The University of the State of New York

The State Education Department
State Review Officer
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No. 12-115

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, attorneys for petitioner, Neha Dewan, Esq., of counsel

New York Legal Assistance Group, attorneys for respondent, Phyllis R. Brochstein, 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 fund the student's tuition costs at the Rebecca School for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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

In this case, the hearing record indicates that the student has received diagnoses of Asperger's Syndrome and an attention deficit hyperactivity disorder (ADHD) (Tr. pp. 606-07; Dist. Ex. 5 at p. 1). The hearing record indicates that the student demonstrated delays in the areas of academics, social/emotional functioning, sensory regulation, fine motor skills, and language processing (Tr. pp. 44, 51, 53, 425, 430-33, 436, 562, 663, 673; Dist. Exs. 4; 5; 8-10). The student has attended the Rebecca School since October 2008 (Tr. p. 358). The Rebecca School is a nonpublic school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On May 27, 2010, the CSE convened to conduct the student's annual review and develop his IEP for the 2010-11 school year (fourth grade) (Dist. Ex. 4 at p. 1). The CSE recommended that the student be placed in a 10-month 12:1+1 special class in a community school and receive related services of one 30-minute session of counseling per week in a group of two, one 30-minute individual counseling session per week, two 30-minute sessions of individual occupational therapy (OT) per week, one 30-minute session of speech-language therapy per week in a group of three, two 30-minute sessions of individual speech-language therapy per week, and a full time 1:1 transitional paraprofessional for the first four months of the school year (id. at pp. 1, 16).

By final notice of recommendation (FNR) dated June 23, 2010, the district notified the parent of the particular public school site to which the student was assigned for the 2010-11 school year (Dist. Ex. 3).

On July 27, 2010, the parent signed a Rebecca School enrollment contract and payment schedule placing the student at the Rebecca School for the 2010-11 school year, commencing September 13, 2010 and ending June 24, 2011 (Parent Ex. E).

By letter dated August 25, 2010, the parent rejected the district's program and further advised that she intended to enroll the student at the Rebecca School for the 2010-11 school year and seek the costs of the student's tuition from the district as well as the provision of round trip transportation (Parent Ex. D).

A. Due Process Complaint Notice and Response

In a due process complaint notice dated July 26, 2011, the parent requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A). According to the parent, the May 2010 CSE's recommendation to place the student in a 10-month 12:1+1 special class in a community school was inappropriate because it would not provide the student with the level of individualized instruction and support he would need, and the student would experience substantial regression without a 12-month program (id. at p. 2). The parent further asserted that the Rebecca School met the student's academic and social/emotional needs (id.). The parent requested that the IHO award the parent the costs of the student's tuition at the Rebecca School and direct the district to provide round-trip transportation (id. at pp. 2-3).

The district responded to the due process complaint notice on September 26, 2011, asserting that it offered the student FAPE (Dist. Ex. 2).

B. Impartial Hearing Officer's Decision

An impartial hearing convened on September 26, 2011 and concluded on April 5, 2012, after seven hearing dates (Tr. pp. 1, 88, 235, 335, 411, 493, 643). In a decision dated April 24, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2010-11 school year, that the Rebecca School was an appropriate placement, and that equitable considerations favored an award of tuition reimbursement (IHO Decision at pp. 19-20).

In making her determinations, the IHO found that because the CSE members who agreed on the recommended 12:1+1 placement worked for the district, while everyone who disagreed

with the placement worked directly with the student, it was reasonable to conclude that the parent was denied the opportunity to meaningfully participate in educational decisions regarding her son (IHO Decision at p. 18). The IHO also found that the May 2010 CSE lacked a regular education teacher (id.). The IHO further found that the hearing record did not contain enough evidence to establish how the transitional paraprofessional provided for in the May 2010 IEP for the first four months of the school year would have helped the student to transition from the Rebecca School to a district school, nor did the evidence show how it would be determined whether it was appropriate to terminate the paraprofessional's services at the end of the four month time period (id. at pp. 18-19). The IHO also found that the hearing record did not demonstrate the justification for changing the student's program from a 12-month to a 10-month program (id. at p. 19). With regard to the district's assigned school, the IHO found that the hearing record did not demonstrate that the assigned class would have been appropriate (id.). According to the IHO, the district did not present any evidence as to the needs of the other special education students in the class, how the teacher worked with the students, or whether the student would have been appropriately grouped with students who had similar educational, social, emotional, and management needs (id.).

With respect to the appropriateness of the Rebecca School, the IHO found that the hearing record showed that the Rebecca School staff conducted appropriate evaluations of the student, assessed him regularly, and were sufficiently aware of his strengths and deficits, as well as his special education needs (IHO Decision at p. 20). The IHO also noted that the staff developed an individualized program for the student, grouped him with students of similar needs, and provided him with all of his related services and a supportive environment (id.). The IHO concluded that the hearing record demonstrated that the student had made academic and social/emotional progress at the Rebecca School and received educational benefits (id.).

With respect to equitable considerations, the IHO noted, among other things, that the parent had cooperated with the district, considered the assigned public school before enrolling the student in the Rebecca School, and provided timely notice that she was rejecting the district's program (IHO Decision at p. 20). Accordingly, the IHO awarded the parent the costs of the student's tuition at the Rebecca School for the 2010-11 school year (id. at pp. 20-21).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2010-11 school year, that the Rebecca School was an appropriate unilateral placement, and that the equities favored the parent.

In regard to the IHO's determination that the district failed to offer the student a FAPE, the district first asserts that the IHO erred when she addressed the issues of meaningful parent participation, CSE composition, and the transitional paraprofessional because none of these issues were raised in the parent's due process complaint notice. Accordingly, the district argues that these findings were beyond the scope of the impartial hearing. In the alternative, the district argues that the parent was provided a meaningful opportunity to participate in the May 2010 CSE meeting, and that a mere disagreement with the district does not constitute a denial of meaningful participation. Regarding CSE composition, the district asserts that the CSE did not need to include a regular education teacher because the CSE was not considering a general education environment in academics for the student. The district also asserts that the IHO's findings relating to the 1:1 transitional paraprofessional were speculative as the student did not attend the district school, and

therefore, the district was not required to prove the need or functionality of the transitional paraprofessional. The district also asserts that the hearing record demonstrated that the transitional paraprofessional would have provided additional support to the student and assisted him in his transition from the Rebecca School to the district classroom. The district also contends that the staff at the district's school would have determined if the services of the paraprofessional were still required after the four month time period set forth in the IEP.

The district also asserts that the IHO erred when she determined that the recommended 10-month 12:1+1 program in a community school was inappropriate. The district asserts that the information before the May 2010 CSE reflected that the student exhibited an overall average cognitive functioning level, and he required exposure to typically developing peers while attending a special education class and that he did not require a 12-month program. The district further asserts that contrary to the IHO's determination, the hearing record demonstrates that the assigned class would have been appropriate, and that the student's academic and social/emotional needs would have been met in the assigned class and the student would have been functionally grouped with the other students in the classroom.

With regard to the Rebecca School, the district asserts that the IHO erred in her determination that it was an appropriate placement for the student because the student would not have been exposed to typically developing peers at the school. Furthermore, the district asserts that the student regressed academically during the student's prior year at the Rebecca School due to the lack of classroom instruction. Lastly, the district asserts that equitable considerations do not weigh in favor of the parent because the parent never intended to place the student in a district school and her August 25, 2010 letter rejecting the district's program did not set forth any allegations regarding the appropriateness of the IEP.

In her answer, the parent asserts that the district's recommended program was inappropriate. With respect to the district's assertions that the IHO improperly considered issues not raised in the parent's due process complaint notice, the parent contends that with respect to the issue of the lack of a regular education teacher at the May 2010 CSE meeting, the district raised the issue at the impartial hearing, and therefore the IHO properly rendered a determination on it. The parent further contends that the district did not object to questions regarding the absence of a regular education teacher until the district's attorney's closing statement.

The parent further asserts that the evidence demonstrates that the district's recommended 10-month program was inappropriate and that the student required a 12-month program to prevent substantial regression. The parent also asserts that the student's social/emotional needs were not addressed by the May 2010 CSE. The parent asserts that district personnel were the only persons at the CSE meeting who believed the recommended 10-month 12:1+1 placement was appropriate for the student, none of whom had worked with the student or had any personal knowledge of him. The parent further asserts that the 12:1+1 placement would not have provided the necessary adult monitoring and support to enable the student to access his skills and to learn. The parent also asserts that the Rebecca School's staff believed that the provision of a transitional paraprofessional for a four month period was ineffective as a support for the student.

The parent further asserts that the assigned school and class were inappropriate for the student, alleging among other things, that the student would not have been grouped with students of similar educational, social/emotional, and management needs. The parent also asserts that the

hearing record did not identify what teaching methodology the assigned school utilized in teaching children with autism.

The parent asserts that the Rebecca School was an appropriate placement as it provided a program that addressed the student's academic and special education needs. The parent contends that the student suffered "severely" in all of the general education settings in which he participated prior to his enrollment at the Rebecca School. The parent also contends that the student demonstrated social/emotional progress at the Rebecca School. Finally, the parent asserts that equitable considerations favor her request for funding of the student's tuition at the Rebecca School.

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]; see 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; 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. Scope of Impartial Hearing

On appeal, the district alleges that some of the issues the IHO ruled on were not asserted by the parent in her due process complaint notice, and as such, were beyond the scope of the impartial hearing. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include claims that the CSE was invalidly composed because it lacked a regular education teacher or that the parent was denied meaningful opportunity to participate in the creation of the student's IEP because the parent did not agree with the CSE's recommended placement (see Parent Ex. A; see also IHO Decision at p. 18).[1] A further review of the hearing record shows that the district did not agree to an expansion of the impartial hearing to include these issues and that the parent did not attempt to amend her due process complaint notice to include the resolution of these issues.

Moreover, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district

[1] I note that although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

"opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]), I note that the issue of whether a regular education teacher was present at the CSE meeting was first raised by the IHO and not the parties, during the district's direct examination of a witness (Tr. pp. 78-81).[2] Furthermore, the hearing record indicates that during the district's closing statement, its attorney objected to testimony brought forth in response to the IHO's questioning regarding the lack of a regular education teacher at the CSE meeting (Tr. p. 702). Regarding the issue of whether the parent had a meaningful opportunity to participate in the decision making at the CSE meeting, a review of the hearing record does not show that this claim was raised by either party at the impartial hearing. Thus, the district did not initially elicit testimony regarding these issues and therefore, I find that the district did not "open the door" to these issues under the holding of M.H.

Based on the foregoing, the IHO exceeded her jurisdiction in finding that the district's failure to include the participation of a regular education teacher at the May 2010 CSE meeting and that the parent was denied an opportunity to participate in the creation of the student's IEP contributed, in part, to the overall determination that the district failed to offer the student a FAPE for the 2010-11 school year. These determinations must, therefore, be annulled.

However, with regard to the issue of whether a transitional paraprofessional as recommended by the CSE was appropriate for the student, I find that the district's attorney did raise this issue at the impartial hearing on direct examination of more than one of its witnesses (Tr. pp. 42, 198-200). The parent's attorney then asked questions regarding this issue on direct examination of the parent's witnesses and the district did not object to this line of questioning (Tr. pp. 442-43, 519). Accordingly, I find that the district "opened the door" to the issue of the appropriateness of a transitional paraprofessional for the student and the IHO did not exceed her jurisdiction in rendering a determination on this issue. Therefore, I will address the parties' contentions regarding the transitional paraprofessional in this decision.

B. May 27, 2010 IEP

1. 12:1+1 Special Class Placement

On appeal, the district asserts that its recommendation that the student attend a 12:1+1 special class in a community school with a transitional paraprofessional was appropriate. Initially, I note that neither party is asserting that the student should be educated in a general education classroom setting. State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students"

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

(8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

The hearing record shows that in developing the student's program for the 2010-11 school year, the May 2010 CSE considered a 2009 classroom observation, a May 2010 psychoeducational evaluation, and a May 2010 Rebecca School interdisciplinary progress report update (Tr. pp. 51-53; Dist. Exs. 5; 8-11).

The district's school psychologist conducted a 30-minute classroom observation of the student at the Rebecca School during a math lesson (Dist. Ex. 8). The observation report reflected that the student engaged in a 1:1 math session with the teacher in the hallway (id. at p. 1). In response to a question posed by the teacher, the student correctly indicated that the presented math problem involved subtraction; however, his answer to the subtraction problem was incorrect (id.) With prompting by the teacher to write down the problem and to draw a pictorial representation of the problem, the student was eventually able to provide the correct answer (id.). According to the observer, with continued prompting by the teacher, the student was able to correctly answer several additional math problems (id. at pp. 2-3).

In May 2010, the psychologist from the Rebecca School completed a psychoeducational report of the student resulting from an assessment conducted over four days in April 2010 (Dist. Ex. 5). The psychologist assessed the student using standardized assessments as well as parent and teacher interviews and provided information regarding the student's background and functioning in the areas of cognition, academics, adaptive behavior, and social/emotional functioning (id. at pp. 1-17). Behaviorally, the psychologist described the student as "friendly and engaging" and stated that he "remained alert and engaged throughout the assessment, requiring few breaks or prompts to refocus" (id. at p. 4). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded composite scores (percentile rank) of 102 (55) in verbal comprehension, 108 (70) in perceptual reasoning, 86 (18) in working memory, 80 (9) in processing speed, and a full scale IQ of 95 (37) (id. at p. 14). According to the psychologist, the student's performance on the verbal comprehension and perceptual reasoning indices fell in the "[a]verage" range, while his performance on measures of working memory and processing speed fell in the "[l]ow [a]verage" range (id. at pp. 4-5). The psychologist noted that because significant differences were identified across the four indices, the student's full scale IQ did not "accurately represent the variations that exist within his cognitive profile" (id. at p. 4).

The evaluative report further indicated that the student demonstrated average verbal fluency, expressive language, and verbal conceptualization as well as provided accurate descriptions of the nature and meaning of words (Dist. Ex. 5 at p. 4). The report also indicated that the student exhibited age appropriate skills in the areas of fluid reasoning, categorical reasoning, and visual discrimination with superior range skills in the area of a timed visual motor task (id. at p. 5). With respect to processing speed related tasks, the student responded in an accurate manner but processed the information slowly resulting in low average standard scores (id.). Administration of the Woodcock-Johnson III Test of Achievement (WJ-III ACH) to the student yielded standard scores (percentile rank) of 66 (3) in total achievement, 75 (5) in broad

reading, 76 (5) in broad math, and 59 (0.3) in broad written language (id. at p. 15). With respect to reading skills, the student exhibited low average skills in the areas of word identification and decoding (id. at p. 6). The student also demonstrated low average skills in math including math reasoning, problem solving, math calculations, and math fluency with numbers (id.).

The psychologist reported, based on the parent's responses on a measure of adaptive functioning, that the student exhibited overall adequate skills in the area of communication, daily living skills, socialization, and motor skills, but demonstrated "an overall Elevated level" of maladaptive behaviors (Dist. Ex. 5 at p. 16). In the area of social/emotional functioning, based on parent and teacher responses, the student demonstrated difficulties with externalizing problems, internalizing problems, hyperactivity, anxiety, depression, atypicality, withdrawal, and functional communication (id. at p. 17). Based on her assessment, the psychologist recommended a highly structured class with a strong language-based curriculum with a low student-to-teacher ratio (id. at p. 12). The psychologist also recommended that the student receive related services of speech-language therapy, OT, and counseling (id. at pp. 12-13).

In a May 2010 Rebecca School interdisciplinary progress report update, the student's teachers and related service providers described the student's functioning in the areas of academics, language processing, social/emotional functioning, sensory regulation, and fine motor skills (Dist. Ex. 9).[3] The report indicated that the student attended an 8:1+4 class and received related services of counseling, OT, speech-language therapy, art therapy, drama, and adapted physical education (id. at p. 1). The report reflected that "[o]ver the past few months we have seen a change in [the student's] regulation" including less moments of dysregulation and an increased ability to "calm himself down faster with minimal adult support" (id.). When the student experienced dysregulation it included becoming frustrated, tense, and impulsive (id.). The report reflected that the student utilized sensory supports and strategies with adult verbal guidance (id.). According to the report, the student demonstrated an increased awareness of his own sensory needs and was becoming more appropriate and independent at seeking out proper input (id. at p. 2). Overall, the student enjoyed interacting with peers, especially during preferred play activities (id.).

With respect to academics, the report reflected that the student read a wide range of reading materials (Dist. Ex. 9 at p. 2). The student demonstrated strong abilities in sight word vocabulary and decoding (id. at p. 3). In the area of reading comprehension, the student answered questions on a second and third grade level (id.). In the area of math, the student explored place value using manipulatives and simple addition with carrying through in solving word problems (id.). The report also indicated that the student understood and identified the values of coins/bills (id.).

The May 2010 Rebecca School progress report also indicated that the student's two 30-minute sessions of OT per week addressed his needs in sensory processing, safety awareness/impulse control, fine motor skills, and visual motor/perceptual skills (Dist. Ex. 9 at p. 7). According to the report, the student received one 30-minute session of individual speech-language therapy per week and one 30-minute session of speech-language therapy per week in a

[3] A review of the hearing record shows that Dist. Ex. 10 contains substantive information similar to Dist. Ex. 9 regarding the student's program and progress (see Dist. Exs. 9-10).

group of two (id.). The student's therapy sessions addressed the student's needs in receptive, expressive, and pragmatic language (id.).

The May 2010 Rebecca School progress report included goals in the areas of social/emotional functioning; play skills; reading comprehension; reading fluency; number sense; money concepts; measurement; time/space; sensory regulation; fine motor skills; as well as pragmatic, receptive, and expressive language (Dist. Ex. 9 at pp. 4-6, 8-13). Overall, the report showed that with regard to his goals, the student had demonstrated progress (id. at pp. 1-13).

The May 2010 CSE recommended that the student attend a 10-month 12:1+1 special class together with a 1:1 transitional paraprofessional because he demonstrated average functional levels and average cognitive abilities (Tr. pp. 42-44, 78; Dist. Ex. 4). The hearing record indicates that the May 2010 CSE considered recommending a 12:1 special class in a community school and a 12:1+1 special class in a community school without a 1:1 transitional paraprofessional, but rejected these placements due to the lack of individualized attention (Tr. pp. 74-75; Dist. Ex. 4 at p. 15). The parent indicated at the CSE meeting that she believed the student needed to attend a nonpublic school (Tr. pp. 76-77). All of the annual goals in the IEP pertaining to related services areas were provided by the Rebecca School staff and approved of by the parent (Tr. pp. 72-73, 84).

As stated above, the student demonstrates delays in the areas of academics, social/emotional functioning, sensory regulation, fine motor skills, and language processing (Tr. pp. 44, 51, 53, 425, 430-33, 436, 562, 663, 673; Dist. Exs. 5, 8-10). With respect to cognition, the student exhibited average verbal and nonverbal reasoning skills; however, he demonstrated delays in working memory and processing speed (Dist. Ex. 5 at pp. 4-5, 14). To address the student's special education needs as set forth in the present levels of performance in the May 2010 IEP, the CSE recommended that the student be placed in a 12:1+1 special class and developed 13 annual goals and 21 short-term objectives targeting the student's needs in the areas of decoding, reading comprehension, punctuation/grammar, visual-spatial skills, motor skills, math computation, sensory regulation, frustration tolerance, social problem solving, play skills, conversational skills as well as receptive, expressive, and pragmatic language skills (Dist. Ex. 4 at pp. 6-13). To address the student's academic management needs, the IEP provided accommodations including redirection, repetition, visual supports, including visual cues, verbal prompts, and additional time to process information (id. at pp. 3, 14, 16). The IEP also provided for speech-language therapy to address the student's language needs (id. at pp. 4, 16). To address the student's social/emotional needs, the CSE recommended that the student receive counseling services and identified environmental modifications and human/material resources that benefited the student including redirection, verbal prompts, and teacher explanations of social situations (id. at pp. 4, 5, 16). To address the student's needs related to sensory regulation, fine motor needs, and visual-perceptual skills, the CSE recommended that the student be provided with OT services, the use of a weighted vest, and visual supports (id. at pp. 5, 16). The May 2010 CSE also recommended a 1:1 transitional paraprofessional for a period of four months (id. at pp. 2, 14, 16).

Based on the foregoing, I find that May 2010 CSE had sufficient information relative to the student's present levels of academic achievement and functional performance at the time of the CSE meeting and developed an IEP that accurately reflected the student's special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

Accordingly, I find that the CSE's recommendation of a 12:1+1 special class, in conjunction with the recommended 1:1 transitional paraprofessional, related services and the program accommodations and strategies described above, was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year.

2. Transitional Paraprofessional

The district contends that the IHO erred in determining that there was insufficient evidence to establish how the transitional paraprofessional would have worked with the student or whether it was appropriate to terminate the transitional paraprofessional services after four months.

The May 2010 CSE recommended that the student receive the services of a 1:1 transitional paraprofessional for a period of four months to assist the student in transitioning from the Rebecca School to a district 12:1+1 special class (Tr. pp. 41-42, 106-07; Dist. Ex. 4 at p. 16). The May 2010 IEP also included an annual goal and short-term objective that given the support of the 1:1 transitional paraprofessional, the student will acclimate to the public school, follow the new school's schedule and routines, and demonstrate the ability to maintain interactions with others (Dist. Ex. 4 at p. 13). The hearing record reflects that the 1:1 transitional paraprofessional would have worked under the supervision of the special education teacher at the assigned public school to address the student's individual needs (Tr. pp. 105-06, 200). Specifically, the special education teacher together with the 1:1 transitional paraprofessional would have developed a plan to address the student's academic and social needs within the 12:1+1 special class, as well as to promote his independence (Tr. pp. 198-200).

After the four month time period, the district would have determined if the student continued to require the services of a 1:1 transitional paraprofessional based on his needs (Tr. p. 42). The hearing record indicates that the student adequately functioned within the classroom in many areas including relating with adults and peers and participation during class activities with supports (see Dist. Exs. 8-10). The student demonstrated average verbal and nonverbal reasoning abilities together with low average abilities in the areas of working memory and processing speed (Tr. pp. 666, 668, 671-72; Dist. Ex. 5 at p. 14). The hearing record further reflects that the May 2010 CSE believed that the student required the services of a 1:1 transitional paraprofessional only as it pertained to the transition from the Rebecca School to the district's 12:1+1 special class setting, but that he did not otherwise require the services of 1:1 paraprofessional based on his strengths, needs, and lack of behaviors (Tr. p. 42).

In consideration of the foregoing, I do not find support in the hearing record for the IHO's determination that the district's recommendation of a 1:1 transitional paraprofessional for a four month period was inappropriate to address the student's needs or that the district would have been unable or unwilling to modify his IEP had the student enrolled in the district's program and require that the services of a 1:1 paraprofessional be extended beyond four months in order for the student to receive educational benefits (see Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]).

3. 12-Month School Year

Next, I will address the parties' contentions regarding the appropriateness of the district's recommended 10-month program versus a 12-month program. The district contends that the IHO erroneously concluded that the school district failed to establish that a 10-month program was appropriate for the student (see IHO Decision at p. 19).

The IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE to the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106).[4]

Here, the hearing record is unclear as to the extent a 12-month versus a 10-month program was discussed at the May 2010 CSE meeting. According to the special education teacher who participated at the CSE meeting, although the student was attending a 12-month program at the Rebecca School for the 2009-10 school year, the CSE recommended a 10-month program for the 2010-11 school year because the student demonstrated average cognitive abilities as indicated by the recent May 2010 psychoeducational evaluation conducted by the Rebecca School (Tr. pp. 43-44; see Dist. Ex. 5). In addition, the special education teacher testified that the student's diagnosis of Asperger's Syndrome indicated that the student exhibited delays in communication and social skills, but demonstrated adequate cognitive skills, and therefore a 10-month program was appropriate (Tr. pp. 99, 103). The special education teacher testified that no CSE member, including the parent, objected to the recommendation of a 10-month program at the time of the May 2010 CSE meeting; however, the student's mother testified that both she and the student's Rebecca School teacher disagreed with the 10-month program recommendation and stated at the CSE meeting that the student required a 12-month program to prevent regression (Tr. pp. 98-99, 615, 627-28).

[4] The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding 12-month services:

> A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred (http://www.p12.nysed.gov/specialed/publications/policy/esy/qa2006.htm).

As indicated above, the May 2010 psychoeducational report, reviewed by the May 2010 CSE, indicated that the student performed in the average range regarding verbal and nonverbal reasoning skills and had an average full scale IQ (Dist. Ex. 5 at p. 14). The report indicated that the student's teacher at the Rebecca School described the student as a "friendly, active, and empathic student whose cognitive, academic, and social-emotional functioning ha[d] improved over the last two school years" (id. at p. 3). According to the report, the student readily participated in small and large group academic activities, and engaged in Floortime sessions with peers (id.). While the psychologist recommended a "highly structured special education classroom environment" for the student with related services of counseling, OT, and speech-language services, the psychologist did not recommend or otherwise indicate that the student required a 12-month educational program in order to prevent substantial regression (id. at pp. 12-13). In addition, the psychologist did not indicate in the evaluation report that the student was unable to maintain developmental levels or that he lost skills or knowledge during the 2009-10 school year (id.).

The May 2010 Rebecca School progress report, reviewed by the May 2010 CSE, indicated that the student enjoyed interacting with adults and peers (Dist. Ex. 9 at p.1). The report also indicated that "[o]ver the past few months" the student became "dysregulated less" and could "calm himself down faster with minimal adult support" (id.). According to the report, the student was a "strong sight word reader as well as decoder" (id. at p. 3). The student's occupational therapist reported that the student had demonstrated improvement in the areas of frustration tolerance and coping strategies since December 2009 (Dist. Ex. 10 at p. 1). In addition, the student's speech-language pathologist reported that the student continued to demonstrate progress regarding language processing skills (id.).

Aside from the parent's testimony that she and the student's Rebecca School teacher believed the student required a 12-month program to prevent regression, the hearing record does not otherwise indicate that the information and evaluations considered by the May 2010 CSE demonstrated that the student required a 12-month program and services to prevent substantial regression.[5] It is understandable that the parent may desire a continuous 12-month educational program for her son; however, the weight of the evidence in this hearing record does not support her contention. While the parent, Rebecca School personnel, and the student's pediatrician all testified during the impartial hearing that they believed the student exhibited regression after not receiving any services at the Rebecca School or elsewhere during the summer of the 2010-11 school year (see Tr. pp. 369, 417, 437-38, 479, 520-21, 578), I note that the Second Circuit adopted the majority rule than an "IEP must be evaluated prospectively as of the time of its drafting" and that this testimony was not available at the time of the May 2010 CSE meeting and is not consistent with the evaluations and information considered by the CSE (R.E., 694 F.3d at 186). Thus, in consideration of the totality of the evidence, the hearing record is bereft of evidence suggesting that at the time of the May 2010 CSE meeting the student would exhibit substantial regression in the absence of a 12-month educational program and services (see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at * 14-*15 [S.D.N.Y. March 28, 2013] ["While it is true that the burden remains on the District to show that the student did not exhibit a need for [extended school year]

[5] I note that the parent acknowledges in her answer that the May 2010 psychoeducational report and May 2010 Rebecca School progress reports do not indicate that the student experienced any academic regression (Answer ¶ 111).

services 'in order to prevent substantial regression,' . . . a negative can often be proven only by the absence of the evidence"]; M.W. v. New York City Dep't of Educ., 869 F.Supp.2d 320, 334 [E.D.N.Y. 2012] [describing the purpose of 12-month services, which are provided when necessary to prevent substantial regression]). Under these circumstances, I cannot find that the May 2010 CSE erred in not recommending 12-month services for the student, and the IHO's determination to the contrary is reversed.

C. Assigned School

Lastly, I review the IHO's determination that there was insufficient evidence to determine the appropriateness of the assigned public school site. Generally, challenges to an assigned school involve implementation claims, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]),[6] and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L., 2012 WL 4891748, at *15-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; c.f. E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]; but see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *13-*16 [S.D.N.Y. March 26, 2013]; B.R. v. New York City Dep't of Educ., 2012 WL 661046, at *5-*6 [S.D.N.Y. Dec. 26, 2012]).

In this case, the parent rejected the IEP and enrolled the student at the Rebecca School prior to the time that the district became obligated to implement the student's IEP (Parent Exs. D; E). Thus, the district was not required to establish that the student would had been grouped appropriately upon the implementation of his IEP in the proposed classroom, and a meaningful

[6] With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

analysis of the parent's claims with regard to the student's particular public school assignment would require the IHO—and an SRO—to speculate to determine what might have happened had the district been required to implement the student's IEP. However, even assuming for the sake of argument that the student had attended the district's recommended program at the assigned school, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at * 13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. Aug. 19, 2011]).

1. Functional Grouping

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to the following: the levels of academic or educational achievement and learning characteristics; the levels of social development; the levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall . . . provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics . . . in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

Furthermore, I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). Here, the hearing record indicates that had the student attended the assigned school, the student would have presented in a similar manner with respect to the other students in the assigned class. At the start of the 2010-11 school year, the assistant principal testified that there was a seat available for the student and eleven students in the proposed class (Tr. pp. 200-01). The testimony of the assistant principal at the assigned school indicated that the decoding, reading comprehension, and writing

levels of the students within the assigned class were similar to the student's functional levels (Tr. pp. 153-56). The hearing record also indicates that the classroom teacher of the proposed 12:1+1 special class uses formalized assessments throughout the school year to determine the functional levels of the students in her class and then groups students with similar abilities together in order to target their needs (Tr. pp. 153-55, 202-03). Regarding the parent's assertion that the student's eligibility for special education and related services as a student with autism differed from the classifications of other students in the proposed class, I note that State regulations require students to be grouped based on similarity of individual needs and not by a student's classification (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]).

Thus, I am not persuaded that the district would have deviated from substantial or significant provisions of the student's IEP in a material way if the district had been responsible for complying with the grouping regulations. Accordingly, upon review of the hearing record, I find that the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 12:1+1 special class at the assigned public school at the start of the 2010-11 school year and did not deny the student a FAPE as a result of improper grouping.[7]

VII. Conclusion

Based on the hearing record evidence, I find that the recommended 10-month 12:1+1 special class in a community school with a 1:1 transitional paraprofessional and related services was reasonably calculated to provide the student with educational benefits and, therefore, offered him a FAPE during the 2010-11 school year. Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary for me to consider the appropriateness of the Rebecca School or whether the equities support the parent's claim for the tuition costs at public expense (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 24, 2012 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to fund the student's tuition costs at the Rebecca School for the 2010-11 school year.

Dated: **Albany, New York**
April 12, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER

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