



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-079

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

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Diane da Cunha, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the costs of the student's unilateral placement for the 2011-12 school year. The appeal must be sustained.

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

In this case, the student demonstrates difficulties with cognition, academics, self-regulation, behavior, social/emotional functioning, language processing, and motor planning (see Dist. Exs. 4-6; 12).¹ In addition, the student has received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (Dist. Ex. 5 at p. 5).

On January 24, 2011, the CSE convened to conduct the student's annual review and to develop her IEP for the 2011-12 school year (Dist. Ex. 3 at pp. 1-2). Finding that the student

¹ The hearing record contains duplicative exhibits. I remind the IHO that, pursuant to State regulations, it is her responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

remained eligible for special education and related services as a student with autism, the CSE recommended that the student receive a 12-month school year program and placement in a 6:1+1 special class in a specialized school with related services consisting of two 40-minute sessions per week of speech-language therapy in a small group (2:1); one 40-minute session per week of individual speech-language therapy; two 40-minute sessions per week of counseling in a small group (2:1); one 40-minute session per week of individual counseling; one 40-minute session per week of individual occupational therapy (OT); and the services of the full-time, 1:1 crisis management paraprofessional (*id.* at pp. 1-2, 13-15).² The CSE also developed long-term adult outcomes for the student's transition needs, which addressed the areas of community integration, post-secondary placement, independent living, and employment (*id.* at p. 16).³ In addition, the CSE drafted annual goals and short-term objectives, recommended special education transportation and adapted physical education, and included a behavioral intervention plan (BIP) with the IEP (*id.* at pp. 1, 4-12, 17).⁴

In a notice dated January 24, 2011, the district summarized the special education and related services recommended for the student for the 2011-12 school year, but advised the parents that although the student had the "right to an immediate placement in this program," the district recommended deferring her placement in the program until June 15, 2011 because the IEP had been developed for the 2011-12 school year (Dist. Ex. 11). The notice indicated that if the parents consented to this recommendation, they should sign the form and return it; if, however, the parents did not consent to this recommendation, they could request another meeting, mediation, or an impartial hearing (*id.*).⁵

² 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]).

³ Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; *see* Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (*id.*).

⁴ Both of the student's parents attended the January 2011 CSE meeting accompanied by their advocate (*see* Dist. Exs. 3 at p. 2; 7 at p. 1).

⁵ The hearing record contains no evidence that the parents responded in any manner to the January 24, 2011 notice of deferred placement (*see* Tr. pp. 1-431; Dist. Exs. 1-23; Parent Exs. A-I; IHO Ex. 1). On January 31, 2011, the parents did, however, sign a consent form (dated January 24, 2011) agreeing to the provision of special education and related services to the student during July and August as part of the recommended 12-month school year program (Dist. Ex. 10; *see* Dist. Ex. 3 at p. 1).

On April 6, 2011, the parents made a \$10,000.00 payment to the Rebecca School for the 2011-12 school year (Parent Ex. F at p. 1; see Parent Ex. E at p. 5).⁶ The parents made the initial payment in April 2011 because they executed a contract with the Rebecca School for the student to attend a 12-month school year program for the 2011-12 school year (see Tr. pp. 412-27).⁷

In a final notice of recommendation (FNR) dated June 6, 2011, the district summarized the special education and related services recommended for the student for the 2011-12 school year, and identified the particular school to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 13).

On June 10, 2011, the parents made a second payment of \$17,240.00 to the Rebecca School for the 2011-12 school year (Parent Ex. F at p. 2; see Parent Ex. E at p. 5).

On June 21, 2011, the parents executed a second contract with the Rebecca School for the student to attend an 11-month school year for the 2011-12 school year—beginning August 1, 2011 and ending June 22, 2012—to accommodate a one-month family vacation (see Tr. pp. 415-16; Parent Ex. E at pp. 1-6; see also Tr. pp. 238-39).

On June 27, 2011, the parents—accompanied by their special education advocate—visited the school site identified in the FNR (Parent Ex. C at p. 1). In a letter dated June 28, 2011, the parents notified the district of their rejection of the proposed public school site (id. at pp. 1-2). The parents indicated that the proposed school site was not appropriate because the school building was very large with over "1500 students," and would overwhelm the student; the "noise level and commotion" of the cafeteria would affect the student's anxiety; the student would not have an appropriate peer group because the school population was "mainly boys;" the "lax" security at the school was a concern due to the student's impulsivity and "potential to run off;" the "medically fragile" students at the school did not have needs similar to the student; the school did not have a "crisis intervention team" to deal with the student's "tendency to be emotionally volatile" and "acting out behaviors;" the school did not have a "set plan or protocol" for dealing with students when they acted out; the school did not have a social skills program; and the parents were told that the school did not have a placement available for the student until September 2011 (id.). As a result, the parents indicated that they intended to unilaterally place the student at the Rebecca School for the 2011-12 school year and that they would seek tuition reimbursement (id. at p. 2). The parents also requested that the district provide the student with round-trip transportation to the Rebecca School (id.).

⁶ The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). During the 2010-11 and 2011-12 school years at the Rebecca School, the student was enrolled in the "Transitions Program" (see Dist. Ex. 12 at p. 1; Parent Ex. H at p. 1). The Transitions Program was "designed to promote student autonomy through ongoing academic and social activities" to prepare students for "long term goals and community life," and the curriculum provided "academic experiences in the classroom and community" (Dist. Ex. 12 at p. 1). During the 2010-11 school year, the student attended an 8:1+3 classroom at the Rebecca School; in the 2011-12 school year, she attended an 8:1+4 classroom with students who were 15 to 20 years old, and she was the only female student in the classroom (see Dist. Ex. 12 at p. 1; Parent Ex. H at p. 1; see also Tr. pp. 242-45, 263-64, 293-94). The student has continuously attended the Rebecca School since March 2009 (see Tr. p. 238; Dist. Ex. 3 at p. 3).

⁷ The 12-month school year program contract with the Rebecca School was not submitted into the hearing record (Tr. pp. 1-431; Dist. Exs. 1-23; Parent Exs. A-I; IHO Ex. 1).

A. Due Process Complaint Notice

By due process complaint notice dated July 11, 2011, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, alleging both procedural and substantive violations (see Parent Ex. A at pp. 1-4). In particular, the parents alleged that the 2011-12 IEP was not appropriate because the January 2011 CSE was precluded from considering the student's needs "as reflected by his/her progress or lack thereof in the second half of the school year" by convening the CSE meeting in January 2011 (id. at p. 2). In addition, the parents alleged that the annual goals and short-term objectives in the IEP did not reflect "all" of the student's educational, social, and emotional needs; the IEP was not reasonably calculated to enable the student to receive educational benefits; the annual goals were not measurable; the CSE was not validly composed; the recommended student-to-teacher ratio was not appropriate for the student; the CSE's recommendations were not consistent with the "suggestions and recommendations of those professionals" working directly with the student; the CSE failed to consider a nonpublic school placement; the CSE failed to consider a more restrictive placement; the CSE failed to develop an appropriate transition plan; the CSE failed to offer the student a placement at the CSE meeting and deferred placement until June 2011; and the school site identified in the FNR was not appropriate (id. at pp. 2-4). The parents requested that an IHO make the following findings: the district failed to offer the student a FAPE, the "CSE review and the IEP" were flawed, the parents were deprived of the opportunity to meaningfully participate in the development of the student's IEP, the CSE failed to offer an appropriate placement for the 2011-12 school year, the Rebecca School was an appropriate placement, and the parents cooperated with the CSE (id. at pp. 4-5). As relief, the parents requested reimbursement for the costs of the student's unilateral placement at the Rebecca School and for the costs of related services, the provision of round-trip special education transportation to the Rebecca School, and the payment of costs and fees (id.).⁸

B. Impartial Hearing Officer Decision

On November 16, 2011, the parties proceeded to an impartial hearing, which concluded after three days on January 23, 2012 (Tr. pp. 1, 88, 330). By decision dated March 6, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 31-35). According to the IHO, the IEP did not "reflect the [student's] present levels of academic achievement and functional performance or [her] academic, developmental and functional needs" for the 2011-12 school year, noting in particular that the CSE meeting held to develop the student's IEP occurred nearly six months before the beginning of the 2011-12 school year (id. at pp. 33-34). In addition, the IHO found that the annual goals in the IEP—which were based upon a December 2010 Rebecca School progress report and input from the student's then-current Rebecca School teacher—were not appropriate (see id. at pp. 33-34). Relying upon testimony from the director of the Rebecca School (director), the IHO concluded that the goals in the December 2010 Rebecca School progress report had been developed with the intention of being

⁸ On August 26, 2011, the parents made a third payment of \$19,872.00 to the Rebecca School for the 2011-12 school year (Parent Ex. F at p. 3; see Parent Ex. E at p. 5).

met within six months, and thus, were not "annual goals" (id. at p. 34).⁹ The IHO also noted that since "five additional months of school" remained before the beginning of the 2011-12 school year, the student's "current levels could have changed and any number of goals in the IEP could have been met in whole or in part" prior to that time, which her review of a subsequent May 2011 Rebecca School progress report confirmed (id.).

Next, the IHO admonished the district regarding a portion of the testimony given by the district special education teacher (special education teacher) who participated in the development of the student's 2011-12 IEP at the January 2011 CSE meeting (see IHO Decision at pp. 34-35).¹⁰ The IHO found it "both troubling and perplexing" that the special education teacher advised the parents at the January 2011 CSE meeting that if the parents determined that the student's goals or needs changed by the end of the current school year, or upon comparison with a subsequent progress report, that the parents could return to a CSE meeting to update the IEP (id. at p. 34). The IHO noted that it was "clearly the responsibility of the [district] to develop an IEP reflecting the [student's] needs and appropriate goals for the coming school year" and that she had no knowledge of any "provision of law that place[d] that burden on parents" (id.). Finally, the IHO determined that the district had sufficient time to schedule a CSE meeting to develop the student's IEP after the Rebecca School issued the May 2011 progress report, and further noted that even if the CSE convened prior to receiving the May 2011 progress report that the CSE "would have had to reconvene before the summer of 2011 since the 12-month school year for which the IEP was developed began in July" (id. at p. 35).¹¹

Turning to the appropriateness of the student's unilateral placement, the IHO concluded that the parents sustained their burden to establish that the Rebecca School was appropriate to meet the student's needs (see IHO Decision at pp. 35-38). The IHO noted that the student attended the Rebecca School in an 8:1+4 classroom, and received speech-language therapy, OT, and counseling as related services to address her academic and social/emotional functioning and to foster her independence within the community (id. at p. 36). The IHO also noted that the testimony described the activities and instruction used to meet the student's needs, including her "regulation issues and her need for sensory input" (id.). According to the IHO, the evidence revealed the progress the student made in all areas, including the area of social skills, as a result of her attendance at the

⁹ The director did not participate in the January 2011 CSE meeting, and the parents did not present any witnesses from the Rebecca School who did participate in the January 2011 CSE meeting (compare Dist. Ex. 3 at p. 2, with Tr. pp. 223-329, 347-402).

¹⁰ The special education teacher at the January 2011 CSE meeting has been employed in a variety of positions—such as a classroom teacher, an education evaluator, and a special education teacher assigned to the CSE—for 19 years (see Tr. pp. 11-14). With respect to this particular student, the special education teacher participated in the development of her IEPs for the 2009-10, 2010-11, and 2011-12 school years, and conducted a November 2010 classroom observation of the student at the Rebecca School (see Tr. pp. 14-16; Dist. Ex. 6 at pp. 1-2).

¹¹ Having concluded that the district failed to offer the student a FAPE based upon these limited issues, the IHO indicated in a footnote that she declined to address the remaining issues raised in the parents' due process complaint notice or the "propriety of the proposed placement" (IHO Decision at p. 35 n.18). She did note, however, that the parents attempted to raise as an issue for the first time in their closing brief that the BIP developed for the student was defective due to the district's alleged failure to conduct a functional behavioral assessment (FBA) (id.). The IHO determined that this issue was not ripe for review since the parents did not raise it in their due process complaint notice and did not seek to amend their due process complaint notice to include this as an issue to be resolved (id.).

Rebecca School (*id.* at pp. 36-37). As to the third criterion for tuition reimbursement—equitable considerations—the IHO found that the evidence supported a finding in favor of the parents (*id.* at pp. 38-39). Consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2011-12 school year (*id.* at p. 39).

IV. Appeal for State-Level Review

The district appeals, and contends that the IHO erred in concluding that the district failed to offer the student a FAPE for the 2011-12 school year. In particular, the district contends that the IHO erred in finding that the information contained in the student's IEP would no longer be current at that time the IEP would be implemented in July 2011. The district argues that neither the IDEA nor State regulations dictate when a CSE must convene to develop a student's IEP, but only require that an IEP must be reviewed, and if appropriate, revised at least once per year. Alternatively, the district argues that even if the drafting of the IEP in January 2011 violated the IDEA, it constitutes a procedural violation that does not rise to the level of a denial of a FAPE. The district also argues that the IHO erred in finding that the parents sustained their burden to establish that the Rebecca School was appropriate to meet the student's needs and that equitable considerations favored the parents' claim for tuition reimbursement. As such, the district seeks to reverse the IHO's decision in its entirety.

In an answer, the parents respond to the district's allegations.¹² The parents also assert a number of additional arguments in support of upholding the IHO's decision, including that the student's IEP is inappropriate due to the "contents" of the IEP and not because the IEP was created in January 2011. The parents also assert, among other things, that the annual goals were "out of date" before the IEP was to be implemented, the transition plan was vague and contained no transition goals, the BIP did not incorporate the findings of an FBA, the district did not conduct an FBA, the recommended amount of OT in the IEP was not appropriate, the methodology in the assigned school was not appropriate, the special education teacher of the assigned classroom would be unable to address the student's self-regulation issues, the other students in the assigned classroom did not have similar social/emotional or academic needs, and a 1:1 crisis management

¹² As noted above, the IHO declined to address all of the parents' claims raised in the due process complaint notice. However, a review of the parents' answer indicates that they did not cross-appeal from the IHO's decision. A party who fails to obtain a favorable ruling with respect to an issue submitted to an IHO is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal (*see* 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer, except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6; *see Application of the Bd. of Educ.*, Appeal No. 11-050). In addition, although the parents state that they "did not waive any issues at hearing and do not waive any issues on appeal" as an affirmative defense, such statement is insufficient to bring any additional issues from their due process complaint notice before me for review where they have not been explicitly raised by a properly interposed cross-appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.4; *see Application of the Dep't of Educ.*, Appeal No. 12-070). Consequently, I will not disturb the unappealed aspects of the IHO's decision not to address all of the parents' claims.

paraprofessional was not appropriate for the student.¹³ The parents also argue that they sustained their burden to establish that the Rebecca School was appropriate to meet the student's needs, and seek to uphold the IHO's decision in its entirety.

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

¹³ However, even if the additional arguments asserted in the parents' answer could be liberally construed as a properly interposed cross-appeal, except for the arguments/affirmative defenses related to the "contents" of the IEP, the annual goals, the transition plan, and the lack of similarity between the student's needs and the needs of the students in the assigned school, the remaining arguments/affirmative defenses asserted in the parents' answer attempt to raise issues for the first time on appeal to further support upholding the IHO's decision with respect to finding a denial of a FAPE, that the Rebecca School was appropriate, and that equitable considerations favored the parents' claim for tuition reimbursement (compare Answer ¶¶ II-V, VII-IX, XII-XVI, XIX-XXVIII, with Parent Ex. A at pp. 1-5). 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 these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also *B.P. v. NYC Dep't of Educ.*, 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; *M.R. v. S. Orangetown Cent. Sch. Dist.*, 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children'" (*R.B. v. Dep't of Educ.*, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting *Hope v. Cortines*, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 [9th Cir. 1992]; see *C.D. v. Bedford Cent. Sch. Dist.*, 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Therefore, as many of the arguments/affirmative defenses in the parents' answer attempt to raise issues for the first time on appeal, those issues are outside the scope of my review and I decline to consider them (see *M.P.G. v. New York City Dep't of Educ.*, 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]; *Snyder v. Montgomery County Pub. Sch.*, 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also IHO Decision at pp. 1-40; Parent Ex. A at pp. 1-6; *Application of a Student with a Disability*, Appeal No. 11-111; *Application of a Student with a Disability*, Appeal No. 11-042; *Application of a Student with a Disability*, Appeal No. 11-041; *Application of the Dep't of Educ.*, Appeal No. 11-035; *Application of a Student with a Disability*, Appeal No. 11-008; *Application of a Student with a Disability*, Appeal No. 11-002; *Application of a Student with a Disability*, Appeal No. 10-105; *Application of a Student with a Disability*, Appeal No. 10-074; *Application of a Student with a Disability*, Appeal No. 09-112).

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 also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046;

Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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., 2010 WL 3398256, at *7).

VI. Discussion

Seeking to reverse the IHO's decision, the district asserts that IHO's findings that the present levels of academic achievement and functional performance, as well as the annual goals, in the student's IEP would no longer be current upon the IEP's implementation in July 2011 is without basis in law. In addition, the district notes that the parents asserted no claims relating to the accuracy of the present levels of performance or needs identified in the student's IEP, and the due process complaint notice did not include a claim indicating that the annuals goals were not appropriate because the student had already met some of the annual goals. As discussed more fully below, in this case there is neither an adequate evidentiary or legal basis for the IHO's findings that the timing of the January 2011 CSE meeting either procedurally, or substantively, resulted in an IEP that failed to offer the student a FAPE for the 2011-12 school year.

A. January 2011 IEP

1. Annual Review

To the extent that the IHO's decision could reasonably be read as finding that the timing of the January 2011 CSE meeting, alone, constituted a procedural violation that rose to the level of a denial of a FAPE, such a conclusion is not supported by law. As argued by the district, in this case the timing of the student's annual review in January 2011 did not impede the student's right to a FAPE, significantly impede the parents' 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]).

The IDEA requires a CSE 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]). 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) and no indication that the timing of the CSE meeting to conduct the student's annual review in the instant case resulted in a loss of educational opportunity for the student. 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, requested to meet later in the school year, that the district thereafter denied a request by the parents for another CSE meeting, or that the parents subsequently requested another CSE meeting to update the student's performance levels or to otherwise update the student's IEP or the annual goals (see Tr. pp. 1-431; Dist. Exs. 1-23; Parent Exs. A-I; IHO Ex. 1).¹⁴ Moreover, the hearing record indicates that the CSE discussed the fact that the IEP would be implemented in July 2011 and that the CSE could meet again if there were any "changes in the goals" (Tr. pp. 71-72; see Dist. Ex. 7 at p. 2). The special education teacher who participated in the January 2011 CSE testified that she specifically advised the parents at the January 2011 CSE meeting that they could request another CSE meeting should they determine that the student's goals or needs changed between the time of the January 2011 CSE meeting and the conclusion of the current school year in order to update the student's IEP (see Tr. pp. 71-74; Dist. Ex. 7 at pp. 1-2).¹⁵ In addition, the special education teacher also testified that at the January 2011 CSE meeting, the student's then-current Rebecca School teacher agreed that the annual goals developed for the "next school year . . . to the end of June 2012" were appropriate for the student (Tr. pp. 72-73). Accordingly, I decline to find under the circumstances of this case that the district denied the student a FAPE for the 2011-12 school year based solely upon the timing of the student's annual review to develop her IEP.

2. Evidentiary Issue/Evaluative Information Available to the CSE

To the extent that the IHO relied upon the timing of the January 2011 CSE meeting and the review of a subsequent, May 2011 Rebecca School progress report as the basis to conclude that the district failed to offer the student a FAPE because the IEP did not "reflect the [student's] present levels of academic achievement and functional performance or [her] academic, developmental and functional needs" for the 2011-12 school year, and that neither these levels nor the annual goals would be current upon the implementation of the IEP in July 2011, the IHO's determinations are not supported by the evidence and must be reversed.

First, at the time of the IHO's decision was rendered prevailing caselaw indicated that the determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis, and includes the consideration of only the information known at the time the IEP was developed (see M.R., 2011 WL 6307563, at *10; J.G. v. Kiryas Joel Union Free Sch. Dist., 736 F. Supp. 2d 606, 636 n.26 [S.D.N.Y. 2011]; J.S. v. N.

¹⁴ In certain instances, State regulations also allow amendments to a student's IEP without convening a formal CSE meeting (see 8 NYCRR 200.4[g]).

¹⁵ The district's obligation to annually review, and if necessary, to revise a student's IEP 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]).

Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 83-85 [N.D.N.Y. 2008] [indicating that a challenge to a proposed IEP, "as opposed to arguing for the modification of an existing IEP," supported an argument for a Court to decline to "consider evidence of [a student's] subsequent performance"]; J.R. v. Bd. of Educ., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004]; see also H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 09-CV-10563 [S.D.N.Y. May 24, 2012]; cf. D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 598-99 [2d Cir. 2005] [declining to decide whether retrospective evidence is properly considered in determining substantive validity of IEP, but noting that other circuits have held such consideration is improper]). Moreover, the J.S. Court noted that the "requirement that [a district's] CSE annually develop an IEP that is reasonably calculated to benefit [the student's] educational development necessarily implies the CSE must make rational predictions about what will be best for [the student] in the future"—a situation not unlike the current matter (J.S., 586 F. Supp. 2d at 84 [emphasis in original]). In the intervening period between the IHO's determination and the date of this decision, the Second Circuit has now concluded that "with the exception of amendments made during the resolution period, an IEP must be evaluated prospectively as of the time it was created" R.E. v. New York City Dep't of Educ., 2012 WL 4125833 [2d Cir. Sept. 20, 2012]).

Thus, to the extent that the IHO considered and relied upon a subsequent, May 2011 Rebecca School progress report to determine that the district's proposed 2011-12 IEP was not reasonably calculated to enable the student to receive educational benefits because the student's subsequent progress rendered the present levels of performance, functional needs, or annual goals in the IEP no longer current at the time the IEP was implemented, such an analysis was not consistent with the greater weight of legal authorities at the time the decision was rendered and can no longer stand in light of the intervening holding in R.E., which has become the controlling interpretation of law on this point. . In addition, given that the parents were challenging not only a proposed IEP in this case, but also an IEP that was never implemented, the consideration of and reliance upon the subsequent, May 2011 Rebecca School progress report appears to be less relevant to the determination of whether the IEP was reasonably calculated to enable the student to receive educational benefits (see J.S., 586 F. Supp. 2d at 84).

Next, although the IHO found it "both troubling and perplexing" that the special education teacher advised the parents at the January 2011 CSE meeting that they could request a CSE meeting if the student's goals or needs changed by the end of the current school year, or upon comparison with a subsequent progress report, the special education teacher's suggestion was not inconsistent with State regulation (see IHO Decision at pp. 34-35). In particular, if a student's parents, "teacher or administrator of the school or agency believes that the program or placement recommended in the IEP is no longer appropriate, such party may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). The evidence in the hearing record indicates that the January 2011 CSE members were aware that they were developing an IEP to be implemented through June 2012 (Tr. pp. 72-73). The evidence in the hearing record also indicates that all of the annual goals in the IEP were reviewed and discussed with all of the CSE members—including the parents and the Rebecca School staff—the CSE members did not object to the IEP, and the CSE members agreed that the annual goals were appropriate for the 2011-12 school year, including the Rebecca School staff and the parents (Tr. pp. 26, 31, 38-39, 72-73; Dist. Ex. 7 at pp. 1-2).

Notwithstanding the discussion above, I will review the present levels of academic achievement and functional performance, as well as the annual goals, out of an abundance of caution.

3. Present Levels of Academic Achievement and Functional Performance

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

Consistent with the regulations, in this case a review of the hearing record indicates that the January 2011 CSE considered and relied upon several forms of assessment to develop the recommendations in the student's 2011-12 IEP, including a 2008 neuropsychological evaluation report, a November 2010 classroom observation report, a December 2010 Rebecca School progress report, and input from the CSE members, including the parents and the student's then-current Rebecca School classroom teacher and social worker (Tr. pp. 21-28, 31, 35, 58; Dist. Exs. 5-7; 12).

According to the 2008 neuropsychological evaluation report, the student exhibited oppositional behavior and inconsistent eye contact during the testing session, which extended the length of the evaluation over four sessions (see Dist. Ex. 5 at pp. 1-2). Upon gaining the student's cooperation, however, the evaluating psychologist noted that she maintained her attention to tasks (id. at pp. 2-3). An administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded composite scores of 61 in verbal comprehension, 77 in perceptual reasoning, 71 in working memory, 75 in processing speed, and 64 as a full-scale IQ (id. at p. 3). Noting that the student's performance within the verbal comprehension domain was significantly below her performance within the perceptual reasoning domain, the psychologist opined that this disparity "suggest[ed] possible problems with verbal processing skills or use of language in general" (id.). The psychologist concluded that the results from the WISC-IV were likely an underestimate of the student's potential due to her lack of motivation during the assessment (id. at p. 5).

With respect to the Wechsler Individual Achievement Test-Second Edition (WIAT-II) results, the student's standard scores in the areas of reading, mathematics, and written language were all well below the average range (see Dist. Ex. 5 at p. 4). The psychologist noted that on tasks requiring a verbal response, the student tended to perform below expected levels compared to her cognitive abilities (id.). The psychologist also noted that the student's failure to respond to the pseudoword decoding tasks suggested that she may experience difficulty with the introduction of new materials (id.).

Standardized testing used to assess the student's fine motor skills and receptive and expressive language abilities revealed that she performed below the average range in these areas (see Dist. Ex. 5 at pp. 4-5). In addition, results from the Conners Parent Questionnaire (completed by both parents) indicated that the student's most problematic behaviors were associated with conduct problems and anxiety, as well as learning, concentration, and attention difficulties (id. at p. 5). According to the evaluation report, the psychologist listed PDD-NOS as the diagnostic

impression, and recommended that the student attend an educational program designed to address PDD symptoms, such as the student's lack of eye contact and difficulties with communication and social engagement (id.).

In November 2010, the special education teacher conducted a classroom observation of the student during a counseling session at the Rebecca School (see Dist. Ex. 6 at p. 1). Overall, with the exception of cursing, the student interacted with the counselor in an appropriate manner, and engaged in a variety of conversational topics (id. at p. 2).

In December 2010, the Rebecca School staff completed an interdisciplinary progress report of the student (see Dist. Ex. 12 at pp. 1-12). At that time, the student attended an 8:1+3 special class, and received counseling, OT, speech-language therapy, and adapted physical education (id. at p. 1). In mathematics, the student worked on money concepts tasks, such as budgeting and shopping within the community (id.). In literacy, the student read both fiction and nonfiction stories to work on reading comprehension and identifying story elements (id.). An administration of the Test of Word Reading Efficiency (TOWRE) to assess the student's word recognition skills yielded a standard score of 61, which fell well below the average range (id. at pp. 1-2).¹⁶ In the area of reading comprehension, the student could answer third-grade reading comprehension questions with moderate support, but responded best when the reading passages were short and presented aloud (id. at p. 2). The report also noted that the student participated in group literacy activities, and required repetition of concepts to feel confident (id.).

According to the December 2010 Rebecca School progress report, the student maintained regulation and attention during preferred activities and when she felt confident in her environment (see Dist. Ex. 12 at p. 2). The student also became more expressive during communications with a preferred peer and when interested, and further, the student expressed a variety of emotions to preferred staff, and could provide explanations pertaining to the underlying reasons for her emotions (id. at pp. 2-3). At that time, the student continued to work on flexibility with peer interactions and increasing her level of engagement during academic activities (id. at p. 3). In addition, the December 2010 Rebecca School progress report contained an education plan developed by the staff and the parents, which included long-term and short-term goals in the areas of academics, social skills, and processing skills (id. at pp. 3-5).

The December 2010 Rebecca School progress report also included information about the student's related services, as well as the long-term and short-term goals corresponding to each related service (see Dist. Ex. 12 at pp. 6-11). During the 2010-11 school year, the student's OT addressed her needs in the areas of sensory regulation, motor planning and sequencing, and visual-spatial processing (id. at p. 6). The report indicated that the student's engagement in gross motor activities—such as dancing—increased her ability to remain regulated and that her "inability" to remain focus negatively affected the student's difficulty with motor planning (id.). The report also indicated that the student could successfully navigate the school environment, her handwriting was legible, and OT was preparing the student to navigate in the community (id.).

During the 2010-11 school year, the student's speech-language therapy continued to address her receptive, expressive, and pragmatic language skills (see Dist. Ex. 12 at pp. 7-8). The

¹⁶ According to the report, however, "several accommodations" were provided to the student during testing and therefore, the scores could not be "used as a standard assessment" (Dist. Ex. 12 at p. 2).

report indicated that the student's ability to process language, including listening comprehension, was dependent in part upon her ability self-regulate during social interactions (id. at p. 7). The report also indicated that the student expressed herself by using an appropriate mean length of utterances and speaking with complex sentences (id. at p. 8). With respect to pragmatic language, the student demonstrated the ability to make requests, comment, ask questions, and use verbal skills to gain attention (id. at p. 7).

During the 2010-11 school year, the student also received counseling services and art therapy at the Rebecca School (see Dist. Ex. 12 at pp. 8-9). In the area of social/emotional functioning, the student would seek out staff to address her feelings of sadness, frustration, and anger as her primary coping mechanism (id. at p. 8). The report indicated that the student became dysregulated when she was uncomfortable or confused during social interactions (id. at p. 9).

Comparing the proposed 2011-12 IEP with the information considered by the January 2011 CSE, the evidence indicates that the present levels of performance in the January 2011 IEP accurately reflected a description of the student's cognitive, academic, and language abilities—as well as social/emotional functioning and sensory regulation—consistent with the information available to the CSE (compare Dist. Ex. 3 at pp. 3-5, with Dist Exs. 5-7, and Dist. Ex. 12).

In the section of the IEP describing the student's present levels of academic performance (including academic achievement, language development, cognitive development and learning style), the CSE indicated that based upon the 2008 neuropsychological evaluation report the student had an "overall cognitive functioning . . . in the deficient range but with higher potential" (see Dist. Ex. 3 at p. 3). The CSE also noted that the student exhibited a "low" frustration tolerance, which she manifested by refusing to work or by walking away (id.). In addition, although group work continued to be a challenge for the student, she responded well when provided with "choices or negotiation" so she felt more in control of the situation (id.; see Dist. Ex. 7 at p. 1). The CSE indicated on the IEP that the student "learn[ed] better" when provided with a quiet setting, tactile activities, and sensory input, and she functioned "better academically when her social needs were met" (see Dist. Ex. 3 at p. 3). In addition, the CSE reported the student's academic instructional levels in the areas of reading comprehension, listening comprehension, mathematics computation, and mathematics problem solving as ranging between the mid-first grade level to the mid-third grade level (id.). Based upon discussions, the CSE recommended the following academic management needs: sensory input, sensory breaks, providing choices, use of manipulatives for mathematics, creative and motivating activities, and repetition (id.; see Tr. pp. 30-31; Dist. Ex. 7 at pp. 1-2).

A review of the evidence indicates that at the January 2011 meeting, the CSE—including the parents—discussed the student's academic achievement and abilities in the areas of reading, writing, and mathematics; her strengths and weaknesses; her related management needs; and her annual goals and short-term objectives (Tr. pp. 24-31, 58; see Dist. Exs. 3 at p. 3; 7 at pp. 1-2). In addition, the student's then-current Rebecca School teacher provided information to the January 2011 CSE about the student's academic achievement, which the CSE relied upon to create the present levels of performance in the IEP and to report the academic instructional levels in the IEP (Tr. pp. 26-29; Dist. Exs. 3 at p. 3; 7 at p. 1). According to the CSE meeting minutes, the CSE also reviewed and discussed the November 2010 classroom observation report, the December 2010 Rebecca School progress report, and the 2008 neuropsychological evaluation report (see Dist. Ex. 7 at p. 1). In addition, the special education teacher who participated at the January 2011 CSE

meeting testified that after discussions, "everybody agreed" with the information describing the student's present levels of academic performance, as well as the recommended academic management needs, in the IEP (Tr. pp. 27-31; see Dist. Ex. 7 at p. 1). In addition, the CSE meeting minutes indicate that the parents were asked at the January 2011 CSE meeting if they had "anything" to add to this section of the student's IEP, and the parents responded "'no'" (Dist. Ex. 7 at p. 1). Moreover, the CSE meeting minutes indicate that this section of the student's IEP was "read aloud" and that "all parties [were] invited to have input" (id.).

In the section of the IEP describing the student's present levels of social/emotional performance, the CSE indicated that based upon a "current school report" the student could better maintain regulation and attention to classroom activities during preferred activities and when she felt "confident in her environment" (Dist. Ex. 3 at p. 4). The CSE noted that the student could communicate "a broad range of emotions" to preferred staff, and provide "reasons for those specific emotions" when she felt "confident and engaged" (id.). As indicated in the IEP, the student continued to "work on flexibility and peer negotiation," and she required "a lot of support with peer interactions" (id.). The CSE noted the student's tendency to "leave the classroom or refuse to engage in a specific activity" if challenged, and characterized her behavior as "seriously interfer[ing] with instruction and requir[ing] additional adult support" (id.). To address the student's social/emotional needs, the CSE recommended the following: counseling services, movement breaks during the school day, breaks from the classroom with an adult, and a BIP (Dist. Ex. 3 at pp. 3, 17; see Tr. pp. 31-34; Dist. Ex. 7 at p. 1).

Similarly, a review of the evidence indicates that the January 2011 CSE—including the parents—discussed the student's social/emotional functioning, her related management needs, and the BIP (see Tr. pp. 31-37; Dist. Ex. 7 at pp. 1-2). At the meeting, this section of the IEP was "read to [the] parents and teacher," who all confirmed its accuracy (see Dist. Ex. 7 at p. 1). Specifically, the evidence reveals that the student's then-current Rebecca School teacher provided information about her social/emotional functioning; the CSE discussed the student's behaviors related to the leaving the classroom and how to address those behaviors; and that the CSE recommended the services of a full-time, 1:1 crisis management paraprofessional to directly address the student's tendency to leave the classroom (see Tr. pp. 33-37; Dist. Ex. 3 at pp. 15, 17).

Next, the evidence reveals that the January 2011 CSE discussed the student's present levels of health and physical development by reviewing the student's prior IEP and gaining updated information from the parents, which included information regarding her general health status and sensory regulation needs (see Dist Exs. 3 at p. 5; 7 at p. 1; see also Tr. pp. 37-38, 75-77). According to the IEP, the student was in good general health, but exhibited a low arousal state and was sometimes sensitive to auditory input (see Dist. Ex. 3 at p. 5). This section of the IEP was also "read to [the] parents and teacher" at the January 2011 CSE meeting, and the parents did not request to make any changes to the information (see Dist. Ex. 7 at p. 2).

Thus, based upon the evidence and the information available to the January 2011 CSE, the January 2011 IEP accurately reflected the student's present levels of academic achievement and functional performance, as well as her academic, developmental and functional needs for the 2011-12 school year (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of the Dep't of Educ., Appeal No. 12-010; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

4. Annual Goals

Turning next to the parties' dispute regarding the annual goals, 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][III]; 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]).

Upon a review of the hearing record, I find that the annual goals and short-term objectives were consistent with the student's identified needs in all areas, including reading, writing, mathematics, language processing, social/emotional functioning, sensory regulation, and motor planning. In addition, the annual goals and short-term objectives contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision (see Dist. Ex. 3 at pp. 6-12; see also Tr. pp. 42-43). Specifically, the student's January 2011 IEP incorporated 14 annual goals and 35 corresponding short-term objectives to address the student's identified needs in the areas of reading comprehension, written expression, money concepts, mathematics calculations, budgeting, communication, sensory and emotional coping strategies, self-esteem, self-awareness, social interactions, self-regulation, motor planning, receptive and expressive language skills, and pragmatic language skills (see Dist. Ex. 3 at pp. 6-12).

According to the evidence in the hearing record, the CSE drafted the annual goals and short-term objectives by relying upon the December 2010 Rebecca School progress report and input from the student's then-current Rebecca School teacher and social worker (student's counselor at the Rebecca School) (see Tr. pp. 26, 38-39; Dist. Exs. 7 at pp. 1-2; 12 at pp. 1-12). With respect to drafting the academic annual goals, the special education teacher who participated in the January 2011 CSE meeting testified that she reviewed the December 2010 Rebecca School progress report to identify what the student had been working on related to "specific skills . . . in reading, math, [and] writing," which she then discussed with the student's then-current Rebecca school teacher (see Tr. pp. 26, 38-39; Dist. Ex. 3 at pp. 6-7). With respect to drafting the annual goals for the student's related services, the CSE transposed, nearly verbatim, the long-term and short-term goals from the December 2010 Rebecca School progress report directly into the January 2011 IEP (see Tr. p. 39; Dist. Ex. 7 at p. 2; compare Dist. Ex. 3 at pp. 8-9, 11-12, with Dist. Ex. 12 at pp. 10-11). Based upon the parents' concern expressed at the January 2011 CSE meeting regarding the student's ability to count money, the CSE modified the academic annual goals to include an annual goal to address this concern (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 3 at p. 7). To create the annual goals related to the student's social/emotional functioning, the special education teacher who participated at the January 2011 CSE testified that the district's school psychologist worked together with the student's counselor at the Rebecca School to develop "all the counseling goals to address" the student's needs (Tr. pp. 26, 39; see Dist. Exs. 3 at pp. 10-11; 7 at pp. 1-2). At the conclusion of the January 2011 CSE meeting, the parents indicated that they did not need to "add" or "change" the information in the "body" of the IEP (Dist. Ex. 7 at pp. 1-2).

In her decision, the IHO relied heavily on the director's testimony and a review of a subsequently prepared May 2011 Rebecca School progress report to conclude that the annual goals in the January 2011 IEP were not appropriate for the student (see IHO Decision at pp. 34-35). However, as discussed below, the IHO's reliance on this evidence to support her conclusion is misplaced.

First, the IHO's decision does not reflect the entirety of the director's testimony about the goals in the Rebecca School progress reports. According to the evidence, the director testified that the Rebecca School regularly reports a student's progress two times per year: December and May (see Tr. p. 248). The December progress reports contain a "narrative" written by "each member of the team" (id.). During the preparation of the December progress reports, the goals that had been developed for the student in May would be "revisited at this time to see whether the goals have been met or do the goals need to be modified" (Tr. pp. 248-49). Thereafter, the student's parents and "all the members of the team" would attend a "team meeting" to discuss the student's "progress, new goals, [and] what . . . we want[ed] to do, and then that gets done in May" (Tr. p. 249). The director then testified that because the Rebecca School issued two progress reports per year, the goals were "six-month goals" and the "goals should be met before the year is up and there should be a new goal for the next six months"—and therefore, in her opinion, it would not be appropriate to use a "six-month goal . . . as an annual goal on an IEP" (id.).

However, the director further qualified her statements on cross-examination insofar as indicating that "new goals" are not necessarily created every six months for a student—but instead, "new goals" are created "if" a goal had been met (see Tr. pp. 273-74). She further testified that in December, the previous goals from May are reviewed individually to determine if "that goal [has] been met, has any progress been made, [and] does the goal need to be modified" (Tr. p. 274). If the goal has been "met," a "new goal would be written" (id.). If the goal has not been met, then "it may need to be modified;" if a student has made "progress" on a goal, then the student continues to work on that goal (id.).

Thus, although the goals at the Rebecca School may be created with the intention of being met within six months, the director's testimony reflects that not every goal is achieved within that timeframe. In this case, a review of the student's December 2010, May 2011, and December 2011 Rebecca School progress reports indicates that while the student did meet 5 out of 12 goals within her educational plan (transition goals) (compare Dist. Ex. 12 at pp. 3-5, with Parent Ex. G at pp. 4-9), 4 out of 7 short-term goals in counseling, and 1 out of 5 short-term goals in art therapy between December 2010 and May 2011 (compare Dist. Ex. 12 at pp. 10-11, with Parent Ex. G at pp. 11-16), the student continued to work on many of the same long-term and short-term goals identified in the December 2010 Rebecca School progress report throughout the following school year, as reported in the December 2011 Rebecca School progress report (compare Dist. Ex. 12 at pp. 3-5, 10-11, with Parent Ex. H at pp. 6-9, 11-14). Consistent with the director's testimony and as demonstrated by a comparison of the three Rebecca School progress reports, while the Rebecca School, at times, added new goals, continued goals, modified goals, and expanded goals for the student between December 2010 and December 2011, the student did not achieve all of the goals in the December 2010 Rebecca School progress report within a six-month timeframe (compare Tr. pp. 273-74, with Dist. Ex. 12 at pp. 1-12, and Parent Ex. G at pp. 1-16, and Parent Ex. H at pp. 1-14). Therefore, assuming for the sake of argument that the prospective analysis of an IEP as required under R.E. was inapplicable, the hearing record shows that even under a retrospective analysis, the student continued to work on many of the long-term and short-term goals in the

December 2010 Rebecca School progress report through at least December 2011, and, therefore does not provide a factual basis for the IHO's finding that the annual goals would not be appropriate upon the implementation of the IEP in July 2011. Because the evidence viewed through the required prospective analysis of the IEP supports the conclusion that the IEP was appropriate, and furthermore, because the evidence does not support the IHO's reasoning that the IEP was flawed when viewed using a retrospective analysis, the IHO's conclusion that the district failed to offer the student a FAPE must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at the Rebecca School was an appropriate placement or whether equitable considerations support the parents' claim (Burlington, 471 U.S. at 370; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 6, 2012, is modified by reversing that portion which concluded that the district failed to offer the student a FAPE for the 2011-12 school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated March 6, 2012, is modified by reversing that portion which ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2011-12 school year.

Dated: Albany, New York
October 24, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER