The University of the State of New York

The State Education Department
State Review Officer
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No. 12-086

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, attorney for petitioner, Ilana A. Eck, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Tracy Spencer Walsh, Esq., and Gary S. Mayerson, 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 them for her tuition costs at the Manhattan Children's Center (MCC) in addition to costs related to her home-based program 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 (FAPE) to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

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

III. Facts and Procedural History

The student has been the subject of a prior administrative appeal, and as a result, the parties' familiarity with the student's educational history and prior due process proceedings is assumed and will not be repeated here in detail (see Application of the Dep't of Educ., Appeal No. 10-123). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (Parent Ex. B at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student has attended MCC since September 2009 (Tr. p. 419; see Tr. pp. 849-50; Dist. Ex. 2 at p. 1).[1] On March 15, 2011, the CSE convened for an annual review and to develop the student's program for the 2011-12 school year (Dist. Ex. 1). For the 2011-12 school year, the March 2011 CSE proposed placement in a 12-month 6:1+1 special class in a specialized school, together with related services and the provision of a 1:1 paraprofessional (id. at pp. 1-2, 20). By letter to the district dated March 23, 2011, the student's mother stated her concerns regarding the student's IEP and the potential public school to which the district might assign the student to attend for the 2011-12 school year (Parent Ex. L at p. 1).

In a final notice of recommendation (FNR) to the parents dated June 10, 2011, the district summarized the March 2011 CSE's recommendations and notified them of the particular public school site to which the student was assigned for the 2011-12 school year (Dist. Ex. 10). By letter to the district dated June 15, 2011, the parents rejected the March 2011 IEP; however, the student's mother further advised that she was scheduled to visit the assigned public school the following week, at which time she would make a decision regarding its appropriateness (Parent Ex. O at p. 1). She also indicated that for the upcoming school year, she planned to unilaterally place the student at MCC, and request tuition reimbursement for the cost of that program, in addition to reimbursement for the cost of the student's home-based services, consisting of 20 hours of instruction using applied behavioral analysis techniques (ABA instruction), four hours of occupational therapy (OT), and two hours of speech-language therapy (id.). On June 22, 2011, the student's mother visited the assigned school (see Tr. p. 805; Parent Ex. P at p. 1). In a letter to the district dated June 27, 2011, the parent advised that she deemed the assigned public school to be inappropriate for the student, and she outlined her reasons for her determination (Parent Ex. P at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated July 8, 2011, the parents requested an impartial hearing, in which they sought as relief, tuition reimbursement for MCC in addition to reimbursement for costs related to the student's home-based services, among other things (Parent Ex. B at pp. 1, 9). The parents asserted, among other things: (1) the district's proposed program was not reasonably calculated to provide the student with a FAPE; (2) the district failed to address and accommodate the student's need for 1:1 support; (3) the district failed to provide the student with consistent 1:1 teaching support throughout the school day; (4) the district failed to conduct a functional behavioral assessment (FBA) and develop an appropriate behavioral intervention plan (BIP) for the student; (5) despite the student's gains made in her home program, the district failed to consider any home-based services for her; (6) the district failed to recommend any extended-day services for the student, although the student required them for the generalization and acquisition of skills and continued progress; (7) the district failed to include the provision of parent counseling and training on the student's IEP; (8) the district failed to discuss, develop, or recommend a transition plan for the student, despite the student's need for consistency in her program; (9) the district recommended a program and a classroom, which, in part employed the

[1] The Commissioner of Education has not approved MCC as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

TEACCH methodology,[2] for which the student was not adequately assessed; (9) the TEACCH methodology was not an appropriate educational methodology for the student; (10) despite the student's "difficulty navigating her environment," the district failed to offer the student adapted physical education or note on the IEP the limited time that the student could participate in activities such as gym and climbing stairs; and (11) the assigned public school constituted an unsafe environment for the student (id. at pp. 3-5, 8).[3] The parents maintained that they fashioned an appropriate program for the student comprised of her placement at MCC in and home-based services, and that no equitable considerations existed that would preclude or diminish an award of relief (id. at p. 9).

B. Impartial Hearing Officer Decision

On August 19, 2011, the parties proceeded to an impartial hearing, which concluded on January 19, 2012, after ten days of testimony (Tr. pp. 1-854).[4] In a decision dated March 13, 2012, the IHO awarded the parents tuition reimbursement for MCC and the student's home-based services for the 2011-12 school year (IHO Decision at p. 15). Regarding implementation of the March 2011 IEP, the IHO found that although the district offered evidence pertaining to the assigned public school designated for summer 2011, the district failed to submit any evidence with respect to the appropriateness of the assigned school designated for the period of September 2011 through June 2012 (id.). Under the circumstances, the IHO concluded that the district failed to establish that it provided the student with a FAPE during the 2011-12 school year (id.).

The IHO made additional findings related to the offer of a FAPE to the student and ultimately concluded that the recommended 12-month 6:1+1 special class program combined with a full-time behavior paraprofessional and related services was insufficient to meet the student's needs and was not reasonably calculated to offer the student educational benefits (IHO Decision at pp. 10-11). Regarding the proposed BIP, the IHO determined that it was deficient because it did not address the student's toileting needs or her needs related to puberty (id. at p. 11). The IHO found that the district failed to consider a home-based program for the student, and indicated that the evidence showed the student had a home-based program for several years and would regress without it (id. at p. 12). In addition, the IHO determined that the district's omission of the provision of individualized parent counseling and training on the IEP was not appropriate and contributed to a denial of a FAPE to the student (id.). Next, he concluded that the CSE's failure to develop a transition plan for the student to move from MCC to the assigned school also contributed to the denial of a FAPE, in light of the student's difficulty transitioning to new environments (id.). The

[2] TEACCH is an acronym for Treatment and Education of Autistic and related Communication-handicapped Children (Parent Ex. BB at p. 1).

[3] Initially, the parents alleged a total of 79 claims as a basis to conclude that the district failed to offer the student a FAPE, but during the impartial hearing they abandoned—by their own admission—the following claims as enumerated in their due process complaint notice: (1) the CSE was improperly constituted; (23) the district failed to indicate methods of measurement for the goals listed in the March 2011 IEP; (42) the portion of this numbered claim, which read "much less actually conduct one;" (46) the use of the time-out room in the assigned school; (57) the district's failure to recommend any special education transportation for the student; and (75) the proposed IEP failed to list the projected date of its initiation (IHO Ex. 7 at p. 1).

[4] Pursuant to pendency, the IHO directed the district to provide the student with her home-based program, related services, and the costs of transportation (IHO Decision at p. 3; Tr. pp. 17-18; Parent Ex. C at p. 43).

IHO further determined that the student required consistent and frequent 1:1 interventions, such as ABA, in order to modify her behavior and make her available to attain new skills (id. at p. 11). Regarding the parents' claims that the district did not afford the student sufficient 1:1 instruction, the IHO concluded that the district could only provide the student with 1.5 hours of 1:1 instruction per day, which he determined was not enough to meet her needs (id.).

Moreover, the IHO found that the classroom teacher of the proposed 6:1+1 special class was not trained in ABA or any behavioral therapy used in the treatment of children with autism (IHO Decision at p. 11). Under the circumstances, the IHO found that the assigned school was too large to meet the student's needs and that the programming in the proposed class was not structured enough for the student to reap educational benefits (id.). In addition, the IHO noted that the student was physically aggressive to adults and peers, and also ingested inedible objects, which had resulted in the student experiencing episodes of choking and gastrointestinal difficulties (id.). He further found that given the student's lack of self-care skills and approach to puberty, the assigned school was not equipped to meet her needs (id.). Additionally, he determined that the location of the proposed classroom in the assigned school, which lacked an elevator, was not appropriate for the student (id.). The IHO reasoned that the student experienced difficulty navigating her environment, particularly stairs, and the student needed to be monitored at all times (id.). For all the foregoing reasons, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 year (id. at p. 12). The IHO further considered all of the other claims raised by the parent and concluded that they did not support any additional findings of a denial of a FAPE (id.).

The IHO proceeded to find that the parents' unilateral placement of the student at MCC and the student's home-based program were appropriate (IHO Decision at p. 14). Among other things, he determined that the student was receiving appropriate behavioral interventions at MCC and in the home and that the student's home-based program was necessary for the student to learn how to generalize the skills obtained at school to the home (id.). He further found no evidence that the parents failed to cooperate with the CSE, but rather, that the evidence showed that they worked collaboratively with the CSE, and accordingly, equitable considerations favored their claim for relief (id. at p. 15). As such, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at MCC and for the costs of the student's home-based program (id.).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that it failed to offer the student a FAPE, that MCC was appropriate, and that the equities favored the parents. The district submits that it offered the student a FAPE during the 2011-12 school year for the following reasons: (1) the 6:1+1 special class program combined with 1:1 paraprofessional support and related services was designed to provide the student with meaningful educational benefits; (2) the proposed program and assigned school afforded the student adequate 1:1 support; (3) the district was not required to conduct another FBA, when the FBA developed by MCC was current and set forth the main functions of the student's behaviors; (4) the BIP adequately described the student's behaviors that interfered with learning and was not inappropriate for the reasons cited by the IHO—that it did not address the student's toileting needs or her needs related to puberty; (5) the omission of parent counseling and training from the March 2011 IEP did not rise to the level of a denial of a FAPE; (6) the district was not required to develop a transition plan for the student to move from MCC to the assigned school; and (7) the March 2011 CSE was not required to

recommend a home-based program for the student when the recommended school-based program was appropriate on its own.

The district further contends that the IHO erred in concluding that it failed to sustain its burden of proof because it did not offer any evidence regarding the assigned public school designated for the student's attendance from September 2011 through June 2012. Furthermore, the district alleges that it is irrelevant to a FAPE determination that the student would have been placed in a different assigned school after completion of the summer program. The district further maintains that the IHO erred in concluding that the assigned school designated for summer 2011 and described at the impartial hearing could not have implemented the student's IEP, including her toilet training and needs related to puberty. The district also asserts that the IHO erred in finding that the assigned school was not appropriate because of its use of the TEACCH methodology and its lack of an elevator. Additionally, the district argues that the IHO improperly considered whether the lack of an elevator rendered the assigned school inappropriate because that claim was not raised in the parents' due process complaint notice.

The district also alleges that the parents failed to establish the appropriateness of MCC. According to the district, MCC is not an appropriate placement for the student because it does not provide the student with all her related services, and it is not the student's least restrictive environment (LRE). Lastly, the district contends that equitable considerations should preclude an award of relief because the parents never intended to avail themselves of a district placement.

The parents submitted an answer, admitting and denying the allegations raised by the district.[5] Although the parents state in a footnote that they have elected to not cross-appeal any portion of the IHO's decision, they maintain that additional grounds existed to support a finding that the district failed to offer the student a FAPE (Answer at p. 1 n.1). In addition, the parents argue that the sufficiency of the IEP should be determined from within the four corners of the IEP.

The parents also assert additional arguments in their answer to support their contention that the district denied the student a FAPE during the 2011-12 school year: (1) the district failed to prove that the student's needs could be met in a 6:1+1 special class; (2) the academic management needs contained in the March 2011 IEP were not appropriate, unless implemented in a 1:1 setting; (3) the March 2011 IEP did not provide the student with 1:1 teaching, and a crisis paraprofessional is not an appropriate substitute for 1:1 teaching; (4) the FBA and BIP were not appropriate to

[5] The parents have requested that I recuse myself as the State Review Officer reviewing this case "on the grounds of demonstrable bias and lack of impartiality" (Parents Mem. of Law at p. 1). The only discernable reason raised by the parents is that upon judicial review, federal district courts have from time to time disagreed with and reversed the merits of several decisions issued by another adjudicator; however, assuming for the sake of argument that such decisions had been issued by me, this would still not be a basis on which to find bias or a need for recusal, as specifically held in several of the district court cases cited by the parents (see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 39-40 [S.D.N.Y. 2011], rev'd on different grounds, 694 F.3d 167 [2d Cir. 2012]; P.K. v. New York City Dep't of Educ., 2011 WL 3625317, at *7 n.7 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *12-*13 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *3-*4 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; see also B.J.S. v. State Educ. Dep't, 2011 WL 4368545, at *10 [W.D.N.Y. Sept. 19, 2011]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *6 [S.D.N.Y. Mar. 30, 2011]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 435 [S.D.N.Y. 2010]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 285-86 [S.D.N.Y. 2010]). I have considered the parents' request and find that I am able to impartially render a decision and that there is no basis for recusal in this instance (see 20 U.S.C. § 1415[g][2]; 8 NYCRR 279.1[c]).

address the student's behavior needs; (5) the student's home-based program was a necessary component of a FAPE for the student; (6) the district failed to include the provision of parent counseling and training on the March 2011 IEP; and (7) the district failed to include a transition plan in the IEP. Additionally, the parents maintain that it was irrelevant whether the district could have implemented the student's IEP because the assigned school would have implemented a defective IEP. Regardless, the parents allege that the district failed to assess the student for her amenability to any teaching methodology, and its failure to discuss any teaching methodology deprived the parents of an opportunity to participate in the development of the student's educational program. With respect to the district's assertion that the IHO improperly found that the assigned public school was not appropriate because it did not have an elevator, the parents maintain that they raised this claim, and further, there was no evidence that the assigned school was safe and accessible for the student. In addition, the parents maintain that the student requires the educational intensity of the combination of MCC and her home-based program and that the equities support their request for relief.

The parents also contend that in light of the district's failure to challenge the appropriateness of MCC or raise any equitable considerations in its response to their due process complaint notice, the district should be precluded from raising such claims on appeal. They further allege that the "IEP documents were missing mandatory federal and state regulatory provisions" (Answer ¶ 61). Moreover, the parents argue that the district should not be permitted to remedy a defective IEP through "revisionist testimony" adduced at the impartial hearing (Answer ¶ 62). Finally, the parents claim that by unilaterally selecting the assigned school for the student, the district violated a stipulation reached in a class action suit.[6]

The district submitted a reply. The district maintains that it is permissible for it to raise an argument on appeal that was not asserted in its response to the parents' due process complaint notice. Additionally, given that the parents have not asserted a cross-appeal of the IHO's decision, the district asserts that the parents' request for additional findings regarding the denial of a FAPE should not be considered.

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[6] See Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]. The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see also Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]). Therefore, I lack the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K., 2011 WL 1131492, *17 n.29 [E.D.N.Y. Jan. 21, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. Apr. 15, 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. Aug. 25, 2010] [addressing the applicability and parents' rights to enforce the Jose P. consent order]).

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., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 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 procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; 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] aff'd, 2009 WL 3326627 [2d Cir. 2009]; 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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing

Initially, I will address the district's claim that the IHO exceeded his jurisdiction by deciding an issue that was not asserted in the parents' due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, 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 B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8).

Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, the parents' due process complaint notice alleged that the assigned school constituted an unsafe environment for the student, that the student had difficulty navigating her environment, and that the IEP failed to indicate the limited time the student could engage in activities such as walking up and down the stairs (Parent Ex. B at pp. 3, 8). Given these allegations, I decline to find that the IHO erred in considering evidence about the student's physical limitations and the safety of the assigned school, and accordingly, I do not find under the circumstances in this case that the IHO exceeded his jurisdiction in concluding that the assigned school was inappropriate because it lacked an elevator (see IHO Decision pp. 11-12).

Regarding the parents' claim that the district is precluded from raising any claims or defenses that were not asserted in its response to the parents' due process complaint notice, there is no legal authority to support the parents' position. Here, the district submitted a response to the due process complaint notice that comported with federal and State regulations, and there is no indication in the hearing record that its failure to include a defense below resulted in a denial of a FAPE to the student (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]; see also Application of the Dep't

of Educ., Appeal No. 11-118; Application of a Student with a Disability, Appeal No. 08-151). Moreover, federal or State regulation does not require the insertion of affirmative defenses in the response to the due process complaint notice, nor does it suggest that unasserted defenses will be waived (R.B. v. Dep't of Educ., 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011]). Under the circumstances, the district is not precluded from challenging the appropriateness of the student's unilateral placement and home-based program and whether the equities support an award of relief.

B. Scope of Review

I now turn to the parents' request that I render additional findings regarding whether the district offered the student a FAPE. The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In this case, although the parents state in a footnote in their answer that they have elected not to cross-appeal (Answer at p. 1 n.1), they request that an SRO "make additional FAPE deprivation findings" (id. at p. 20). The district argues that the parents are prohibited from challenging any of the IHO's findings absent a cross-appeal (Reply ¶ 2). As further explained below, I concur with the district and find that although the IHO granted the parents all the relief they requested, the IHO rendered findings that were adverse to the parents that they elected not to cross-appeal, and, therefore, such issues are not properly before me for review.

In his decision, the IHO considered all of the other claims raised by the parents and found that they did not support any additional findings with respect to a denial of a FAPE, which constitutes an adverse finding to the parents (IHO Decision at p. 12). A party who fails to obtain a favorable ruling with respect to an issue decided by an IHO is bound by that ruling unless a party asserts an appeal or a cross-appeal (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 [S.D.N.Y. Nov. 27, 2012] [finding that "parties contesting the validity of an IEP may cross-appeal an IHO's adverse particular findings even if they obtained all of their requested relief;" see also Parochial Bus. Sys., Inc. v. Bd. Of Educ., 60 N.Y.2d 539, 545-47 [1983]).[7] While the IDEA provides that "any party aggrieved by the findings and decision" of an IHO may pursue an appeal to the SRO (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]), State

[7] While this case concerns whether a respondent must cross-appeal an adverse finding rendered by an IHO, recently two district court decisions reviewed the scope of a respondent's right to cross-appeal issues that were not addressed by the IHO (J.F., 2012 WL 5984915, at *9-*10 [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also D.N. v. New York City Dep't of Educ., 2012 WL 6101918 [S.D.N.Y. Dec. 10, 2012] [notice of appeal filed Jan. 3, 2013] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]).

regulations provide that a respondent may seek review of "all or a portion" of an IHO's decision by asserting a cross-appeal in the answer (8 NYCRR 279.4[b]). Prior SRO decisions have determined that State regulations preclude a respondent from raising additional issues in an answer without a cross-appeal, explaining that to do otherwise would deprive 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 Dep't of Educ., Appeal No. 12-079; Application of the Dep't of Educ., Appeal No. 12-067; Application of the Dep't of Educ., Appeal No. 12-055; Application of the Dep't of Educ., Appeal No. 12-035; Application of the Dep't of Educ., Appeal No. 12-034; Application of the Dep't of Educ., Appeal No. 12-030; Application of the Dep't of Educ., Appeal No. 11-156; Application of the Dep't of Educ., Appeal No. 11-118; Application of the Bd. of Educ., Appeal No. 11-072; Application of the Dep't of Educ., Appeal No. 11-066; Application of the Dep't of Educ., Appeal No. 11-050).

Based upon the foregoing, I find that the parents elected not to cross-appeal any adverse finding of the IHO and thereby have waived their right to pursue those issues, and consequently, I lack the jurisdiction to review them (see Parochial Bus. Sys., Inc., 60 N.Y.2d at 545-47; J.F., 2012 WL 5984915, at *9; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

C. March 2011 IEP

Next, I will address each of the district's challenges to the IHO's decision regarding the adequacy of the March 2011 IEP. The parents argue that the IEP is deficient and urge that review of the IEP must be limited to the "four corners" of the document, contending that the district cannot be permitted to present testimony at a due process hearing in an attempt to subsequently cure deficiencies in the IEP. As the Second Circuit recently articulated, 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 (R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). However, the Second Circuit rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 185-89). Applying a prospective analysis, an independent review of the entire hearing record supports the district's contention that the recommended 6:1+1 special class program with related services set forth in the March 2011 IEP was reasonably calculated to provide the student with educational benefits and sufficient 1:1 support in the least restrictive setting.

1. Appropriateness of 6:1+1 Special Class with 1:1 Paraprofessional Services

The district asserts that the IHO erred in finding that a 6:1+1 special class was not appropriate for the student. A review of the documents considered by the March 2011 CSE supports the conclusion that the CSE had sufficient information relative to the student's present levels of academic achievement and functional performance at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs and that a 6:1+1 special class was appropriate and provided sufficient 1:1 support for the student.

Attendees at the March 2011 CSE meeting included a district school psychologist (who also participated as the district representative), a special education teacher, an additional parent member, the student's mother, and one of the student's home-based ABA providers (Tr. pp. 72-73; Dist. Ex. 1 at p. 2). The educational director of MCC, and the student's MCC occupational therapist, speech-language pathologist, and lead teacher also participated in the meeting by telephone (Tr. p. 73; Dist. Ex. 1 at p. 2). According to the district school psychologist, the March 2011 CSE reviewed numerous evaluations and progress reports pertaining to the student, including December 2010 MCC educational, OT, and speech-language progress reports; a December 2010 district classroom observation report; a February 2011 MCC FBA report; and March 2011 home-based speech-language therapy, OT, and ABA instruction progress reports (Tr. pp. 74-78, 92, 119-20, 123; Dist. Exs. 2-9).

The school psychologist testified that the March 2011 CSE discussed the student's academic performance and communication skills during the meeting (Tr. pp. 78-82). According to the March 2011 IEP, MCC worked on developing the student's functional communication skills, she communicated by using verbal approximations and written language, and she was learning to communicate through the use of an iPad with a Proloquo2go application, which she had demonstrated "tremendous" progress learning to navigate (Dist. Ex. 1 at pp. 3, 5). At the time of the March 2011 CSE meeting, the student showed the ability to request items using three to four-word utterances, navigate to different boards to ask for desired activities, answer "wh" questions, and label pictures and objects using her device (id. at p. 3). The March 2011 IEP indicated that the student's vocal responses contained repetition (id.). Receptively, the March 2011 IEP indicated that the student followed two-step directives with a visual cue, identified objects by color, and was beginning to identify objects by shape and size (id.). When provided with visual cues, the student identified location terms (e.g., under, next to, behind) (id.). The March 2011 IEP noted that the student's perseverative requests had decreased, and the amount of time spent using the Proloquo2go application, rather than a preferred application, had increased (id.). The March 2011 IEP indicated that the student was working on improving skills such as sequencing, number identification, giving specified objects, matching words to pictures, object/picture identification, and calendar skills (id.).

Based upon information obtained from MCC and discussed at the March 2011 CSE meeting, the March 2011 IEP described the student's social/emotional skills as significantly delayed and as atypically developed (consistent with a diagnosis of autism) (Dist. Ex. 1 at p. 5). According to the IEP, the student's "onset of puberty" further confounded her social/emotional functioning (id.). The student required verbal cues to ask for help in order to reduce episodes of inappropriate physical responses (Dist. Ex. 1 at p. 3). According to the March 2011 IEP, the student was "quick to hit others," and exhibited spitting, "swatting" and "smacking" behaviors to escape tasks she did not want to complete or as a form of communication (id. at p. 5). The March 2011 IEP indicated that the MCC used a "DRO" procedure to extinguish hitting behaviors, and had successfully extinguished the student's clothes-shredding behavior (id.).[8] Although the March 2011 IEP noted that the student did not seek interaction in an appropriate manner and exhibited non-relatedness to her environment, she was hard working and very responsive to the attention of

[8] The educational coordinator of MCC testified that part of the student's behavior plan included "differential reinforcement of other behaviors" or DRO, which she described as the student receiving reinforcement (e.g. access to pieces of a preferred puzzle) for exhibiting appropriate behaviors (Tr. pp. 413, 428, 483-84).

others (id.). The March 2011 CSE determined that the student's behavior seriously interfered with instruction and required additional adult support, and at the meeting, the CSE developed a BIP for the student to address significantly interfering behaviors (Tr. pp. 93-95; Dist. Ex. 1 at pp. 5, 21).

Regarding the student's health and physical development discussed during the March 2011 CSE meeting, the March 2011 IEP indicated that the student had received diagnoses of a pervasive developmental disorder, verbal apraxia, hyperactivity, a seizure disorder, and acute sensitivity to environmental stimuli (Tr. pp. 95-97; Dist. Ex. 1 at p. 6). According to the March 2011 IEP, the student exhibited balance and coordination difficulties, difficulty navigating her environment including stairs, and she needed to be monitored for choking at all times (Dist. Ex. 1 at pp. 6-7). Information provided in the OT progress reports and included in the IEP indicated that the student's OT sessions focused on improving her motor planning, self-regulation, strength and endurance, fine motor, sensory modulation, and self-help skills (id. at p. 6). The March 2011 IEP indicated that the student required consistent and frequent intervention to reach a "well regulated state" and attain new skills, and described the difficulties the student exhibited after missed sessions or school breaks (id.). The March 2011 IEP further indicated that the student required physical therapy (PT), and therefore, the CSE developed PT goals based upon information provided by MCC, the parents, and past PT information (id.).

Following consideration of placements such as community school settings and a 12:1+4 special class, the March 2011 CSE recommended placing the student in a 12-month program in a 6:1+1 special class in a specialized school (Tr. pp. 110-11; Dist. Ex. 1 at pp. 1, 19-20).[9] The school psychologist testified that 6:1+1 special class placements were designed specifically for students with autism in that they were "built around" students who exhibited significantly delayed speech-language skills and behavioral difficulties (Tr. p. 112).

In conjunction with the structure and support inherently provided in a 6:1+1 special class, the March 2011 CSE recommended that the student receive the services of a full-time 1:1 paraprofessional to support the student in the following areas: to reduce interfering behaviors by assisting in the implementation of the student's BIP; to monitor safety concerns, such as navigating the school environment and preventing choking episodes; and "as a supplement to instruction," due to the student's highly distractible nature and her responsiveness to staff intervention (Tr. p. 93).[10] The March 2011 CSE also recommended related services of five individual OT sessions per week, three individual PT sessions per week, and five individual sessions of speech-language

[9] According to State regulation, 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]).

[10] I also note the recent issuance of a guidance document by the Office of Special Education in January 2012 entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," indicates that with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented (see http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (id.).

therapy per week (Dist. Ex. 1 at p. 20; compare Dist. Ex. 1 at pp. 3-7, with Dist. Ex. 1 at pp. 8-17; see Dist. Exs. 2-9).

To address the student's needs described above, the March 2011 IEP incorporated annual goals and short-term objectives drafted by MCC and reviewed at the CSE meeting that were designed to address the student's needs in the following areas: receptive and expressive communication, academic, social, self-management, leisure, pragmatic language, visual motor, fine motor, and visual perceptual skills (Tr. p. 109; Dist. Ex. 1 at pp. 8-16). The CSE also developed annual goals and short-term objectives targeting the student's improvement of her gross motor skills (Tr. pp. 109-10; Dist. Ex. 1 at p. 17).

The March 2011 CSE provided additional supports to the student by recommending management strategies, which the school psychologist described as "procedures or approaches that [were] particularly useful in educating [the student and] in implementing [the student's] IEP" (Tr. p. 82). He further testified that these approaches were "particularly salient to [the student's] profile strengths and weaknesses," and were developed using information from the documents reviewed and the discussions held with MCC and home-based service providers during the CSE meeting (Tr. pp. 82-83). The management needs contained in the March 2011 IEP included repetition or clarification of questions, instructions, or directions as needed; teacher prompts to help manage moments of distractibility and retrieval difficulties; preview of educational material before classes; physical cues and the break down of directions into small clear steps; extended processing time and for the student to repeat back directions to the teacher; repetition of information; use of a multisensory, sequentially structured approach; hands-on activities and the use of manipulatives to help the student visualize the meaning of the content presented; teacher scaffolding to help regulation and organization of ideas; and movement breaks (Dist. Ex. 1 at p. 4). The IEP also provided the student with modeling, cueing and reinforcement of appropriate classroom behaviors (id. at p. 5). The district school psychologist testified regarding the rationale for each of the student's recommended management strategies (Tr. pp. 83-89).

In summary, contrary to the IHO's conclusion, the hearing record demonstrates that the student exhibited highly intensive management needs that required a high degree of individualized attention and intervention, such that the CSE's recommendation to place the student in a 6:1+1 special class with the services of a full-time, 1:1 paraprofessional was appropriate. While I understand the parents' and MCC staffs' viewpoints that the student should receive instruction solely on a 1:1 basis, this amounts to conflicting viewpoints among educators over the best manner in which to deliver special education instruction and services to the student (see, e.g., J.A. v. New York City Dep't of Educ., 2012 WL 1075843, *9-*10 [S.D.N.Y. Mar. 28, 2012] [resolving conflicting views over the quality and extent of adult support services that must provided to a student]; D.S. v. Hawaii, 2011 WL 6819060, at *10 [D.Haw., Dec. 27, 2011] [commenting that the IDEA does not set forth with specificity the level of adult support services to be provided to particular students]). The IEP in this case was individualized to address the student's needs, and the district was not required to guarantee a specific level of benefit to the student and instead was required to offer an IEP that was designed to offer the opportunity for greater than trivial advancement (A.C., 553 F.3d at 173; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 130; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *5–*6 [S.D.N.Y. 2009]). Accordingly, I decline to find that the lack of 1:1 teaching support in the IEP rose to the level of a denial of a FAPE, given the CSE's recommendation of a 6:1+1 special class with 1:1 paraprofessional

services, in conjunction with the recommended related services and the program accommodations and strategies described above.

2. Home-Based Services as a Component of a FAPE

To the extent that the IHO found the March 2011 CSE's recommendation was not appropriate without the inclusion of a home-based program, I note that several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also Application of the Dep't. of Educ., Appeal No. 11-031).

In this case, the March 2011 CSE reviewed reports prepared by the home-based providers, several of whom also participated in the meeting, and was aware that the student received home-based services (Tr. pp. 112-13, 171; Dist. Exs. 1 at p. 2; 6-7; 9). According to the school psychologist, home-based services were not a necessary feature of the student's program, because the 6:1+1 special class placement included a parent training component, which was discussed during the meeting and could adequately address her needs (Tr. pp. 113-16, 123-24, 171, 177). The co-supervisor of the student's home-based ABA program testified that the student had received home-based ABA instruction for the past six years (Tr. pp. 753-54). During the 2010-11 and 2011-12 school years, the student's seven-day per week home-based program consisted of 20 hours of ABA instruction, four hours of OT, and three hours of speech-language services (Tr. pp. 781-82, 790-93). Testimony provided by the parents' witnesses familiar with the home-based program generally showed that the needs the home-based providers addressed related to the level of supervision and custodial care the student required (Tr. pp. 555-59, 574-75, 591-92, 637, 646-47, 715-16, 718-19, 727, 730, 749-50, 759-60, 785). The coordinator of the home-based ABA program opined that without the combination of a home-based and school-based program to promote the generalization of skills in both settings, the student might require a residential placement (Tr. pp. 555-56, 568). Both the coordinator and the co-supervisor of the student's home-based program stated that the student would continue to make progress without the home-based program, albeit not at the same rate as with those services (Tr. pp. 594-95, 768-69).

Upon review of the hearing record, I find that the district offered the student an appropriate educational program that would address the student's significant needs during the school day and that the evidence does not suggest that the student required home-based programming in order to make progress during the in-school portion of her program or to receive educational benefits. Although it is understandable that the parents, whose daughter has substantial needs, desire greater educational benefits through the auspices of special education, it does not follow that the district must be made responsible for them. 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). The IDEA 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, 873 F.2d at 567 [citations omitted]).

3. Special Factors, Interfering Behaviors, an FBA, and a BIP

a. Failure to Conduct an FBA

As set forth in greater detail below, I find that although the March 2011 CSE did not conduct its own FBA of the student, it nonetheless properly considered the special factors related to the student's behavior that impeded her learning, and the May 2011 IEP and BIP otherwise appropriately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation, " at pp. 25-26, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id. at p. 25). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234, at *2).[11]

Although the hearing record does not show that the district conducted its own FBA of the student, as explained more fully below, I find that the district had obtained and considered information sufficient to identify the student's interfering behaviors and the strategies/goals MCC used to address the behaviors, which were reflected in the March 2011 IEP.[12] The district school psychologist who participated in the March 2011 CSE meeting testified that the CSE considered and in part relied upon a February 22, 2011 FBA report prepared by MCC, which he characterized as being "more extensive" than other FBA reports he had reviewed (Tr. pp. 74-75, 139-40; Dist. Ex. 3). He further testified that he did not dispute the information contained in the MCC reports, and found the reports to be reliable (Tr. pp. 119-20).

The MCC FBA report identified the student's current target behaviors as swatting (gentle hit ranging to hard hit/slap), pinching, biting, spitting, and mouthing fingers/objects; and shredding behaviors, regarded as previously of concern but now dormant (Dist. Ex. 3 at p. 1). The report identified the student's strengths, weaknesses, and potential reinforcers, including edibles; opportunities to access YouTube, iTouch or books; and social interaction with adults (id. at p. 2). Data contained within the FBA report indicated that the function of the student's aggressive behaviors most often was to obtain attention/gain access to preferred items or escape task demands (id. at pp. 3-5).[13] The FBA report identified the goals of the treatment plan as increasing the student's acceptance of prompting from staff, and increasing her functional communication skills

[11] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [Aug. 14, 2006]).

[12] I note at the outset of this discussion that the student was attending MCC at the time of the March 2011 CSE meeting and conducting an FBA to determine how the student's behavior related to that environment has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at MCC and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]).

[13] An assessment of the student's spitting behavior was ongoing (Dist. Ex. 3 at p. 5).

to gain access to interaction with adults or access to preferred items (id. at p. 5). According to the FBA report, the target behaviors occurred most often when the student was given an instruction or prompt from staff, or during "unstructured" time such as transitions between activities (id.). Replacement behavior goals included in the FBA report were to increase the student's communication skills and appropriate attention seeking behaviors (id. at p. 6).

A review of the March 2011 IEP shows that it reflected information about the student's interfering behaviors commensurate with the MCC FBA report (compare Dist. Ex. 1 at pp. 3-5, with Dist. Ex. 3). Specifically, the IEP indicated that the student often required verbal cues to ask for help, as she often reverted to inappropriate physical responses instead of asking for help (Dist. Ex. 1 at p. 3; see Dist. Ex. 3 at pp. 1-2). According to the IEP, the student was "quick to hit others," and had a history of shredding her clothing, a behavior that has since been extinguished (Dist. Ex. 1 at p. 5; see Dist. Ex. 3 at p. 1). The IEP noted that the MCC educational director discussed the student's swatting and smacking behaviors, indicating that the student used those actions to escape tasks that she did not want to do (Dist. Ex. 1 at p. 5; see Dist. Ex. 3 at pp. 3-5). The IEP indicated that MCC worked on the student's functional communication and that she did not seek interactions in an appropriate manner, rather, tended to use hitting as a form of communication (Dist. Ex. 1 at p. 5; see Dist. Ex. 3 at pp. 5-6). It further indicated that the student was very responsive to the attention of others (Dist. Ex. 1 at p. 5; see Dist. Ex. 3 at p. 2). The March 2011 CSE determined that the student's behavior seriously interfered with instruction and required additional adult support (Dist. Ex. 1 at p. 5).

b. Adequacy of the BIP

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral

interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

According to the school psychologist, the BIP included with the March 2011 IEP was discussed during the CSE meeting (Tr. pp. 138-39). The BIP identified the behaviors that interfered with the student's learning as swatting (gently hit, ranging to hard hit/slap), pinching, biting, spitting, and mouthing of fingers, with the goal being a significant reduction in the instances of these behaviors (Dist. Ex. 1 at p. 21; see Dist. Ex. 3 at p. 1). The BIP indicated that the student would be taught alternative and appropriate ways to communicate her needs, wants, and frustrations (Dist. Ex. 1 at p. 21; see Dist. Ex. 3 at p. 5-6). According to the BIP, when the target behavior occurred, the student would be guided through the situation again while being prompted to behave in an appropriate manner, using "overcorrection" methods (Dist. Ex. 1 at p. 21; see Dist. Ex. 3 at p. 6). The BIP indicated that the entire school staff would be involved in the "ongoing implementation and development of [the] plan" (Dist. Ex. 1 at p. 21).

To address the behaviors that interfered with the student's learning, the March 2011 IEP included annual goals and short-term objectives designed to improve the student's functional communication skills, both verbally and through the use of an augmentative communication device (Dist. Ex. 1 at pp. 8, 14; see Dist. Ex. 3 at pp. 5-6). Annual goals and short-term objectives to improve the student's self-management skills included increasing her ability to follow classroom routines and transitions, her ability to sit in close proximity to others without displaying inappropriate behaviors, and her ability to wait appropriately for items or activities given teacher instruction (Dist. Ex. 1 at pp. 12-13; see Dist. Ex. 3 at pp. 5-6). Management needs provided in the March 2011 IEP that correlated to the student's achievement of the goals set forth in the MCC FBA report included the provision of physical cues, teacher prompts to help manage moments of distractibility and retrieval difficulties, and use of a keyboard and word processing for written expression tasks (Dist. Ex. 1 at p. 4; see Dist. Ex. 3 at p. 5). The March 2011 IEP indicated that the student required modeling, cuing, and reinforcement of appropriate classroom behaviors including compliance with adult directives and school procedures and rules (Dist. Ex. 1 at p. 5; see Dist. Ex. 3 at pp. 5-6). The March 2011 CSE also recommended that the student receive five individual sessions per week of speech-language therapy to work on improving her functional communication skills, and the services of a 1:1 behavior management paraprofessional, in part, to assist with the student's interfering behaviors (Tr. pp. 93-95; Dist. Ex. 1 at pp. 20-21). Thus, the hearing record reflects that in conjunction with the BIP, the March 2011 IEP provided additional supports to address the student's behavior needs.

Notwithstanding the above, however, the parents are correct that the BIP included with the March 2011 IEP does not contain baseline data about the frequency, duration, and intensity of the student's behaviors (see Dist. Ex. 1 at p. 21). The parents argue that the absence of this information rendered the BIP inadequate as the BIP does not adequately plan for how the student's behaviors would be addressed by staff implementing the BIP. In this case, although the BIP's failure to include baseline data constitutes a procedural violation of the State regulations governing the formulation of BIPs (see 8 NYCRR 200.22[b][4]), I do not find under the circumstances of this case that this procedural violation (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]). As discussed above, the March 2011 IEP identified the student's major interfering behaviors and provided numerous services and supports to address them, and therefore, I decline to find that the lack of baseline data in the BIP rose to the level of a denial of a FAPE (see R.E., 694 F.3d at 190-92).

Regarding the IHO's finding that the BIP was inadequate because it did not address the student's needs related to toileting or puberty, a review of the evidence indicates that these particular needs are more appropriately characterized as self-care or management skills rather than interfering behaviors that would impede the student's learning and thus, be addressed through the implementation of a BIP (see 8 NYCRR 200.22[b][1]). I further note that the February 2011 FBA and BIP designed by MCC did not include the student's toileting needs and needs related to puberty among the interfering behaviors that impeded her learning or that of others (Dist. Ex. 3). Thus, the hearing record does not support a finding that the student was denied a FAPE due to the absence of a plan to manage toileting needs and needs related to puberty in the IEP—particularly where the district formulated a BIP based on uncontroverted information and documentation provided by MCC—and developed annual goals and short-term objectives in addition to the management needs designed to target the student's interfering behaviors. Accordingly, the IHO's finding that the BIP was deficient on these grounds must be annulled.

In summary, I find that the district's failure to conduct its own FBA in this case does not support a finding that the district failed to offer the student a FAPE, particularly where as here, there was agreement between the information before the March 2011 CSE and the resultant IEP as to the function of the student's behaviors; the March 2011 CSE accurately identified the student's behavior needs in the March 2011 IEP and in the BIP; the March 2011 CSE addressed the student's behavior needs and formulated a BIP based on information and documentation provided by the student's providers; the March 2011 CSE developed management needs designed to target the student's interfering behaviors and recommended a 1:1 paraprofessional, in part, to assist with the student's behaviors; and where it was not possible to conduct an FBA in the setting in which the BIP would have been implemented due to the student's then-current placement at MCC (see R.E., 694 F.3d at 190-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; A.C., 553 F.3d at 172-73; Cabouli, 2006 WL 3102463, at *3; F.L., 2012 WL 4891748, at * 7-*9; C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

4. Transition Plan

With regard to the IHO's finding that the district denied the student a FAPE in part due to its failure to develop a "transition plan" for the student to facilitate her transfer from a nonpublic school to a district school, the IDEA does not specifically require a school district to formulate a

"transition plan" as part of a student's IEP when a student transfers from one school to another (see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y., Oct. 16, 2012]).[14, 15]

The hearing record is unequivocal that a transition plan was not incorporated into the March 2011 IEP to facilitate the student's transfer from MCC to the assigned public school (Tr. pp. 176; Dist Ex. 1; see Tr. p. 827). The educational coordinator of MCC testified that with the right cues and teaching, the student was able to accept changes in her schedule and that the student needed a visual schedule in addition to someone to walk the student through it (Tr. pp. 470-71). The March 2011 CSE recommended supports in the student's IEP to aid her in organizing the sequence of events, such as previewing educational material before classes (Tr. p. 85; Dist. Ex. 1 at p. 4). Similarly, the March 2011 IEP recommended a multisensory approach to instruction, which the school psychologist testified could help the student compensate with other modalities where she exhibited delays, both in understanding and in responding to her environment (Tr. p. 87; Dist. Ex. 1 at p. 4). In addition, the March 2011 CSE recommended the services of a full-time 1:1 paraprofessional (Dist. Ex. 1). Thus, I find that the March 2011 IEP was designed with services in mind to address the student's needs relating to transitioning to a new environment and any such deficiency alone, in light of the array of other services provided on the IEP, is not sufficient to conclude that the IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]).

Moreover, although the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another, a review of the hearing record also suggests that had the student attended the district placement, the district would nevertheless have offered

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

[15] I also note that distinct from the "transition plan" at issue in this case, the parents do not assert that the district failed to recommend "transitional support services" pursuant to State regulations governing the provision of educational services to students with autism. That particular State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

the student specialized services to assist her in her transfer from MCC to the district-recommended class (see F.L., 2012 WL 4891748, at *9; E. Z.-L. v. New York City Dep't of Educ., 763 F.Supp.2d 584, 598 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d 167; M.S., 734 F. Supp. 2d at 280).[16] The teacher of the proposed class testified that within the first couple of weeks of the school year, she used the ABLLS to conduct assessments of her students, which measured student performance in all areas of functioning, both academic and nonacademic (Tr. pp. 190-91, 212).[17] She further indicated that she conducted the ABLLS, because that assessment instructed the teaching to align with IEP goals, particularly when a student entered her classroom that she had not previously met (Tr. p. 192). The teacher of the proposed class also testified that she also relied on conference notes to assess her students, which enabled her to keep track of what she had worked on with her students, what they were supposed to be working on before, and their next steps (Tr. pp. 192-93). According to the teacher of the proposed class, information derived from the student's assessments was an important part of the student's transition to the assigned school, because no one would have known the student, except on paper (Tr. pp. 212-13). She further explained that she would try to compile the student's information as soon as possible, and try to get to know the student through observation (Tr. p. 213). The teacher of the proposed class surmised that the student's placement at MCC was similar to the 6:1+1 setting in terms of class size, and she added that per the student's IEP, the student required "space around her," so the teacher noted that she could provide that to the student (id.). The teacher of the proposed class also testified that she would have tried to internalize the student's present levels and what her social needs were, because during the first couple of weeks of the school year, she was getting to know the students, and the teacher indicated that it was important to know what they were like socially (id.). The teacher of the proposed class added that she would want that information "really soon," to help the student become more comfortable in the classroom (id.).

Based on the foregoing, the IHO's determination that the district denied the student a FAPE on the basis of a lack of a transition plan must be reversed.

5. Parent Counseling and Training

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, 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 R.E., 694 F.3d at

[16] To the extent that a change in restrictiveness, if any, existed between MCC and the public school program, such change is also minimal, which further diminishes a need to recommend transitional support services on the student's IEP (8 NYCRR 200.1[ddd]).

[17] ABLLS is an acronym for Assessment of Basic Language and Learning Skills (see Application of a Student with a Disability, Appeal No. 12-017).

191; M.M., 583 F. Supp. 2d at 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [State regulation][18] 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., 694 F.3d at 191). The Second Circuit 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.).

In the instant matter, it is undisputed that the March 2011 CSE did not recommend parent counseling and training in the student's March 2011 IEP, which violates the procedures for formulating an IEP. However, the hearing record demonstrates that parent counseling and training was discussed at the March 2011 CSE meeting and had the student attended the particular school to which the district had assigned the student during the 2011-12 school year, the parents would have had access to parent counseling and training that satisfied the requirements of the State regulation. According to the school psychologist, parent counseling and training was an important component of the proposed 6:1+1 classroom, and although it was not mentioned in the March 2011 IEP, the provision of parent counseling and training was discussed during the March 2011 CSE meeting (Tr. pp. 114-15, 120, 177; see Dist. Ex. 1). He added that parent counseling and training could involve the parents coming into the classroom, but that it also involved workshops provided during the school day for parents (Tr. p. 116). Similarly, the assistant principal of the assigned school testified that the assigned school offered parent counseling and training to all parents, regardless of the IEP, and that the assigned school conducted parent counseling and training, because it warranted for all students (Tr. pp. 329-30). In addition, the assistant principal explained that the assigned school's related services providers and the parent coordinator also provided training sessions to parents (id.). Lastly, the teacher of the proposed class testified that she worked with parents on an individual basis in implementing programs on which she worked in the classroom (Tr. pp. 244-47).

Based upon the foregoing, I find that although the March 2011 CSE's failure to recommend parent counseling and training in the student's IEP was a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; F.L., 2012 WL 4891748, at *9-*10; C.F., 2011 WL 5130101, at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 2010]; M.M., 583 F. Supp. 2d at 509; M.W v. New York City Dep't of Educ., 2012 WL 2149549, at *13 [E.D.N.Y. June 13, 2012]).

D. Assigned School

In his decision, the IHO addressed the parents' concerns about the assigned public school and further found a denial of a FAPE based in part on the district only offering evidence regarding the appropriateness of the school to which the student was assigned for summer 2011 and no evidence to demonstrate the appropriateness of the assigned school that the student was designated to attend for the remainder of the school year (IHO Decision at p. 10). On appeal, the district contends that the IHO erred in reaching the parents' contentions about the assigned school because

[18] 8 NYCRR 200.13[d].

the student did not attend the assigned school, and further that it only had to show that it had a program and seat available to the student at the start of the 2011-12 school year.

1. Implementation of the IEP

Initially, the district correctly argues that the IHO erred in reaching the parents' contentions about the assigned school since such analysis would require the IHO—and an SRO—to determine what might have happened had the district been required to implement the student's March 2011 IEP. Generally, challenges to an assigned school involve implementation claims, and failing to implement 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 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]),[19] and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). 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" (694 F.3d at 195; see F.L., 2012 WL 4891748, at *15-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; c.f. E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; 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 this case, the parents rejected the IEP and enrolled the student at MCC prior to the time that the district became obligated to implement the student's IEP (Parent Exs. O; P). Thus, the district was not required to establish that the assigned school was appropriate, and therefore, it was error for the IHO to reach any of the parents' contentions with respect to the assigned school or how the student's March 2011 IEP would have been implemented at the assigned school. However, even assuming for the sake of argument that the student had attended the district's recommended program at the assigned school, as further explained below, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P., 2010

[19] With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. 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]).

WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-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., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. Aug. 19, 2011]).

Moreover, 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). 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).

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, Appeal No. 09-063).[20] 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 [Aug. 14, 2006]).

Here, it is undisputed by the parties that the district had a program available to the student at the start of the school year and the parents rejected the district's program (Tr. pp. 323, 325; Dist. Ex. 10; Parent Exs. O; P). Notwithstanding the parents' assertions that the hearing record weighs against a finding that the district offered the student a FAPE, because of the possible change in location of the delivery of the student's IEP, the parents have not submitted any legal authority to show that a future change in school buildings amounts to an actionable claim pursuant to the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *16 [S.D.N.Y. Aug. 23, 2012]). Thus, I find the IHO erred in finding a denial of a FAPE based on the district's failure to present

[20] The Second Circuit has established that "'educational placement' refers to the general educational program—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 R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; 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 C.F.R. § 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., 812 F. Supp. 2d at 504).

evidence about the location of the school the student may have attended in September 2011 had she attended the public school program.

2. Educational Methodology

To the extent that the IHO found that the programming in the proposed class was "not structured enough" because the special education teacher of the 6:1+1 special class lacked training in behavioral methods of instruction, an independent review of the hearing record shows that the IEP provided appropriate management strategies and that the special education teacher of the 6:1+1 special class could offer instructional techniques individualized to meet the student's needs had the parents elected to enroll the student in the public school program.

Although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; K.L., 2012 WL 4017822, at *12; Ganje, 2012 WL 5473491, at *11-*12; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

In this instance, the March 2011 IEP did not specify an instructional methodology that the student required, although it referenced she had experienced success using a "DRO procedure" to eliminate hitting behaviors (Dist. Ex. 1 at p. 5). Language within the student's annual goals and measurement methods referenced terminology used during ABA instruction (Tr. pp. 478-79, 581-82; Dist. Ex. 1 at pp. 8-13). The school psychologist testified that although the March 2011 CSE did not discuss at the CSE meeting the specific methodologies referenced in the evaluation and progress reports that the CSE reviewed, he also stated that the CSE had an "extensive discussion" about the student's need for management techniques such as scaffolding, repetition, and an instructional approach or method that would emphasize communication and language functioning (Tr. p. 126; see Tr. pp. 74-78, 92, 119-20, 123; Dist. Exs. 2-9). As noted previously, the March 2011 IEP provided the student with instructional strategies including repetition or clarification of questions, instructions or directions as needed; prompts from teachers that help manage moments of distractibility and retrieval difficulties; preview of educational material before classes; physical cues and the break down of directions into small clear steps; extended processing time and that the student repeat back directions to the teacher; repetition of information; use of a multisensory, sequentially structured approach; hands-on activities and the use of manipulatives to help the student visualize the meaning of the content presented; teacher scaffolding to help regulation and organization of ideas; and movement breaks (Dist. Ex. 1 at p. 4). The March 2011 IEP also provided the student with modeling, cueing and reinforcement of appropriate classroom behaviors (id. at p. 5).

In addition, the special education teacher of the 6:1+1 special class testified about how she would differentiate the student's instruction, based upon the student's needs as identified in the March 2011 IEP present levels of performance (Tr. pp. 214-17). For example, because the student's academic functioning levels were somewhat lower than the other students in the proposed class during summer 2011, the special education teacher stated she could provide the student with an individual schedule allowing for more frequent breaks during instruction (Tr. pp. 215-16). She testified at length how during summer 2011 she implemented for other students, the management strategies provided for in the student's IEP (Tr. pp. 221-31). Based upon her reading of the IEP, the special education teacher explained that the student needed visual cues and "hands on" teaching methods (Tr. p. 285).[21] Under the circumstances, in light of the evidence illustrating how the special education teacher of the 6:1+1 special class could implement the student's management needs had she attended the district's program and given other supports enumerated in the March 2011 IEP, the hearing record does not support a finding that the assigned school was not appropriate for the student because it did not employ a specific educational methodology, namely, ABA instruction.

3. 1:1 Instruction in the Proposed Special Class

In his decision, the IHO determined that the 1.5 hours of 1:1 instruction that would have been provided to the student in the proposed class was insufficient to meet the student's needs (IHO Decision at p. 11). As explained below, the hearing record does not support the IHO's finding.

The hearing record showed that as of the first day of the 2011-12 school year, the proposed class was composed of four students, one special education teacher, one classroom paraprofessional, and one 1:1 paraprofessional (Tr. pp. 184, 326-27). The special education teacher testified that both the occupational therapist and the speech-language therapist also pushed into the classroom to work with students (Tr. p. 188), further reducing the student-to-adult ratio. As stated previously, the March 2011 IEP provided the student with daily individual sessions of speech-language therapy and OT, and three individual sessions of PT per week (Dist. Ex. 1 at p. 20).

The special education teacher of the proposed class stated that within the first few weeks of school, she administered the ABLLS to the students to determine how the results of the assessment align with the annual goals (Tr. pp. 191-92). She testified about her opportunities to work 1:1 with students on a daily basis during summer 2011, and she further indicated that the amount of time that she spent providing individual instruction to students varied according to the students' needs (Tr. pp. 211-12). The special education teacher also indicated that the paraprofessionals in her classroom, carrying out lesson plans she developed, functioned as assistant teachers and following whole group instruction, she and the paraprofessionals worked with students in groups, in pairs, and on an individual basis (Tr. pp. 193-95, 199). Following a

[21] I further note that the student has been enrolled in MCC for the past three years, which the hearing record describes as a school whose primary special education philosophy centers around ABA instruction; however, prior to her admission in MCC, the student attended the Rebecca School for two years, which is based on a Developmental Individual Difference Relationship (DIR) model, giving rise to a conclusion that the student is amenable to other teaching methodologies, other than exclusively ABA instruction (Tr. pp. 415, 850-51; Parent Ex. C at p. 27).

review of the student's present levels of performance in the March 2011 IEP, the special education teacher opined that although the student would need a different schedule and require more individual attention than other students in the class, it was possible to provide the student with the individual support that she required (Tr. pp. 213-17).

In view of the foregoing, I find the March 2011 CSE acknowledged and addressed the student's need for 1:1 support and intervention, which the hearing record shows that the assigned school was capable of offering the student had she attended the district's program (see A.L., 812 F. Supp. 2d at 504).

4. Ability to Meet Self-Management Needs

In addition, despite the parents' claims to contrary, the evidence suggests that had the student enrolled in the assigned school, the teacher of the proposed classroom could address the goals contained in the March 2011 IEP, in particular, the student's goals regarding toileting and puberty education. The March 2011 IEP indicated that the student exhibited significantly delayed social/emotional functioning that was compounded by the onset of puberty (Dist. Ex. 1 at p. 5). The March 2011 IEP contained annual goals and short-term objectives related to the student's need to independently request to use the bathroom, and improve toileting and self-care skills (id. at pp. 12-13). As described above, the March 2011 CSE recommended a 1:1 paraprofessional to support the student in the special class (id. at p. 20). In order to implement this portion of the student's IEP, the special education teacher stated she would first discuss the student's needs with her family, to align her instruction with what was occurring at home (Tr. p. 231). The special education teacher described instruction techniques such as the use of dolls, the student's iPad, provision of a separate pair of underwear/sanitary napkin, and books to provide lessons regarding puberty to the student (Tr. pp. 231-32, 281-82, 312). She further indicated that those skills could be reinforced at home as "homework" to provide additional practice (Tr. p. 282). Under the circumstances, I find the IHO's conclusion that the district did not present evidence showing the proposed class was "equipped" to meet the student's toileting and self-care needs lacks support in the hearing record (IHO Decision at p. 11).

5. Absence of an Elevator

I now turn to the IHO's determination that the assigned school was inappropriate because it lacked an elevator (IHO Decision at p. 11; see Tr. p. 257). The March 2011 IEP indicated that the student had difficulty navigating her environment including stairs, but that she did not require an accessible program (Dist. Ex. 1 at pp. 6-7). According to the school psychologist, the March 2011 CSE came to that conclusion after discussing that the student was physically able to use stairs, but that she required supervision to do so (Tr. pp. 161-62).

To support the student's safety and stair navigation needs, the March 2011 CSE recommended the services of a 1:1 paraprofessional (Tr. p. 93; Dist. Ex. 1 at p. 20). The March 2011 IEP also included annual goals and short-term objectives to improve the student's muscle tone, strength, balance, posture control and coordination to complete tasks such as ascending and descending a flight of stairs with supervision, without upper extremity support; engaging in gross motor activities for a specified length of time; adapting her posture while engaging in playground activities; and maintaining her balance on unstable or uneven surfaces (Dist. Ex. 1 at pp. 16-17).

The CSE recommended that the student receive three individual sessions of PT per week, and five individual sessions of OT per week (Dist. Ex. 1 at p. 20).

Based on the foregoing, there is no showing in the hearing record that the district would have deviated from substantial or significant provisions of the student's IEP, namely, the supports and services described above to meet her stair navigation needs, in a material way and thereby precluded her from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P., 2010 WL 1049297, at *2). Although one can understand the parents' preference for a school with an elevator, in this instance, that preference does not equate to a violation of the district's obligation to offer the student the basic floor of opportunity through an IEP that was reasonably calculated to enable the student to receive educational benefits (see Grim, 346 F.3d at 379).

VII. Conclusion

Based on the hearing record evidence, I find that the recommended 6:1+1 special class in a specialized school with related services was reasonably calculated to provide the student with educational benefits and sufficient 1:1 support in the least restrictive setting and, therefore, offered her a FAPE during the 2011-12 school year. Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to reach the issue of whether MCC was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 13, 2012 is modified by reversing those portions that concluded that the district failed to establish that it offered the student a FAPE in the LRE for the 2011-12 school year and ordered the district to reimburse the parents for the costs of the student's tuition at MCC and for the costs of the student's home-based program.

Dated: **Albany, New York**
January 11, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER