The University of the State of New York

The State Education Department
State Review Officer
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No. 12-099

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for petitioner, Cynthia Sheps, Esq., of counsel

Lewis Johs Avallone Aviles, LLP, attorneys for respondent, Jennifer M. Frankola, 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 respondent's (the parent's) son and ordered it to pay the costs of the student's tuition at the Rebecca School for the 2011-12 school year. The parent cross-appeals from the IHO's determination which denied her request for home-based special education itinerant teacher (SEIT) services. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

At the time of the hearing in this proceeding during the 2011-12 school year, the student turned nine years old and was attending a 7:1+3 self-contained class at the Rebecca School where he received occupational therapy (OT), physical therapy (PT), speech-language therapy, and music

therapy (Dist. Ex. 9 at p. 1).[1, 2] Additionally, after the commencement of the impartial hearing and thereafter during the 2011-12 school year, the student received services outside of the Rebecca School by related service authorizations (RSAs) for five hours of 1:1 special education itinerant teacher services (SEIT) per week, three 30-minute individual sessions of OT per week; three 30-minute individual sessions of PT per week, and three 30-minute individual sessions of speech-language therapy per week (Parent Ex. C at pp. 1-3; Tr. p. 4).[3] With regard to the student's educational history, the hearing record reflects that the student received early intervention services, and attended a center based special education preschool program for a few months when he was three years old (Tr. p. 348). Around that time the student moved out of the United States with his mother, and attended a preschool for children with pervasive developmental disorder (PDD) or autism for three to four years (Tr. p. 347, Dist. Ex. 6 at p. 3; Parent Ex. F at p. 1). Sometime in summer 2010 the student returned to New York State with his mother (Tr. p. 347; Dist. Ex. 11 at p. 4). In a July 26, 2010 letter to the CSE, she requested an evaluation and school placement for her son (Parent Ex. I). The student entered the Rebecca School on October 12, 2010, where he remained through the 2011-12 school year (Tr. pp. 305, 347).

The CSE met on May 27, 2011 for an initial CSE review to determine classification and the student's possible eligibility for services as a student with a disability (Dist. Ex. 6 at pp. 1-2).[4] The May 2011 CSE determined that the student was eligible for special education programs and services as a student with autism (Dist. Ex. 6 at p. 1).[5] In developing an IEP for the student, the CSE recommended that the student attend a 12-month special class (6:1+1) in a specialized school with related services of individual speech-language therapy four times per week for 30 minutes, group (2:1) speech-language therapy one time per week for 30 minutes, individual OT four times per week for 30 minutes, group (2:1) OT one time per week, individual PT one time per week for 30 minutes, group (2:1) PT one time for 30 minutes per week, and a full time crisis intervention paraprofessional (id. at pp. 1-2, 15, 17). In addition, the CSE developed a behavior intervention plan (BIP) for the student, recommended adaptive physical education and special education

[1] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[zz][1], 200.7). The student has attended the Rebecca School since October 2010 (Tr. p. 305).

[2] Testimony by the teacher assigned to the May 27, 2011 CSE indicated that the Rebecca School also "used" a paraprofessional provided by the district (Tr. p. 128). The hearing record does not indicate if the paraprofessional was designated specifically for the student.

[3] These out-of-school services were provided pursuant to an unappealed interim order determining the student's pendency ("stay put") placement rendered by the IHO on July 19, 2011 at the onset of the impartial hearing (IHO Interim Order at p. 2). The IHO determined that the student's pendency was based upon the student's last agreed upon IEP dated August 10, 2005 when he was classified as a Preschooler with a Disability by the Preschool Committee on Special Education (CPSE) (id.; see Tr. p. 4; Parent Ex. B at pp. 1-17).

[4] Testimony by the teacher assigned to the May 27, 2011 CSE indicated that although the student received preschool special education services in the past, what she referred to as his three-year absence from New York prompted the CSE to treat the May 2011 CSE meeting as an initial meeting for the student, and to request all available reports and evaluations (Tr. p. 49).

[5] The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (Dist. Exs. 1 at pp. 1-9; 2 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

transportation, and recommended that the student participate in the Alternative Assessment due to his significant cognitive and academic delays (id. at p. 1, 17-19).

On June 15, 2011, the parent sent a letter noting that she had not yet received a placement for her son for the 2011-12 school year, and she notified the district of her intention to unilaterally place the student at the Rebecca School for the 2010-11 school year and to seek reimbursement and/or funding for the costs of the student's tuition and related services (Parent Ex. V at p. 1).

The district sent the parent a final notice of recommendation (FNR) also dated June 15, 2011, and advised her of the recommendations of the May 2011 CSE meeting and the resultant IEP (Dist. Ex. 14). The FNR indicated that the student was recommended for placement in a 6:1+1 special class, the receipt of related services of a full-time 1:1 crisis paraprofessional, speech-language therapy, OT and PT, and it notified the parent of the particular school to which the student was assigned for the 2011-12 school year (id.).

The parent visited the particular school to which the student was assigned and by letter dated June 28, 2011, notified the district that she considered the location inappropriate for a variety of reasons. She restated her intention to unilaterally place the student at the Rebecca School for the 2011-12 school year and to seek reimbursement and/or funding for the costs of the student's tuition and related services (Parent Ex. W at pp. 2-3).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year upon procedural and substantive grounds (see Parent Ex. A at pp. 1-8). The parent asserted that the student's pendency ("stay-put") placement consisted of the student's last agreed upon IEP dated August 10, 2005 (id. at p. 7). As set forth in 38 numbered paragraphs, the parent argued, among other things, that the district failed to conduct proper evaluations of the student and failed to meaningfully consider evaluations that the student's mother provided to the CSE (id. at pp. 2-6). The parent further asserted that she was denied a meaningful opportunity to participate in the May 2011 CSE meeting because the CSE "failed to develop, recommend or offer a specific placement/program with full participation of all members of the IEP team" (id. at p. 4). The parent also asserted that the IEP's 6:1+1 student/teacher ratio did not provide sufficient academic and therapeutic support and that the IEP did not include adequate levels, ratios and placements for related services (id. at pp. 4, 5). The parent also asserted that the IEP should have included music therapy, parent training and counseling and a transition plan (id. at pp. 3, 5). The parent further asserted that the CSE failed to consider the student's educational needs including his physical limitations, curriculum and methodology requirements, and his need to work on a variety of specific skills (id. at p. 4). The parent asserted that the CSE failed to adequately address the student's sensory needs, including his need for a sensory diet (id. at pp. 4, 6). The parent also contended that the "placement/program" offered by the district did not provide needed out-of-school services to promote generalization across settings, and would not promote self-sufficiency and independence (id. at pp. 3-4).

The parent also asserted several arguments related to the particular school identified in the district's June 15, 2011 FNR, including, among others, that the "overall atmosphere" at the school

was chaotic and "institution like", and that the parent was never provided with information regarding which teachers the student would be instructed by or how related services would be delivered at the school (Parent Ex. A at pp. 3-4, 6). The parent also asserted that the district's assigned school's staff was not adequately trained to address the student's behavioral and other needs, and that the school could not provide appropriate speech-language therapy, parent training and counseling, and after school services (id. at pp. 3, 5-6).

Finally, the parent asserted that the unilateral placement at the Rebecca School was appropriate, that there were no equitable considerations that would preclude or diminish a reimbursement award, and requested an order providing for payment of the student's tuition at the Rebecca School during the 2011-12 school year, out-of-school related services, specific evaluations and transportation (Parent Ex. A at pp. 6-8).

In a response dated July 11, 2011, the district described the program it recommended in the May 2011 IEP, noted the information that it relied upon in developing the IEP, and asserted that the May CSE's recommendations were reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 2 at p. 1-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on July 18, 2011 and concluded after nine non-consecutive days of proceedings on February 29, 2012 (Tr. pp. 1, 7, 39, 148, 179, 185, 244, 460, 525). Pursuant to an interim order dated July 19, 2011, the IHO noted that the parties agreed that the student was entitled to receive the services set forth on his August 2005 IEP pursuant to pendency and therefore, she directed the district to provide the student with three 30-minute individual sessions per week of speech-language therapy; three 30-minute individual sessions per week of OT; three 30-minute individual sessions per week of PT; and five 60-minute individual sessions per week of special education itinerant teacher (SEIT) services from the "date of the filing of the [hearing] request until the end of these proceedings " (IHO Interim Order at p. 2).

On April 2, 2012, the IHO issued a decision finding, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that the hearing record showed that the Rebecca School was an appropriate placement for the student, that the hearing record showed that the out-of-school related services were appropriate for the student with the exception of SEIT services, and that equitable considerations favored the parent (IHO Decision at p. 38). Specifically, the IHO found that the district failed to offer the student a FAPE in that although the CSE was properly constituted and the parent meaningfully participated in the meeting, the CSE lacked adequate evaluative information upon which to develop an IEP for the student that addressed his individual needs (IHO Decision at pp. 31-34). The IHO found that the district's classroom observation of the student did not provide accurate information about the student, that the district's CSE participants did not have an adequate understanding of the teaching methodologies that the student had been exposed to, and that the district should have made a second attempt to conduct a (bi-lingual) neuropsychological evaluation of the student in Hebrew (id.). The IHO found that the May 2011 IEP failed to provide out-of-school services that the student required and that the recommended placement lacked the opportunity to engage with nondisabled peers in a least restrictive environment (LRE) (id. at pp. 32-34). The IHO also found that the district offered a placement too late in the year to provide a FAPE (id. at p. 34). With respect to the particular school

identified for the student by the district, the IHO found that even if the district was prepared to implement the student's IEP, the hearing record did not contain sufficient information about the specific class the student would have attended (id. at p. 33). Further, the IHO found that the student would not have been placed with "peers on his level" at the assigned school and that the school and class could not have adequately addressed the student's sensory needs (id. at pp. 33-34). The IHO also found that the classroom teacher who testified on behalf of the district would not have provided the student with "structured breaks" and that she had "little understanding" of the student's sensory needs (id.).

The IHO found that the parent's unilateral placement at the Rebecca School was appropriate, that the school addressed the student's needs, provided access to typically developing peers, and that progress was shown in speech-language therapy, OT, PT and in managing the student's sensory needs (id. at pp. 34-46). The IHO further found that the hearing record showed that the student required out-of-school related services in order to avoid regression (id. at p. 36) and that these services are an appropriate component of the student's program. With respect to the request for SEIT services, the IHO noted the lack of testimony from the provider and found they had not been proven to be necessary (id. at pp. 36-37).

Lastly, the IHO found that the parent's claim was supported by equitable considerations because, among other reasons, the parent fully cooperated with the CSE (IHO decision at p. 37). The IHO rejected the district's claim that the parent lacked standing because "under basic contract law the parent is responsible for the debt" (id.). The IHO ordered the district to pay the student's tuition at the Rebecca School during the 2011-12 school year, and to provide related services authorizations (RSAs) for out-of-school OT, PT and speech-language therapy, but did not order the district to provide RSAs for SEIT services, or to reimburse the parent for a deposit she paid to the Rebecca School because the deposit had been a "grant" from a third party (id. at p. 38).

IV. Appeal for State-Level Review

The district appeals, contending that the IHO erred in finding that it failed to offer the student a FAPE for the 2011-12 school year. The district asserts that the IHO erred in finding that the May 2011 CSE lacked adequate evaluative information because the CSE had sufficient information relative to the student's then present levels of academic achievement and functional performance to develop an IEP that addressed the student's needs. The district asserts that a bi-lingual evaluation was not required because the student's dominant language was English. Further, the district contends that overall the evaluations were adequate because methodology is not required on an IEP and had no bearing on the student's needs, and that the CSE was aware of the concerns with the classroom observation and relied upon other evaluations including those performed by the Rebecca School. The district further argues that the May 2011 CSE was properly constituted and that the parent had a meaningful opportunity to participate in the development of the student's IEP. The district also contends that the May 2011 IEP adequately addressed the student's sensory needs, and that student did not require out-of-school services in order to receive meaningful educational benefit. The district further contends that the recommended placement was in the LRE because the student required a special class in a special school and the CSE considered less restrictive placements and ultimately rejected them based on the student's needs.

In response to the parent's concerns and the IHO's findings regarding the particular school the student was assigned to, the district contends that these concerns are speculative since the student was never enrolled in its program and the district was never required to implement the student's IEP. The district contends that there was sufficient information in the hearing record regarding the specific class the student would have attended, that the age range and functional levels of the other students in that class were described, and that the student's sensory needs could have been addressed in the class.

The district next contends that the unilateral placement at the Rebecca School was not appropriate for the student because the school did not provide all of the necessary related services to the student and did not provide a 1:1 paraprofessional. The district contends that the Rebecca School's inappropriateness is further demonstrated by the fact that the parent had to supplement out-of-school services for the student with district personnel. Next, the district argues that current case law holds that there is a presumption in favor of the district regarding equitable considerations, that the parent did not provide proper notice of its intention to unilaterally place the student, and that any reimbursement awarded to the parent should be reduced. Lastly, the district contends that the parent failed to show that her circumstances qualified for prospective payment rather than tuition reimbursement.

The parent answers, denying the district's assertions and requesting that the IHO's determinations be affirmed. The parent also contends that the IHO properly concluded that the district failed to offer the student a FAPE because the CSE failed to assess the student's need for out-of-school services and the IEP failed to provide such services. Additionally, the parent asserts that the IEP should have included parent training and counseling and that the IHO properly concluded that the district failed to offer the student a FAPE on LRE grounds and failed to show what, if any, class would be available for the student at the assigned school. The parent also asserts that the IHO properly concluded that the Rebecca School was appropriate and that the out-of-school services were appropriate, but the parent argues in a cross-appeal that the IHO erred in finding that the student's need for SEIT services had not been proven. With regard to equitable circumstances, the parent argues that her notice to the district was adequate and that the hearing record supports her claim that she requires prospective funding of the unilateral placement at the Rebecca School. The parent requests that the IHO's order providing for funding at the Rebecca School and the provision of RSA's for out-of-school related services be upheld, and that the order be modified to include the provision of RSA's for SEIT services.

The district answers the cross appeal and asserts that SEIT services are not appropriate for school age students, that the services would be unnecessary in a program that addressed the student's academic and social-emotional needs, and that the record demonstrates that the SEIT services obtained by the parent did not remedy the inappropriateness of the Rebecca School program.

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. Oct. 16, 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. New York City Bd. 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. May 2011 IEP

1. Timing of the Placement Offer

Initially, I will address the district's contention that the IHO erred in finding that the District offered a placement too late in the school year to offer the student a FAPE. Upon review of the hearing record, I am persuaded that the district is correct. While the IDEA and State Regulations require the CSE to meet "at least annually" (see 20 U.S.C. § 1414[d][4][A] [emphasis added]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), they do not preclude additional CSE meetings, prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). Additionally, State procedures contemplate changes to an IEP insofar as parents, teachers and administrators are all empowered to refer the student to the CSE if any of those individuals has reason to believe that the IEP is no longer appropriate (8 NYCRR 200.4[e][4]). At the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). As a matter of State law, the school year runs from July 1 through June 30; therefore, a 12-month school year begins on July 1 (see Educ. Law § 2[15]). As further discussed below there is no indication that the timing of the IEP in the instant case impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

In the instant case, the hearing record reflects that the student's May 2011 IEP was provided to the parent, along with an FNR setting forth the particular school the student was assigned to, on or about June 15, 2011 (Dist Ex. 14; Tr. pp. 359-62). Although the parent had informed the district by letter also dated June 15, 2011, that she was placing the student at the Rebecca School, the parent was able to and did visit the assigned school shortly after receiving the FNR (Parent Ex. V at p. 1; Tr. p. 359-62). Accordingly, there was an IEP in place for the student before the commencement of the statutory school year, which satisfies the IDEA and State regulation requirements (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). Although a parent may understandably be concerned upon visiting a particular public school site, conducting a retrospective analysis to "evaluat[e] the adequacy of an unimplemented IEP based on evidence about the particular classroom in which a student would be placed" is not permissible (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013] quoting N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *11 [S.D.N.Y. Aug. 13, 2013] citing R.E., 694 F.3d at 186–87; see also E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *26 [E.D.N.Y., Aug. 19, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F.Supp.2d 256, 273 [S.D.N.Y. Nov. 16, 2012]; F.L. v. New York City Dep't. of Educ., 2012 WL 4891748, at *14 [S.D.N.Y. Oct. 16, 2012]).

Even if there were some violation of IDEA procedures for developing an IEP, I find no evidence to support a conclusion that any such violation impeded the student's right to a FAPE,

significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]).

2. Adequacy of Evaluative Information

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The IHO found that the district did not have the appropriate evaluations to determine an appropriate program for the student for the 2011-12 school year (IHO Decision at p. 32). Upon review of the hearing record, I disagree.

Specific to the issues arising in this matter, State regulations define an individual psychological evaluation as including the use of "a variety of psychological and educational techniques and examinations in the student's native language, to study and describe a student's developmental, learning, behavioral and other personality characteristics" (8 NYCRR 200.1[bb] [emphasis added]). Additionally, school districts must ensure that assessments and other evaluative materials used to assess a student are "provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally and functionally, unless it is clearly not feasible to so provide or administer" (8 NYCRR 200.4[6]; see

also 8 NYCRR 200.4[d][3][iv] [requiring a CSE to consider special factors that include a student's communications needs]; "Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/ English Language Learners (ELLs) who are Students with Disabilities" [March 2011] available at http://www.p12.nysed.gov/specialed/publications/ bilingualservices-311.pdf).[6]

In October 2010, shortly after the student began attending the Rebecca School, the same special education teacher who later participated in the May 2011 CSE meeting conducted a classroom observation of the student at that school (id.; Dist. Ex. 8 at pp. 1-3). The special education teacher testified that the CSE requested there be a bilingual psychoeducational evaluation, but that such evaluation never occurred "[b]ecause the agency didn't have the clinician" (Tr. p. 49, 100-02).[7] The special education teacher noted that prior to its May 2011 meeting the CSE requested all reports and she had seen reports before the meeting (Tr. p. 49).

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[6] Additional explanation can be found in State guidelines for developing quality IEPs, in part:

> **Students with limited English proficiency**
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> For all students with disabilities with limited English proficiency, the Committee must consider how the student's language needs relate to the IEP. Schools must provide a student with limited English proficiency with alternative language services to enable him/her to acquire proficiency in English and to provide him/her with meaningful access to the content of the educational curriculum that is available to all students, including special education and related services. The Committee should consider the following questions:
>
> - Has the student been assessed in English as well as his/her native language?
> - Did the evaluation of the student with limited English proficiency measure the extent to which the student has a disability and needs special education rather than measure the student's English language skills?
> - Does the disability impact on the student's involvement and progress in the bilingual education or English as a Second Language (ESL) program of the general curriculum?
> - What language will be used for this student's instruction?
> - What language or mode of communication will be used to address parents or family members of the student?
> - What accommodations are necessary for instruction and testing?
> - What other language services (i.e., English as a second language, bilingual education) must be provided to ensure meaningful access to general and special education and related services?

("Guide to Quality Individualized Education Program (IEP)Development and Implementation," at Attachment 2, [Dec. 2010] available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

[7] Other information in the hearing record, includes a notation in the meeting minutes from the May 2011 CSE meeting that reads "Discussed attempts to get testing in Hebrew Mother indicated she was contacted, but her son just started a new after school program and she could not go, then they could only give her a morning slot + it was not convenient" (Dist Ex. 7 at p. 1).

The hearing record includes a February 2009 psychological developmental report signed by both a school psychologist and a clinical psychologist issued when the student was in his third year of attendance at a preschool for children with autism or PDD outside of the United States; a September 16, 2010 psychoeducational evaluation report which indicated that on September 13, 2010 the student underwent psychoeducational evaluation to ascertain his current level of cognitive/emotional functioning and to determine his academic needs; an October 28, 2010 classroom observation report written by the special education teacher assigned to the May 2011 CSE which described details of the student's performance during a one hour observation in the classroom during snack and movement time activities; a May 2011 Rebecca School interdisciplinary report of progress which updated the student's progress at the private school since December 2010 (Dist. Exs. 3; 8 at p. 1; 9 at pp. 1-14; 10 at pp. 1, 4, 9; Parent Ex. F at pp. 1-5). A school based support team (SBST) case material checklist reflected that the May 2011 CSE also considered a December 2010 PT evaluation, all pages of an August 2005 IEP, and a teacher progress report (Dist. Exs. 5 at p. 1; 11 at pp. 1-11; Parent Exs. B at pp. 1-17; D).[8]

In regard to the lack of a bilingual psychoeducational evaluation, the district requested a bilingual psychoeducational evaluation as part of its initial CSE review of the student (Tr. pp. 49, 100-02).[9] It did so because when the special education teacher conducted the classroom observation in October, 2010, it was clear to her that the student communicated in both English and Hebrew (Tr. pp. 78-79, 100; Dist. Exs. 8 at pp. 1-3; 10 at pp. 1-9). In her testimony, the special education teacher explained that the requested bilingual psychoeducational evaluation was not conducted because there was no Hebrew evaluator available (Tr. p. 101). However, she also indicated that by the time the May 2011 CSE was conducted, the student had already attended a monolingual program, in English, at Rebecca School from October 2010 to May 2011. According to the minutes of the May 27, 2011 CSE meeting, the CSE, including the parent, agreed the student was English dominant at that time at home and at school (Tr. pp. 50, 101-02; Dist Ex. 7 at p. 1).

The fact that the bilingual evaluation did not occurred because the agency with which the CSE contracted did not have an appropriate clinician available then did not absolve the district of any regulatory requirement to evaluate the student in this case in Hebrew as well as English. However, I find that, at most, this failure constituted a procedural error (8 NYCRR 200.4

[8] The hearing record contains multiple duplicative exhibits. To maintain consistency within this decision, only district exhibits are cited when multiple copies of an exhibit are available as part of the hearing record. I remind the IHO of her responsibility to exclude irrelevant, immaterial, unreliable, or unduly repetitious material (see 8 NYCRR 200.5[j][3][xii][c]).

[9] I note that in light of the standards set forth above requiring a district to conduct evaluations in the student's "native language" as well as in the "form most likely to yield accurate information", there is a question as to whether an evaluation in Hebrew was required (8 NYCRR 200.1[bb]; 200.4[6]). Here it appears the student was born within the United States and raised for approximately three to four years in an English-speaking household before leaving the country and being exposed to Hebrew, thus one could make a finding that his "native" language was English (Tr. pp. 347-48, 355, 389-92; Parent Es. F at p. 1; Dist. Ex. 10 at p. 1). Moreover, there are various references to whether the student was "dominant" in one language and some note that the student was equally fluent and delayed in both languages (Tr. pp. 50, 78-80, 100-02, 389-92; Parent Ex. F. at pp. 1-2; Dist Exs. 7 at p. 1; 8 at pp. 2-3; 9 at p. 1). Although this is a close question, the district's conclusion that it should conduct a psychoeducational evaluation in Hebrew cannot be faulted, and it should have followed up on obtaining one (see generally Application of a Student with a Disability, Appeal No. 08-138; Application of the Dep't of Educ., Appeal No. 08-056).

[b][6][i][a]); Tr. pp. 49, 100-02). Although the IHO found that there "should have been at least another attempt" to obtain/schedule a bilingual psychoeducational evaluation for the student (IHO Decision at p. 31), State regulations (see 8 NYCRR 200.4 [b][6][i][a]) do not define the number of scheduling attempts necessary to determine feasibility to provide or administer an evaluation. However, as discussed below, the hearing record demonstrates that the lack of a bilingual psychoeducational evaluation in Hebrew did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits. In this case, the lack of such evaluation in both languages did not prevent the district from offering the student an appropriate program that addressed his needs and was designed to confer the student with educational benefit for the 2011-12 school year.

Review of both the private September 2010 psychoeducational evaluation report conducted when the student returned to New York State and the February 2009 psychological developmental report conducted during the time period when the student still attended a preschool outside the United States, reveals there was a similar inability to administer standardized tests for the student (compare Dist. Ex. 10 at pp. 1, 3 with Parent Ex. F at p. 1). The 2009 psychological developmental report states, "[i]t is impossible to assess [the student's] sills (sic) using standard psychological tests" (Parent Ex. F at p. 1). Instead, the psychological developmental report indicates that the evaluating psychologists relied on a questionnaire which was analyzed by a developmental doctor, reports and observations from the student's preschool therapists, and conversations with the student's mother (id. at pp. 1, 5). Among other things, the February 2009 psychological evaluation report indicates that according to the student's mother, the student learned to "read globally in Hebrew and English, used symbols to answer questions, recognized numbers up to ten, and recognized and sorted colors and activities (id. at p. 3).

Review of the September 2010 psychological evaluation report, conducted in New York State and considered by the May 2011 CSE, indicates the student's mother reported the student was "equally delayed" in English and Hebrew (Dist. Ex. 7 at p. 1; Parent Ex. 10 at p. 1). The September 2010 psychoeducational evaluation report lists an array of formal and informal tests administered, some of which were unable to be completed (Dist. Ex. 10 at pp. 1, 3). However, unlike the February 2009 psychological evaluation report conducted outside of the United States, the September 2010 psychoeducational evaluation report indicates formal cognitive testing was completed and that the results were interpreted (id. at pp. 1-2).[10] Although formal academic achievement testing was unable to be completed in September 2010, informal preschool and academic readiness assessment revealed readiness skills whereby the student was able to respond consistently to his name, verbally identify several numbers (4, 8, 13) and letters (A, S, Q, T, P), read several monosyllabic words (boy, car, big), identify his name in print, and read a simple sentence ("I am a big boy") (id. at p. 3). The student displayed the ability to use gestures and one and two word utterances to make his needs known (id.). The student displayed basic computer skills and was able to play games on the computer, and type simple words, although he did not display such skills using paper and pencil (id.). According to the report the student was able to

[10] The September 2010 psychoeducational evaluation report indicates the student's specific formal cognitive testing scores, and that the scores "may represent a minimal estimate of [the student's] true level of functioning as various factors interfered with his performance" (Dist. Ex. 10 at p. 3).

carry out a simple one step command with prompting, clarification, and redirection and he was able to identify several colors (id.). In regard to academic readiness skills the student was unable to do, the September 2010 psychoeducational evaluation report indicated the student was unable to print his name or the first letter of his name, recite the alphabet in its entirety, count from one to five consistently, identify simple geometric shapes, demonstrate ability to add single-digit numbers, or spontaneously state his age or gender on command (id. at pp. 3-4).

In other areas of the student's development, the September 2010 psychoeducational evaluation provides specific information about the student based on a standardized assessment of adaptive/functional behavior targeting domain areas of communication, receptive and expressive language, daily living skills (personal, domestic, and community skills), and socialization skills (interpersonal, play and leisure, and coping skills) (Dist. Ex. 10 at pp. 1-5). The report also describes two different rating scales targeting behavior and signs and symptoms generally associated with autism (including areas of communication, toilet training, attention, self-regulation), and the use of a clinical interview/mental status examination and parental interview, review of records, and observation (id.). I note that for various aspects of the evaluation the student's mother was the informant (id.).

In regard to the student's May 2011 IEP, the description of the student's present performance includes information consistent with the aforementioned evaluations, as well as the May 2011 Rebecca School interdisciplinary report of progress (Dist. Exs. 6 at p. 3; 9 at pp. 1-14; 10 at pp. 1-4; Parent Ex. F at pp. 1-4). Related services recommendations for speech-language, OT, and PT, and a 1:1 crisis management paraprofessional and management strategies such as use of singing familiar songs to help the student self-regulate are consistent with recommendations offered and management strategies discussed in the February 2009 psychological evaluation report (Dist Ex. 6 at pp. 2, 5, 17-18; Parent Ex. F at pp. 4-5).[11]

Review of the minutes of the May 2011 meeting of the CSE and the resultant IEP shows that the draft of the May 2011 IEP was also based in part on the May 2011 Rebecca School interdisciplinary report of progress update and discussion at the May 2011 CSE meeting with the student's teacher from Rebecca School, who actively participated in the meeting (Dist. Exs. 6 at p. 2; 7 at pp. 1-2). Specifically, the Rebecca School interdisciplinary report of progress update for the 2010-11 school year stated,

> At the beginning of the year [the student] would primarily only speak to the classroom staff in Hebrew. If the staff in the classroom were not able to understand him, he would become frustrated walk away and cry. [The student] has made significant gains in his ability to request desired activities as well as communicating his wants and needs in English while at school.

(Dist. Ex. 9 at p. 1).

In addition, the May 2011 Rebecca School interdisciplinary report of progress update indicated the student usually communicated by verbally asking for motivating or preferred

[11] The September 2010 psychoeducational evaluation report indicates that recommendations would be decided by the IEP team [CSE] (Dist. Ex. 10 at p. 5).

activities as well as getting his wants and needs met (Dist. Ex. 9 at p. 1). The Rebecca School report indicated that since December 2010, the student's communication changed by becoming more expansive in that the student included and initiated other activities and different ideas (id. at pp. 1-2). Furthermore, since December 2010, the student demonstrated increased interest in initiating with his peers, a decrease in the amount of support he required from classroom staff to initiate with classmates, and increased ability to open and close "circles of communication" over a wider range of topics (id. at pp. 2, 4, 11). In regard to the student's interest and abilities in reading, the Rebecca School report indicated that since December 2010, the student requested a wider range of books, and progressed from being able to read approximately 25-30 words to 40-50 words (id. at pp. 2-3). According to the Rebecca School report, additional improvement since December 2010 was noted in his visual spatial reasoning, number sense/1:1 correspondence, and measurement skills (id. at pp. 3-4). Specific to speech-language therapy, the May 2011 Rebecca School report indicated that since December 2010, the student's reliance on a visual schedule decreased; the student broadened his range of interests to include a variety of songs and books, as well as to accept new activities presented to him during speech-language therapy sessions; the student increased his capacity to follow one and two-step verbal directives embedded into play and functional activities; the student's awareness of basic descriptive, spatial, qualitative, and quantitative concepts improved, especially with visual and verbal support; that during multi-sensory activities the student demonstrated a slightly broader descriptive vocabulary; that the student labeled verbs, nouns, and basic descriptive concepts including body parts, animals, spatial concepts, and foods (id. at pp. 5-6, 12-13).

In light of the variety and breadth of information regarding the student's language and communication needs and abilities available to the May 2011 CSE, as well as the evidence of language-based progress in multiple areas in school during the 2010-11 school year, the hearing record shows that the student was not harmed by the lack of a bilingual psychoeducational evaluation conducted in Hebrew in preparation for the 2011-12 school year.[12] For all of the reasons discussed above specific to sufficiency of the evaluations, I find that the lack of bilingual OT and speech-language evaluations did not result in harm to the student or prevent him from potentially receiving educational benefit during 2011-12. Therefore, the district's failure in conducting a bilingual psychoeducational evaluation for the student did not result in a denial of FAPE for the 2011-12 school year.

3. Adequacy of IEP

The IHO found that the May 2011 IEP was substantively inadequate for a variety of reasons, most notably because, in her view, the IEP failed to adequately address the student's sensory needs, failed to provide needed out-of-school services and was not the student's LRE (IHO

[12] Testimony by the special education teacher assigned to the May 27, 2011 CSE indicated that despite that the May 2011 CSE did not have bilingual OT or speech-language evaluations to consider, the CSE did have the Rebecca School report available; that the CSE recognized the student's visual, spatial, sensory and motor planning needs and recommended OT five times per week for 30 minutes (Tr. pp. 99-100). Similarly, the May 2011 CSE did not have a bilingual speech-language evaluation available; that based on the May 2011 Rebecca School report, the October 2010 classroom observation report and teacher reports, the CSE recognized the student's significant speech-language needs and recommended speech-language therapy five times per week for 30 minutes (Tr. pp. 102-03).

decision at pp. 32-34). Review of parties' arguments and the evidence shows that the May 27, 2011 IEP contained detailed academic performance and learning characteristics, and social/emotional, and health/physical performance characteristics consistent with the previously discussed evaluative documentary evidence (Dist. Ex. 6 at pp. 3-4). Specifically, the May 2011 IEP indicated that the student started attending a non-graded private school in October 2010 after returning to New York State (id. at p. 3) and that he had been diagnosed with autism (id. at p. 1). Consistent with the September 2010 psychoeducational evaluation, it also included information that his overall cognitive functioning fell in the moderately delayed range, and that he was not able to take the Woodcock-Johnson-III, a standardized test for academics (id. at p. 3; Dist. Ex. 10 at pp. 3-5). The IEP indicated the student was reported to be English dominant at school and home (Dist. Exs. 6 at p. 3; 7 at p. 1). The IEP described the student as tending to communicate his needs and wants in three to five words and that he was not fully toilet trained (Dist. Ex. 6 at p. 3). In addition, the IEP noted the student's teacher at the time of the May 2011 CSE meeting reported that the student was able to attend to story reading for 15 to 20 minutes; he was able to read approximately 40 to 50 words including sight word such as "is" and "and;" he could answer "who" questions about a familiar story; he could follow directions in class and fill in blanks with familiar songs and stories (id. at p. 3; Dist. Ex. 9 at p. 3). In math, the student was able to identify the numbers one to ten, given two choices (Dist. Exs. 6 at p. 3; 9 at p. 4). The student was working on identifying numbers to 30, developing number sense on 1:1 correspondence, understanding the concepts "big, small, more, less, fast, slow," and (pre)positional words, "above, under, on top" (id.). The IEP further indicated the student was able to write his name but had great difficulty forming all letters; he needed hand-over-hand support in writing; he would dictate to an adult and was able to spell words he knew (Dist. Exs. 6 at pp. 3-4).

In regard to the student's social/emotional performance, the May 2011 IEP reflected the student's current school report which indicated that the program at his private school was designed to foster his ability to stay regulated and engaged for longer periods of time, across a wider range of activities (Dist. Exs. 6 at p. 5; 9 at p. 1). The IEP described the student as more easily redirected to a wider range of classroom activities (id.). It noted that at times the student might become emotionally dysregulated by becoming fixated on the visual schedule and the end of the day when he could go home (id.). During times when he is emotionally dysregulated, the student tends to cry, may have toileting accidents, may request to see his mother, may hit himself in the head with his hands or may put his hands in his mouth (id.). The IEP indicated the student usually communicates by verbally asking for motivating and preferred activities in addition to getting his wants or needs met (id.). The student's communication was described as also able to include other activities and initiating different ideas or activities (id.). At the time of the May 2011 CSE meeting, the student showed an interest in initiating interactions with peers, his classmates, and his relationships with those classmates; whereby he might approach a peer and attempt to get them to participate in activities of interest to the student (Dist. Exs. 6 at p. 5; 9 at p. 2). The IEP further noted the student requires decreasing amounts of adult support to initiate interactions with classmates, and that keeping the student engaged in a continuous flow of communication continues to be a focus for him (id.). The May 2011 IEP indicated the student's behavior seriously interfered with instruction and that he required additional adult support provided by the special education teacher and related services of OT, PT, and speech-language therapy, and that a behavior intervention plan had been developed (Dist. Exs. 6 at pp. 5, 19).

In regard to the student's present health status and physical development, the May 2011 IEP again noted the student had been diagnosed with autism, in addition to Fragile X Syndrome, developmental coordination disorder, and a speech-language disorder (Dist. Exs. 6 at p. 6; Parent G at p. 1). The IEP indicated the student was not yet fully toilet trained and required support in this area, he had difficulty with feeding and tended to put too much food in his mouth whereby he required monitoring (Dist. Exs. 6 at p. 6). The IEP also indicated the student presented with strong sensory needs, as well as fine and gross motor delays (id.).

The May 2011 IEP reflected that the CSE identified academic, social/emotional, and health/physical development management needs that were aligned with the student's present levels of performance, and consistent with the aforementioned evaluations and reports. The IEP included academic management needs of redirection, repetition, visual cues and verbal prompts, sensory input, and sensory breaks (Dist. Ex. 6 at p. 3). Recommended social/emotional management needs were for a 1:1 crisis management paraprofessional, use of a visual schedule to assist with transitions, use of a first/then board, (use of) writing whereupon staff writes what the student dictates or looks at a book to calm the student, proprioceptive movement based activities to assist with regulation, and singing familiar songs to help the student regulate (id. at p. 5). The IEP indicated the student did not have mobility limitations, but required adaptive physical education (6:1:1), OT and PT (id. at p. 6). The CSE also recommended OT and speech-language therapy five days per week, PT three days per week, and a fulltime 1:1 crisis paraprofessional to address the student's needs (id. at pp. 1-2, 15, 17-18).

Review of the May 2011 IEP revealed that 15 annual goals and 38 associated short-term objectives were aligned with the student's identified academic, social/emotional, and health/physical development needs (Dist. Ex. 6 at pp. 7-14). Goals and objectives addressed the student's reading, math, OT related skills, PT related skills, speech-language related skills, ADL skills, sensory regulation skills, communication skills, and interaction skills (id.). The goals and objectives incorporated various management strategies in the classroom and in related services sessions including teacher support, use of visual and verbal cues, vestibular and proprioceptive input, provision of choices represented by pictures, quiet settings free of visual and auditory distractions, individual and small group related services therapy sessions, scaffolding, additional processing time, verbal and gestural support, verbal models, individual support of a crisis management paraprofessional and special education teacher, and self-regulation strategies in the classroom with sensory and co-regulating support (Dist. Ex. 6 at pp. 7-14).[13] The hearing record reflects that the CSE developed the student's ADL goal/objectives during the May 2011 CSE meeting with input from the parent and the student's classroom teacher and addressed the student's oral motor/feeding, independent dressing, and toileting needs (id. at p. 12; Dist. Ex. 7 at p. 2). According to the special education teacher assigned to the CSE, no writing goal was included in the IEP because the student's classroom teacher from Rebecca School told her the student was not ready for a writing goal at that time because he required more OT to strengthen his fine motor

[13] I note that the strategies incorporated into the goals and objectives were consistent with the FBA attached to the May 27, 2011 IEP (Dist. Ex. 6 at pp. 7-14, 19).

skills (Tr. p. 135).[14] The special education teacher also indicated that the annual goals and objectives included in the IEP were a collaborative effort based on the May 2011 Rebecca School interdisciplinary progress report update, discussion with the student's classroom teacher, and input from the parent (Tr. pp. 57-60; Dist. Exs. 7 at p. 1; 9 at pp. 7-13). The minutes of the May 27, 2011 CSE indicated the parent approved all goals to be included in the May 2011 IEP (Dist. Ex. 7 at p. 2).

I also find upon review of the hearing record that the 6:1+1 special class placement with an additional 1:1 crisis management paraprofessional was reasonably calculated to enable the student to receive educational benefits. State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Information provided by the Rebecca School in the May 2011 interdisciplinary progress report update, the input provided by the Rebecca school CSE members during the development of the present levels of performance sections of the student's May 2011 IEP, the September 2010 psychoeducational evaluation and the October 2010 classroom observation, all demonstrate that at the time of the May 2011 CSE meeting the student had significant deficits in academics; sensory regulation; attention; pragmatic, receptive, and expressive language; social interaction, and self-help skills (Dist. Exs. 6 at pp. 3-6; 7 at pp. 1-2; 8 at pp. 1-3; 9 at pp. 1-13). The May 2011 IEP reflects that the CSE addressed the student's constellation of needs and determined that he required 12-month programming to prevent regression of skills, and a 6:1+1 special class in a special school with the additional support of a 1:1 crisis management paraprofessional, particularly because he becomes dysregulated and required individual support throughout the school day (Dist. Ex. 6 at p. 16).[15]

a. Sensory Needs

The IHO found that the district failed to meet the student's sensory needs (see IHO Decision at pp. 33-34). For the reasons set forth below, I disagree with this conclusion. The IHO was required to examine the student's May 27, 2011 IEP to whether the student's sensory needs were being addressed therein. She failed to do this (see id.). Instead, the IHO mistakenly concluded that the special education teacher at the assigned public school site who testified for the district had little understanding of the student's sensory needs (see id. at p. 32). Based upon my review of the May 2011 IEP and documentary evidence included in the hearing record, as discussed below, I find the May 2011 CSE adequately addressed the student's sensory needs.

Specific to the student's sensory needs and consistent with the May 2011 Rebecca School interdisciplinary progress report update, the May 2011 IEP indicated in part that the student's

[14] There was testimony that there was no fine motor goal on the May 2011 IEP (Tr. p. 136), but I note the IEP contains a fine motor related goal/objective for the student to string beads on a pipe cleaner with minimal assistance (Dist. Ex. 6 at p. 9).

[15] As previously noted, testimony by the parent indicated that she understood the recommended class ratio (Tr. pp. 371, 392, 406-07). The parent also testified that she understood the difference between the 6:1+1 placement, which she thought was "okay", and the particular school the student was assigned to and that she initially thought the recommendation for a 1:1 crisis management paraprofessional "might be a good idea" but that she later changed her mind (Tr. p. 407-08).

"current school" (the Rebecca School) program was designed to foster his ability to stay regulated and engaged for longer periods of time across a wider range of activities (Tr. p. 123; Dist. Exs. 6 at p. 5; 9 at p. 1). Consistent with the student's need to stay regulated and engaged for longer periods of time, information included in the October 2010 classroom observation report and/or the OT section of the May 2011 of the Rebecca School report and teacher reports, the May 2011 IEP indicated in its description of the student's present level of performance, that the student was more easily directed to a wider range of classroom activities; that at times the student might become emotionally dysregulated, whereby he would cry, possibly have toileting accidents, request to see his mother, hit himself in the head with his hands, or put his hands in his mouth (Tr. p. 87; Dist. Exs. 6 at p. 5; 8 at p. 2; 9 at p. 5). The May 2011 IEP indicated that the student's behavior seriously interfered with instruction and required additional adult support in conjunction with the special education teacher and related services of OT, PT, and speech-language therapy (Dist. Ex. 6 at p. 5). The May 2011 IEP identified multiple social/emotional management needs for the student, including proprioceptive movement based activities to assist with regulation, and singing familiar songs to help the student self-regulate, as well as a 1:1 crisis management paraprofessional (id.). Specific to the student's academic management needs, the CSE accepted the recommendation of the student's teacher from Rebecca School concerning sensory input and sensory breaks, and the IEP contains provision for required sensory input and sensory breaks (Tr. p. 84; Dist. Ex. 6 at p. 3).[16] The May 2011 IEP also notes in the section describing the student's present health status and physical development that he presents with "strong sensory needs;" and then states that he requires adaptive physical education, and that OT and PT continue to be warranted (Dist. Ex. 6 at p. 6). The May 2011 IEP included CSE recommendations specific to OT four times per week for 30 minutes individually, and one time per week for 30 minutes in a group of two (Dist. Ex. 6 at pp. 2, 15, 17-18). The May 2011 IEP included an annual OT goal and associated short-term objectives that addressed the student's need for improvement in sensory processing and regulation as demonstrated by the student's ability to attend to classroom activities in four out of five opportunities, following the student receiving vestibular and proprioceptive input and as demonstrated by the student's ability to perform self-generated activities to provide vestibular and proprioceptive input with minimal to moderate assistance in four out of five opportunities (id. at p. 8). Also specific to the student's sensory needs, the special education annual goals and short-term objectives addressed the student's need to increase his ability to maintain regulation in the classroom by demonstrating use of self-regulation strategies developed through co-regulating interactions to be available for shared attention and interactions in the classroom five times per day; addressed the student's need when presented with a challenging situation, to use a self-regulating strategy rather than become dysregulated and crying; addressed the student's need to remain in a continuous flow of interaction across a range of emotions by remaining in a continuous flow of interaction around a highly preferred activity for 15-20 circles of communication two times per day, and by sustaining engagement in a non-preferred activity with sensory and co-regulating support for one out of four non-preferred activities (id. at p. 13).

[16] Testimony by the special education teacher assigned to the May 27, 2011 CSE indicated that she agreed that the student needed sensory input and sensory breaks (Tr. pp. 85-87). When questioned about the student's need for a swing or a trampoline, the teacher clarified that the CSE does not specify methodology or equipment; that a student's needs would be reflected through that student's IEP and the goals; that when a school principal receives a student's IEP, the school would know what it needed to provide for that student (Tr. pp. 86, 106).

As a result of the aforementioned discussion specific to the student's sensory needs, I find that the May 2011 IEP adequately addressed those needs, and that the IHO's determination that there was no sensory diet was unsupported by the evidence.

b. Out-of-School Services

The IHO also found that the district failed to offer the student a FAPE because the May 2011 IEP should have included "additional services" outside of the regular school day and that there was "ample testimony from those who had worked with [the student] that without the additional services he would regress" (IHO decision at p. 32). 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 Application of the Dep't. of Educ., Appeal No. 11-031; 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]). Upon review of the hearing record, as discussed below, I find that the student's out-of-school services focused on the objective of generalization of skills that the student learned at school, which, in this case, weighs heavily against a finding that the out-of-school services were designed to address the student's educational needs and make progress in his school-based program.

Testimony by the special education teacher assigned to the May 27, 2011 CSE indicated that the May 2011 CSE did not make any recommendations for out-of-school services; that in developing an IEP, the CSE generally addresses the school day unless a child has a need for out-of-school services and the parent wants to discuss such services (Tr. pp. 105, 133-34). The teacher also testified that that out-of-school services were not raised at the student's May 2011 CSE meeting by the parent or anyone else and that various service agencies other than the district might be appropriate options from which the student could possibly receive out-of-school services (Tr. pp. 133-34). Testimony by the parent indicated she did not recall if she requested out-of-school services at the May 2011 meeting, nor did she recall if the CSE discussed that the student received RSAs from the district for related services at the time of the meeting (Tr. pp. 372-73). Consistent with this and other testimony by the parent, minutes of the May 2011 CSE indicated the related services goals provided by (Rebecca School) were reviewed, approved by the parent, and included in the May 2011 IEP (Tr. p. 403; Dist. Ex. 7 at p. 3). The parent testified she did not disagree with anything at the May 2011 CSE meeting because she was not in a "disagreement mode" and was somewhat passive (Tr. pp. 371, 392, 406-07). The parent also noted that at the time of the May 2011 CSE she was not concerned about whether a specific school would be able to fulfill mandated related services frequencies (Tr. p. 134).

Furthermore, the hearing record reflects the related services provided to the student during school hours at Rebecca School during 2010-11 adequately addressed his needs. Testimony by the student's occupational therapist at Rebecca School attributed the student's progress in regard to regulation, motor planning, fine motor, and visual spatial skills to OT and the sensory diet he received during school hours (Tr. p. 283). The same occupational therapist opined that three sessions of OT per week in school in conjunction with the sensory diet in the classroom were

sufficient to meet the student's OT needs during school (id.). In regard to out-of-school OT services for the 2011-12 school year, the occupational therapist from Rebecca School opined that "the more he gets the better he'll be" because, the student was sensory seeking and "autism doesn't end after school" (Tr. pp. 278, 282-83). Similar testimony was offered by the program director of Rebecca School and the out-of-school occupational therapist (see Tr. p. 332, 477, 485). Testimony by the student's head teacher at Rebecca School indicated the student was able to generalize some skills across a range of environments in school (Tr. pp. 447, 451-52).

Moreover, a district is not required to maximize a student's potential (see Thompson R2-J, 540 F.3d at 1155 [holding that "[t]he Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program]). In the instant case, the May 2011 CSE recommended OT five times per week, speech-language therapy five times per week, and PT three times per week (Dist. Ex. 6 at pp. 1-2, 15, 17-18). Such related services recommendations were more than the three OT sessions, three speech-language sessions, and two PT sessions per week the student received at Rebecca School during 2010-11 (Dist. Ex. 9 at p. 5). Although the student's out-of-school speech-language pathologist and his out-of-school occupational therapist both opined that the student needed the intensity of out-of-school services in order to make progress and not regress, the out-of-school speech-language pathologist (who previously worked at the Rebecca School) indicated that the Rebecca School "absolutely" worked on generalization skills with the student during the school day (Tr. pp. 477, 485, 517-19). Testimony by the student's speech-language pathologist from Rebecca School also indicated the private school worked on the student's ability to generalize skills from school to home; that in regard to related services, even though the student received "ample services" at Rebecca School, "it's always wonderful for a child to receive additional services, so he can generalize those skills outside of the school setting;" and that in the student's case out-of-school services were appropriate for the student so that he could "further reach his goals and progress" (Tr. pp. 543, 547-48).

In general, the evidence suggests that the parent may require assistance in the supervision and custodial care of her son in the home and that the student may benefit from the generalization of skills afforded by the home instruction. During the impartial hearing, I note that the parent testified she needed the out-of-school RSAs for assistance with the student after school; that once the school day ended and the student arrived home at 3:15 PM she was totally responsible for the student's care and the need for "constant attention" until his bedtime at 11:00 PM; that the situation was "taxing" and took "a very big toll" (on the parent as caregiver) over eight hours because the student needed to be "worked with at all times" and to be "contained" (Tr. pp. 376-77, 418). The parent opined the student was more behaviorally manageable and calm when he had the afternoon services; that she was able to bond with other parents of students with autism in the waiting room of the center that delivers the related services (Tr. pp. 375-77). In regard to the RSAs, testimony by the parent indicated she took the student to the sensory gym every day for one hour, whereupon he worked with two therapists (Tr. p. 399). The student also received SEIT services at home on Saturday and Sunday (id.). The SEIT related service provider worked with the student on table top activities such as fine motor tasks of cutting, gluing, and coloring, as well as snack (Tr. pp. 383, 400). In addition, the SEIT provider worked with the student on reading, math, and matching, and on goals developed in the (unspecified date) IEP (Tr. pp. 383-84). According to the parent, who described herself as having an "artist personality," the SEIT related service provider helped

her "put the structure into the house" because she worked with the student in a structured manner (Tr. p. 400).

Although I agree the parent needed assistance in caring for her son during non-school hours, there is insufficient evidence in the record to find that this student's supervision and custodial care during non-school hours and on the weekends must be provided in the form of out-of-school services.[17] It is understandable that the parent, whose son has substantial needs, desired greater educational benefits through the auspices of special education. But even an earnest and well-meaning desire facilitate supervision, custodial care, and behavior and functioning of the student in his or her home is not itself a sufficient basis to require that home-based ABA instruction be made part of the student's educational program under the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd 2013 WL 3814669 [2d Cir. July 24, 2013]; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. April 21, 2008]; Application of the Dep't of Educ., Appeal No. 12-086; Application of a Student with a Disability, Appeal No. 12-052; Application of a Student with a Disability, Appeal No. 11-068; Application of the Dep't of Educ., Appeal No. 10-123). Instead, the issue is whether the district has failed to comply with its obligation to offer the student an educational plan that was specially designed for the student and from which there is a reasonable likelihood that the student would receive some educational benefits. If the parent continues to need assistance to provide supervision and custodial care of her son when he is not at school, I encourage the parties to work cooperatively to assist the parent to utilize the resources through the district's CSE and/or with the help of a social worker or a case manager to identify available respite, residential habilitation, or other services and funding which may be available through the New York State Office of People with Developmental Disabilities or local municipal agencies that could provide support services with trained providers for the child when he is not receiving educational services (see, e.g., Application of the Bd. of Educ., Appeal No. 08-074; Application of a Child with a Disability, Appeal No. 07-050).

Therefore, in light of the aforementioned discussion specific to out-of-school services, I find that the related services recommendations in the May 2011 IEP sufficiently addressed the student's educational needs during the normal school day. The hearing record does not demonstrate the district was obligated to provide out-of-school services for the student.

c. LRE

Regarding the IHO's finding that the district's proposed placement lacked the "opportunity for engaging with typical peers in a least restrictive environment", this conclusion was also erroneous (IHO Decision at p. 34). The IDEA requires that a student's recommended program must 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 111; Gagliardo, 489 F.3d 105;

[17] An October 2010 pediatric sub-specialty report written by a developmental-behavioral pediatrician who evaluated the student indicated the parent needed support in the student's transition back to the United States; recommended in part, "consider home-health aid and supplemental home services will provide therapeutic benefit" (Parent Ex. O).

Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112 at 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR. 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the

inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[18]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

Here, the district correctly asserts that the placement offered in the May 2011 IEP was in the student's LRE. The hearing record shows that the CSE considered other special class programs for the student, but rejected those programs based upon the student's needs (Dist. Ex. 6 at p. 16). 12:1+1 and 8:1+1 programs were considered, but the CSE rejected those programs as "too large for [the student] to make progress and achieve his IEP goals" (id.). The special education teacher assigned to the CSE testified that the CSE also discussed other class ratios without the assistance of a paraprofessional, but concluded that the student needed the 1:1 assistance a paraprofessional provides (Tr. p. 61). The CSE chose the 6:1+1 special class placement with a 1:1 paraprofessional because the student "exhibits dysregulation that warrants individual support throughout the school day", a finding confirmed by the student's teachers at the Rebecca School (Dist. Ex. 6 at p. 16; Parent Ex. Z at p. 7). Lastly, I note that the evidence shows that similar to the district placement, the Rebecca School was also constituted a special class placement, the school does not accept any general education students, and there is nothing in the hearing record suggesting that the student should have been placed in any setting other than a special class environment (Tr. pp. 291-92, 301-02), thus the IHO's determination, which was made without explanation, must be reversed.

B. Assigned School

In its petition, the district raises a number of concerns regarding the IHO's findings on the appropriateness of the particular public school site to which the student had been assigned. The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[19] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J,

[18] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

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

502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 2012 WL 4891748, at *14-*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], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C., 906 F. Supp. 2d at 273 [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]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 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]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented], quoting R.E., 694 F.3d at 187). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. 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 to be appropriate, but the parents chose not to avail themselves of the public school program]).[20]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B., 2013 WL 5438605, at *17; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because the "appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing and under the circumstances of this case, I find that the parent cannot prevail on the claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's May 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the May 2011 IEP containing the recommendations of the CSE by the district and instead chose to maintain the student's enrollment at the Rebecca School. While I can understand the parent's concern that IEP services would not be put into effect for her son in conformity with federal and State regulations if she placed him in the public school, the district cannot escape its obligation to put the IEP into effect and such concerns are not automatically transformed into viable claims simply by the parent visiting the public school site and viewing other students receiving services under different IEPs (see F.L., 2012 WL 4891748, at *13-*14).[21]

However, I have reviewed the evidence in the hearing record in order to discuss what alternative findings could be made, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site. As further explained below, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation. the evidence would nevertheless show that the 6:1+1 special class at the assigned district school was capable of providing the student with a suitable classroom environment and appropriate grouping, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material

[20] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y., 584 F.3d at 420 [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

[21] While not required, the practice of visiting an assigned school in a unilateral placement case has value for purposes of equitable considerations, especially if it helps the parents further explain to the district their views regarding the alleged defects in the IEP which require correction.

or substantial way (A.P., 2010 WL 1049297; 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], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502 [S.D.N.Y. 2011]; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 850 F. Supp. 2d 1315, 1319 [S.D.Fla. 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

1. Grouping in the Assigned Class

The IHO found that there was a lack of sufficient information about the particulars of the class the student would have attended, and noted that there was little information about the student population at the school and held that the student would not be appropriately grouped for instructional purposes (IHO Decision at p. 33). Although I agree with the IHO that the hearing record lacked a degree of specificity in regard to the assigned class, review of testimony by the special education teacher of the assigned class revealed more specific information about the assigned class than the IHO acknowledged (see Tr. pp. 152-55, 157-59, 159-71, 190, 192, 194-99, 202-12, 219-23, 230, 236-37). The special education teacher of the 6:1+1 class indicated the age range of her students was between seven and nine years old; that estimated instructional levels in the class ranged between kindergarten and third grade; that her students were verbal and could make their needs known (Tr. pp. 194-95, 222-23). The teacher described a typical schedule during summer school that included instructional breakfast, morning meeting in which the class covered attendance, calendar, morning story (students would write a story or read a story they had written), physical education, math, reading, instructional lunch, recess, art, free time, snack, and dismissal (Tr. p. 155-56).[22] In addition, she described a typical schedule during the part of the 2011-12 school year beginning in September 2011 that included instructional breakfast, circle time, art, yoga, reading, instructional lunch, recess, music, math, story or game, free time, snack, and dismissal (Tr. p. 236).[23] The class participated in field trips to locations in the community such as swimming (every other week), a farm, a zoo, and a museum (Tr. pp. 236-37). In light of the above, I find that although the testimony by the special education teacher of the 6:1+1 class in which the student would have likely been enrolled (Tr. pp.153, 198) was sparse in regard to specific instructional levels of her students, such testimony offered a reasonable description of the class under the circumstances of this case and does not support that the district would have materially

[22] Testimony by the special education teacher of the 6:1+1 class defined "writing a story" to mean that students dictated their stories to the teacher, who in turn wrote down the story, whereupon the students copied what the teacher recorded (Tr. p. 202).

[23] Testimony by the special education teacher of the 6:1+1 class indicated the students ate in their own cafeteria room adjacent to the school's main cafeteria; that the five 6:1+1 classes ate breakfast together, but that lunch was broken up into two groups of classes; that the proposed class ate lunch in a group of three classes comprised of 18 students (Tr. pp. 206, 231-32). In addition, both breakfast and lunch were instructional in nature; each classroom teacher was present during both daily instructional mealtimes; that the speech-language related service provider and all of the paraprofessionals were present during breakfast (Tr. pp. 232-33).

deviated from the student's IEP.

2. Sensory Needs

Despite the IHO's findings to the contrary, the hearing record reflects that the assigned school was capable of addressing the student's sensory needs, had the student attended the school. Consistent with the student's needs identified in the May 2011 IEP, the special education teacher testified she provided her students with sensory input and breaks and used techniques that afforded her students proprioceptive input and movement, and incorporated music and familiar songs (Tr. pp. 159-60, 163, 212; Dist. Ex. 6 at pp. 3, 5). The teacher used a classroom visual schedule and would have been able to use an individual visual schedule as necessary (Tr. p. 161; Dist. Ex. 6 at p. 5). The teacher's testimony indicated that consistent with the May 2011 IEP she would have been able to offer the student redirection, verbal prompts, and visual cues; that she would have been able to provide the student with the "high frequency repetition" he needed as she already taught topics daily "over and over and over again" until her students mastered the topic; that she used visual cues and prompts in her classroom "all the time" (Tr. pp. 157-59; Dist. Ex. 6 at p. 3). The teacher would have been able to use dictation with the student to help calm him as necessary; she took photographs of special activities and when on field trips so that students could dictate about such happenings to the teacher; she opined these dictation activities were calming to her students (Tr. p. 162; Dist. Ex. 6 at p. 5). The teacher indicated she worked on students' coping skills and self-regulation/modulation daily, would interrupt instruction to address her students' self-regulation needs and that all the students in her class had a BIP (Tr. p. 170-71, 223). In regard to related services, the special education teacher indicated five of her students at the time of the impartial hearing received OT; the assigned school had a suspended swing, a trampoline, and other sensory equipment; that if the occupational therapist was not in the building and the student needed to use the swing or trampoline, arrangements would be made for the student to use the equipment (Tr. pp. 207-08, 210, 212).

The aforementioned testimony of the special education teacher of the proposed class demonstrated she had students in the class with similar needs of the student in the instant case, and she would have been able to implement the student's May 2011 IEP. In addition, insofar as the parent did not accept the CSE's recommended placement, I note that the hearing record in its entirety, does not support the conclusion that, had the student attended the assigned classroom, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (A.P., 2010 WL 1049297).

VII. Conclusion

After reviewing the hearing record, I disagree with the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year. I find that the evidence contained in the hearing record supports a finding that the May 2011 CSE appropriately identified the student's areas of need and that the special education programs and services recommended in the IEP, including placement in a 6:1+1 special class with a 1:1 crisis management paraprofessional, addressed the student's needs and were reasonably calculated to enable the student to receive

educational benefits. Thus, I find that the district offered the student a FAPE for 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 for me to consider the appropriateness of the Rebecca School or whether equitable considerations support the parent's claim for the tuition costs at public expense (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13 aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]). I have also considered the parties' remaining contentions, including the parent's cross-appeal and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that that the IHO's decision dated April 2, 2012, is modified by reversing the portions which concluded that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to pay the student's tuition costs at the Rebecca School for the 2011-12 school year.

Dated: **Albany, New York**
October 21, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER