The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-013

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

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Neha Dewan, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Lauren A. Baum, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2010-11 school year. The parents cross-appeal from the IHO's decision to the extent that she did not reach or dismissed certain determinations on issues raised in the due process complaint notice. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, psychologists, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 party 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the hearing record indicates that the student demonstrates difficulties with language processing, attention, anxiety, activities of daily living (ADL), social skills, academics, self-regulation, frustration tolerance as well as fine and gross motor skills (Tr. pp. 171-77; Dist. Exs. 11-16). The student has received diagnoses of a pervasive developmental disorder (PDD-NOS) and a learning disorder, NOS (Dist. Ex. 16 at pp. 3-4). The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (Dist. Ex. 3 at p. 1; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student attended the Aaron School from 2003 until fall 2010 (Tr. p. 819; see Dist. Ex. 12 at p. 1).

On April 26, 2010, the CSE convened for the student's annual review and to develop his IEP for the 2010-11 school year (Dist. Ex. 3). The CSE found the student eligible for special education programs and related services as a student with a speech or language impairment and recommend a 12:1+1 special class in a community school (id. at p. 1). The CSE further recommended one 40-minute session of individual speech-language therapy per week, two 40-minute sessions of speech-language therapy per week in a group of two, one 40-minute session of individual counseling per week, one 40-minute session of individual occupational therapy (OT) per week, and one 40-minute session of OT per week in a group of two (id. at p. 16).

In a letter to the parents dated August 6, 2010, the district summarized the April 2010 CSE's recommendations and notified the parents of the particular school to which the student was assigned for the 2010-11 school year (Dist. Ex. 9). By letter to the district dated August 13, 2010, the parents advised that they could not visit the assigned school during the summer and requested information about the assigned school (Parent Ex. B). The parents further indicated that the student would attend Eagle Hill until such time that they obtained the requested information from the district (id.). The parents subsequently visited the particular public school identified by the district and advised the district by letter dated November 23, 2010 that they believed that the district's recommended program was inappropriate for a number of reasons (Parent Ex. C). The parents indicated that the student would continue to attend Eagle Hill for the 2010-11 school year and that they would seek tuition reimbursement from the district (id.). The Commissioner of Education has not approved Eagle Hill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice and Response

In a due process complaint notice dated March 3, 2011, the parents requested an impartial hearing and asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A). The parents asserted that the April 2010 CSE was invalidly composed, the CSE did not rely on sufficient evaluative data, and that the parents were denied meaningful participation in the development of the IEP (id. at p. 1). The parents further asserted that the April 2010 IEP was flawed because: (1) the present levels of performance and needs were inadequately described; (2) the goals did not reflect the student's needs and many of the goals were vague, did not correspond with appropriate recommendations of services, and did not provide measurable benchmarks with which to measure the student's progress; (3) the IEP fails to specify special education services tailored to the student's unique needs; and (4) the IEP failed to provide transitional support services despite the CSE recommending a community school which was a larger educational environment than the student attended in the past (id. at p. 2). The parents also asserted that the assigned public school was not appropriate for the student because it would not provide the student with suitable and functional peer grouping; the school would not address the student's social development; there were too many students grouped together at lunch, recess, and gym which would be overwhelming to the student; the school was too large; and the school's bells were too loud given the student's sensitivity to loud noises (id. at p. 3). According to the parents, Eagle Hill was an appropriate placement for the student and the equities favored an award of reimbursement because the parents cooperated with the district and provided timely notification of their rejection of the district's recommended program (id.). The parents requested

that the district reimburse them for the student's tuition at Eagle Hill for the 2010-11 school year as well as reimburse them for the provision of related services and transportation (id. at p. 4).

The district responded to the due process complaint notice on March 9, 2011, asserting that the district offered the student a FAPE (Dist. Ex. 2). The district also noted the persons who participated in the April 26, 2010 CSE meeting and asserted that the student would have been grouped within the mandated three year range, that the parents had an opportunity to participate in the IEP review, that the IEP contained academic goals and goals for the recommended related services, and that a transition plan was not required as the student had not yet reached the age of 15 (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 13, 2011, and concluded on September 8, 2011, after seven days of proceedings (Tr. pp. 1, 97, 115, 247, 555, 732, 873). In a decision dated December 13, 2011, the IHO determined that the district had failed to offer the student a FAPE for the 2010-11 school year, that Eagle Hill was an appropriate unilateral placement for the student, and that equitable considerations favored an award of tuition reimbursement (IHO Decision at p. 28).

The IHO determined that the April 2010 CSE failed to consider sufficient and appropriate evaluative data, did not discuss in detail all of the existing evaluative data and current assessments of the student to justify its recommendation, did not provide documents to review at the CSE meeting, and failed to provide the CSE participants with the opportunity to properly digest the contents of the IEP because a draft was too "quickly read" to them (IHO Decision at p. 23). However, the IHO determined that the student's mother and her advocate participated at the April 2010 CSE meeting and made contributions and therefore, the IHO concluded that these procedural violations did not rise to the level of a denial of a FAPE (id.).

With regard to the substantive aspects of the April 2010 IEP, the IHO determined that the district had failed to meet its burden to demonstrate that the student's recommended placement in a special class in a special school with a 12:1+1 staffing ratio was appropriate (IHO Decision at p. 23).[1] According to the IHO, none of the CSE participants thought a 12:1+1 placement was appropriate for the student and the district witnesses also indicated that a 12:1+1 class would not be an appropriate peer group for the student (id.). Further, the IHO determined that the student would not have received a FAPE at the assigned school because the student would not have been functionally grouped with his peers or be within the three year chronological age range (id. at p. 24). The IHO also found that the size of the assigned school would be anxiety producing for the student and cause regression, and that all of the district's proposals to reduce the student's anxiety would alienate him and negatively impact his socialization at the school (id. at p. 25). Lastly, the IHO noted that the district was aware of the student's difficulties with sensory processing and anxiety, but that no transition plan was discussed either at or after the CSE meeting (id.).

[1] The IHO mistakenly refers to the district's recommendation as a 12:1+1 special class in a special school, when the April 2010 IEP reflects that the CSE recommended placement in a 12:1+1 special class in a community school (compare IHO Decision at p. 23, with Dist. Ex. 3 at p. 1).

With respect to the parents' unilateral placement, the IHO determined that the "district" had met its burden to show that Eagle Hill was appropriate (IHO Decision at p. 26).[2] Among other things, the IHO noted that the Eagle Hill teachers and providers testified about the student's progress (id.). The IHO also determined that the Eagle Hill program was tailored to meet the student's unique needs with respect to academic, sensory, social, speech and language, and emotional needs (id.). The IHO further noted that Eagle Hill provided the student with a language based remedial program, and that Eagle Hill has tweaked the student's classes in order to provide him with more academic challenges (id.). According to the IHO, there is never more than a two year functional range difference between students in the same class at Eagle Hill, and the student's schedule is individualized such that he is provided with staffing ratios that appropriately address his strengths and needs (id. at p. 27). The IHO noted that although the student does not receive counseling at Eagle Hill, he does have an outside therapist, and the program at Eagle Hill is addressing his needs through other interventions and strategies (id.).

With respect to equitable considerations, the IHO found that the parents cooperated with the district; provided the district with observations and reports from both the student's prior nonpublic school, (the Aaron School), and the student's related service providers prior to the April 2010 CSE meeting; and that the student's mother actively participated at the April 2010 CSE meeting (IHO Decision at p. 28).

As to the relief, the IHO denied the parents' request for reimbursement of transportation costs based on her determination that no evidence was provided with respect to the type of transportation provided, nor was there any invoices or other evidence indicating the amount the parents were seeking to be reimbursed for transportation costs (IHO Decision at p. 28). The IHO also noted that the IEP does not provide for special transportation (id.). The IHO ordered the district to reimburse the parents for the student's tuition at Eagle Hill for the 2010-11 school year (id. at p. 29).

IV. Appeal for State-Level Review

The district appeals and requests a reversal of the IHO's decision. The district asserts that the April 2010 CSE considered sufficient evaluative documentation to create an IEP for the student, including a 2009 classroom observation, 2009 and 2010 Aaron School progress reports, the student's prior year IEP, and a 2007 psychological evaluation. According to the district, no one at the CSE meeting objected to the evaluations or observations, and no one requested that additional evaluations or testing be conducted. The district further asserts that the IHO erred to the extent that she concluded that a lack of transitional support services on the IEP constituted a denial of a FAPE. The district notes that while there were no specific strategies set forth on the student's IEP, the district presented testimony reflecting the strategies that would have been employed at the assigned school to assist the student with transitioning from a nonpublic to public school. The district also asserts that the "transition plan," as referred to by the IHO, is not necessary since the student had not attained the age of 16. With respect to the IHO's determination that the recommended 12:1+1 placement was not appropriate for the student, the district asserts that the IHO misconstrued the testimony, noting that the student's then Aaron School teacher believed that

[2] The burden rests with the parents to demonstrate that the unilateral placement was appropriate for the student (Educ. Law § 4404[1][c]). Given the context of the IHO's decision, it appears that the word "district" was a typographical error and that the IHO had determined that the parents had met their burden.

a 12:1+1 placement was appropriate and that her recommendation was discussed at the CSE meeting. In addition, the district argues that the IHO erred in finding that the student would not have been functionally grouped at the assigned school and that the school was too large. The district asserts that the student did not attend the public school and therefore it was error for the IHO to speculate whether the public school would have functionally grouped the student in accordance with State regulations, and alternatively the IHO's findings were without merit as the evidence showed that the student would have been appropriately grouped with his peers and the school would have provided various accommodations and strategies to the student to minimize concerns about the size of the school.

With regard to Eagle Hill, the district asserts that the IHO erred in determining that the parents met their burden to show that it was an appropriate placement because the only witness relied upon was a retired Eagle Hill employee who had only observed the student a few times. The district also asserts that since Eagle Hill is exclusively for special education students, there are no mainstreaming opportunities, except for the student's interaction with typically developing peers from other schools during cross-country competitions, and therefore Eagle Hill is an overly restrictive placement. The district also asserts that the parents did not clearly demonstrate that the student was receiving his OT mandates. Finally, the district asserts that the IHO erred in relying solely on proof of the student's progress as the measure of assessing the appropriateness of Eagle Hill. With respect to equitable considerations, the district asserts that the parents never intended to enroll the student in a public placement and their letter to the district rejecting the district's recommended program did not make any allegations regarding the appropriateness of the program or placement.

In an answer, the parents assert that the IHO correctly determined that the district failed to offer the student a FAPE, that Eagle Hill was appropriate, and that equitable considerations favored an award of tuition reimbursement. The parents also cross-appeal the IHO's determination that the student's mother was provided a meaningful opportunity to participate in the decision making process. The parents also assert as a cross-appeal that the CSE was invalidly composed, that the CSE engaged in impermissible predetermination, that the April 2010 IEP did not contain full and accurate present levels of performance and needs, and that the April 2010 IEP failed to contain sufficient, appropriate, and measurable annual goals and short-term objectives.

In its answer to the cross-appeal, the district asserts that the parents fail to allege any facts to support their assertions that the CSE was invalidly composed and that the student's mother was denied a meaningful opportunity to participate in the formulation of the student's IEP. The district also asserts that the parents failed to allege in their due process complaint notice that the CSE acted with predetermination, and therefore the SRO should decline to review this portion of the cross-appeal. Finally, the district asserts that the April 2010 IEP accurately set forth the student's present levels of performance and contained sufficient, appropriate, and measurable annual goals and short-term objectives.

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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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; 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing and Review

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, at *8 [S.D.N.Y. Mar. 10, 2011]; M.P.G., 2010 WL 3398256, at *8). In this case, while the parents were dissatisfied that the CSE recommended that the student attend a special class in a community school, I find that the parents' due process complaint notice may not be reasonably read as asserting a claim that a 12:1+1 special class was an inappropriate placement on the continuum for the student (see Parent

Ex. A).[3] Additionally, while the hearing record contains some testimony relating to this issue, there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing or that the parents requested to amend their due process complaint notice. "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Accordingly, I find that the IHO erred in addressing this issue that was not raised in the parents' due process complaint notice and I will not address this issue further in my decision (B.P. v. New York City Dep't of Educ., 2012 WL 33984, at * 4 [E.D.N.Y. Jan 6, 2012]; see M.R., 2011 WL 6307563, at *12-*13; M.P.G., 2010 WL 3398256, at *8).

The district is also correct in its contention that the parents raise for the first time on appeal the allegation that the April 2010 CSE engaged in predetermination. Consequently, I find that this claim is also not properly before me since it has only been raised for the first time on appeal, and is thus, beyond the scope of review (see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 08-158; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-026; Application of a Student with a Disability, Appeal No. 08-020; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-072; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).

B. April 2010 IEP

1. CSE Composition

The parents argue that the CSE was improperly composed, but do not specify how the CSE failed to meet CSE composition requirements. In review of the hearing record, I find that the CSE consisted of all the legally mandated members as required by federal and State regulations (see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Participants at the April 2010 CSE meeting included the student's mother, a special education teacher who also served as the district representative, a district school psychologist, a regular education teacher, an additional parent member, the student's

[3] I note that the parents' March 2011 due process complaint notice includes a provision that would seek to "reserve" the parents' right to object to other matters or to raise other issues, such as the district's inability to maintain the appropriate ratio in the student's special class or actually provide the related services on the student's IEP (see Parent Ex. A at pp. 3-4). However, to allow the parents to raise additional issues without the district's agreement pursuant to a reservation of rights clause would render the IDEA's statutory and regulatory provisions meaningless (see B.P. v. New York City Dep't of Educ., 2012 WL 33984, at * 5 [E.D.N.Y. Jan 6, 2012] [rejecting the proposition that a general reservation of rights in a due process complaint notice preserves additional procedural arguments later in the proceeding]; 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; Application of the Dep't of Educ., Appeal No. 11-141; Application of a Student with a Disability, Appeal No. 11-010).

then Aaron School teacher, and a parent/student advocate (Dist. Exs. 3 at p. 2; 4). Therefore, I find that the CSE was validly composed.

2. Parental Participation

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's April 2010 IEP. The student's mother participated in the development of the IEP, including providing the CSE with information regarding the student's needs and abilities (Tr. pp. 177, 179-86). Both the parent and her advocate provided information regarding the student's skill levels and social/emotional functioning (Tr. pp. 816, 846-47). The parent was repeatedly asked if she would like to provide information into the development of the IEP as the draft IEP was read aloud (Tr. p. 168), which tends to show that the district maintained an open mind during the process (J.G. v. Kiryas Joel Union Free Sch. Dist., 2011 WL 1346845, at *30-*31 [S.D.N.Y. Mar. 31, 2011]). Additionally, the parent participated in the development of the student's annual goals (Tr. pp. 177, 179-86). The minutes of the April 2010 CSE also indicated that the parent participated in the CSE process and was asked several times for input as well as whether she agreed with the information on the IEP (Dist. Ex. 4). According to the advocate, the parent was in agreement with the academic levels identified on the IEP (Tr. pp. 795-96). Based upon my review of the hearing record, I concur with the IHO that the student's mother was afforded an opportunity to participate in the IEP development process (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

3. Sufficiency of Evaluative Data and Present Levels of Performance

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation

of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). 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]).

The district alleges that the IHO erred in determining that the April 2010 CSE failed to review sufficient and appropriate evaluative data. The parents allege that the CSE did not review a classroom observation, a medical evaluation, a social history, a speech-language evaluation, an OT evaluation, or any documents other than the 2009 IEP. Contrary to the parents' allegation, the hearing record indicates that the April 2010 CSE reviewed a 2009 classroom observation, a 2009-10 Aaron School fall report, the student's 2009 IEP, and a 2007 psychological evaluation (Tr. p. 149; Dist. Exs. 11-12; Parent Ex. D).[4] As explained in greater detail below, these evaluative documents described the student's needs in the areas of language processing, anxiety, social skills, academics, play skills, problem-solving skills, sensory processing, cognitive flexibility, activities of daily living (ADL), communication as well as fine and gross motor skills all of which were incorporated into the April 2010 IEP (compare Dist. Ex. 3 at pp. 1-16, with Dist. Exs. 11-16; Parent Ex. D).

The April 2010 CSE reviewed a classroom observation of the student at the Aaron School that was conducted by a district special education teacher in December 2009 during the student's writing and social studies sessions (Dist. Ex. 11). The observation report indicated that the student maintained attention on all tasks, followed directions and academic instructions, and exhibited appropriate adult and peer interactions (id. at p. 2).

The Aaron School 2009-10 fall report indicated that the student was provided instruction at a fifth grade reading level and a fifth/sixth grade math level (Dist. Ex. 12 at pp. 1-2). The report also indicated that the student was an "independent learner," managed materials independently, and with support applied study skills, self-monitored attention, and followed multi-step directions (id. at p. 4). When provided with support, the student interpreted social cues/body language

[4] All documents may not have been reviewed by all CSE members (Tr. pp. 203-04). In addition, the district indicates in its petition that the April 2010 CSE reviewed a February 2010 Aaron School mid-year report (Parent Ex. L). However, it is unclear from the hearing record whether the April 2010 CSE reviewed the February 2010 Aaron School mid-year report (see Tr. pp. 149, 152-53, 199, 203-04).

accurately, articulated his ideas clearly, managed frustration appropriately, and solved conflicts appropriately (id.).

In the 2007 psychological evaluation of the student, the psychologist noted that the student demonstrated superior skills in verbal reasoning and comprehension, average perceptual reasoning and visual processing abilities, and below average skills in the area of working memory (Dist. Ex. 16 at p. 11). The student exhibited difficulties in the areas of auditory/visual processing, visual-spatial reasoning, semantics and grammar, handwriting, visual sequencing, memory, physical rigidity, and a prosodic tone (id.). With respect to academic achievement, results of standardized testing indicated that the student achieved average to high average skills in the areas of reading, writing, math, and academic fluency (id. at p. 10). The student demonstrated difficulties with sensory processing (id.). With respect to language processing, the student exhibited overall average to below average skills (id. at p. 3). With respect to motor skills, the student demonstrated overall low tone and below average handwriting skills as well as both weak hand muscles and manual dexterity (id. at pp. 3, 8). The student's difficulties with motor skills negatively affected his ability to engage in ADLs (id. at p. 3).

The hearing record indicates that prior to the CSE April 2010 meeting, the school psychologist and a district special education teacher determined that an updated psychological evaluation was not needed to develop the student's educational program because the student continued to exhibit high cognitive functioning and consequently the CSE could rely on the 2007 psychological evaluation (id.). The school psychologist also testified that updated cognitive testing was not needed to develop the student's IEP in light of the student's consistent functioning and based upon the input provided to the CSE by the student's then-current Aaron School teacher in conjunction with the 2009 classroom observation, 2009 IEP, and 2007 psychological evaluation (id.).

In addition to the evaluative data considered by the CSE, minutes from the CSE meeting indicated that the student's then-teacher at the Aaron School provided information regarding the student's instructional academic levels in the areas of decoding, reading comprehension, writing, math computation, and math problem solving (Tr. p. 154; Dist. Ex. 4). The parent advocate testified that the student's Aaron School teacher provide extensive information regarding the student's needs and abilities (Tr. p. 767). As stated above, both the student's mother and the advocate provided information regarding the student abilities and social/emotional functioning (Tr. pp. 816, 846-47). During the April 2010 CSE, the student's areas of strength were discussed including his cognitive abilities and academic achievement (Tr. p. 171). The CSE also discussed the student's needs related to language processing, memory, anxiety, reading, writing, math, and confidence related to academic work (Tr. pp. 171-78). The school psychologist testified that the April 2010 CSE reviewed sufficient evaluative data to develop an appropriate IEP for the student and that the CSE considered all the evaluative data and input from the members in development of the IEP (Tr. pp. 152-53, 155-56). The hearing record indicates that the CSE members did not object to the evaluative documents under review and there was no request for additional evaluations to be conducted (Tr. p. 153).

In view of the foregoing evidence, I find that sufficient evaluative data was available to formulate the student's IEP, but the extent to which it was considered by the members of the CSE is not clear as the hearing record suggests that not all the evaluative data was reviewed by the CSE (see Tr. pp. 203-04). The procedural deficiency of failing to consider evaluative data during a

CSE meeting does not constitute a per se denial of a FAPE, but instead it must be established that the deficiency also impeded the parents' participation in the IEP's development or denied the student educational benefits (see Luo v. Baldwin Union Free Sch. Dist., 2012 WL 728173, at *4-*5 [E.D.N.Y. Mar. 5, 2012]; Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2 [2d Cir. 2011]). Here, given my above determination that the student's mother had the opportunity to meaningfully participate in the development of the student's IEP and my determinations below regarding the present levels of performance and annual goals, I decline to find that any procedural deficiencies regarding the extent to which the CSE considered the evaluative information impeded the student's right to a FAPE, impeded the parents' ability to participate in the decision making process, or deprived the student of educational benefits.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]).

Review of documentary evidence included in the hearing record reveals that the April 2010 IEP reflected the student's present levels of performance consistent with the evaluative information before it including the 2007 psychological evaluation and participation of CSE members (compare Dist. Ex. 3, with Dist. Ex. 16). The April 2010 IEP described the student's delays in speech-language, attention, and short-term memory as well as noted that the student required "reassurance due to his lack of self-confidence" (Dist. Ex. 3 at p. 3). In addition, the IEP indicated that the student tended to become anxious with respect to novel tasks, new instructional materials, and time limits (id.). The IEP also indicated that the student responded in a positive manner to redirection and rewards and benefited from reminders, individualized goals, chunking, preview/review of materials, and graphic organizers (id.). Additionally, the student demonstrated difficulties with functioning within a noisy environment, self-regulation, and fine and gross motor skills (id. at p. 5). With respect to cognitive skills, the student's verbal reasoning abilities fell within the superior range, his perceptual reasoning abilities fell within the average range, and his abilities related to working memory fell within the low average range (id. at p. 4). The April 2010 IEP indicated that the student enjoyed social interactions with adults and peers (id.). Furthermore, the IEP indicated that the student exhibited difficulties with cognitive inflexibility, low frustration tolerance, and social cognition (id.). Additionally, the student exhibited difficulties with short term memory, focus, anxiety and confidence all which negatively affected his progress (id. at p. 3). According to the advocate, the student's mother was in agreement with the academic levels identified on the IEP (Tr. pp. 795-96).

Regarding the parents' assertion that the April 2010 CSE failed to discuss the student's diagnosis of a PDD-NOS, I note that federal and State regulations do not require the district to set forth the student's diagnosis in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; Application of a Student with a Disability, Appeal No. 09-126 ["a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). Here, the April 2010 IEP addressed the student's needs related to sensory regulation and anxiety which was

sufficient to address the student's deficits related to his diagnosis of PDD. For example, the IEP provided the student with sensory tools and sensory/body breaks throughout the school day (Dist. Ex. 3 at pp. 3-4). In addition, the student received counseling services to address his difficulties with anxiety (id. at pp. 4, 16).

Moreover, I note that a 2009 private neuropsychological evaluation of the student yielded similar results compared to the 2007 psychological evaluation of the student (compare Dist. Ex. 16, with Parent Ex. E). For example, both evaluations indicated that the student's overall cognitive abilities fell within the average range with above average verbal reasoning skills (id.). In addition, both evaluations indicated that the student demonstrated average to above average academic abilities (id.). I further find that the present levels of performance set forth in the April 2010 IEP are consistent with the information contained in the 2009 private neuropsychological evaluation (compare Parent Ex. E, with Dist. Ex. 3), and that therefore there has been no loss of educational opportunity for the student due to any procedural violation related to the student's evaluations in this case.

Based upon the foregoing, I find that the April 2010 CSE had sufficient information relative to the student's present levels of performance including the teacher estimates of the student's current skills levels at the time of the CSE meeting with which to develop an IEP that accurately reflected the student's special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

4. Annual Goals and Short-Term Objectives

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

The April 2010 IEP contains 14 annual goals and 4 short-term objectives which target the student's needs related to reading, writing, math, study skills, self-advocacy, social skills, cognitive flexibility, oral language, language processing, conversational speech, verbal reasoning, problem solving, frustration tolerance, group skills as well as fine and gross motor skills (Dist. Ex. 3 at pp. 6-13). I find that the goals included in the April 2010 IEP were measurable insofar as they contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress several times during the school year or gauge the need for continuation or revision, and contained adequate evaluation criteria and procedures to facilitate measuring progress (see id.).

The student's needs related to anxiety, attention, and sensory processing were also addressed within the IEP (Dist. Ex. 3 at pp. 3-5). The April 2010 CSE detailed on the IEP the environmental modifications and human/material resources to address his management needs in the areas of anxiety, attention, and sensory processing as follows: (1) redirection, repetition, and preview of material; (2) modeling; (3) use of graph paper/calculator and graphic organizers; (4) markers to maintain place; (5) tasks broken down into small steps; (6) sensory tools, water breaks, and body breaks; (7) instruction regarding perspective taking, anxiety, social problems solving, and transitions and; (8) the provision of the related services of counseling and OT (id. at pp. 3-5). While the CSE may not have addressed these needs by designing goals, the IEP does address these needs and I note that federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 CFR 300.320[d][2]).

The school psychologist testified in detail as to how the IEP annual goals addressed the student's needs (Tr. pp. 171-186). The goals related to academics were developed with input from the student's then Aaron School teacher (Tr. pp. 177, 179-80). The goals related to speech and language and OT were taken directly from the student's direct service providers (Tr. pp. 184-86). The student's mother provided input into the development of the student's goals related to counseling and speech and language (Tr. pp. 181-83). In addition, the advocate testified that the student's mother provided input into the goals during the CSE meeting and when asked, the parent stated that she had no further input (Tr. pp. 796-99).

Based on the above, I find that the annual goals and short-term objectives in the April 2010 IEP appropriately targeted the student's areas of need, contained sufficient specificity by which to direct instruction and intervention, and contained sufficient specificity by which to evaluate the student's progress or gauge the need for continuation or revision.

5. Transitional Support Services

Turning to the parents' assertion that the district failed to provide transitional support services to the student with respect to his transition from a nonpublic school to the district, the IDEA does not specifically set forth the provisions requiring a school district to formulate a "transition plan" as part of a student's IEP when a student moves from one school to another.[5] However, under separate State regulations, "transitional support services" are temporary services to be provided to a regular or special education teacher to aid in the provision of services to a

[5] Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student has not yet attained the age of 15 (see Dist. Ex. 3 at p. 1).

student with a disability who is transferring to a regular program or to a program or service in a less restrictive environment (8 NYCRR 200.1[ddd]).[6]

Here, the IHO determined that the district failed to develop a "transition plan" despite being aware that the student exhibited difficulties with anxiety and sensory processing (IHO Decision at p. 25). The April 2010 IEP indicated that in novel situations, the student may experience social/emotional difficulties and may withdraw or become anxious (Dist. Ex. 3 at p. 4). Regarding the student's health and physical development, the IEP noted that the student exhibits sensory concerns and has difficulty functioning in a noisy setting (id. at p. 5). The April 2010 CSE recommended counseling services for the student to address his anxiety (id. at pp. 4, 14, 16). Additionally, the CSE incorporated other supports into the student's IEP to address his anxiety and sensory processing needs, including sensory tools and breaks, body breaks, water breaks, access to sensory materials, as well as teacher support for social problem solving and transitions (id. at pp. 3-4).

The parents are correct that the district was proposing to move the student to a less restrictive environment (a community school) and, therefore, I find that it may have been appropriate to consider placing transitional support services as a supportive service on the student's IEP. However, as described above, the IEP was designed with services in mind to address the student's anxiety and any such deficiency alone, in light of the array of other services provided on the IEP, is not sufficient to conclude that the IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]). Accordingly, I find that the parents do not prevail on their claim that the district failed to offer the student a FAPE.

The parents argue that the district is not permitted to speculate on what might have occurred had the student attended the public school regarding matters that are not in the IEP (Answer ¶10). I do not believe this testimony was necessary to establish that the district designed an IEP that was sufficient to offer the student a FAPE. Assuming for the sake of argument that the the student had been enrolled in and attended the public school, the hearing contains evidence suggesting that the district would have offered the student specialized services to assist him in transitioning from the nonpublic school to the district's 12:1+1 special class in a community school (see A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *12 [S.D.N.Y. Aug. 19, 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011]; but cf. R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011] [holding that the sufficiency of a

[6] The Office of Special Education issued a guidance document updated in April 2011 entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

district's recommended program must be determined on the basis of the IEP itself]).[7] To assist with the transition, the assistant principal testified that the student would have been provided with a tour of the school building including introductions to teachers and students during the first week of school (Tr. pp. 307-08). The student would have also remained in the same class for all subject areas without having to change classrooms for the first few weeks of school and instead would have become familiar with both the physical layout of school and his schedule under staff supervision (id.). In addition, parent workshops were offered at the assigned school which introduced the parents to the staff, classrooms, and curriculum and the student could have also met the guidance counselor to assist with the transition (Tr. p. 307).

Based on the foregoing, I decline to find under the circumstances of this case a denial of a FAPE on the basis of a lack of transitional support services.

C. Assigned School and Class

I will next address the parties' contentions regarding the district's choice of assigned school and classes. In this case, a meaningful analysis of the parents' claims with regard to functional grouping and school size would require me to determine what might have happened had the district been required to implement the student's IEP.

The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11, aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E., 785 F. Supp. 2d at 42). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at Eagle Hill prior to the time that the

[7] Judicial viewpoints have differed within the Second Circuit as to whether adjudicators should rely on retrospective evidence regarding a district's program (C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8 [S.D.N.Y. Oct. 28, 2011] [collecting cases]); however, if the district should not engage in such speculation, the same principle should apply to the parents' claims regarding the implementation of the IEP in the assigned school, which are discussed below.

district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student would have been grouped appropriately or that the school's size was appropriate upon the implementation of his IEP in the proposed classroom and school.

Even assuming for the sake of argument that the student had attended the district's recommended school and class, the evidence in the hearing record nevertheless shows that the 12:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes, and that the school staff would have accommodated the student with regard to any anxiety issues related to the size of both the school and student population, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L., 2011 WL 4001074, at *9).

1. Functional Grouping

I will now consider the IHO's finding that the student was denied a FAPE based upon the determination that the student would not have been grouped with students having similar functional ability (see IHO Decision at p. 24). While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). Assuming for the sake of argument that the district had been required to implement the student's IEP in accordance with State regulations regarding grouping, the parents' contention that the student would not have been grouped appropriately in the assigned class is nonetheless without merit.

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range

of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

The hearing record reflects that the student would have been in the higher range of functioning compared to the students in the assigned class (Tr. pp. 292, 356). The class profiles for the recommended classes indicated that the students' ELA levels ranged from 1.0 through 4.8 and math levels ranged from 1.0 through 4.7 (Parent Ex. EE at p. 2). The student's ELA levels were 4.8 through 5.0 and his math levels were at 5.5 grade level (Dist. Ex. 3 at p. 3). With respect to social/emotional functioning, the assistant principal at the assigned school testified that the student was similar to the students in the assigned classes (Tr. p. 293). In consideration of the foregoing, I find that the hearing record demonstrates that had the parents elected to place the student in the assigned 12:1+1 special class, the student would have been appropriately grouped with students of similar needs and abilities.

2. Size of Assigned School

The parents maintain that the size of the assigned school to which the student was assigned was inappropriate, because the setting would have been "overwhelming" for the student (Parent Ex. A at p. 3). Additionally, the IHO found that the assigned school was too large for the student and that the accommodations proposed by the district would have negatively affected the student's socialization (IHO Decision at p. 25).

During the 2010-11 school year, the assigned school served approximately 1280 sixth through eighth grade students of which approximately 210 students were provided with IEPs (Tr. pp. 262-63). Approximately 420 students attended lunch and recess together at the assigned school (Tr. p. 302). Accommodations could have been provided to the student at the assigned school if the student found lunch and recess too difficult including the provision of having lunch in the library and classroom (Tr. p. 303). The student would have had four transition times between classes in which the classroom paraprofessional provided guidance to the students (Tr. p. 304). If transition times proved to be overwhelming for the student, he could have also transitioned to his classes after the group transitioned (Tr. p. 305). If the student had found physical education class anxiety provoking, the student could have attended a smaller adapted physical education class (Tr. p. 306). During school dismissal, the students exit through different building doors depending on grade to avoid overcrowding (Tr. p. 338). A student could exit the building early if dismissal time was found to be overwhelming (Tr. p. 403). In view of the foregoing, I find the parent's concerns regarding the size of the assigned school building, had the district been required to implement the student's IEP, are not supported by the preponderance of the evidence contained in the hearing record.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. The hearing record contains evidence showing that the April 2010 IEP recommending a 12:1+1 special class in a community school with related services was reasonably calculated to enable the student to receive educational benefits,

and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether Eagle Hill was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).[8]

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the part of the impartial hearing officer's decision dated December 13, 2011, which determined that the district failed to offer the student a FAPE for the 2010-11 school year is hereby reversed.

Dated: **Albany, New York**
April 06, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[8] Although I do not reach the issue of whether Eagle Hill is appropriate, I note that the district is correct with regard to the inadequate standard employed by the IHO, who relied on the progress of the student alone to determine that the unilateral placement was appropriate (IHO Decision at pp. 14-15). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]).