The University of the State of New York

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

No. 12-071

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

Appearances:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Jesse Cole Cutler, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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 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 student's educational program has been the subject of a previous administrative appeal (Application of the Bd. of Educ., Appeal No. 11-133) and the parties' familiarity with the student's prior educational history is presumed and will not be repeated here.

On February 9, 2011, the CSE met for its annual review of the student's program and to develop an IEP for the 2011-12 school year (Dist. Exs. 1 at p. 2; 2). The CSE recommended continuation of the student's eligibility for special education and related services as a student with autism, and placement in a 6:1+1 special class in a specialized school with the support of a 1:1

transitional paraprofessional (Dist. Ex. 1 at pp. 1, 14, 17; 2).[1] The CSE also recommended that the student receive related services of speech-language therapy, occupational therapy (OT), and counseling (Dist. Ex. 1 at p. 16). Additionally, the CSE recommended the student for adapted physical education, alternative assessment, and 12-month school year services (Dist. Ex. 1 at pp. 1, 5; 2). At the time of the CSE meeting, the student's mother expressed concerns regarding the scores reported in the district's psychological evaluation, the recommended class ratio, and the qualifications of the transitional paraprofessional, among other things (Tr. pp.28-29, 50, 58-59, 81-82, 84, 86, 344-45, 395-400; Dist. Ex. 2).

On May 14, 2011, the parents executed an enrollment contract with the Rebecca School for the student's attendance from July 5, 2011 through June 22, 2012 (Parent Ex. D). On May 18, 2011 the parents paid a $10,000 nonrefundable deposit to the school, in accordance with the contract (Parent Exs. E; F).

By a final notice of recommendation (FNR) dated June 14, 2011, the district summarized the February 2011 CSE's recommendations and notified the parents of the particular public school to which the student was assigned for the 2011-12 school year (Dist. Ex. 3).[2]

The parents advised the district by letter dated June 17, 2011, that as of the first day of school for the 2011-12 school year they intended to place the student at the Rebecca School and seek funding for the placement from the district (Parent Ex. C at p. 1). The parents stated that although they agreed with the CSE's recommendation to place the student in a special class in a specialized school, the program recommendation by the CSE was inappropriate to address the student's needs because the program used a methodology "that would not be able to appropriately address the goals in the student's IEP" (id. at p. 2). The parents also contended, among other things, that the student should not be excused from testing or evaluation by the district and that the CSE had refused to consider an evaluation provided by the parents and "insisted on including data that was irrelevant or outdated on the IEP" (id.). The parents further stated that, as of that date, the district had failed to identify a specific public school site for the student to attend school for the 2011-12 school year (id.).[3] The parents also stated their willingness to meet with the CSE to discuss their concerns (id.).

Following the parents' receipt of the FNR on or around June 24, 2011, the student's mother visited the public school site to which the student had been assigned and concluded that it was not appropriate for the student (Tr. pp. 401-09).

[1] 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]).

[2] The June 14, 2011 FNR reflected that the student was recommended for a 1:1 crisis management paraprofessional, rather than a 1:1 transitional paraprofessional as indicated on his February 9, 2011 IEP (compare Dist. Ex. 3, with Dist. Ex. 1 at p. 17).

[3] The student's mother reported that the parents did not receive the district's June 14, 2011 FNR until June 24, 2011 (Tr. pp. 401-02).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2011, the parents requested an impartial hearing, asserting that the February 2011 IEP was inappropriate because the February 9, 2011 CSE meeting was held "several months before it would have made sound educational sense to asses [the student's] educational progress" for the 2010-11 school year (Parent Ex. A at pp. 1, 2). The parents also asserted that the recommendations made in the February 2011 IEP were inappropriate because such recommendations were made five months prior to the start of the 2011-12 school year (id.). Next, the parents asserted that the CSE was improperly constituted, that a teacher from the Rebecca School who participated by telephone was not provided with the reports, evaluations, and other written documents concerning the student reviewed by the CSE, and that the CSE should have sent the parents copies of "all requisite documents" five days prior to the CSE meeting (id. at p. 3). The parents also asserted that the CSE should have conducted an evaluation of the student's vocational needs and interests and did not have evaluations supporting its recommendation for a "large and less supportive educational environment" than the student was attending at the time (id. at p. 6).

The parents next asserted that the IEP failed to describe the student's health and physical management needs and that the goals in the IEP were insufficient in that they did not specify a method of measurement, there were no goals concerning adapted physical education, the social/emotional goals were insufficient, and there was only one goal regarding the transitional paraprofessional (Parent Ex. A at pp. 3-5). Additionally, the parents contended that the CSE inappropriately decided to place the student in a 6:1+1 class in a specialized school based not on the student's needs, but on the type of placement it had available within the district's schools (id. at pp. 1, 2). The parents also asserted that the CSE erred in placing the student in a 6:1+1 special class in a specialized school because the student required a smaller and more supportive setting, and that the CSE "summarily ignored" the input of the parents and the student's then-current providers regarding this issue (id. at pp. 2, 6-7). The parents also contended that the IEP should have provided for parent counseling and training, and that the CSE should have conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) for the student (id. at pp. 5-6). The parents next contended that the CSE improperly removed the student from participation in State and local assessments and recommended use of alternative assessments against their wishes (id. at p. 6). The parents next asserted that the district's FNR was untimely because it was received "several days before the end of the school year," thus, the parents were not able to visit the school until the last day of the 2010-11 school year (id. at p. 7).

The parents also challenged the particular school to which the district assigned the student by alleging the school was too large, diverse, and distracting to be appropriate; the school could not meet the student's OT and sensory needs; the math curriculum the school employed was not appropriate; and the school could not provide a "suitable and functional peer group for instructional, sensory, and social/emotional purposes" (Parent Ex. A at pp. 7-8). Lastly, the parents contended that their unilateral placement at the Rebecca School was appropriate and that equitable considerations favored reimbursement (id. at p. 8). For relief, the parents requested tuition reimbursement and transportation to and from the Rebecca School for the 2011-12 school year (id. at pp. 2, 8-9).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on August 11, 2011, for purposes of determining the student's educational placement during the pendency (stay put) of the proceedings (Tr. pp. 1-9).[4] The impartial hearing was reconvened on October 26, 2011, to address the merits of the parents' claims and continued on two additional hearing dates, concluding on January 4, 2012 (Tr. pp. 10, 137, 229).

In a decision dated February 28, 2012, the IHO found that the district offered the student an appropriate program for the 2011-12 school year (IHO Decision at pp. 17-18).[5] Regarding the parents' contention that the February 2011 IEP did not reflect all of the student's progress during the 2010-11 school year, the IHO found that the IEP appropriately reflected the student's needs and showed the student's slow, measured progress, noting that according to Rebecca School progress reports most of the goals set forth on the February 2011 IEP had not yet been met by December 2011 (id. at pp. 12-13, 15). As for the allegation that the CSE lacked certain evaluative information, the IHO found that the evaluations the CSE had before it were adequate to draft the student's IEP and that the lack of a specific vocational evaluation was not inappropriate because sufficient information regarding the student's skills, aptitudes, and interests was present in other evaluative data before the CSE (id. at pp. 11-12). Further, the IHO found that the student's IEP accurately described his present academic performance and learning characteristics and was consistent with the findings and conclusions of the psychoeducational evaluations, the Rebecca School teacher reports, and the classroom observation conducted by the district (id. at p. 12).

The IHO rejected the parents' claim that the CSE ignored their input at the meeting and based its placement determination on program availability rather than the student's individual needs, noting that the parents had input at the CSE meeting and that changes had been made to the final IEP reflecting their input (IHO Decision at p. 13). The IHO found that while the IEP annual goals did not have measurement criteria, the short-term objectives related to the goals were sufficient such that the measurement of progress could be ascertained (id. at p. 15). Further, the IHO found that the IEP goals concerning the student's social and emotional needs were adequate and that the lack of specific goals regarding adapted physical education did not deprive the student of a free appropriate public education (FAPE) because the student's sensory needs would have been addressed by the district's "mandated adapt[ed] physical education and by the occupational therapist" (id. at p. 16). The IHO found that while it was "undisputed" that the IEP failed to provide for parent counseling and training in violation of State regulation, this violation did not amount to a denial of FAPE because the evidence showed that the service would be provided in the school to which the student was assigned and that the parents had consistently obtained appropriate training at the Rebecca School previously (id. at pp. 14-15).

[4] In an interim decision dated August 12, 2011, the IHO found that the student's pendency placement was at the Rebecca School based on a prior unappealed IHO Decision (Interim IHO Decision at p. 3; see Parent Ex. B).

[5] The IHO included form decisions in the hearing record regarding the parties' requests for extensions, in which she described the factors considered, the reasons why she granted the parties' extension request and her notification to the parties of the new date for rendering her decision (IHO Ex. I pp. 1-6; see 8 NYCRR 200.5[j][5][iv]).

The IHO also determined that a 6:1+1 special class placement with a 1:1 transitional paraprofessional recommended by the CSE was sufficient to address the student's needs and as described in the evaluative information before the CSE (IHO Decision at pp. 13-14). Further, the IHO found that the related services set forth on the IEP were appropriate for the student (id. at p. 14). The IHO found that the circumstances of the parents' visit did not deny the student a FAPE and rejected their claim that the FNR was untimely (id. at p. 16).

With regard to the parents' arguments concerning the classroom at the public school site, the IHO concluded that the school to which the student was assigned would have been able to implement the student's IEP, provide the student with the related services set forth on the IEP, and provide meaningful educational benefits (IHO Decision at pp. 16-18).

Having found that the district offered the student a FAPE during the 2011-12 school year, the IHO determined that it was unnecessary to examine the appropriateness of the Rebecca School and denied the parents' request for tuition reimbursement (IHO Decision at p. 18).

IV. Appeal for State-Level Review

The parents appeal the IHO's decision that the district offered the student a FAPE during the 2011-12 school year and her denial of their request for tuition reimbursement. The parents contend that the February 2011 CSE meeting was held too long before the start of the 2011-12 school year to determine student's needs for the upcoming school year and that, contrary to the IHO's finding, the student had made "significant progress" during the intervening time period. Further, the parents assert that the IHO "carelessly stated" that the parents could have requested that the CSE reconvene to address their concerns with the IEP and did not make such a request. However, the parents allege that they requested such a meeting in writing in their June 17, 2011 letter, and the district failed to convene the CSE. The parents next contend that the IHO erred in failing to address the parents' contention that the CSE erred in refusing to consider placing the student at the Rebecca School. The parents also contend that the IHO erred in failing to address the parents' argument that there was not a valid special education teacher present at the February 2011 CSE meeting because the district's teacher who attended the meeting was not a teacher of the student. The parents also contend that the IHO erred in finding that the CSE had adequate evaluations because there was no evaluation of the student's vocational needs and the IHO erred in finding other evaluations before the CSE remedied the lack of evaluations. Further, the parents contend that the CSE did not have any evaluations supporting its choice for moving the student to a large and less supportive setting than his then-current setting at the Rebecca School.

The parents next argue that the IHO erred in finding that the IEP annual goals were sufficient because, among other things, none of the goals contained adequate methods of measurement, there was no "appropriate baseline information," no adapted physical education goals, and only one goal for the 1:1 transitional paraprofessional. Further, the parents argue that the IHO erred in finding that the short-term objectives cured the defects in the annual goals because the district's special education teacher who testified at the impartial hearing stated that there were no short-term objectives in the IEP. The parents also contend that the 1:1 "transitional paraprofessional" assigned to the student should have been an "assistant teacher". The parents next argue that the IHO erred in determining that the lack of identifying parent counseling and training on the IEP did not deny the student a FAPE. The parents also contend that the CSE should

not have removed the student from participation in State and local assessments and mandated the use of alternative assessments against their wishes. The parents assert that the CSE improperly recommended that the student attend a 6:1+1 special class in a specialized school because the student required a smaller and more supportive setting, and that the CSE "ignored" the input of the parents and the student's then-current providers related to the special class placement . The parents also argue that they were denied a meaningful opportunity to participate in the development of the student's program by the late issuance of the FNR and the assignment of the student to a vocational school, which was not discussed at the February 2011 CSE meeting. Further, the parents contend that they attempted to have academic goals added to the IEP during the CSE meeting but that the district's representatives refused to do so and refused to engage in a discussion.

Regarding the particular public school site to which the district assigned the student, the parents argue that it was too large, diverse, and distracting to be appropriate; that the school could not meet the student's OT and sensory needs; that the methodologies and vocational training the school employed were inappropriate; and that the school could not provide a suitable functional peer grouping. Further, the parents contend that the student should have been assigned to a middle school rather than a high school due to his age, and that the district did not prove that there would have been a middle school class at the particular school to which the student was assigned. The parents contend that the district's classroom teacher who testified at the impartial hearing was not certified to teach eighth grade special education students and also stated that she would not have followed parts of the student's IEP because she disagreed with them.

The parents assert that their unilateral placement at the Rebecca School was appropriate and that equitable considerations favored reimbursement. The parents request that the IHO's decision be vacated and that the district be ordered to reimburse the parents for the student's tuition at the Rebecca School for the 2011-12 school year.

In its answer, the district denies that the IHO erred in determining that the district offered the student a FAPE during the 2011-12 school year. Regarding the parents' concerns that the February 2011 CSE meeting was held too early, the district contends that the meeting was not premature given the student's slow progress, that most of the goals in the IEP had not been attained by May 2011, that the IDEA does not specify when it is permissible for a CSE to meet, that the parents never informed the district that the student had attained some of the goals on his IEP, and that the parents never requested a second CSE meeting to update the student's goals. The district next contends that the February 2011 CSE was properly constituted, that the CSE had adequate evaluations before it, that a vocational assessment is only conducted for high school students and that because the CSE did not recommend a vocational program for the student, an assessment was not required. Regarding the parents' concerns about the annual goals and short-term objectives in the student's IEP, the district contends that the goals were appropriate and that the math goals the parents wanted added to the IEP were not related to math skills. Regarding the parents' concerns about parent counseling and training, the district asserts that the parents were advised at the CSE meeting that such services did not need to be set forth on the student's IEP because they were "programmatic" and were provided by the individual schools. The district also denies the parents allegations concerning State and local assessments and asserts that the offered 6:1+1 special class in a special school with a 1:1 transitional paraprofessional and related services would meet the student's needs. Next, the district asserts that the timing of the FNR did not deprive the student of a FAPE and that the parents had a meaningful opportunity to participate in the development of the

student's educational program. The district also contends that some of the parents' arguments in the petition were not raised in their due process complaint notice and therefore should not be addressed by an SRO.

Regarding the parents' contentions concerning the particular school to which the student was assigned, the district asserts that because the parents rejected the district's recommended program, the district is not required to prove how it would have implemented the student's IEP. The district further asserts that, in any event, the particular school to which the student was assigned would have been appropriate for the student. The district next contends that the parents' unilateral placement at the Rebecca School was not appropriate for the student and that equitable considerations do not favor reimbursement.

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 Review

A review of the hearing record supports the district's contention that the parents' have attempted to raise several new claims for the first time on appeal. Specifically, the parents now allege that the CSE erred in refusing to consider placing the student at the Rebecca School and that the parents were denied a meaningful opportunity to participate in the development of the student's IEP because the district's FNR placed the student in a vocational school. The parents also allege for the first time on appeal that the educational methodologies that they saw employed at the assigned public school site with other students were not appropriate for the student in this case. The parents further allege for the first time on appeal that the district's classroom teacher who testified at the impartial hearing was not certified to teach eighth grade special education students and would not have followed parts of the student's IEP because she disagreed with them.[6]

With respect to these contentions, 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]; see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parents' due process complaint notice, I find that it may not be reasonably read to raise the issues described above (see Parent Ex. A). Moreover, the hearing

[6] To the extent that the Second Circuit recently held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 2012 WL 2477649, at *28-*29 [2d Cir. June 29, 2012]), I note that the issues of whether the CSE erred in refusing to consider placing the student at the Rebecca School, parent participation in the context of placing the student in a vocational school, and the qualification of the teacher who testified as a district witness, were first raised by the parent or by counsel for the parent on cross examination of district witnesses (Tr. p. 111, 184-85, 192, 405). Although the district initially elicited testimony regarding the educational methodologies employed in the assigned school (Tr. pp. 151-54), such questioning was in the context of describing a typical day in a district classroom and the district did not argue that the methodologies were specifically appropriate to meet the student's needs in response to a claim in the parent's due process complaint notice and, therefore, I find that the district did not "open the door" to this issue under the holding of M.H. Finally, with respect to the parent's contention that the teacher who testified as a district witness would not have followed parts of the student's IEP because she disagreed with them, to the extent that the district could be considered to have opened the door to the issue by eliciting testimony from the teacher, I note that the parents rejected the recommended placement by letter dated June 17, 2011 (Parent Ex. C at pp. 1-2) prior to the time the district became obligated to implement the February 2011 IEP (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]).

record does not suggest that the district agreed to expand the scope of the impartial hearing to include these issues (Application of the Bd. of Educ., Appeal No. 10-073).

Where, as here, the parents 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 it. 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]). "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. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [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]).

B. February 2011 CSE Process

1. Timing of the CSE Meeting

Regarding the parent's assertion that it was not appropriate to conduct the CSE meeting in February 2011 because that date was too remote in time to the next school year and prevented the CSE from considering progress the student made between the date of the CSE meeting and the start of the 2011-12 school year, I find that the timing of the February 2011 CSE meeting did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]). Under the IDEA, a CSE is required to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]).[7] While the IDEA and State Regulations require the CSE to meet "at least annually" (see 20 U.S.C. § 1414[d][4][A] [emphasis added]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), they do not preclude additional CSE meetings, prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). Additionally State procedures contemplate changes to an IEP insofar as parents, teachers and administrators are all empowered to refer the student to the CSE if any of those individuals has reason to believe that the IEP is no longer appropriate (8 NYCRR 200.4[e][4]). At the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194)

[7] This obligation continues during the pendency of a challenge to a prior IEP (see Town of Burlington v. Dep't of Educ., 736 F.2d 773, 794 [1st Cir. 1984], aff'd 471 U.S. 359 [1985] ["pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law"]; Lopez v. District of Columbia, 355 F. Supp. 2d 392, 400-01 [D.D.C. 2005]; Grant v. Indep. Sch. Dist. No. 11, 2005 WL 1539805, at *8 [D. Minn. June 30, 2005]; Norma P. v. Pelham Sch. Dist., 19 IDELR 938 [D.N.H. Mar. 15, 1993]).

and there is no indication that the timing in the instant case resulted in a loss of educational opportunity for the student. Consequently, I am not convinced that the district violated any procedures by deciding to conduct an annual review of student's program in February 2011, especially in circumstances such as these in which the parties have previously disagreed and a unilateral private school placement was effectuated in the previous school year and it may be appropriate to allow for more time in the planning process (see Application of the Bd. of Educ., Appeal No. 11-133). I also note that the hearing record does not reflect that at the time of the CSE meeting the parents objected to the timing of the CSE meeting. Moreover, the district's special education teacher testified that the parents and the student's Rebecca School classroom teacher were informed at the CSE meeting that if they observed a significant change in the student, they could request a "reconvene" at any time (Tr. p. 25). Although the parents assert on appeal that they requested another CSE meeting in their June 17, 2011 letter, review of that letter does not support their assertion (see Parent Ex. C). Rather, the parents' June 17 letter states after detailing their concerns with the IEP and stating their intention to seek tuition reimbursement for the Rebecca School, that they were "willing to meet" with the CSE who had conducted the February 2011 meeting or with another CSE "to discuss their concerns" (id.). While this constitutes evidence that supports the parents' continued cooperativeness with the district (Parent Ex. C at p. 2), I decline to adopt so broad an interpretation of their 10-day notice of unilateral placement such that being "willing" to meet with the CSE automatically triggered the district's obligation to reconvene the CSE and review the student's program under the parent referral provision in State regulations (see 8 NYCRR 200.4[e][4]). Instead, I find the purpose of the 10-day notice sent by the parents' counsel was quite clear—that the parents wished to communicate their dissatisfaction with the district's position, their decision that they had reached to unilaterally place the student, and their willingness to remain cooperative and entertain other offers in the event the district was willing to reconsider its position (Parent Ex. C), all actions that are reasonable precursors to a tuition reimbursement claim. However, I do not find support for the conclusion that this notice constituted an affirmative demand for a new CSE meeting to revise the student's IEP based on new information, nor for that matter does it list the timing of the CSE meeting as a concern of the parents (id.). Although the letter was written in mid-June 2011, nearly the end of the 2010-11 school year, it does not state that the student had made progress which was not reflected in the February 2011 IEP (id.).

According to the CSE meeting minutes, it appears that the "12-month school year + deferment" of the student's placement was a topic that was either discussed or explained during the February 2011 CSE meeting as there is a handwritten notation to that effect (Dist. Ex. 2 at p. 1), but there is no evidence regarding a particular outcome or reaction(s) of the participants to such discussion.

Moreover, upon consideration of the student's progress between the date of the CSE meeting and the end of the 2010-11 school year, the student's Rebecca School teacher testified that by May 2011, the student had met one "Floortime" goal and many of the academic short-term objectives found in the school's December 2010 progress report that was reviewed by the February 2011 CSE (Tr. pp. 331-33).[8] The teacher's testimony, however, does not establish that the majority of the goals and objectives found in the student's February 2011 IEP would have been inappropriate

[8] The student's May 2011 Rebecca School progress report is not part of the hearing record.

as of the start date of that IEP (July 2011). Included in the February 2011 IEP were several short-term objectives that were different in terms of academic content and/or criteria from those found in the December 2010 Rebecca School progress report and there is no evidence in the hearing record that the student had mastered these objectives by May 2011 (compare Dist. Ex. 1 at pp. 6-7, with Dist. Ex. 5 at pp. 10-11; Tr. pp. 331-33). Furthermore, the hearing record suggests that there were many short-term objectives from the December 2010 Rebecca School progress report that had not been met as of May 2011, particularly related services objectives, as the student continued to work on them through December 2011 (compare Dist. Ex. 5 at pp. 10-12, with Parent Ex. H at pp. 9-16). Since the February 2011 CSE adopted, almost verbatim, the related services objectives from the December 2010 Rebecca School progress report, the hearing record indicates that these short-term objectives remained appropriate at least through December 2011 (compare Dist. Ex. 1 at pp. 8-12, with Parent Ex. H at pp. 1-16).

In light of the above, I decline to find that the timing of the February 2011 CSE meeting was a procedural error that impeded the student's right to a FAPE, impeded the parent's ability to participate in the decision making process, or deprived the student of educational benefits.

2. Composition of the CSE

Next, I turn to the parents' contention that the February 2011 CSE was improperly composed because the special education teacher who participated in the meeting did not meet the applicable requirements. Participants at the February 2011 CSE meeting included the student's mother, a district special education teacher who also served as the district representative, a district school psychologist, an additional parent member, a social worker from the Rebecca School, and a special education teacher from the Rebecca School who participated by telephone (Dist. Ex. 1 at p. 2).

Regarding the parents' argument that the February 2011 CSE lacked a proper special education teacher, I note that the IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

The hearing record reflects that the district's special education teacher previously taught special education, but was not teaching within a classroom at the time of the February 2011 CSE meeting (Tr. pp. 19-21). The hearing record further reflects the active participation of the student's then-current head classroom teacher at the February 2011 CSE meeting; specifically, that the Rebecca School classroom teacher discussed with the CSE the student's needs, present levels of performance, and annual goals and short-term objectives (Tr. pp. 310, 321-22; Dist. Ex. 2 at pp. 1-2). Moreover, the hearing record reflects that at the February 2011 CSE meeting, the CSE considered a December 2010 interdisciplinary report of progress, prepared by the student's Rebecca School providers (Tr. pp. 21-22; Dist. Exs. 2 at p. 1; 5). In addition, a review of the hearing record reflects that the concerns of the parents and the student's Rebecca School teacher were considered by the February 2011 CSE (Tr. pp. 320-23, 393-400).

Although I find that the February 2011 CSE lacked a special education teacher who either has or would likely have personally implemented the student's IEP had the student attended the district's proposed program, assuming without deciding that this constituted a procedural error, I am not persuaded by the evidence that it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]), particularly in light of the participation of the student's classroom teacher and social worker from the Rebecca School at the February 2011 CSE meeting and evidence in the hearing record which shows that the student's mother participated and expressed her concerns during the meeting (Tr. pp. 320-23, 393-400; Dist. Ex. 2; see Application of the Dep't of Educ., Appeal No. 12-010; Application of the Dep't of Educ., Appeal No. 11-040; Application of the Dep't of Educ., Appeal No. 08-105).

3. 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]).

Although the parents raise a variety of arguments concerning parental participation on appeal, the issue was only raised to a limited extent in their due process complaint notice, specifically that the CSE "ignored" the parents' concern that the 6:1+1 placement would not provide sufficient support for the student (see Parent Ex. A at p. 6). In any event, the hearing record reflects meaningful and active parental participation in the development of the student's February 2011 IEP, as discussed above. 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. 393-400; Dist. Exs. 1 at p. 2; 2). Both the student's mother and the teacher from the Rebecca School provided information regarding the student's skill levels and social/emotional functioning that is reflected in the student's IEP (Tr. pp. 320-23, 397, 399; compare Dist. Ex. 1 at pp. 3-4, with Dist Ex. 2 at pp. 1-2). Additionally, the student's mother was repeatedly asked for her thoughts regarding the IEP as the draft IEP was read aloud during the CSE meeting (Tr. pp. 35, 38-40; Dist Ex. 2), 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]). Although she disagreed with the CSE's decision, the hearing record shows that the CSE responded to the mother's concerns that the student needed a 2:1 student-to-teacher ratio by adding a 1:1 transitional paraprofessional to the student's IEP (Tr. pp. 399-400). The minutes of the February 2011 CSE meeting also indicated that the student's mother 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. 2). Based upon my review of the hearing record, I find that the student's mother was afforded an opportunity to participate in the development of the student's IEP (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

C. February 2011 IEP

1. Adequacy 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 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]).

As part of the evaluation process, State regulations require that students age 12 and those referred to special education for the first time who are age 12 and over, shall receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests (8 NYCRR 200.4[b][6][viii]).

Although the student was 12 years old at the time of the February 2011 CSE meeting, the district's special education teacher who participated in the CSE meeting testified that the district did not conduct a vocational assessment of the student because he was not yet age appropriate (Tr. p. 60). She further testified that the district usually conducted a vocational assessment when a student was entering or reaching high school age (id.; Tr. pp. 108-09). The district's special

education teacher opined that February 2011 was too early to pinpoint the student's interest in developing a career (Tr. p. 109). The district's failure to conduct a vocational assessment of the student constitutes a procedural violation. However, in the circumstances of this case and for the reasons described more fully below, I do not find that this procedural violation rose to the level of a denial of a FAPE.

While the parents assert that the district's failure to conduct a vocational assessment of the student was a significant deficiency that denied the student a FAPE in light of the district's placement of the student in a vocational high school, the hearing record does not indicate that the student would have been placed in a vocational program. First, I note that the daily schedule described by the district's classroom teacher for the recommended assigned class did not include vocational activities; rather it reflected an academic program (Tr. p. 150). When asked if the assigned school was a vocational school, the teacher testified "it's a regular school with a lot of vocational" (Tr. p. 192). The student's mother testified that when she visited the public school site in June 2011, she was informed by a district staff person she believed to be the parent coordinator that the school was a high school, not a junior high school, but that "maybe there were going to be some changes for the summer, and maybe there would be a junior high class there" (Tr. p. 405). She further testified that she was informed that the school was a vocational school (id.). During a subsequent visit to the school while the summer program was in session, the student's mother learned that there was a 6:1+1 class for junior high school students at the school (Tr. p. 406). The student's mother testified that she was introduced to the woman who coordinated the vocational program who informed her that starting in ninth grade the students worked for an hour and a half to two hours per day in either a hospital or retail store in the community, and as the students got older they worked more hours (Tr. p. 408). The student's mother confirmed that the student would not have been in ninth grade for the year in question (Tr. p. 422). In light of the above, and under these circumstances, I decline to find that the lack of a specific vocational evaluation prior to the February 2011 CSE meeting in this instance impeded the student's right to a FAPE, impeded the parent's ability to participate in the decision making process for developing the IEP, or deprived the student of educational benefits.

The parents further maintain that the CSE recommendation to place the student in a 6:1+1 special class in a specialized school was also inappropriate without first conducting an evaluation designed to assess the student's ability to be placed in a large and less supportive educational environment than the private school that the student was currently attending at the time. However, as further discussed below in the section addressing the 6:1+1 special class placement with 1:1 paraprofessional services, I find that the evaluative documentation considered at the CSE meeting and the input provided by the student's parent and Rebecca School staff to the CSE was sufficient to determine whether placement in a 6:1+1 special class setting was appropriate to address the student's needs. I also note that the district was responsive to the parent's concern regarding the level of support that would be provided to the student in the district's school and as a result, recommended that he be assisted by a 1:1 paraprofessional.

Based on the above, I find that the evaluative data considered by the February 2011 CSE and the input from the CSE participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041;

Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

2. Annual Goals and Short-Term Objectives

Next, I will consider the parents' claims regarding the sufficiency of the annual goals contained in the February 2011 IEP. As detailed below, a review of the hearing record shows that the annual goals and short-term objectives included in the February 2011 IEP were detailed, measurable, and designed to meet the student's needs.

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]).

Prior to the February 2011 CSE meeting, the parents provided the district with annual goals and short-term objectives developed by Rebecca School staff in December 2010, as part of their interdisciplinary report of the student's progress (see Dist. Ex. 5 at pp. 10-12). The CSE used the goals and objectives developed by the Rebecca School, along with input from the student's mother and Rebecca School teacher, to craft the student's IEP goals and objectives for the 2011-12 school year (Tr. pp. 34, 40-52; Dist. Ex. 2). The resultant IEP included approximately 15 annual goals and 49 short-term objectives that addressed the student's deficits in reading fluency and comprehension; functional math; writing; motor planning; visual-spatial and perceptual skills; sensory processing and body awareness; reciprocity; shared attention, engagement and communication; pragmatic language skills; receptive and expressive language skills; activities of daily living; and his ability to transition from a private school to a public school environment (Dist. Ex. 1 at pp. 6-13).[9]

Although the annual goals contained in the February 2011 IEP lacked specificity and measurability, all of the goals contained specific short-term objectives related to the student's needs, from which the student's progress could be measured (Dist. Ex. 1 at pp. 6-13). Contrary to the parents' assertions, embedded in the annual goals and short-term objectives were the means by which the student's progress would be measured including teacher observation and assessment,

[9] During the impartial hearing, the district's special education teacher who attended the February 2011 CSE meeting stated, as the parents contend, that the short-term objectives on the student's IEP were actually year-end goals (Tr. pp. 40-41, 93-95). However, I disagree with the parents' contention that this statement shows that the IHO erred in finding that the annual goals, when read together with the short-term objectives, were appropriate. Reading the goals and objectives in concert, I find that the objectives were sufficiently detailed and measurable, and adequately addressed the student's identified educational needs in a way that was reasonably calculated to provided the student with the opportunity to receive educational benefits.

teacher-made tests, writing samples, and clinical observation and checklists (id.). In addition the short-term objectives included targeted levels of mastery such as "with 80% accuracy," "within 5 seconds," and "3/5 opportunities" (id.).

The hearing record supports, in part, the parents' assertion that the CSE did not add certain academic goals—requested by the student's mother—to the February 2011 IEP. The December 2010 Rebecca School report contained two "visual spatial" goals, identified in the report as math goals (Dist. Ex. 5 at p. 10). The first goal required the student to look at a pattern of 7-8 parquetry blocks and then reconstruct the pattern without referencing the original and the second goal required the student to repeat a complex clapping pattern without the use of a visual aid (id. at pp. 10-11). Referring to the visual-spatial goals, the district's special education teacher testified that during the CSE meeting the student's mother and Rebecca School staff proposed some math goals that were "not . . . math related" (Tr. pp. 53-54). The district's special education teacher testified that the goals were not appropriate for the student, given his higher level math skills, and that as written the goals might assist a student with memorization, but not with math (id.; see Dist. Ex. 2 at p. 1). According to the district's special education teacher, when asked, no one was able to answer what specific math skill the visual-spatial goals addressed (Tr. pp 54, 100-01, 106). The student's February 2011 IEP contained a goal targeting the student's visual-spatial and perceptual skills; however, the corresponding short-term objectives addressed different skills than the "math" visual-spatial goals requested by the parent (Dist. Ex. 1 at p. 8).

With respect to the social studies goals requested by the parent, the evidence in the hearing record shows that the CSE included short-term objectives related to map reading skills as part of an activities of daily living (ADL) goal in the proposed IEP (Tr. p. 101: compare Dist. Ex. 5 at p. 11, with Dist. Ex. 1 at p. 12). With respect to the health education goals requested by the parent, the district's special education teacher testified that she informed the parent that health education was part of the district's curriculum (Tr. p. 101; Dist. Ex. 2 at p. 2). Consistent with the district's special education teacher's testimony, the student's mother testified that she was told the student didn't require health education goals because health education was part of the standard curriculum and would be addressed in the classroom (Tr. p. 398).

The parents accurately note that the February 2011 IEP did not include goals for the service of adapted physical education, Adapted physical education is defined as "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]). If a student with a disability is not participating in a regular physical education program, the IEP shall describe the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education (8 NYCRR 200.4[d][2][viii][d]). In this case, the student's IEP notated adapted physical education would be provided as a service, but it did not provide any description of the extent to which the student would participate in such specially-designed instruction. I find that the general statement of district's special education teacher that the service was "programmatic" and part of the standard curriculum is not sufficient to satisfy the requirement to describe the instruction in the student's IEP (Tr. pp. 90-92, 124-25); however, I cannot conclude, as the parents assert, that the CSE "refused" to include goals to guide and address the provision of this service. The IEP made provision for the adapted physical education and the student's deficits were well described on the

IEP. In reading and considering the evidence regarding the services provided by the IEP as a whole, in this instance I decline to find that the vague description of the adapted physical education instruction rose to the level of a denial of a FAPE (Karl v. Bd. of Educ. of the Geneseo Cent.Sch. Dist., 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. of Albuquerque Pub. Schs., 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]).

Lastly, with respect to the transitional paraprofessional, the parents assert that no plan or appropriate goals for this service were included in the February 2011 IEP. As an initial matter, I note that annual goals must relate to the student's needs that result from the student's disability and need not be tied to a specific service. However, upon reviewing the student's IEP, I find that it appropriately reflects the role of the transitional paraprofessional in supporting the student. According to the student's mother, at the CSE meeting she articulated what she believed to be five duties of the transitional paraprofessional (Tr. p. 400). Among others, those duties included facilitating the student's social interaction, assisting him with academics, and anticipating his emotional and social needs (id.). According to the student's mother, the school psychologist stated that the duties as articulated by the parent would be included in the student's IEP (id.; see Dist. Ex. 2 at p. 2). As the parent claims, the February 2011 IEP does not describe in detail every possible duty that the paraprofessional may have engaged in with the student; however, it includes an annual goal targeting the student's transition from a private to a public school with the support of the 1:1 transitional paraprofessional (Dist. Ex. 1 at p. 13; see Tr. pp. 50-52). I note that neither the IDEA, nor federal and State regulations require that the duties of district staff be detailed in a student's IEP.[10] Additionally, I note that the corresponding short-term objectives relate to the student identifying the emotional triggers that lead to dysregulation, accepting sensory strategies when sensory breaks are needed, and engaging in peer interactions and small group instruction (Dist. Ex. 1 at p. 13). Thus, the implication of the IEP is that the role of the transitional paraprofessional includes, at a minimum, facilitating the student's peer interactions and participation in small group instruction, and helping the student to anticipate his own emotional needs (id.).

In conclusion, I find that the student's annual goals and short-tem objectives, when read together, were sufficiently detailed and measurable, and they adequately addressed the student's identified educational needs. Based upon the forgoing evidence, I find that while the IEP may not

[10] Distinguishable from this point are cases in which IHOs or SROs have relied upon their equitable authority to fashion a remedy in a specific case by directing the identification of staff duties in a student's IEP in a manner that is beyond that normally required by the IDEA or attendant federal or State regulations (J.K. v. Springville-Griffith Institute Cent. Sch. Dist. Bd. of Educ., 2005 WL 711886, at *9 [W.D.N.Y. Mar. 28, 2005] [noting that the directive to a CSE to consider the addition of a 1:1 aide and the inclusion of the duties of such aide in writing in the student's revised IEP "as required by SRO Munoz," but also noting that the failure to include such duties in the IEP in accordance with the SRO's order did not constitute a denial of a FAPE]).

have detailed the paraprofessional's duties in a particular manner desirable to the parents, I decline to find that the district denied the student a FAPE on this basis.

3. Alternate Assessments

State regulations provide that the use of alternative testing procedures shall be limited to students identified by a CSE as eligible for special education or students whose native language is other than English (see 8 NYCRR 100.2[1][g][1]). Guidance regarding the development of IEPs states in pertinent part that a CSE must determine whether a student should participate in State and local assessments, or the New York State Alternative Assessment (NYSAA):

> All students with disabilities must be included in State or district-wide assessment programs. If the Committee determines that the student will participate in an alternate assessment on a particular State or district-wide assessment of student achievement, the IEP must provide a statement of why the student cannot participate in the regular assessment, and why the particular alternate assessment selected is appropriate for the student.

("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Feb. 2010 Revised Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf)

In this case, the student's February 2011 IEP indicated that due to the student's "global developmental and significant academic delays," he would participate in "Alternative Assessment" and that the student would be further assessed by teacher observation, class participation, and a student portfolio (Dist. Ex. 1 at p. 17). The district's special education teacher explained that due to the student's cognitive level and academic functioning, he would not be able to participate in State and local assessments and therefore his "testing category" was changed to "Alternative Assessment" at the CSE meeting (Tr. pp. 59-60). Although the parents assert on appeal that the CSE failed to meaningfully consider their request to provide accommodations to permit the student to participate in State and local testing, there is no record of the parents making this request in the CSE meeting minutes, there is no testimonial evidence in the hearing record regarding this topic, and in support of this claim, the parents cite only to their due process complaint notice. Under the circumstances herein, I decline to find that CSE's determination to designate the use of "Alternative Assessment" on the student's IEP resulted in a failure of the district to offer the student a FAPE.

4. 6:1+1 Special Class Placement with 1:1 Paraprofessional Services

Next, I turn to the parents' challenge to the student's placement in a 6:1+1 special class placement. In developing the student's IEP for the 2011-12 school year, the CSE considered an August 2010 private psychoeducational evaluation, a November 2010 classroom observation, a November 2010 psychoeducational evaluation, a December 2010 Rebecca School interdisciplinary report of progress, and a January 2011 addendum to the December 2010 Rebecca School report (Tr. pp. 21-22; see Dist. Exs. 4-8).

The August 2010 private psychoeducational evaluation was provided to the district by the student's parents (Tr. pp. 22, 71-75, 394). Based on standardized testing of the student's cognitive

abilities, the evaluators reported that, in general, the student's knowledge and demonstration of nonverbal concepts was significantly stronger than that of verbal concepts (Dist. Ex. 8 at p. 5).[11] In addition, based on the results of achievement testing, the evaluators reported that the student's academic skills appeared to be impaired overall but with some variability, indicating signs of relative strengths and weaknesses (id. at p. 6). They noted that during testing the student's nonverbal skills such as pattern recognition and making connections could reach the "Average" range and be commensurate with typically developing peers, but that the student's verbal skills, fine motor skills, and academic skills as a whole remained significantly impaired and required intense remediation (id. at p. 7). Based on a classroom observation, the evaluators reported that the student exhibited limited eye contact and tended in engage in self-stimulatory behaviors during 1:1 Floortime instruction (id. at pp. 3-4). They noted, however, that despite the student's self-stimulatory behaviors he appropriately participated in required activities and engaged with and responded well to staff members (id. at p. 4).

The evaluators concluded that the student presented with significant difficulties with receptive, expressive, and pragmatic language and reciprocal interaction skills, as well as perseverative, self-directed behavior and sensory impairments consistent with an autism spectrum disorder diagnosis (Dist. Ex. 8 at pp. 6-7). They further reported that the student's adaptive functioning was underdeveloped and that he exhibited problems with sustained attention and self-directed behaviors, particularly when he became overwhelmed (id. at p. 7). Throughout their report, the evaluators commented on how the student had benefited from his placement at the Rebecca School based on his familiarity with the setting and instructors, and his response to the strategies and structure provided by the school (id. at pp. 4, 7-8). They opined that placement in a larger academic setting or unfamiliar program that focused less on generalization of skills in more of a natural environment would be greatly detrimental to the student's continued progress and could have the potential for regression in the student's academic abilities, as well as his developmental and adaptive skills (id. at p. 7).

Next the February 2011 CSE considered the November 8, 2010 classroom observation of the student at the Rebecca School, conducted by district's special education teacher (Dist. Ex. 4). Notably, the special education teacher reported that during her observation the student was able to follow directions and respond to redirection (id. at p. 2). He did not engage in peer interaction (id.). Although the special education teacher indicated that the student displayed self-stimulatory behaviors, she reported that no overly disruptive behaviors were observed (id.).

The February 2011 CSE also considered a December 2010 Rebecca School interdisciplinary report of progress that described the student's program at the private school, as well as his performance with regard to academics, emotional development, and motor skills (Dist. Ex. 5). The December 2010 progress report indicated that the student was enrolled in an 8:1+3 class where his schedule consisted of morning meeting; "Thinking Goes to School" activities; instruction in English language arts (ELA), mathematics, and science; related services of speech

[11] The evaluators reported that they attempted to administer selected subtests from the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), but due to significant language difficulties and behavior associated with his autism diagnosis the student was only formally able to complete two nonverbal subtests (Dist. Ex. 8 at p. 5). The evaluators supplemented the WISC-IV with additional standardized testing which they used to assess the student's nonverbal and expressive language skills (Dist. Ex. 8 at p. 5).

therapy, OT, and music therapy; Floortime sessions; adapted physical education; snacks; and lunch (id. at p. 1).

With respect to the student's functional emotional development, the Rebecca School teacher reported that the student presented with a generally calm but sensory seeking regulatory state (Dist. Ex. 5 at p. 1). She noted that the student did not frequently become dysregulated, but that when he did his voice became higher pitched and his speech faster, as he attempted to verbally negotiate the situation in an attempt to achieve re-regulation (id.; see Dist. Ex. 6 at p.1). The teacher described the student's periods of dysregulation as "brief" and lasting no more than 10 minutes (Dist. Ex. 5 at p. 1). She explained that the student's dysregulation could be triggered by communicative partners who did not follow the student's rules and expectations that the student transition before he was ready (id.).

Following her description of the student's functional emotional development, the Rebecca School teacher described the student's academic skills and provided an overview of the student's academic curriculum (Dist. Ex. 5 at pp. 3-5). With respect to literacy, the teacher reported that the student was able to read full sentences from familiar texts, and noted that because the student was a strong "sight and phonemic reader" his reading program focused on fluency and comprehension (id. at p. 3).

As detailed by the teacher, the student was able to consistently use math terms such as "greater" and "less" and explain the relationship between numbers (Dist. Ex. 5 at p. 4). The teacher stated that the student had mastered addition and subtraction of single digit numbers, and was working on adding and subtracting double-digit numbers (id.).

Next, the student's occupational therapist at the Rebecca School reported that the student received two individual and two small group sessions of OT per week and also participated in additional groups led or co-led by the reporting therapist (Dist. Ex. 5 at p. 5). She stated that a focus of the student's therapy was on activities that encouraged upper extremity, lower extremity, and core strength (id. at p. 6). According to the occupational therapist, the student presented with a mixed-sensory profile in that he was under-responsive to vestibular input but over responsive to auditory input of increased volume (id.). According to the occupational therapist, the student required moderate verbal and tactile redirection to remain on task with his peers, but that he was overall flexible (id.).

The student's counselor at the Rebecca School reported that the student was seen twice weekly for counseling (Dist. Ex. 5 at p. 7). The first session was conducted as an individual Floortime session that focused on expanding the student's flexibility, reciprocity, and engagement over a broad range of topics and emotions; while the second session was conducted in a 2:2 setting and focused on increasing shared attention, engagement, and communication in peer play (id.). She reported that in recent months the student had demonstrated growth in his reflection and expression of his emotional state (id.). With respect to peer play, the counselor reported that the student continued to require her support to share attention with a peer throughout the counseling session using eye contact, proximity seeking, or verbal response (id.).

According to the December 2010 Rebecca School progress report, the student received mental health services in the form of individual music therapy twice weekly (Dist. Ex. 5 at p. 8).

The music therapist explained that the focus of therapy was to develop and broaden the student's functional emotional developmental milestones through interactive music making experiences (id.). According to the therapist, since the start of therapy, the student had become increasingly able to share his musical ideas with others, using them to relate (id.).

Lastly, the December 2010 progress report included Floortime, academic, fine motor, visual-spatial, sensory processing, reciprocity, communication, shared attention and engagement, and two-way purposeful interaction goals for the student (Dist. Ex. 5 at p. 12).

The CSE also considered a January 2011 addendum to the Rebecca School progress report that described the student's communication abilities and speech-language therapy services (Dist. Ex. 6). With respect to receptive language, the speech-language pathologist reported that the student's ability to process and respond to language was dependent upon his level of regulation, engagement, and motivation during a given interaction (id. at p. 2). With respect to expressive language, the speech-language pathologist reported that the student was a verbal communicator who typically used five to seven word utterances to communicate during individual therapy sessions (id.). The speech-language therapist developed goals for the student targeting his engagement/pragmatic language skills, as well as his receptive and expressive language (id. at p. 4).

Also considered by the February 2011 CSE was a November 2010 psychoeducational evaluation contracted for by the district (Tr. p. 68; Dist. Ex. 7). Administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB5) yielded the following standard scores: nonverbal IQ 62 (mildly delayed), verbal IQ 46 (moderately delayed), and full-scale IQ 52 (moderately delayed) (Dist. Ex. 7 at p. 2). Based on the student's test scores, the psychologist reported that the student's nonverbal visual-motor reasoning skills were better elaborated than his verbal-linguistic auditory processing skills (id. at p. 3). To assess the student's academic achievement, the psychologist administered the same achievement test administered to the student as part of the August 2010 psychoeducational evaluation, and concluded that the student's academic skills, as well as his ability to apply them were in the "very low" range (id. at p. 4; see Dist. Ex. 8 at p. 6). Overall, the psychologist found that the student exhibited delays in cognitive and adaptive functioning and demonstrated "issues" with attention, impulse control, and self regulation that could impact his overall academic functioning and adjustment (Dist. Ex. 7 at p. 5). The psychologist noted that the student was easily distracted, tended to engage in repetitive and stereotyped behaviors, demonstrated decreased frustration tolerance, and required ongoing external intervention and redirection (id.). The psychologist also cited the student's strengths, noting that he was friendly; cooperative when provided appropriate redirection, prompting, and external support; able to make his needs known; in fair health; and had a supportive family (id.).

The IEP developed by the CSE on February 9, 2011 reflected the results of the district's psychological evaluation, the December 2010 Rebecca School progress report, and the January 2011 Rebecca School addendum, as well as the discussion that took place at the CSE meeting (compare Dist. Ex. 1 at pp. 3-5, with Dist. Exs. 2; 5; 6; 7).

State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). To address the

student's needs as outlined above, the February 2011 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with the assistance of a full-time 1:1 transitional paraprofessional (Dist. Ex. 1 at pp. 1, 17). In addition, based on information from the student's mother, evaluators, Rebecca School teacher, and service providers, the CSE incorporated environmental modifications and human/material resources into the IEP that the CSE believed the student required in order to be successful in a 6:1+1 setting (id. at pp. 3-5). These modifications and resources included the use of visual and verbal cues, teacher prompts, redirection, sensory breaks, calm affect/voice, and building the student's interest in academics, as well as the provision of special education and related services (id.). As discussed above, the CSE also developed annual goals and short-term objectives that targeted the student's deficits in reading fluency and comprehension, functional math, writing, reciprocity, shared attention, ADLs, and his ability to transition from a private school to a public school environment (id. at pp. 6-13). To address the student's speech-language delays, the CSE recommended that the student receive three 30-minute sessions of individual speech-language therapy per week and two 30-minutes sessions of speech-language therapy in a dyad (id. at p. 16). The CSE developed goals and objectives related to the student's weaknesses in engagement and pragmatic language skills, receptive language processing, and expressive language (id. at pp. 11-12). To address the student's sensory processing and motor needs, the CSE recommended the student receive two 30-minute sessions of individual OT per week and two 30-minute sessions of OT in a dyad (id. at p. 16). The CSE also developed goals and objectives related to motor planning, visual-spatial and perceptual skills, and sensory processing (id. at pp. 8-9). Lastly, to address the student's social/emotional difficulties, the CSE recommended that the student receive one 30-minute session of individual counseling per week and one 30-minute session of counseling in a dyad (id. at p. 16). The CSE also developed goals and objectives targeting the student's weaknesses in reciprocity, identifying emotions, shared attention, and communication during joint play (id. at pp. 9-10).

After carefully reviewing the evidence in the hearing record I find that the February 2011 CSE recommended an appropriate special class placement in the student's IEP for the 2011-12 school year that was designed to address the student's academic, language, motor and social/emotional needs.

Minutes from the February 2011 CSE meeting reflected the participation of the student's mother and Rebecca School teacher in the development of the student's IEP for the 2011-12 school year (Dist. Ex. 2). The student's Rebecca School teacher testified that during the CSE meeting the student's IEP was reviewed section by section and that she was asked to give her opinion regarding each section (Tr. pp. 320-21). She further testified that she was asked to provide input regarding the student's academic abilities, including functional levels and IEP goals (Tr. p. 322).

While the parents assert that the district failed to consider the student's individual educational needs, the hearing record shows that the CSE considered the student's mother's concern that the proposed 6:1+1 class ratio would not provide the student with sufficient support and in response, recommended that the student be provided with a 1:1 transitional paraprofessional. The Rebecca School teacher indicated that during the CSE meeting, she expressed concern regarding the level of support available to the student in a 6:1+1 setting, as well as disagreement with the district's recommendation for a transitional paraprofessional because she believed the paraprofessional would provide the student with too much support and cause him to lose some of his independence (Tr. pp. 344-45). She expressed further concern regarding the qualifications of

the paraprofessional and the length of time that a paraprofessional would remain part of the student's IEP (Tr. p. 345). The student's mother also testified that she shared her concerns with the February 2011 CSE regarding the student-to-teacher ratio of the proposed class, among other things (Tr. pp. 394-95). She indicated that in response to the district's recommendation for a 1:1 transitional paraprofessional, she expressed her opinion that the student did not require a 1:1 paraprofessional, rather he required a small class ratio, or a "T.A," as he needed someone to help him with academics (Tr. pp. 399-400). According to the district's special education teacher, a 1:1 transitional paraprofessional was recommended based on the student's mother's concern regarding class ratio and the student's need for assistance in transitioning from the private school to the public school placement (Tr. pp. 81-82). She noted that the student's behavior did not seriously interfere with instruction and was not the basis for the recommendation of a paraprofessional (id.). She confirmed that during the CSE meeting the parent opined that the student did not require a paraprofessional, rather that he required a "2:1 ratio" (Tr. p. 84).

Although a CSE must consider parents' suggestions or input offered from privately retained experts, the CSE is not required to merely adopt such recommendations for different programming (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]). The IDEA does not require the district to offer the student what some may view as the "best opportunities" for the student (Watson, 325 F. Supp. 2d at 144) or "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132). At the time of the February 2011 CSE meeting, the student was enrolled in an 8:1+3 class at the Rebecca School (Dist. Ex. 5 at p. 1). While the parents may have preferred that the student receive additional classroom support through the provision of an additional teacher assistant rather than a 1:1 transitional paraprofessional, I find that the CSE's recommendation for a 1:1 transitional paraprofessional within a 6:1+1 special class was sufficiently tailored to address the student's individual needs and was an appropriate placement in order to offer the student a FAPE.

5. Parent Counseling and Training

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, some courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see M.W. v. New York City Dep't of Educ., 2012 WL 2149549, at *13 [E.D.N.Y. June 13, 2012]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011];M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 25, 2010]), or where the district was not unwilling to provide such services at a

later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [2008]; but c.f., P.K., 2011 WL 3625088, at *9, adopted at, 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011]).[12] Recently, the Second Circuit explained that "because school districts are required by [State regulation][13] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E. v. New York City Dept. of Educ., 2012 WL 4125833 [2d Cir. 2012]). The Court further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (id.).

Here, it is undisputed that the February 2011 CSE did not recommend parent counseling and training on the student's February 2011 IEP in violation of State regulation. However, neither the parents' claim by itself nor the evidence adduced in the hearing record offer much in the way of insight or rationale regarding how the failure to specify parent counseling and training on the student's IEP in this instance rose to the level of a denial of a FAPE, and as state above, the Second Circuit does not appear to support application of such a broad rule when the principle defect in the student's IEP is failure to set forth parent training and counseling services (R.E., 2012 WL 4125833; see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y. Oct. 30, 2008]). Where as here, the lack of parent counseling and training is the only service lacking in the IEP and the hearing record does not contain evidence showing that this defect rose to the level of denying the student a FAPE, I find that the parents' argument must be dismissed.

I further note that in this case, the district's special education teacher testified that parent counseling and training were discussed at the CSE meeting and that the parents were informed that the services were "programmatic for our city-wide programs" and that they could discuss services with the staff of the specific school to which the student was assigned (Tr. p. 59). The special education teacher further testified that the district recognized that the parents' need for counseling and training may change over time (id.). I also note that the student's mother testified that the parents made use of parent counseling and training services made available by the Rebecca School and elsewhere in the past (Tr. pp. 389-93). The Second Circuit has explained that this evidence may not be considered because it constitutes "retrospective testimony" regarding services not listed in the IEP (R.E., 2012 WL 4125833 [explaining that the adequacy of an IEP must be examined prospectively as of the time of the parents' placement decision and that "retrospective testimony" regarding services not listed in the IEP may not be considered, but rejecting a rigid "four-corners rule" that would prevent consideration evidence explicating the written terms of the IEP]).

[12] To the extent that P.K. or R.K. may be read to hold that the failure to adhere to the procedure of listing parent counseling and training on an IEP constitutes a per se, automatic denial of a FAPE, I note that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]).

[13] 8 NYCRR 200.13[d].

Even acknowledging that the February 2011 CSE's failure to recommend parent counseling and training violated State regulation, the hearing record ultimately supports the conclusion that this violation, alone, did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419). While I find the parents' argument on this issue unavailing in this case in terms of a denial of a FAPE, I continue to be troubled with what appears to be a repeated failure of this particular district to comply with federal and State regulations requiring a district to set forth needed parent counseling and training as a related service on students' IEPs; especially in this case where the district argues on appeal that parent counseling and training is a methodology, rather than a related service (Answer ¶ 57; see, e.g., Application of the Dep't of Educ., Appeal No. 12-091; Application of a Student with a Disability, Appeal No. 12-047; Application of the Dep't of Educ., Appeal No. 12-035; Application of the Dep't of Educ., Appeal No. 12-034; Application of a Student with a Disability, Appeal No. 12-032; Application of a Student with a Disability, Appeal No. 12-024; Application of a Student with a Disability, Appeal No. 11-145; Application of the Dep't of Educ., Appeal No. 11-137; Application of the Dep't of Educ., Appeal No. 11-136; Application of the Dep't of Educ., Appeal No. 11-133; Application of the Dep't of Educ., Appeal No. 11-118; Application of a Student with a Disability, Appeal No. 11-110; Application of a Student with a Disability, Appeal No. 11-089; Application of the Dep't of Educ., Appeal No. 11-070; Application of a Student with a Disability, Appeal No. 11-068; Application of a Student with a Disability, Appeal No. 11-032; see also 34 CFR 300.34[a], [c][8]; 8 NYCRR 200.1[kk], [qq] [defining parent counseling and training as a related service within the meaning of the IDEA]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][b][5] [noting that a statement of related services must be described on a student's IEP]; 34 CFR 300.320[a][7] [stating that an IEP must describe the anticipated frequency, duration, and location of special education and related services]). Notwithstanding the requirements regarding related to findings of FAPE (see 34 CFR 300.513[a][1]-[2]) an administrative hearing officer may order a district to comply with the procedural safeguards contained in the IDEA (34 CFR 300.513[a][3]). In light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I will order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on a form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).[14]

[14] The State's model prior written notice form and guidance materials are located at http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html.

D. Assigned School

In their petition, the parents raise a number of concerns regarding the appropriateness of the particular public school site to which the student had been assigned. The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[15] The IDEA and State regulations also 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 at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). 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. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In addition, 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). 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]).

In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement (R.E., 2012 WL 4125833). Thus, in a case such as this one when it became clear that the student was not going to be educated under the proposed IEP, there can be no denial of a FAPE due to the to the speculation that there would be a failure to implement the IEP (see R.E v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42; 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]).

In order to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability,

[15] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

Appeal No. 09-063).[16] Additionally, the United States Department of Education (USDOE) has also 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]).

In this case, the district correctly argues that these issues are speculative insofar as the parents did not accept the IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing. Consequently the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, therefore, there is no basis for concluding that it failed to do so. Accordingly, the parents' claims regarding the inadequacy of public school site and classroom must be dismissed.

Even in the absence of the Second Circuit's holding in R.E., as discussed below I note that the hearing record in its entirety does not support the conclusion that had the student actually attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P., 2010 WL 1049297; Cerra, 427 F.3d at 192; see Van Duyn, 502 F.3d at 811; Houston Independent School District, 200 F.3d 341 at 349; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; DD-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

1. Sensory Needs

Despite the parents' claims to the contrary, the hearing record reflects that the assigned school was capable of addressing the student's sensory needs, had the student attended the school. The hearing record shows that the student had a mixed sensory profile in that he was under responsive to vestibular input and over responsive to auditory input of increased volume (Dist. Ex. 5 at p. 6). The teacher of the assigned class testified that her classroom included a designated sensory corner with squeaky balls, bean bags, and weighted vests (Tr. pp. 151-52; see Tr. p. 171). She reported that classroom staff had been trained by the occupational therapist on how to apply pressure "massages" to students and that they also had students move heavy things from one place to another as a means of calming their nervous system (Tr. p. 152). In addition, the teacher testified that her class included a morning movement session that used yoga, jumping, and body movements that would assist the student with vestibular input (Tr. pp. 172-73). According to the

[16] The Second Circuit has established that "'educational placement' refers to the type of educational program on the continuum—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *11 [S.D.N.Y. Aug. 19, 2011]; R.K., 2011 WL 1131492, at *15-*17, adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 CFR 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 2011 WL 4001074, at *11).

teacher, if a student required sensory breaks they would be included in the student's individual schedule (Tr. pp. 169, 171, 215). The teacher also reported that there was OT in the classroom (Tr. p. 204). Based on the above, the evidence supports the conclusion that if the student had been enrolled in the public school, his sensory needs could have been adequately addressed at the assigned school.

2. Functional Grouping

With regard to the parents' claim related to grouping the student at the public school site, 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).[17]

[17] In a thoughtful and carefully reasoned opinion regarding adherence to functional grouping regulations and the analysis of claims thereunder, at least one District Court has found that there is some room made for parents to permissibly speculate to a degree regarding the likelihood that the public school would or would not make adjustments to its strategies for complying with State's grouping regulations "if the alleged defects were reasonably apparent to either the parent or the school district," even when such parents have rejected the public school placement without enrolling the student under the proposed plan (see E.A.M. v. New York City Dept. of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]); however, I believe the Second Circuit's opinion in R.E., which was promulgated at approximately the same time as the District Court's decision in E.A.M., represents the controlling view that such speculation may not serve as the basis for finding a denial of a FAPE and that the focus of the inquiry under these circumstances must remain on the adequacy of the written IEP (R.E., 2012 WL 4125833).

In this case, the student's mother initially raised concerns regarding grouping in the district's 6:1+1 special classes at the February 2011 CSE meeting (Tr. pp. 82-83, 399). Specifically she indicated that the 6:1+1 classes that the district had assigned the student to thus far were "really low functioning" and that the student was not (Tr. p. 399). The student's mother testified that at the CSE meeting she was assured by district staff that there were many 6:1+1 classes that were functionally grouped, including high functioning 6:1+1 classes where some of the students were pursuing Regents diplomas, and that the student would be appropriately functionally grouped (id.).

The teacher of the assigned class testified that in July 2011 she taught a 6:1+1 special class "with an autistic population" (Tr. pp. 143, 145). She indicated that at the time there were three paraprofessionals assigned to her classroom, the first paraprofessional worked as a 1:1 aide for a specific student, while the other two paraprofessionals were assigned to the class as a whole (Tr. pp. 146-47). The teacher indicated that as of the first day of summer school there were five students in the class ranging from age 11 to 14 (Tr. p. 148). According to the teacher, the students were functioning academically between kindergarten and the sixth grade level (Tr. pp. 148-49). She explained that one of the students was functioning at the kindergarten level, one student was functioning at the sixth grade level, and the other three students were functioning at a second to third grade level (id.). The teacher testified that she employed functional grouping throughout the day in her classroom (Tr. p. 149).

At the time the student's IEP was developed in February 2011, the student's academic skills ranged from below kindergarten to a third grade level (Dist. Exs. 1 at p. 3; 7 at p. 4; 8 at p. 9). According to the teacher's testimony, the classroom curriculum included academic instruction in ELA, reading, math, social studies, and science (Tr. pp. 150, 167-68, 210).

While the evidence regarding the range of grade levels in the proposed classroom shows was broad, the evidence also shows that there were similarities between the student and the other students in the proposed class, and there is no indication of how the district would have reacted in light of grouping requirements had the student actually attended the proposed public school site. I am not persuaded that the district would have deviated from substantial or significant provisions of the student's IEP in a material way if district had been responsible for complying with grouping regulations. Accordingly, upon review of the hearing record, I find that the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned district school at the start of the 2011-12 school year and did not deny the student a FAPE as a result of improper grouping.[18]

3. Math Curriculum

With respect to the claims regarding the math curriculum raised in the parents' due process complaint notice, the teacher of the assigned class reported that she worked on budgeting and managing money, purchasing items in the supermarket, and waiting for change (Tr. p. 158). In addition she reported that the class used manipulatives, math software, hands-on activities, and a smart board to calculate costs (Tr. p. 177). The teacher indicated that she had access to a math coach, who spent time in her classroom, and that she prepared teacher made materials in relation

[18] When implementing an IEP, a district can be required to comply with the grouping requirements in State regulations at any point in time that the student is receiving services.

to the specific goals on her student's IEPs (Tr. pp. 153, 155, 205). The teacher confirmed that she did not use "touch point" math in her class during summer 2011 (Tr. p. 216). She testified that she used "News-2-You" and the district's "blueprint for learning" (id.). The teacher reviewed the math goals in the student's IEP and described the manner in which she would implement them (177-78).

Accordingly, upon review of the hearing record, I find that the evidence indicates that the district was capable of implementing the student's IEP with respect to the math goals and objectives on the IEP in the 6:1+1 special class at the assigned district school at the start of the 2011-12 school year.

4. Assignment to a High School

Regarding the parent's argument that the student should have been assigned to a district middle school rather than a high school due to his age, I note (and as also described above) that the hearing record shows that the public school site to which the student was assigned contained a 6:1+1 class for student's of middle school age during summer session of the 2011-12 school year and further note that during the balance of the school year middle school classes were held at another location (Tr. pp. 187, 405-06, 422).

I find that the evidence indicates that the district had assigned the student to an age-appropriate classroom and was capable of implementing the student's IEP in the 6:1+1 special class at the public school sites offered by the district.[19]

In view of the foregoing evidence, there is no basis to conclude that if the student had been enrolled in the public school and the district been required to implement his IEP, that the district would have thereafter failed to implement the February 2011 IEP in a material or substantial way and thereby denied the student a FAPE.

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of the Rebecca School or whether the equities support the parents' claim for the tuition costs at public expense (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[19] The parents asserted in their due process complaint notice that the assigned school would be too large, diverse and distracting for the student (Parent Ex. A at p. 7). The IHO did not make any findings with respect to this claim. My previous holding in this case that the parents may not speculate that implementation of the IEP would have been unsuccessful is equally applicable to these claims regarding the size and diversity of the public school site and therefore they cannot prevail on them (R.E., 2012 WL 4125833); however I am unable to offer alternative findings on this issue as there was insufficient evidence in the hearing record on this point to draw even speculative conclusions.

IT IS ORDERED that at the next CSE meeting regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision.

Dated: **Albany, New York**
October 17, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER