The University of the State of New York

The State Education Department
State Review Officer
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No. 12-044

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at Reach for the Stars (RFTS) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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]; 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 [FAPE] 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record reflects that the student received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS), demonstrated severe expressive and receptive language delays as well as delays in speech production, oral motor functioning, and pragmatic language secondary to his autism spectrum disorder, experienced significant difficulties in sensory processing and modulation, demonstrated deficits in gross motor, fine motor, and visual motor skills, was unable to follow 1-2 step directions independently, demonstrated maladaptive behaviors, and utilized an augmentative and alternative communication (AAC) device to communicate expressively (Tr. pp. 228, 283-84, 289-300, 323, 336; Dist. Exs. 2 at p. 1; 3 at p. 2; 4 at pp. 1, 3-6; 6 at pp. 1, 8; Parent Exs. B[1] at pp. 3-7, 9-12; F at p. 1; G at pp. 1, 3-6; Q). According

[1] Dist. Ex. 1 and Parent Ex. B are both identified in the hearing record as the student's March 8, 2011 IEP, which

to the hearing record, the student received early intervention (EI) services as well as special education services through the Committee on Preschool Special Education (CPSE), had attended RFTS since 2007, and, at the time of the impartial hearing, attended a special class there consisting of five students, ranging in age from seven to nine years, and six adults, and received special education services consisting of speech-language therapy and occupational therapy (OT) (Tr. pp. 152-53, 157-59, 184-85, 194-95, 205-06, 284-86, 324, 328-29, 355-56, 410-12; Dist. Ex. 3 at p. 1). The Commissioner of Education has not approved RFTS as a school with which school districts may contract to instruct students with disabilities (Tr. p. 193; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

On March 8, 2011, the CSE convened an annual review meeting to develop the student's IEP for the 2011-12 school year (Parent Ex. B at p. 1). The March 2011 CSE continued the student's classification as a student with autism and recommended a 12-month education program consisting of placement in a 6:1+1 special class in a specialized school; related services of speech-language therapy, 4 times per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 2:1 setting, OT and physical therapy (PT), both 3 times per week for 30 minutes per session in a 1:1 setting; and a full-time 1:1 health management paraprofessional (id. at pp. 1-3, 5-7, 20, 22). The March 2011 CSE also found the student eligible for New York State alternate assessment and determined that he required a behavior intervention plan (BIP) (id. at pp. 5, 22).

By letter dated June 22, 2011, the district summarized the recommendations made by the March 2011 CSE and notified the parent of the school to which it had assigned the student (Parent Ex. D at p. 1).[2] The parent visited the assigned school "on or about July 20, 2011" (Tr. pp. 333, 341-50; Parent Ex. A at p. 2). On July 20, 2011, the parent notified the district in writing that she was rejecting the assigned school as "inappropriate for [the student] socially, academically and behaviorally" and stated the reasons for her objections (Parent Ex. D at p. 1). The parent further indicated that the student would attend RFTS for the 2011-12 school year and that she would seek to obtain tuition reimbursement through an impartial hearing (id.).

A. Due Process Complaint Notice

On August 5, 2011, the parent filed a due process complaint notice, alleging that the district failed to offer the student a FAPE for the 2011-12 school year (Parent Ex. A). The parent alleged that: (1) the district's triennial assessment of the student "was not complete" and was not administered by a bilingual (Arab-speaking) psychologist; (2) the recommendation of a 1:1 health

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is the IEP at issue in the instant appeal. The only differences between the two exhibits are that Parent Ex. B contains some handwritten notations and does not include a page describing the other educational programs considered by the CSE and the CSE's reasons for rejecting the other educational programs (compare Dist. Ex. 1 at pp. 9-13, 15-18, 20-23, with Parent Ex. B at pp. 9-13, 15-18, 20-22). For the purposes of this decision, except when referencing other programs/services considered for the student by the CSE, I cite only to Parent Ex. B when referencing the May 8, 2011 IEP.

[2] The hearing record contains duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both District and Parent exhibits were identical. I remind the IHO that it is his responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

management paraprofessional in the IEP was not appropriate to address the student's education needs, and he instead required a 1:1 crisis management paraprofessional; (3) the annual goals and short-term objectives contained in the March 2011 IEP were deficient; (4) the assigned school was inappropriate for the student because its staff was not familiar with the use of the student's AAC device and the assigned school's lunchroom would not have provided the student with adequate support; and (5) the assigned 6:1+1 special class was inappropriate for the student because had he enrolled, the student would have been inappropriately grouped with higher functioning students, none of whom had BIPs (id. at pp. 1-2). The parent sought an order from an IHO directing the district, among other things, to pay for the student's tuition for the 2011-12 school year at RFTS (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 27, 2011 and concluded on December 8, 2011, after five days of proceedings. On January 17, 2012, the IHO issued a decision, finding, among other things, that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at 7-10). Specifically, the IHO found that the annual goals and short-term objectives contained in the IEP were appropriate, that the assigned school and the 6:1+1 special class were adequate to provide the student with a FAPE, and that the "[p]arent has not substantiated any procedural or substantive failure of the CSE meeting, the IEP produced, or the inappropriateness of the placement assigned by the [district] to deny this student a FAPE" (id. at pp. 8-10).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision, arguing, among other things, that the IHO misallocated the burden of proof during the impartial hearing and that he erred in determining that the district offered the student a FAPE for the 2011-12 school year. Specifically, the parent maintains that the IHO erred in failing to address her contentions that the March 2011 CSE failed to consider sufficient evaluative information in formulating the student's present levels of performance, and that the IEP itself was inadequate because it failed to accurately describe the student's speech disability and the AAC device he used for communication. The parent also contends that the March 2011 IEP was deficient because it contained inappropriate annual goals and short-term objectives. The parent also argues that the functional behavioral assessment (FBA) performed by the district was inadequate, and led to the development of a deficient BIP for the student. The parent also contends that the assigned school was inappropriate for the student because its staff was not familiar with the use of the student's AAC device, and therefore, would not have been able to implement it. According to the parent, the assigned 6:1+1 special class was inadequate because the 6:1+1 student-to-teacher ratio was inappropriate to address the student's education needs and the student would not be appropriately grouped within the 6:1+1 special class for instructional purposes. Lastly, the parent also contends that the IHO erred in not allowing the prior educational director of RFTS to testify during the impartial hearing on the ground that her testimony would have been duplicative.

The district answers the parent's petition, countering, among other things, that: (1) the IHO properly allocated the burden of proof during the impartial hearing; (2) the parent failed to challenge in her due process complaint notice the sufficiency of the evaluative information considered by the CSE, the IEP's description of both the student's speech disability and his AAC device, the sufficiency of the FBA, and the assigned class's 6:1+1 student/teacher ratio, and

therefore, the parent should be precluded from raising these issues on appeal; (3) the IHO correctly determined that the district offered the student a FAPE for the 2011-12 school year; (4) the IHO acted within his discretion in not allowing the testimony of prior educational director of RFTS during the impartial hearing; (5) that RFTS was an inappropriate placement for the student for the 2011-12 school year because it was too restrictive; (6) and that equitable considerations favored the district because the parent never intended to place the student in public school during the 2011-12 school year.

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][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

VI. Discussion

A. Burden of Proof

Initially, I will address the parent's argument that the IHO misallocated the burden of proof to the parent regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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]). Although the IHO may have used less than optimal language[3] in his decision to describe his conclusion that the district offered the student a FAPE (see IHO Decision at pp. 8, 10), a review of the IHO's decision in its entirety and of the complete impartial hearing transcript, taken together, demonstrates that the IHO properly placed the burden on the district to prove that it offered the student a FAPE. Even if the IHO had allocated the burden of proof to the parent, the harm would

[3] The IHO used similar language in the decision reviewed in Application of a Student with a Disability, Appeal No. 12-007.

be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was equipoise (Schaffer, 546 U.S. at 58).

Moreover, I have independently examined the evidence in the entire hearing record (see 34 CFR 300.514[b][2]), and as discussed more fully below, I find that regardless of which party bore the burden of proof, the evidence in the hearing record demonstrates that the district offered the student a FAPE for the 2011-12 school year. Accordingly, I decline to reverse the IHO's decision on the ground that he misallocated the burden of proof.

B. Scope of Review

The IDEA and its implementing regulations provide that 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 300.507[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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Here, the district correctly asserts that the parent raises for the first time on appeal arguments relative to the March 2011 IEP's descriptions of the student's speech disability and his AAC device,[4] the sufficiency of the FBA, and the appropriateness of the 6:1+1 special class student-to-teacher ratio for the first time on appeal; moreover, although not asserted by the district, the parent also failed to challenge the adequacy of the student's BIP in her due process complaint notice (see Parent Ex. A). Furthermore, the hearing record does not reflect that the parent requested to amend the August 2011 due process complaint notice, that the IHO otherwise authorized an amendment to the August 2011 due process complaint notice, or that the district consented to expand the scope of the impartial hearing to include the resolution of these issues.

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 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]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "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. v. Dep't of Educ., 2011 WL 4375694,

[4] Assuming for the sake of argument that the parent properly alleged in her due process complaint notice that the March 2011 IEP was deficient because it failed to describe the student's AAC device, I note that, although the IEP indicated that the student did not require assistive technology devices or services, the school psychologist and the parent both testified that the March 2011 CSE discussed the student's use of an AAC device to communicate, and several of the student's speech-language goals contained in the March 2011 IEP related the student's use of a DynaVox device and specifically identified that device (Tr. pp. 87-88, 92-94, 331-32; compare Parent Ex. B at pp. 1, 7, with Parent Ex. B at pp. 9-12).

at *6 [S.D.N.Y. Sept. 16, 2011], 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. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [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]).

Consequently, I find that those claims are not properly before me since they have only been raised for the first time on appeal, and are, thus, beyond the scope of review (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Application of a Student with a Disability, Appeal No. 12-001; 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).

Relative to the parent's argument in her petition that the March 2011 CSE failed to consider sufficient evaluative information in developing the student's 2011-12 IEP, the parent alleged in her due process complaint notice that "the[student's] triennial assessment was not complete and was not administered by a bilingual [Arab-speaking] psychologist[5]," and was, therefore, procedurally deficient (Parent Ex. A at p. 1). Thus, I find that the due process complaint notice may be reasonably read to include the issue of whether the March 2011 CSE considered sufficient evaluative information in developing the student's 2011-12 IEP, and therefore, I will address this issue.

C. March 2011 IEP

1. Sufficiency of Evaluative Information

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 S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; 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

[5] This allegation was neither addressed by the IHO in the decision nor asserted by the parent in the petition. However, even if the parent did raise this issue in the petition, I find this allegation unavailing, insofar as the hearing record establishes that English was the primary language spoken in the student's home, and that the student's language skills were English-dominant (Dist. Ex. 3 at p. 2), and there is no evidence contained in the hearing record suggesting that the administration of evaluations solely in English during the evaluation process impeded the student's right to a FAPE for the 2011-12 school year.

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]).

In the instant case, the specific evaluations reviewed by the March 2011 CSE in formulating the student's present levels of performance were not identified in the IEP itself or elsewhere in the hearing record (see Tr. pp. 76, 174-76; Parent Ex. B at pp. 3-7). In its answer, however, the district asserts that the March 2011 CSE considered the student's prior IEP,[6] an FBA dated March 8, 2011 (Dist. Ex. 2), an OT progress report dated December 22, 2010 (Dist. Ex. 6), a December 17, 2010 educational progress report (Dist. Ex. 3), a classroom observation report dated December 7, 2010 (Dist. Ex. 7), a speech-language evaluation dated June 10, 2010 (Dist. Ex. 4), and the student's speech-language goals from RFTS for July 2010 to June 2011 (Dist. Ex. 5; see Answer ¶ 15). As explained in greater detail below, these evaluative documents described the student's needs in the areas of academics, speech-language, OT, sensory needs, behavior, activities of daily living (ADL) skills, and socialization consistent with the descriptions of the student's needs contained in the March 2011 IEP (compare Dist. Exs. 2-7, with Parent Ex. B at pp. 3-7).

The March 8, 2011 FBA indicated the student's background of severe speech-language and socialization delays, and identified his problematic behavior as tantrums and attention-seeking behavior such as laughing, crying spells, and spitting (Dist. Ex. 2). The FBA indicated that the functions of the student's problematic behavior included task avoidance, self-stimulation, seeking adult attention, and reduction of frustration, and proposed that these problematic behaviors be addressed through the implementation of a token system, frequent refocusing, modeling behaviors, and speech-language therapy (id.).

According to the December 22, 2010 OT progress report, which was generated by the student's OT provider at RFTS, the student received OT 5 times per week for 45 minutes per session in a 1:1 setting, which worked toward annual goals and short-term objectives addressing his demonstrated deficits in sensory processing, gross motor skills, fine motor skills, and self-care skills (Dist. Ex. 6). The OT progress report indicated that the student had progressed across each

[6] The hearing record does not contain any prior IEPs for the student.

of the above-referenced domains, but continued to "[display] difficulty maintaining his nervous system in a calm state," experienced difficulty with "gravitational insecurity," required continued OT for trunk strengthening and spinal mobility, and continued to display significantly delayed fine motor skills and to require assistance with self-care tasks (id.).

The December 17, 2010 educational progress report summarized the student's overall educational performance during the 2010-11 school year at RFTS (Dist. Ex. 3). The report indicated that the student received 20 hours of in-school applied behavioral analysis (ABA) services in a class consisting of five students, with a 1:1 student-teacher ratio, and related services consisting of speech-language therapy, OT, and music therapy (id. at p. 1). The progress report noted that the student "continue[d] to make academic progress when he [was] not engaged in maladaptive behaviors," which included self-injurious behaviors upon his becoming frustrated (id. at pp. 1-2). According to the progress report, the school addressed the student's behaviors through the implementation of a token system and a sensory diet; however, the student "continue[d] to have difficulties when redirected from off task behaviors" (id.). The progress report further indicated that due to his significant delays in expressive and receptive language, the student communicated primarily by way of an AAC device, with a "communication wallet" serving as a backup mode (id. at p. 2). Cognitively, the progress report indicated that the student "[was] acquiring new skills at a faster rate, as well as maintaining them," that he had mastered and maintained basic imitation skills, and that his expressive language skills were "slowly increasing" (id. at p. 3). The progress report also noted the student's improvement in ADL skills, demonstrated by his ability to complete a pre-assigned morning routine each school day with minimal prompts (id. at p. 4). Collectively, the progress report indicated that the student "[had] demonstrated improvements in all areas" and referenced his "very positive response to the highly structured and individualized behavioral teaching methods," but noted that "he continue[d] to engage in self-stimulatory behaviors that interrupt the task at hand," and recommended continuation of a 1:1 classroom model for the student going forward (id.).

The classroom observation report, dated December 7, 2010, summarized a bilingual district social worker's 50-minute classroom observation of the student at RFTS during a 1:1 classroom work session and music class (Dist. Ex. 7). The social worker noted that the work session consisted of a series of brief tasks, with the student receiving a reward (an activity chosen by him) upon the successful completion of each task (id. at p. 1). The social worker observed that the student did not typically initiate communication with his teachers, but responded via gestures or one or two word responses, or approximations that were difficult to understand (id.). The social worker noted that although the student required repetition, he was generally receptive to teacher assistance, redirection, modeling, and to taking turns during play (id.). During the transition to music, the social worker observed the student adjust his DynaVox device to the appropriate page and work individually with an adult during the lesson (id. at p. 2). Although the social worker noted the student's active participation during the lesson, she indicated that by the end of the lesson, the student became more "fidgety" – made loud noises, laughed, touched the teacher, moved his chair, touched a shelf and the carpet, and walked over to a hand sanitizer – and "was less responsive to [teacher] efforts to redirect him" (id.). The social worker also related that the student's teacher advised her that the student's behavior varied, that he had become "more 'excitable' and 'silly,'" and that the student's behavior during the classroom observation had been "better than usual" (id.).

According to the June 10, 2010 speech-language annual evaluation report generated by RFTS, the student, then aged 7.1 years, was administered multiple standardized tests, including

the Preschool Language Scales – Fourth Edition (PLS-4), during the three day annual evaluation in May 2010 (Dist. Ex. 4 at p. 1). The PLS-4 yielded scores indicating that the student was functioning at a 1 year 9 month age equivalent in auditory comprehension, and at a 1 year 7 month age equivalent in expressive communication (id. at pp. 2-3). Administration of the Receptive One Word Picture Vocabulary Test (ROWPVT) and Expressive One Word Picture Vocabulary Test (EOWPVT) yielded results indicative of reduced receptive and expressive vocabulary for a student of his age (id.). The evaluation report described the student's use of his AAC device to communicate his basic needs and to request desired items, and the use of his communication wallet as a secondary avenue of communication (id. at pp. 3-4). Informal observations identified significant delays in the student's pragmatic language, but also revealed that his play skills were continuing to progress (id. at pp. 4-5). Results yielded by the Kaufman Speech Praxis Test identified the student's difficulty in oral motor planning, as demonstrated by his inconsistent speech errors and "oral groping" which suggested verbal apraxia; however, the evaluation report also cited the student's "significant growth and success in his speech production skills over the last year" (id.). In summary, the speech-language evaluation report indicated that the student presented with severe delays in receptive language, expressive language, and pragmatic language, as well as speech production delays secondary to his autism spectrum disorder, and recommended that the student continue to receive speech-language therapy 5 times per week for 60 minutes per session (id. at pp. 5-6).

The student's speech-language goals from RFTS for July 2010 to June 2011 contained annual goals and short-term objectives targeting the student's needs in receptive language, expressive language, pragmatic language, speech sound production/motor speech, oral-sensory-motor and feeding skills, and play skills (Dist. Ex. 5).

In addition to the written evaluative information considered by the CSE, the hearing record reflects that three representatives from RFTS, including the school's prior educational director, who had worked with the student during the 2009-10 and 2010-11 school years, the student's special education teacher from the 2010-11 school year, and a speech therapist, together with the parent, participated telephonically at the March 2011 CSE meeting (Tr. pp. 73, 78-79, 326-27; Parent Ex. B at p. 2). The district's school psychologist, who attended the CSE meeting, testified during the impartial hearing that the student's mother was "very active" and "engaged in significant conversation with the [CSE] team during the meeting, and further testified that "we discussed several particular issues about [the student] and the parent participated in the discussion" and that when the CSE developed the recommended program, "she did not object to that" (Tr. pp. 78-79).[7] The parent also acknowledged that "everything" was discussed during the CSE meeting – "everything possible about [the student's] behaviors, how he communicates, [and] what he needs to communicate with" (Tr. pp. 327-28). The March 2011 IEP also indicated that the RFTS representatives at the CSE meeting provided information describing the student's current academic and social/emotional levels of performance (see Parent Ex. B at pp. 3-5). Furthermore, I also note that in this case, the parties do not dispute that the March 2011 IEP contained an accurate

[7] The school psychologist testified that during the March 2011 CSE meeting, the CSE discussed "some new behaviors that [the student] was demonstrating that [were] reported by the school and the parent," and that the CSE "suggested a psychiatric evaluation, and we even offered – we offered that we can provide this kind of evaluation through the [district], but [the parent] refused. So it was quite an active discussion" (Tr. pp. 79-80).

description of the student's educational needs and present levels of performance based upon the evaluative information available to the CSE.

Based upon the foregoing, I find that the March 2011 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).

Moreover, assuming for the sake of argument that the evaluative information available to the CSE was insufficient, 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 parent's 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 the evidence discussed above that the parent had the opportunity to meaningfully participate in the development of the student's IEP, and because the adequacy of the student's present levels of performance as described in the March 2011 IEP are not at issue in this appeal, 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.

2. 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]).

On appeal, the parent alleges that the annual goals and short-term objectives contained in the student's 2011-12 IEP were deficient because they were developed primarily by RFTS staff for implementation in a 1:1 classroom setting, such as the student's present placement at RTFS, and were inappropriate for the recommended placement in a 6:1+1 special class.

Initially I note that, under the IDEA and State and federal regulations discussed above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a particular classroom setting or student-teacher ratio, but rather whether said goals and objectives are consistent with and relate to the needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR

200.4[d][2][iii]). In this case, the March 2011 IEP contains annual goals and short-term objectives targeting the student's needs in the areas of fine motor skills; self-care tasks; receptive, expressive, and pragmatic language skills; oral motor skills; speech production skills; play skills pre-academics; and visual performance skills as identified in the evaluative material available to the CSE at the time of the March 2011 meeting (compare Dist. Exs. 2-7, with Parent Ex. B at pp. 8-13).[8] The hearing record reflects that the annual goals and short-term objectives contained in the student's 2011-12 IEP were previously developed by RFTS staff and adopted by the CSE (compare Dist. Ex. 5 at pp. 1-16, and Dist. Ex. 6 at pp. 1, 4-7, with Parent Ex. B at pp. 8-13). The school psychologist testified that the majority of annual goals and short-term objectives in the student's IEP were provided by RFTS staff "[b]ecause they were providing the related services directly to the [student]. They were working with the [student]. And they [had] the best knowledge of which goals should be used for this particular student because they were working with him" (Tr. pp. 85-86, 96-97). The educational director from RFTS testified that the CSE "had access to the goals [from] prior [CSE meetings] that we helped them to develop if [the student] was in a [district] site, but that doesn't mean that [the CSE] used those goals"; instead, the educational director explained, RFTS "just basically … [gave] over what we [felt] would be appropriate and [the CSE took] from that what they want[ed] to use" (Tr. p. 171). In consideration of the foregoing, I find that the CSE's consideration of the annual goals and short-term objectives suggested by RFTS staff in developing the student's 2011-12 IEP was not unreasonable under the facts of this case, considering that RFTS staff had worked with him on a daily basis since 2007 (see Tr. pp. 324, 410-11).[9]

A review of the annual goals and short-term objectives reveals that although the annual goals did not include evaluative criteria by which to measure the student's progress, overall, the related short-term objectives "contained sufficiently detailed information regarding 'the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress'" and remedied any deficiencies in the annual goals (Tarlowe, 2008 WL 2736027, at *9; see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y 2006]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). I also note that the March 2011 IEP indicated that progress toward meeting the goals would be measured by written reports four times during the school year (Parent Ex. B at pp. 8-19).

Based on the above, I find that the annual goals and short-term objectives in the March 2011 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.

[8] The hearing record reflects that 12 annual goals contained the March 2011 IEP are duplicative (compare Parent Ex. B at pp. 14-16, with Parent Ex. B at pp. 17-19). For simplicity, I refer only to those annual goals contained on pages 14-16 of the March 2011 IEP.

[9] Its possible, however, that a private school may unintentionally develop annual goals that are not appropriate for inclusion in the IEP of a student with a disability, and the CSE should not adopt them simply to appease the student's parents or the private school personnel without first considering whether the goals meet the required standards set forth under the IDEA and State regulations (20 U.S.C. § 1414[d][1][A][i][II]-[III]; 34 CFR 300.320[a][2][i], [3]; 8 NYCRR 200.4[d][2][iii]).

3. 1:1 Support

The parent further contends that the recommended program in the March 2011 IEP would not have provided sufficient 1:1 support[10] to meet the student's needs. As set forth below, the recommendation of a 6:1+1 special class, combined with a 1:1 health management paraprofessional was appropriately designed to address the student's academic and social/emotional needs.

According to the hearing record, at the time of the March 2011 CSE meeting, the student demonstrated maladaptive behaviors including self-stimulatory behaviors, attention seeking behaviors, escape based behaviors, non-contextual vocalizations, aggression, and difficulties with sensory processing and modulation, and also required supervision during toileting and while he was eating (Tr. pp. 206-10, 228, 283-84, 328-29; Parent Ex. B at pp. 4-7; see Parent Ex. Q at pp. 1-2). To address these behaviors, the March 2011 IEP included an annual goal and six short-term objectives reflecting the role of the student's 1:1 health management paraprofessional to remind the student to use the bathroom regularly, to assist the student with toileting, to supervise lunch and snack times in order to prevent the student from choking, to assist the student's participation in class activities, to assist the student to travel safely within the school building, and to help the student maintain his personal safety in school (Parent Ex. B at p. 14). The IEP also reflected that the 1:1 health management paraprofessional would assist with the implementation of various suspended equipment, heavy work, and obstacle courses to improve the student's deficits in sensory processing and modulation, which interfered with the student's ability to complete his daily routines (id. at p. 7). The student's BIP also identified the "individual paraprofessional" among those supports to be employed to assist the student to modify his interfering behaviors (id. at p. 22).

In addition to the support afforded the student by the 1:1 health management paraprofessional, review of the March 2011 IEP further reveals that behavioral support for the student would also have been provided by the student's special education teacher and his occupational, physical, and speech-language therapists, during the 11 30-minute sessions per week of related services recommended in the March 2011 IEP (Parent Ex. B at pp. 3, 5-7, 21). The March 2011 IEP also provided environmental modifications and human/material resources to address the student's management needs, including behavior interventions consisting of fast paced instruction, frequent reinforcement breaks, redirection, a token economy to decrease maladaptive behaviors, positive reinforcement to enhance academics and attentional skills, repetition, rephrasing, prompting, modeling, and staff supervision (id. at pp. 3-5). The March 2011 IEP also provided for tactile, sensory, and edible reinforcers, and social reinforcers such, as playing with adults and "playing ball with [a] peer buddy" to reduce negative behaviors and promote the student's ability to learn and make academic progress (id. at p. 5). In addition to the student's 1:1 health management paraprofessional, the March 2011 IEP also indicated that both the student's

[10] As discussed above, the March 2011 CSE recommended a 1:1 health management paraprofessional for the student (see Parent Ex. B at pp. 2, 6-7, 14, 17, 20, 22). In the due process complaint notice, the parent asserted that the student instead required a crisis management paraprofessional, alleging that during the CSE meeting, the student's teachers from RFTS "supported [the parent's] request to change [the student's] service from [a] health paraprofessional to [a] crisis paraprofessional," and that "by not hiring the appropriate paraprofessional . . . [the district] would place [the student] and his classmates in danger" (Parent Ex. A at p. 2). However, I note that State regulations do not distinguish between types of paraprofessional services.

occupational and physical therapists would assist the student with various suspended equipment, heavy work, and obstacle courses to address his sensory processing and modulation, and would also assist the student with toileting and eating (id. at pp. 6-7). According to the student's BIP, behavior modification strategies, including the provision of immediate tangible rewards for appropriate behavior, a visual schedule, breaks from class activities, and short duration, high interest activities, would be implemented not only by his 1:1 health management paraprofessional, but also by the student's special education teacher and his related services providers during his daily OT, PT, and speech-language therapy sessions, with assigned school staff apprising the parent of the student's progress through regular contacts (id. at p. 22).

The hearing record further reflects that the CSE considered other programs for the student during the March 2011 meeting, including a special education class in a community school, and a special class in a 10-month educational program, both of which it rejected as being "insufficient for [the student's] cognitive, academic and social-emotional needs" (Dist. Ex. 1 at p. 21). The school psychologist testified that although the March 2011 CSE discussed recommending a 10-month educational program for the student consisting of a 12:1+1 self-contained special class, the CSE rejected it because "[w]e believed a ten-month program would not meet [the student's] needs. That he would need the consistency of a 12-month program and the smaller class also" (Tr. pp. 84-85). She added that, based upon her review of the student's evaluative information and the March 2011 IEP, the recommended program would have met the student's educational needs in the LRE (Tr. pp. 83, 103-04; see Tr. pp. 53-54). Based on the above, the hearing record demonstrates that the recommended 6:1+1 program with a 1:1 health management paraprofessional offered the student sufficient 1:1 support to address his needs as identified in the evaluative information before the CSE and was reasonably calculated to enable him to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]). In view of the forgoing evidence, I find that the parent's claims that the March 2011 IEP was deficient are with out merit.

D. Assigned School

I will next address the parties' contentions regarding the district's choice of assigned school.[11] In this case, a meaningful analysis of the parent's claims with regard to functional grouping and the staff's familiarity with the student's AAC device 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 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of 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]). 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

[11] The United States Department of Education has clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).

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]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011], but see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8 [S.D.N.Y. Oct. 28, 2011]).

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 (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 parent rejected the IEP and unilaterally placed the student prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student would have been provided with appropriate grouping and the staff would have been familiar with the student's AAC device upon the implementation of his IEP in the proposed classroom.

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 6:1+1 special class at the assigned district school was capable of providing the student with suitable functional grouping in a timely manner and implementing his AAC device, 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 T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at * 14 [E.D.N.Y. Mar. 30, 2012]; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

1. AAC Device

With respect to the parent's claim that the assigned school was inappropriate for the student because its staff was unfamiliar with the use of the student's AAC device, and therefore, could not have implemented it, the parent contends that when she visited the assigned school, she inquired whether the special education teacher of the assigned 6:1+1 special class "was familiar with using the DynaVox. [The teacher] said that they will learn to use it. . . . So they said [they] would be able to learn how to use it and how to program it" (Tr. pp. 333; see Tr. pp. 347, 350-51).[12]

The assistant principal of the assigned school testified that the classroom teacher in the assigned 6:1+1 special class was trained in the use of high tech AAC devices and would have collaborated with the assigned school's speech department on their use in the classroom (Tr. p. 51). The assistant principal further testified that she was personally familiar with the DynaVox-V device that the student was currently using, and that although she was uncertain as to whether any of the students in the assigned 6:1+1 special class were also using that particular device, she was

[12] According to the parent's testimony, the special education teacher was referring to a speech-language pathologist at the assigned school (Tr. p. 333).

aware that other students in the assigned school were using the device (id.). She also explained that all of the classes in the assigned school were equipped with a series of AAC devices available in the classroom, and that if a nonverbal student in need of such a device arrived in a classroom but did not have such a device provided for in his or her IEP, the assigned school typically contacted the parent to ascertain whether the student had previously used such a device, the assigned school's speech-language department would immediately evaluate the student to determine his or her needs and the appropriate device to address them, and the student's IEP would be amended at that time to provide the appropriate device (Tr. pp. 108-116). In this case, as discussed above, the March 2011 IEP specifically referenced the DynaVox-V device in the speech-language goals (Parent Ex. B at pp. 9-12). Based upon the testimony of the assistant principal of the assigned school, it is reasonable to conclude that had the student enrolled at the assigned school, the student would have been provided with a DynaVox-V device, and the hearing record suggests that even if assigned school staff lacked previous experience or training regarding its use, the assigned school would have provided staff with training sufficient to incorporate the device into the student's educational program and enable him to obtain educational benefits.

2. Assigned 6:1+1 Special Class—Functional Grouping

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 the Dep't of Educ., Appeal No. 11-113; 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).

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 parent's contention that the student would not have been offered a FAPE is not supported by the evidence available in the

hearing record. The parent argues that in the assigned 6:1+1 special class, the student would have been inappropriately grouped for instructional purposes with higher functioning students and because he would have been the only student in the assigned 6:1+1 special class with a BIP. However, although the hearing record does not include a profile of the assigned 6:1+1 special class, the assistant principal of the assigned school testified that the assigned 6:1+1 special class contained "four to five" students, two of whom were verbal students who were able to communicate their wants via words, and two nonverbal students; she further testified that four of the students in the assigned 6:1+1 special class communicated either through the Picture Exchange Communication System (PECS) picture symbols or, like the student, through an AAC device (Tr. pp. 37, 48-49, 117; see Dist. Exs. 3 at p. 2; 4 at pp. 4-5). She also stated that two of the other students in the assigned 6:1+1 special class, similar to the student in this case, "[were] on a more severe end of the [autism] spectrum than less severe end of the spectrum" and, also like the student, "[had] severe handicapping conditions versus those that [had] less significant handicapping conditions" (Tr. pp. 58-60). Moreover, the fact that the student may have been the only student in the assigned 6:1+1 special class with a BIP would not by itself render the functional grouping inappropriate, insofar as State regulations provide that "[t]he management needs of such students may vary, provided that the environmental modifications, adaptations, or, human or material resources required to meet the needs of any one student in the group are provided and do not consistently detract from the opportunities of other students in the group to benefit from instruction" (8 NYCRR 200.6[a][3][iv]). In consideration of the foregoing, I find that the hearing record demonstrates that had the parent elected to place the student in the assigned 6:1+1 special class, the district was capable of grouping the student with other students of similar needs and abilities.

In sum, assuming that the district had been required to implement the student's IEP and upon consideration of the totality of the evidence contained in the hearing record, I find the parent's concerns regarding the assigned 6:1+1 special class and the abilities of the assigned school to provide the student with an AAC device appropriate to address the student's educational needs and to suitably group the student with students of similar needs and abilities are not supported by the preponderance of the evidence contained in the hearing record (see generally, M.H. v. New York City Dep't of Educ., 2011 WL 609880 [S.D.N.Y. Feb. 16, 2011], citing Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). The evidence does not support the conclusion that upon implementation 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).

E. Exclusion of Witness Testimony

Lastly, the parent maintains that the IHO erred in not allowing the prior educational director of RFTS[13] to testify. The parent's advocate contended at the impartial hearing that, with respect to the testimony elicited from the current educational director of RFTS, the parent "did not feel that [the prior educational director] effectively represented … who her child was" and that the prior

[13] The hearing record indicates that the prior educational director of RFTS served in that capacity during the 2010-11 school year, and that she participated telephonically in the March 2011 CSE meeting (see Tr. pp. 368-69; Parent Ex. B at p. 2); the hearing record does not indicate whether she served in that capacity during the student's three previous school years at RFTS.

educational director "can only testify about her knowledge about the [student], not about the [RFTS] program this year" (Tr. pp. 368-69).

During an impartial hearing, parents have a right to compel the attendance of witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]), subject to an IHO's discretion to limit or exclude the testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]). However, an IHO must also protect against the infringement of the parents' due process rights, and balance this discretion with his or her responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of a Student with a Disability, Appeal No. 12-007; Application of the Dep't of Educ., Appeal No. 11-004; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92).

In this case, the IHO declined to permit the parent to present the prior educational director's testimony because he viewed the proffered testimony as "duplicative testimony relative to the circumstances of [the student]" (Tr. p. 369). However, during the impartial hearing, the IHO allowed testimony about the student from the parent and from both the student's special education teacher at RFTS, who had taught the student for past two school years, and from the student's speech-language pathologist at RFTS who had worked with the student during the 2010-11 school year (see Tr. pp. 199-256, 267-359). Additionally, the IHO admitted into evidence multiple documents from both the 2010-11 and 2011-12 school years describing in detail the student's academic and social functioning within the classroom environment (see Dist. Exs. 1-7; Parent Exs. F-H; K-L; Q-R). The IHO offered the parent a reasonable opportunity to be heard and present her case and State regulations do not require an IHO to permit each party to make an exhaustive presentations of evidence. Consequently, I have no reason to disagree with the IHO's sound determination to preclude the testimony of the prior educational director of RFTS, especially where, as here, the hearing record already contained sufficient documentary and testimonial evidence proffered by the parties' which described the student's present levels of performance and his education needs.

Based on the above, I find that, after a careful review of the evidence contained in the hearing record, the IHO properly exercised his discretion in excluding the prior educational director's testimony, that he had an adequate evidentiary basis upon which to render a decision and the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 34 CFR 300.514[b][2][ii]). Accordingly, I will not disturb the IHO's decision on the basis of his ruling to preclude the testimony of the witness.

VII. Conclusion

In summary, upon due consideration of the evidence contained in the hearing record, I find that the March 2011 CSE's recommendation of a 6:1+1 special class with a 1:1 health management paraprofessional and related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record demonstrates that the March 2011 IEP identified the student's multiple needs, developed annual goals and short-term

objectives to address those needs, and recommended a program in the LRE (see 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]). Having reached this determination, it is not necessary to address the appropriateness of the student's unilateral placement at RFTS, and I need not consider whether equitable considerations support the parent's request; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 18, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER