given "fill in the blank," illustrations, visual support, and verbal prompting (Parent Ex. OO at p. 2; Dist. Ex. 10 at p. 7). With respect to written expression, the student was able to respond to writing prompts and independently write one to two sentences, but he required verbal prompting to construct complete sentences with appropriate syntax and grammar (Parent Ex. OO at p. 2; Dist. Ex. 10 at p. 7). The student was successful spelling words on a third-grade level (Parent Ex. OO at p. 2; Dist. Ex. 10 at p. 7). The teacher indicated that the student's handwriting skills had improved and he was writing within one inch lines without visual supports and using appropriate spacing

[21] Although not listed under the evaluation results section of the June 2017 IEP, the 2016-17 annual review report written by the classroom teacher and the May 2017 independent educational review report were discussed at the June 2017 CSE meeting (see Tr. pp. 928-29; Parent Ex. PP; see also Parent Exs. LL; OO). The June 2017 IEP also listed 2014 and 2015 evaluation reports and 2016 parent report and observations in the evaluation results section of the IEP (Dist. Ex. 10 at pp. 1, 6).

between words (Parent Ex. OO at p. 2; Dist. Ex. 10 at p. 7). Math was noted to be an area of interest and strength for the student (Parent Ex. OO at p. 2; Dist. Ex. 10 at p. 8). The student was able to complete double digit addition and subtraction with regrouping (Parent Ex. OO at p. 2; Dist. Ex. 10 at p. 8). Word problems were described as challenging and the student required assistance to solve the problems, including visual supports, graphic organizers, and manipulatives (Parent Ex. OO at p. 3; Dist. Ex. 10 at p. 8).

The speech-language pathologist reported to the June 2017 CSE that the student had worked on one and two step directions and was able to complete functional one to two step directions with prompts; however, he required extra support for listening comprehension (Dist. Ex. 10 at pp. 2, 6). Expressively, the student had made gains when asked to verbalize two details to describe a picture during a structured activity, but he had difficulty generalizing this skill across tasks (id. at p. 6). Although the student answered "wh" questions about his day/background knowledge, he struggled answering questions about stories (id.).

Socially, the June 2017 IEP indicated that the student initiated greetings with peers and adults, responded to greetings with variable eye contact, interacted more with peers, and exhibited increased verbal spontaneity throughout the school day (Dist. Ex. 10 at pp. 2, 6). According to the IEP, the student was friendly with peers, interacted with other students when prompted, and showed interest in playing with classmates during preferred activities (id. at p. 9). Based on his teacher's report reflected in the IEP, the student was able to follow a variety of daily routines within the classroom, but he continued to require support throughout the day (id.). The student was able to transition to various parts of the school building and between activities within the classroom with minimal assistance (id.). The student referred to a daily schedule to complete academic tasks, but he required redirection to remain on task and prompting to move to the next task on his schedule (id.). The IEP indicated that the student continued to require a "considerable amount of support to promote social communication and peer interaction" (id.).

With respect to motor skills, the June 2017 IEP reflected reports from the occupational therapist that the student continued to make steady progress, enjoyed sensory motor activities, and had made gains in strength and endurance, as well as improvements in handwriting skills (Dist. Ex. 10 at p. 9). The student required a sensory diet throughout his school day to assist in regulation of sensory processing and modulation needed for optimal functioning (id.). He continued to exhibit "vulnerability regarding spatial relations and visual motor skills," which affected graphomotor tasks (id.).

C. June 2017 IEP

1. Support for Sensory Needs

The parents allege that the IHO erred by not addressing their claim that the June 2017 CSE failed to recommend sensory-based goals, services, and accommodations.

According to the special education teacher's 2016-17 annual review report, the student was able to follow the daily routines of the classroom, but he continued to require support throughout the day, such as redirection to remain on task, prompting to move on to the next task, and a sensory diet to help regulate sensory processing and modulation needed for optimal functioning (Parent Ex. OO at pp. 1, 3). The teacher stated that the student displayed various behaviors (e.g., chewing

his clothing, hitting his hands together, jumping out of his seat, repetitive speech, and squeezing people or objects) throughout the day that interfered with his participation in daily activities (id. at p. 3). The student's sensory diet included regular use of a sensory room (id.). The teacher reported that the student responded well to sensory breaks throughout the day to increase attention and appropriate behaviors in the classroom and mainstream setting and prompting to remain focused on morning writing tasks (id. at p. 1).

The CSE meeting information summary attached to the June 2017 IEP indicated that the CSE discussed that the student received frequent sensory breaks as needed, had scheduled breaks, and also that he would ask for breaks, or ask to use a bean bag, receive deep pressure, or use the sensory room (Dist. Ex. 10 at p. 1). The June 2017 IEP present levels of performance included information from the teacher's annual review report about the student's sensory needs including that he required a sensory diet, along with "the regular use of a sensory room designed for such purposes," and access to sensory breaks throughout his day to increase attention to task (compare Parent Ex. OO at p. 3, with Dist. Ex. 10 at pp. 9-10). Additionally, the June 2017 IEP reflected reports from the occupational therapist that the student enjoyed sensory motor activities at the start of each session and provided that the student would receive 30-minutes of individual OT twice per six-day cycle (Dist. Ex. 10 at pp. 9, 13).

The district special education teacher of the recommended 8:1+2 special class described opportunities for sensory input both in the classroom and in the building, including an area of the classroom designated for sensory input (with several different bins of sand, rice, and beans, as well as different types of playdough and slime), a designated space for OT in the building, and a separate area with a swing that was accessible to students throughout the day (Tr. pp. 376-77, 405-07).[22] In addition to having student strengths and needs evaluated by the occupational therapist and being provided with sensory input during OT sessions, the teacher explained how sensory activities were also incorporated in the classroom (e.g., yoga, dancing, use of sensory table) (Tr. pp. 407-08). The parent argues that the testimony of the district special education teacher is impermissibly retrospective and that the IHO erred in relying on it to describe the sensory supports available in the district proposed classroom and school; however, since the IEP described the student's needs for a sensory diet, access to a sensory room, and access to sensory breaks, testimony describing the manner in which such supports were available in the district proposed classroom and school does not constitute after-the-fact testimony used to "rehabilitate a deficient IEP"; instead, the testimony "explains or justifies the services listed in the IEP" and, thus, may be considered (R.E., 694 F.3d at 186, 188; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not

[22] Similarly, the student's classroom teacher from the out-of-district public school program testified that, during the 2016-17 school year at the out-of-district school, the student had access to sensory support in the gym, "classroom sensory," as well as the sensory room (Tr. pp. 743-44). The teacher described the sensory room at the out-of-district school as "just a separate smaller room," apart from the OT room, with furniture, activities, and equipment (Tr. pp. 744-45). Although the parents argue that the proposed district public school did not have a "sensory room," they point to no evidence that the OT room, the area with the swing, or the area in the classroom described by the district special education teacher (Tr. pp. 376-77, 405-07) were insufficient to provide the student access to sensory activities and equipment in a manner sufficient to address his needs.

introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'" [internal citations omitted]).

The June 2017 IEP did not include annual goals per se related to the student's sensory needs; however, as discussed, the IEP otherwise provided supports to address this need and courts have determined that an IEP does not need to identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE. (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Overall, the June 2017 described and addressed the student's sensory needs consistent with the information available to it; accordingly, the parents' claim that the IEP failed to address the student's sensory needs is without merit.

2. 8:1+2 Special Class Placement

On appeal, the parties dispute whether the June 2017 CSE's recommendation for an 8:1+2 special class placement was appropriate to address the student's needs. Specifically, the parents argue that the IHO erred by not addressing their claim that the district failed to offer an appropriate IEP when the June 2017 CSE "reduced" the special class ratio recommendation from an 8:1+4 to an 8:1+2 special class and failed to offer the student a 1:1 "teaching aide."[23] The parents further take issue with the IHO's analysis to the extent he improperly compared the program recommended by the June 2017 CSE to the program the student received at the out-of-district public school.[24]

[23] The student's IEPs from August 2014, June 2015, June 2016, and June 2017 all included a placement recommendation for an 8:1+2 special class (Parent Exs. P at p. 13; DD at p. 13; Dist. Exs. 3 at p. 11; 10 at p. 13).

[24] The parents rely on a statement in the decision of an SRO in the prior administrative appeal involving this student that the IHO in that matter improperly compared the district's proposed classroom to the out-of-district program (see Application of a Student with a Disability, Appeal No. 17-097); however, that statement pertained to the nature of the claims at issue there. To be sure, it has been held that comparisons of a unilateral placement to a public placement are not a relevant inquiry when determining whether the district offered the student a FAPE (see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]). However, here, where the student is receiving instruction in a program originally recommended by the district CSE, the student's progress under the prior IEP—or, in this case, in the stay put placement based upon the last agreed upon IEP—may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate (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, at *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 [Dec. 2010]; available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

The student's special education teacher for the 2016-17 school year, who participated in the June 2017 CSE meeting, testified that, during that school year, the student's special class at the out-of-district school was composed of herself as the lead teacher of the class, one teaching assistant, three to four teacher aides, and eight students (Tr. pp. 722-27; see Dist. Ex. 10 at p. 2). The student received 1:1 instruction to sustain focus when he was taught new concepts and he required adult support for academic instruction, following his schedule, and when in the mainstream setting (Tr. pp. 748, 765-66; see Dist. Ex. 10 at pp. 1, 2). The special education teacher noted that the student needed redirection to follow through on tasks throughout the day (Tr. pp. 746-48; see Dist. Ex. 10 at p. 9). She reported to the June 2017 CSE that the student was cooperative and compliant when asked to do his daily work independently and that he responded well to a positive reinforcement system, asked for breaks appropriately, worked independently on technology-based academic programs, was an active and engaged participant during circle time, and performed his role as a class leader in an effective manner (Tr. pp. 737-48; Parent Ex. OO at p. 1; see District Ex. 10 at p. 1). The special education teacher also reported to the CSE that the student had made some "great progress" during the 2016-17 school year, followed his schedule independently, knew what was expected of him during academic tasks, and navigated the building to go to services (Dist. Ex. 10 at pp. 1-2).[25]

The June 2017 CSE reviewed the private BCBA's May 2017 independent educational review report that included observations of the student working 1:1, following teacher directions given to the class, working in a group of two with a teacher, working in a group of three with a counselor, and working independently on a computer (Parent Ex. LL at pp. 11-13, 15; see Tr. pp. 1040-42). The private BCBA also noted that, according to teacher report, the student transitioned independently from the classroom to related services (Parent Ex. LL at p. 12).[26]

The district supervisor of special education, who acted as the chairperson of the June 2017 CSE (CSE chairperson), testified about the June 2017 CSE's discussion regarding the student's progress and the amount of teacher support he required (Tr. pp. 517-25). The CSE chairperson opined that the June 2017 progress report provided documentary evidence that the student did not require as much adult support as was in an 8:1+4 special class because the student had achieved his study skills goals (i.e. maintaining attention on task during class lessons and assignments in order to complete assignments on time on a daily basis across all academic settings and independently coming to a group meeting [e.g., circle time, sitting, and taking turns]) and because related service providers indicated that the student could navigate the building independently (see Tr. pp. 517-27; Parent Ex. PP; Dist. Exs. 9 at p. 1; 10 at pp. 1-2).

The June 2017 CSE recommended an 8:1+2 special class placement for the student for the 2017-18 school year. State regulations provide that a special class placement with a maximum class size not to exceed 8 students, staffed with one or more supplementary school personnel, is

[25] The audio recording of the June 2017 CSE meeting reveals that during the meeting one committee member stated that the student had made progress in the out-of-district program over the last three years and, although she could not determine if an 8:1+2 special class would be appropriate for the student, she also stated that there was no reason to believe the student was not ready for an 8:1+2 special class (Parent Ex. PP).

[26] Although the private BCBA concluded that the district's recommended special class placement would not provide the student with an appropriate education, that conclusion was based upon her opinion that the frequency of ABA consultation was insufficient, and not based upon this specific student's ability to function with the level of adult support available in an 8:1+2 special class (see Parent Ex. LL at pp. 18-19).

designed for "students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b]). The district director of student services and the district school psychologist testified that there were two certified teaching assistants in the 8:1+2 special class who were able to provide direct instruction to students under the guidance of the special education teacher (Tr. pp. 195, 198-99, 273-74). According to the school psychologist, the difference between the district recommended 8:1+2 special class composed of a special education teacher and two teaching assistants, and an 8:1+4 special class composed of a special education teacher and four teacher aides, was in the duties the teaching assistants could perform versus those of the teacher aides (Tr. p. 198). She further testified that pursuant to State regulations, teacher aides can assist with non-medical supports, provide redirection and prompting, and assist with certain areas of behavior plans, whereas teaching assistants could provide instructional support that aides are not able to provide (Tr. p. 199).[27]

The June 2017 IEP reflected that the student required verbal prompting and positive reinforcement to remain on task and complete activities, and that he learned "best" when given tasks that were broken down into discrete steps with 1:1 direct instruction (Dist. Ex. 10 at pp. 9-10). To meet those needs, the district school psychologist stated that the 8:1+2 special class provided a high level of support, small group instruction, and individual instruction (Tr. p. 195). The district special education teacher of the proposed district classroom testified that the 8:1+2 special class program was individualized based on a student's needs and, with two teaching assistants in the classroom, the special education teacher was able to provide individualized instruction to one student while the teaching assistants were available to deliver instruction to other groups of students (Tr. pp. 395-96). The school psychologist opined that the 8:1+2 special class recommendation seemed to balance the student's need for instructional support—such that the presence of the teaching assistants in the 8:1+2 special class was "important"—with his ability to perform many skills with minimal assistance (Tr. p. 210).

Regarding the other supports and services provided in the June 2017 IEP, the CSE recommended that the student receive the following resources and accommodations: a small teacher to student ratio, a highly structured environment, a modified curriculum, a token economy, verbal prompting, positive reinforcement, sensory breaks, tasks and directions broken down into discrete steps, 1:1 instruction, visual cues and support, a visual schedule, sentence completion tasks, and repetition of information (Dist. Ex. 10 at pp. 9-10, 13). The following testing accommodations were also included in the June 2017 IEP: extended time, tests administered in a separate location, on-task focusing prompts, directions and test passages read to the student, answers recorded in test booklet, and use of a scribe (id. at pp. 14-15). Additionally, the June 2017

[27] Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf).

IEP also included 22 annual goals designed to address the student's reading, writing, mathematics, speech-language, social/emotional/behavioral, motor, and daily living skill needs (id. at pp. 10-12). To address communication and motor needs, the June 2017 CSE recommended that the student receive per 6-day cycle: one session of individual and two sessions of group speech-language therapy, and two sessions of individual OT (id. at p. 13).

Turning to the parents' specific argument that the 8:1+2 special class recommendation offered insufficient adult support without an additional recommendation for a 1:1 "teaching aide," State regulations regarding the recommendation of supplementary school personnel require consideration of a number of factors, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations, the portion of the day for which the student needs 1:1 support, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]).

The school psychologist discussed the importance of the CSE weighing the student's level of independence versus his need for 1:1 assistance, and she indicated that supports were incorporated into the IEP to address the student's need for prompting, visual aids, and individualized instruction (Tr. pp. 209-14). After reviewing the student's 2016-17 IEP annual goals progress report and the June 2017 IEP present levels of performance, the school psychologist opined that the student did not require a 1:1 aide because he had achieved his goals or was performing tasks with minimal assistance (e.g., maintaining attention, transitioning, taking turns), the student was not exhibiting any significant behaviors, and the IEP included the necessary information and supports for the student to be successful (e.g., social skills groups, breaking down directions, token economy, visual cues, visual schedule, annual goals) (Tr. pp. 199-210, 213-17, 219-21). She further testified about State guidance regarding the circumstances in which recommending a 1:1 aide would be appropriate (e.g., when a student with attentional or behavioral needs required support or documentation to be mainstreamed into a general education classroom; when a student has medical needs that have to be addressed throughout the day; when a student has significant behavioral needs that require consistent data collection throughout the day) and concluded that a 1:1 aide would not be appropriate based on the student's present functioning levels (Tr. pp. 211-12; see Parent Exs. LL; OO; Dist. Ex. 9).[28]

Based on the foregoing, the hearing record supports the IHO's conclusion that the CSE's recommendation of an 8:1+2 special class, in conjunction with the recommended related services and program accommodations described above, was designed to provide the student with sufficient individualized support such that the IEP was reasonably calculated to enable the student to receive educational benefits for the 2017-18 school year. While the parent may have preferred the higher adult to student class ratio at the out-of-district public school, the district is not required to replicate the preferred setting, when the district's recommendation is appropriate (see, e.g., Z.D. v.

[28] State regulations were amended, effective June 29, 2016, requiring CSEs to consider certain factors prior to determining that a student needs a one-to-one aide (see 8 NYCRR 200.4[d][3]). While it is not clear from the hearing record to what guidance the district school psychologist was referring, a document published in 2012 by the State Education Department outlined similar considerations to those now contained in the regulations ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Mem. [Jan. 2012], available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf).

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]).

3. Extended School Day – Social Skills

The parents allege that the IHO erred in failing to address whether the June 2017 CSE failed to offer the student a FAPE by refusing to recommend extended school day services. However, the IHO did make a determination pertaining to this issue in that the IHO determined that the extended school day services which the parents sought (i.e., the services provided at the out-of-district school) consisted of a social skills group and that the June 2017 IEP addressed the student's social needs through a social skills group during the school day, rather than in an after-school program (IHO Decision at pp. 11-12).

According to the CSE meeting information summary, the school psychologist from the out-of-district public school reported to the June 2017 CSE that the student attended an after-school program at the out-of-district school three times per week for one hour and that the program was "for recreational skills in a leisure setting," where the student worked on "reinforcing IEP goals and generalization" of skills that the student learned during the school day (Dist. Ex. 10 at p. 2). According to the meeting information summary, some of the topics addressed during the after-school program included following directions during play activities, group settings, spatial concepts and increased length of direction, making and responding to greetings, remaining on topic of conversation, observation of turn-taking rules, making eye contact, and asking for help from others (id.). The after-school program also included "[p]articipating in play activities with peers, listening to read a-louds, walk through of books and speaking about the book, arts and crafts, play doh, water and sand play," playing educational games and cooking, as well as music and movement (id.).

The June 2017 IEP present levels of performance indicated that the student initiated greetings with peers and adults, responded to greetings with variable eye contact, enjoyed playing games, inconsistently obtained a peer's attention prior to asking a question, and at times, provided an answer to a question posed to a peer without waiting for a response (Dist. Ex. 10 at p. 6). The student was described as friendly with classmates and peers, able to interact with other students when prompted, and showed interest in playing with classmates during preferred activities (id. at p. 9). The IEP also reflected the student's need for "a considerable amount of support to promote social communication and peer interaction" and "further social-emotional skill development via social skills groups, direct instruction, and exposure to typically developing peers" (id.).

To address the student's social skill and pragmatic language needs, the June 2017 IEP provided annual goals to improve the student's ability: to gain the attention of his peers before commenting/requesting; to pose a question to his peer and wait for an answer; to strengthen reciprocal conversation and question/answer skills with a peer; and engage in appropriate cooperative social play interactions initiated by others (Dist. Ex. 10 at pp. 11-12; see Tr. pp. 215-17, 514-15). Additionally, the CSE recommended that the student receive three sessions per week of speech-language therapy and twice weekly small group social skills instruction consisting of one session with peers in the same grade and one with students in the grade below (Dist. Ex. 10 at p. 13).

When asked if, in addition to the services recommended in the June 2017 IEP, the student required an additional three hours per week of a social skills program, the district school psychologist testified that, given the pace of the student's progress and because what he needed to improve—his reciprocal conversation skills and ability to respond to conversations initiated by others—consisted of skill areas that he could engage in throughout the school day "in situ," additional social skills instruction was not needed (Tr. pp. 217-18). The chairperson of the June 2017 CSE meeting testified that, if three after-school sessions were added to the two sessions of social skills training already included on the June 2017 IEP, the result would be daily social skills training, which the student did not require to further his skills in this area (Tr. p. 534). The CSE chairperson also stated that the student needed to work on skills that required opportunities for peer modeling and the acquisition of appropriate work-task behavior, neither of which would be addressed in an after-school program, as she noted that the student's then-current after-school program was made up of classmates from his special class and did not provide access to general education peers for modeling, and that the student's behaviors having to do with attention to task could be addressed in the special class setting (Tr. pp. 534-35).

Although a June 2017 CSE meeting participant from the out-of-district public school recommended that the student continue to participate in the after-school program, when asked how to determine if the after-school program was necessary for the student to make progress, the participant told the committee that it was hard to tease out, because the after-school program was considered to be part of the special education program in that school (see Parent Ex. PP). Further review of the audio recording of the June 2017 CSE meeting reflects conflicting discussion about whether or not the out-of-district after-school social skills program worked on the student's IEP annual goals (see Parent Ex. PP).[29] Whether or not the after-school program addressed the IEP goals, the CSE chairperson concluded that there was no data presented that showed the student needed the after-school program, rather, the data presented showed that the student had made progress toward his goals during his school day program (Tr. pp. 515-16; see Tr. pp. 557-58).[30] Additionally, despite the June 2017 CSE's discussion that the extended school day program was "good" because the student was able to generalize his skills in that setting, the CSE chairperson testified that the district's responsibility was that the student learn the skills and not the generalization of those skills (Tr. pp. 511-14).

Even to the extent the after-school program the student attended at the out-of-district school worked on the student's annual goals during that time, it was for the stated purpose of reinforcing and generalizing skills (see Dist. Ex. 10 at p. 2), and several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL

[29] The audio recording reflected discussion by the parent that the teacher had provided specific information about how the after-school program addressed the skills in the goals, including literacy, social skills, answering "WH" questions, sensory activities, educational games, community skills, and verbalization of illustrations, although another participant at the meeting stated that the after-school program did not work on goals (see Parent Ex. PP).

[30] The CSE chairperson testified that, although the student did not need an after-school program to achieve his IEP goals, she did not believe the student should be excluded from the program if the out-of-district public school was providing it (Tr. pp. 568-72).

3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). The parents' private BCBA was not able to say that without an extended day program, the student would not have been able to make progress; instead, she testified that the extended school day enhanced the student's opportunity to progress and also provided him with additional opportunities for generalization of skills (Tr. pp. 1102-03, 1117-18). As such, the student does not require extended day services in order to receive an educational benefit from his school program, therefore, they were not required for the provision of a FAPE.

Accordingly—and consistent with the IHO's decision—the evidence in the hearing record reveals that the special education program offered in the June 2017 IEP addressed the student's identified social skill needs such that extended school day services were not required (see IHO Decision at pp. 11-12; see generally Dist. Ex. 10).[31]

4. Parent Counseling and Training

The parents allege that the IHO erred in his conclusion that the district's failure to notify the parents of parent counseling and training did not amount to a denial of a FAPE or significantly impede the parents right to meaningfully participate.

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]).

Initially, the June 2017 IEP recommended one 30-minute session of individual parent counseling and training services per month (Dist. Ex. 10 at p. 13). Accordingly, it appears that the IHO's determination that parent counseling and training was not "specifically listed" on the IEP was inaccurate (IHO Decision at p. 13). Further, it is unclear what the IHO meant when he opined that it was unclear whether the parents "understood what the district's parent counseling and training would have entailed" (id.). Ultimately, however, even assuming that the IHO's decision may be read to describe a procedural violation relating to parent counseling and training, the Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 122-23 [2d Cir. 2016]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191; see also A.M. v. New York City Dep't of Educ., 845 F.3d

[31] The student did not receive extended day services from September 2017-April 2018; yet, his teacher testified that the student continued to make progress towards his annual goals during the 2017-18 school year (Tr. p. 769).

523, 538 [2d Cir. 2017]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; but see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80-82 [2d Cir. 2014]). The Second Circuit explained that, "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 2013 WL 3814669 [2d Cir. Jul. 24, 2013]).

Here, the hearing record does not support a finding that the district committed a procedural violation pertaining to parent counseling and training or that any failure to communicate to the parents what parent counseling and training would entail would otherwise contribute to a finding of a denial of a FAPE.

5. Least Restrictive Environment

The parents allege that the IHO erred in failing to address whether the June 2017 IEP set forth a program that met the mandates of LRE. Initially, the IHO did address the parents' claim about the recommended mainstreaming opportunities, finding that the evidence showed that the 8:1+2 special class ratio would be adequate for the student when "mainstreaming" in that "two teaching assistants travel" with the students to support them in settings with nondisabled peers (IHO Decision at p. 11). Notwithstanding the parents' failure to articulate that the IHO erred in this specific determination—and, therefore, their failure to accurately "identify[] the precise rulings, failure to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]) and resultant failure to "clearly specify the reasons for challenging the [IHO's] decision" (8 NYCRR 279.4[f])—the parents' argument is addressed in full.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative

placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

> (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[32]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

There is no dispute that the student needed to attend a special class for the majority of his instruction; thus, the inquiry in the present case focuses on the second prong of the Newington test (Newington, 546 F.3d at 120). According to the June 2017 IEP meeting information summary, at

[32] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington,546 F.3d at 120 n.4).

the time of the meeting, the student was attending lunch and recess and math every other day with nondisabled peers, as well as physical education once per six day cycle (Dist. Ex. 10 at p. 2). The summary noted that the student "require[d] support from a teaching assistant/aide during mainstreaming" (id.). When asked about her recommendation for mainstreaming for the 2017-18 school year during the June 2017 CSE meeting, one CSE member from the out-of-district school recommended that the student be mainstreamed for one period per day, with support, in addition to lunch and recess (Parent Ex. PP; Dist. Ex. 10 at p. 2). The district director of student services testified that there were multiple opportunities for mainstreaming in the district and the amount and type of mainstreaming was determined by the student's strengths and IEP (Tr. pp. 278-79).

Although the June 2017 IEP stated that the student "will not participate in general education programs because he requires special instruction in an environment with a smaller student to teacher ratio and minimal distractions in order to progress in achieving the learning standards," the June 2017 IEP also indicated that "the student will have lunch and recess with typically developing peers in addition to one extra period during the day such as art, physical education, or an academic period as appropriate" (Dist. Ex. 10 at p. 15). Additionally, the June 2017 IEP indicated that the student "will participate in an adapted physical education program 2 x 30 minutes a week. He will mainstream for physical education 1 x 30 minutes a week with the support of a teaching assistant/aide" (id.). The IEP also provided two sessions per week of a social skills group, which at the June 2017 CSE meeting was described as including nondisabled peers in the student's grade and one grade below (Parent Ex. PP; Dist. Ex. 10 at p. 13; see Tr. pp. 276-78).

The parents argue that the testimony of the district special education teacher, wherein she described the manner in which mainstreaming occurred for the students in her classroom during the 2017-18 school year, reflected that the mainstreaming opportunities were based on the class rather than the individual students' needs (see Tr. pp. 409-12); however, the mainstreaming opportunities specifically built into the student's IEP belie this argument (Dist. Ex. 10 at p. 15). Further, although the student's teacher from the out-of-district program testified about the flexible approach to mainstreaming in their program (i.e., "his mainstream teacher just relays to [the special education teacher] on the fly like, hey, we're having a really great reading this morning, can you please have [the student] join us) (Tr. p. 785), the IEP allows for this flexibility by providing that the student would attend "one extra period during the day" with nondisabled peers "such as art, physical education, or an academic period as appropriate" (Dist. Ex. 10 at p. 15).[33]

With regard to the level of support available to the student during mainstreaming, in addition to the support of the teaching assistant/aid for physical education specifically delineated on the IEP (Dist. Ex. 10 at p. 15), the district special education teacher testified that students in the 8:1+2 special class in the district elementary school were mainstreamed with the support of two

[33] Moreover, the student's teacher's testimony was specific about the mainstreaming opportunities the student received during the 2017-18 school year at the out-of-district program, which was not information available to the June 2017 CSE and, therefore, may not be used to retrospectively evaluate the sufficiency of the program offered by the district (see R.E., 694 F.3d at 186-88).

teaching assistants for lunch, recess, music, art, and physical education (Tr. pp. 409-11).[34, 35] The private BCBA indicated that the student needed adult support in the mainstream environment because the student "might need some help . . . managing his behaviors in the classroom in terms of attending to the teacher presenting the lesson" (Tr. pp. 1042-43). She elaborated that, since the class would be one the student did not consistently attend, the adult support would make sure the student had his book "open to the right page" and that he was "sitting appropriately" and "attending" (Tr. p. 1043). However, for the same reasons discussed above, the evidence in the hearing record demonstrates the student had achieved greater independence during the school day and did not demonstrate a need for 1:1 assistance generally.

In summary, the June 2017 IEP offered a plan for mainstreaming the student and, to the extent the IEP lacked greater detail regarding "when or how []he would reintegrate with h[is] non-disabled peers," the allowance for flexibility in the plan, on its own, does not support a finding that the IEP failed to recommend a program in the LRE (Rockwall Ind. Sch. Dist. v. M.C., 2014 WL 12642573, at *16 [N.D. Tex. Feb. 17, 2014], aff'd, 816 F.3d 329 [5th Cir 2016]). On the contrary, the evidence in the hearing record supports a finding that the June 2017 IEP provided for the student's inclusion in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

D. Parent Participation

The parents assert that the IHO erred by failing to address their claim that the district impeded their right to meaningfully participate in the development of the student's program for the 2017-18 school year by failing to respond to the parents' requests for information about the classroom to which the district assigned the student to attend or the parents' requests that the district allow the private BCBA to visit the district program.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]).

The United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]); see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating

[34] Since the IEP provided for the mainstreaming opportunities, and this testimony described the manner in which such mainstreaming occurred in the district classroom, it does not constitute after-the-fact testimony used to "rehabilitate a deficient IEP"; instead, the testimony "explains or justifies the services listed in the IEP" and, thus, may be considered (R.E., 694 F.3d at 186).

[35] The private BCBA testified that it would be "unlikely" that the adults dedicated to the 8:1+2 special class would be able to travel with the student to mainstream settings (Tr. p. 1100). However, given the testimony that the two teaching assistants would travel with the student, it appears that the BCBA's concerns were unfounded in this respect.

access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B., 242 F Supp 3d at 195 [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]).[36] However, OSEP also acknowledged that "there may be circumstances in which access may need to be provided," such as "if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement" (Letter to Mamas, 42 IDELR 10). Further, there is some district court authority indicating that a parent has a right to obtain information about an assigned public school site (F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding "implicit" in the reasoning of the Second Circuit's decision in M.O. the proposition that parents have the right to obtain information on which to form a judgment about an assigned school]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered, rather than, the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

The parents' past requests for an expert to observe the district proposed program were considered in the prior administrative proceeding involving this student (see Application of a Student with a Disability, Appeal No. 17-097; see also Parent Ex. KK). In the present proceeding, in an interim decision dated May 9, 2018, the IHO considered the parents' request that the IHO order the district to allow the observation and denied that request (Interim IHO Decision at p. 6). The IHO denied that request on the grounds that the information sought at that juncture—i.e., "what the class would have been like had [the student] attended"—would have been speculative (id. at pp. 5-6). On appeal, the parents do not challenge the IHO's interim decision but instead seek a determination that the district denied their ability to participate in the development of the student's program as a consequence of their refusal to allow the private BCBA to observe the district proposed program (as opposed to requesting the observation for the purposes of litigation, which is the lens through which the IHO viewed the issue).

By email to the district dated July 27, 2017, the parent reiterated her request—originally communicated at the June 2017 CSE meeting—for "information/documentation about the profile/cohort of students in the program proposed for [the student]" and for an opportunity for the

[36] Nothing in this decision is intended to discourage districts from offering parents the opportunity to view school or classroom placements, as such opportunities can only foster the collaborative process between parents and districts envisioned by Congress as the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

parents' private BCBA to observe the program (Parent Ex. QQ).[37] The district director of student services testified that she received the email but did not recall responding to it and the students' mother testified that she did not receive a response (Tr. pp. 313-14, 928). The district director of student services did, however, recall discussing the parents' request for a class profile at the June 2017 CSE meeting, at which point the parents were informed that the district "had not yet fully built the classes" but that the parents could obtain a copy of the class profile once "the students in the class were solidified" (Tr. pp. 544-45). Further, the director testified that, while the parents were not provided with the class profile at that time, the CSE discussed "what types of students would be in that class": that the students would be verbal and would have similar IEP goals as the student (Tr. pp. 545-46).[38]

Ultimately, given the wealth of information available to the parents about the similar district proposed program recommended for the student for the prior school year, including the parents' own observation of the classroom (see, e.g., Tr. pp. 493-96, 914, 953-56, 963; Parent Ex. HH), as well as the information about the program conveyed during the June 2017 CSE meeting (see generally Parent Ex. PP), the district cannot be said to have withheld information from the parents to the degree that the parents were, as a result, unable to form a judgment about the proposed district program. On the contrary, the parents appeared to have a firm opinion about the proposed program at the CSE meeting (see Dist. Ex. 10 at p. 2). Moreover, unlike the context contemplated by OSEP that might warrant a district allowing an evaluator access to a classroom observation, the parents did not seek that the private BCBA observe the proposed program as part of an independent educational evaluation at district expense (Letter to Mamas, 42 IDELR 10; see also Letter to Savit, 64 IDELR 250 [OSEP 2014]; Letter to Wessels, 16 IDELR 735 [OSEP 1990]). Accordingly, the evidence in the hearing record does not support a finding that the parents were denied an opportunity to participate in the development of the student's program for the 2017-18 school year.

E. Capacity to Implement

The parents assert that the IHO impermissibly relied on retrospective testimony to conclude that the district could implement the student's IEP. In addition, the parents allege that the IHO erred in finding that the district's inability to provide community outings—and, therefore, its inability to implement an annual goal from the student's IEP requiring the student to generalize skills into the community—was not of such material deviation from the student's IEP that it resulted in a denial of a FAPE.

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., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B., 603 Fed. App'x at 40 ["declining to entertain

[37] The parents filed their due process complaint notice in this matter the day after their email on July 28, 2017 (Dist. Ex. 1).

[38] The district provided the parents a copy of a class profile during the impartial hearing (Parent Ex. AAA at p. 3).

the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[39] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held 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., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C., 643 Fed. App'x at 33; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Initially, a review of the parents' due process complaint notice reveals that the parents did not assert any challenge relating to the district's capacity to implement the June 2017 IEP at the district public school, let alone one that was based on something more than mere speculation (see Parent Ex. GGG; see also 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 N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]). The IHO appears to have reached this issue

[39] The Second Circuit has 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 deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

sua sponte (see IHO Decision at pp. 10-11). Further, beyond the question of community outings discussed below, on appeal, the parents do not further challenge the IHO's factual determination that the district could implement the IEP but instead attack the type of evidence upon which the IHO relied (i.e., alleging that the IHO impermissibly relied upon retrospective testimony to determine the district could implement the IEP). Absent a particularized, non-speculative challenge to the district's capacity to implement the IEP at the district public school, I decline to disturb the IHO's determination that the evidence indicated the district could implement the June 2017 IEP at the public school.

On the issue of access to the community setting, the IHO made a determination that the district did not demonstrate that community outings would have been utilized in the district program (IHO Decision at p. 12). On appeal—perhaps in an effort to "tether" the IHO's finding to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5)—the parents focus on the IHO's determination in conjunction with one of the annual goals in the student's June 2017 IEP. However, the parents have not identified a reason to reverse the IHO's determination that this failure should not invalidate the district program except to state that the IHO failed to cite legal authority for his determination. The legal authority provides that, assuming that the lack of access to community outings would have represented a failure of the district to implement the student's IEP, such a failure would have to amount to a material or substantial deviation from the student's IEP in order to constitute a denial of a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]).

The June 2017 IEP included 22 annual goals, three of which addressed daily living skills (Dist. Ex. 10 at pp. 10-12). The daily living skills goals targeted identifying the value of groups of coins with amounts up to $2.00, telling time to the minute using a digital clock and relating that to the schedule, and approaching a counter to order a food item with minimal prompting (id. at p. 12). The annual goal that focused on ordering food with minimal prompting was the only goal of the 22 annual goals that indicated "within the community setting" (see id. at pp. 10-12). During the June 2017 CSE meeting, it was discussed that the phrase, "within the community," was written in the goal because the student had mastered the goal in the school setting, so the next natural step was to have the student go into the community (Parent Ex. PP). The June 2017 IEP does not specify what need was targeted by the student's goal to approach a counter and order a food item with minimal prompting within the community setting (Dist. Ex. 10 at pp. 2-10). In contrast, the two other daily living goals address skills which are aligned with the student's needs as discussed during the June 2017 CSE meeting and as detailed in the present levels of performance on the IEP (see id. at pp. 1-2). According to the IEP, math was reported to be a strength of the student's (id. at pp. 2, 8). In the area of money skills, the IEP indicated that the student was able to count values of coin collections containing pennies, nickels, and dimes, but required verbal prompting for collections containing quarters (id.). This aligns with the goal pertaining to identifying the value of groups of coins (id. at p. 12). In addition, the IEP reflected that the student had been working on telling time to the minute using a digital clock but had "difficulty relating the time of day to his daily schedule," which aligns with the goal of telling time using a digital clock and referring to the schedule to identify the task for that time of day (id. at pp. 2, 8-9, 12). Reference to access to the community is made in the meeting information summary with respect to the student working on identifying safety signs while walking in the community and having mastered "picture and photos of safety signs" (id. at p. 2); however, there is no reference to an area of need that relates to the

goal that the student will approach a counter in order to order one item. Further, according to the annual goal progress report for the prior school year, the student achieved the goal of researching, selecting, shopping, and purchasing three items at a store every week (Dist. Ex. 9 at p. 8). The private BCBA testified about the importance of access to the community for students with autism generally, opining that the access was important for the opportunity to generalize skills across environments (Tr. p. 1054); however, as noted above with respect to the extended school day program, generally, the IDEA does not require districts to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see, e.g., F.L., 2016 WL 3211969, at *11; L.K., 2016 WL 899321, at *8-*10; P.S., 2014 WL 3673603, at *13-*14; M.L., 2014 WL 1301957, at *11).

Based on the foregoing, assuming the district's inability to implement the daily living skill goal within the community, it would not amount to a material deviation from the student's IEP such that it would amount to a denial of a FAPE.

VII. Conclusion

As discussed above, the IHO erred by failing to determine the student's pendency. Having reviewed each of the parents' remaining challenges in their appeal, I find the district offered the student a FAPE in the LRE for the 2017-18 school year. Accordingly, the parent is not entitled to relief and the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall ensure the student is provided with the services to which he is entitled pursuant to pendency as indicated above.

Dated: **Albany, New York**
February 19, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER