The University of the State of New York

The State Education Department
State Review Officer
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No. 12-143

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

Appearances:
Educational Advocacy Services, attorneys for petitioners, Jennifer A. Tazzi, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeals from the decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) reimburse them for their son's tuition costs at the Rebecca School for the 2011-12 school year. The district cross-appeals from the IHO's determinations that the Rebecca School was an appropriate placement and that equitable considerations favored the parents' request for relief. The appeal must be dismissed. 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 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 the present case, the student demonstrates delays in the areas of cognition, communication, sensory regulation, academics, attention, fine and gross motor skills, social and play skills, activities of daily living (ADL) skills, feeding skills as well as receptive, expressive,

and pragmatic language (Dist. Exs. 1; 4-6).[1] The student received diagnoses of an autism spectrum disorder (ASD) and Down's syndrome (Tr. pp. 512-14; Dist. Ex. 5).

The hearing record reflects that the student received a diagnosis of Down's syndrome as well as a heart condition and feeding and respiratory difficulties at birth (Tr. pp. 512-15). The student received Early Intervention (EI) services both in the home and later at preschool which included occupational therapy (OT), physical therapy (PT), and speech-language therapy (Tr. pp. 516-17). The Committee on Preschool Special Education (CPSE) continued the student's related services while he attended a center-based preschool program (Tr. p. 518). For the student's kindergarten year, the student was found eligible to receive Committee on Special Education (CSE) services and attended a district 12:1+1 special class (Tr. pp. 519-20). The parents were concerned regarding the student's academic and social regression due to a lack of support within the district's program (Tr. pp. 520-23). The student attended district schools up to the 2009-10 school year, at which time the parents enrolled the student at the Rebecca School (Tr. pp. 522-27, 534-35). The Rebecca School 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).

On January 24, 2011, the CSE convened for the student's annual review and to develop his individualized education program (IEP) for the 2011-12 school year (Dist. Exs. 1; 2). The CSE found the student eligible to receive special education and related services as a student with autism (Tr. p. 23; Dist. Ex. 1 at p. 1).[2] To address the student's needs, the CSE recommended placing the student in a 6:1+1 special class in a specialized school together with related services of four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group (2:1), four 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT (Dist. Ex. 1 at p. 14). The IEP also provided for a full time 1:1 health services paraprofessional (id.). In addition, to address the student's needs, the CSE recommended a 12-month extended school year, adapted physical education, and participation in the alternate assessment (Dist. Ex. 1 at pp. 1, 14). The January 2011 IEP indicated that the student's behavior seriously interfered with instruction and a behavioral intervention plan (BIP) was developed for the student (Dist. Ex. 1 at pp. 4, 15). The CSE also amended the IEP in March 2011 to provide the student with transportation services to and from the assigned school (Parent Ex. H).

By final notice of recommendation (FNR) dated June 13, 2011, the district notified the parents of the school to which the student was assigned and at which his IEP would be implemented for the 2011-12 school, year (Dist. Ex. 7). In a letter dated June 15, 2011, the parents notified the district that they intended to enroll the student at the Rebecca School for the 2011-12 school year, asserting that the district's recommended placement was not appropriate for the

[1] I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a Parent and District exhibit were identical. I remind the IHO that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

student (Parent Ex. G). The parents then contacted the unit coordinator at the assigned public school site and visited the school on June 16, 2012 observing both the classroom the student would have attended for the summer beginning in July 2011 and the classroom the student would have attended during the ten month school year beginning in September 2011 (Tr. pp. 537-540). On or about June 22, 2012, the parents returned the FNR to the district with handwritten comments rejecting the assigned public school site for various reasons—including lack of appropriate sensory equipment, that academics were too advanced for the student, and that the student would not receive sufficient ABA instruction—and advising the district that the parents intended to enroll the student at the Rebecca School for the 2011-12 school year and seek tuition reimbursement from the district (Parent Ex. F at p. 1). On June 24, 2011, the parents executed an enrollment contract for the student's attendance at the Rebecca School beginning July 2011 (Parent Ex. N at pp. 1-6).

A. Due Process Complaint Notice

The parents commenced an impartial hearing to challenge the IEP for the student's 2011-12 school year, pursuant to a due process complaint notice dated August 18, 2011 (Dist. Ex. 3). The parents alleged that the district did not provide the student with a free appropriate public education (FAPE) for the 2011-12 school year (id. at p. 1). In particular, the parents alleged that the district failed to administer a complete clinical evaluation within the three years prior to the CSE meeting and instead relied on teacher evaluations, which resulted in the student's recorded reading and math levels being the same since 2007 (id. at p. 2). In furtherance of the same point, the parents question why the student's apparent lack of progress was not discussed at the January, 2011 CSE meeting (id. at pp. 1, 2). They also question the appropriateness of the district calling the CSE meeting four months earlier than the projected date of review set forth in the IEP for the prior school year (id.). In addition, the parents alleged that the academic goals were intended for a 7:1:3 student to teacher ratio, rather than the district's 6:1:1 ratio; that the academic goals did not follow from prior goals or include appropriate means of assessment or achievement dates; that the OT, PT and speech language goals did not include grade or age level, various levels of assessments, or achievement dates; that the IEP did not contain goals for adaptive physical education, or the use of a health paraprofessional; and that the IEP did not recommend toilet training (id. at pp. 2-3). Regarding the 6:1:1 program offered by the district, the parents alleged a 6:1:1 program was insufficient to address the student's behavioral issues, particularly due to the student requiring extensive support in activities of daily living (id. at p. 2). The parents also alleged that the BIP was not drafted to the specific needs of the student but was general to any student suffering from autism (id. at 3). Further, the parents alleged that the classroom assigned in the district's FNR did not serve the student's academic, behavioral or social needs and did not provide sufficient sensory materials (id.).

The parents sought (1) tuition reimbursement and/or direct payment for the student's 2011-2012 enrollment at the Rebecca School, (2) the provision of related services contained in the January 24, 2011 IEP, and (3) transportation for the student to and from the Rebecca School (Dist. Ex. 3 at p. 3). The parents "reserve[d] the right" to challenge the appropriateness of the entire IEP and the specific class provided by the district (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 3, 2011 and concluded on April 27, 2012 (IHO Decision at p. 3). The hearing record was closed on May 29, 2012 after four non-consecutive days of hearings (Tr. pp. 1-582). In a decision dated June 8, 2012, the IHO determined that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 14-21). The IHO then went on to find that the parents' unilateral placement of the student at the Rebecca School was appropriate and that equitable considerations would have favored the parents (id. at pp. 21-23).

The IHO found the district's failures to evaluate the student and conduct an FBA were procedural violations under the IDEA, but that they did not impede the student's right to a FAPE or deny the student educational benefits (IHO Decision at pp. 15-16; 18). The IHO based her determination that the district's failure to administer testing within the three years prior to the CSE meeting did not deprive the student of a FAPE on the difficulties encountered by both the district and the Rebecca school in administering testing to the student (id. at pp. 15-16). The IHO reasoned that the lack of an FBA did not amount to a denial of FAPE because the CSE considered the students behaviors and needs and the teacher at the proposed classroom testified how she would have developed an individual plan according to the student's functions and needs (id. at p. 18). The IHO also found that the lack of adaptive physical education goals on the IEP—although a procedural violation—did not rise to the level of being a denial of FAPE. (id.). The IHO further found that the IEP was substantively proper in that the student's specific needs were laid out, goals were appropriately tailored to meet the student's needs, and the district increased the services provided to the student by adding a 1:1 paraprofessional to address concerns raised by the parents (id. at p. 16).

The IHO went on to find that the proposed placement in a 6:1:1 program provided the student an opportunity to progress and receive a meaningful benefit. (IHO Decision at pp. 16-17). The IHO then separately addressed the suitability of the proposed classroom settings for the summer program and the regular school year (id. at pp. 17-21). The IHO determined that the 2011 summer school classroom was appropriate (id. at p. 17). The IHO found the testimony from the summer school teacher persuasive in that the teacher would be able to address the child's sensory needs utilizing OT and the school's sensory gym (id.). The IHO then reviewed the proposed classroom setting for the 10 month school year beginning September 1, 2012. (id. at pp. 17-21). The IHO determined that although the classroom setting did not contain a sensory gym, the student would have received sufficient sensory support and the classroom setting was therefore appropriate (id. at pp. 19-20).[3]

The IHO also rejected the parents' argument that ABA was not an appropriate teaching methodology for the student, noting that there was no evidence the student had ever been educated utilizing ABA methods in a 6:1:1 placement and further noting that the testimony from the staff at the Rebecca School showed the student responded to motivating activities (IHO Decision at p. 20). Similarly, the IHO found unavailing the parents argument that the addition of a 1:1

[3] The IHO mentioned the parents concern that the student would have been grouped with students that were at too high a functional level compared to the student, however the IHO did not address that argument directly (IHO Decision at p. 18).

paraprofessional was too restrictive (id. at pp. 20-21). The IHO pointed out that the parents had sought the support of a 1:1 paraprofessional as additional support for the student in the due process complaint (id. at p. 20).

Even though the IHO determined that the district provided the student a FAPE for the 2011-12 school year, the IHO continued the Burlington/Carter analysis and determined that the parents unilateral placement at the Rebecca School was appropriate and the equities considerations would have favored the parents (IHO Decision at pp. 21-23). Based on testimony that the student showed some improvement at the Rebecca School, the IHO found that the student received some educational benefit and determined that the Rebecca School was an appropriate placement (id. at p. 22). The IHO further found that the parents properly notified the district of their intention to reject the proposed public school placement and therefore determined that the equitable considerations would have favored the parents (id. at p. 23).

IV. Appeal for State-Level Review

The parents appeal from the IHO's decision that the district offered the student a FAPE for the 2011-12 school year. The parents raise the following issues on appeal in support of their argument that the district did not provide a FAPE: (1) the district's failure to evaluate the student within three years of the CSE meeting denied the student educational benefits; (2) the failure to evaluate denied the parents of a meaningful opportunity to participate in the student's placement for the 2011-12 school year; (3) the CSE team did not have sufficient evaluative data at the CSE meeting to determine a 6:1:1 placement was appropriate; (4) the proposed classroom setting was not appropriate because it grouped the student with students who were at too high a functional level and had dissimilar skills and abilities from the student; (5) the district's failure to develop a BIP based on a proper FBA resulted in denial of educational benefits to the student; and (6) the CSE failed to develop appropriate goals to address the student's special education needs. The Petition requests that an SRO reverse the IHO's finding that the district offered the student a FAPE for the 2011-12 school year and order tuition reimbursement or direct funding for the student's 2011-12 enrollment at the Rebecca School.

The district answers denying the parents allegations and asserting that the IHO correctly determined the district offered the student a FAPE for the 2011-12 school year. Along with its answer, the district cross-appeals seeking to overturn the IHO's determinations that the Rebecca School was an appropriate placement and that the equities favored the parents. In its cross-appeal the district also seeks determinations that the IHO erred in considering the 2011 summer program and the 10 month program separately and that the IHO erred in considering issues that were not addressed in the due process complaint. The parents respond denying the allegations contained in the cross-appeal and further alleging the appropriateness of the parents' unilateral placement at the Rebecca School and the balancing of equitable considerations in favor of the parents.

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 Sch. Dist. 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 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, 293 Fed. App'x 20, 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, 486 Fed. App'x 954, 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 Review

1. New Issue Raised on Appeal

Before reaching the merits of the instant matter, I must discuss which claims were properly preserved for review. Contrary to the district's assertion in its cross-appeal, I find that the parents' argument that the district's failure to appropriately evaluate the student significantly impeded the parents' opportunity to participate in the placement process was sufficiently raised in the parents' due process complaint notice. Upon review of the parents' due process complaint notice, the parent's raised the district's failure to administer a complete clinical evaluation for more than three years as an alleged procedural violation leading to the deprivation of a FAPE. Because a procedural violation does not rise to the level of being a denial of FAPE, unless it (a) impedes the student's right to a FAPE, (b) significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) causes a deprivation of educational benefits, a claim in the due process complaint notice involving a procedural violation may be inferred to include a claim that the procedural violation impeded the parents' opportunity to participate in the decision making process (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513 [a][2]; 8 NYCRR 200.5[j][4][ii]).[4] Although the parents' allegation is ultimately unpersuasive, I have addressed it below.

The district also asserts that the IHO erred in considering arguments relating to the appropriateness of goals and the recommended placement based on the IHO's determination that the parents reserved "the right to contest the appropriateness of the goals as well as the recommended placement" (IHO Decision at p. 18; Parent Ex. A at p. 3). The IHO erred to the extent that she determined the parents may reserve the right in the due process complaint notice to contest issues not specifically raised therein (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; B.P. v. New York City Dep't of Educ., 841 F.Supp.2d 605, 611 [E.D.N.Y. 2012] [finding that upholding a general reservation of rights in the due process complaint notice would impermissibly expand the court's scope of review beyond its statutory authority]; see Application of the Dep't of Educ., Appeal No. 11-154; Application of a Student with a Disability, Appeal No. 11-141; Application of a Student with a Disability, Appeal No. 11-010).[5] However, in this instance, a cursory review of the parents' due process complaint notice indicates that the parents did in fact raise a number of specific issues relating to the appropriateness

[4] It should be noted that the IHO did not directly address this claim, and only found that the district's failure to have updated testing did not deprive the student of a FAPE or educational benefits (IHO Decision at pp. 15-16).

[5] A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

of goals and the recommended placement (Parent Ex. A at pp. 2-3). Pertinently, the due process complaint notice contains allegations that the January 2011 IEP goals: "were extremely limited," "did not include appropriate means of assessment," "did not include grade or age level, various means of assessment and diverse achievement dates," "[t]here were no goals developed for adapted physical education," "goals for the specific use of the health paraprofessional were not developed at the meeting," and regarding the recommended placement that it "would not serve [the student's] academic, behavioral or social living needs." Because the parents sufficiently raised these allegations in their due process complaint notice, they were properly addressed by the IHO and will be addressed herein.

2. Finality of Unappealed Determinations

The IHO addressed allegations that were not included in the due process complaint notice and were not raised in the petition, determining that ABA could have been an appropriate teaching methodology for the student and that the provision of a 1:1 health paraprofessional was not too restrictive (IHO Decision at pp. 20-21). The due process complaint notice did not mention teaching methodology or the restrictiveness of a 1:1 health paraprofessional and cannot be reasonably read to include such allegations (Dist. Ex. 3). Moreover, there is no indication in the hearing record that the parents requested, or that the IHO authorized, an amendment to the due process complaint notice to include these additional issues. Nor is there any evidence that the district agreed to expand the scope of the impartial hearing to cover these new issues. However, the parents have not appealed from the IHO's determination on these matters. Accordingly, I need not address them herein (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; IHO Decision at pp. 20-21). In addition, the IHO's determinations that the student's present levels of performance were discussed and included in the January 2011 IEP and that the student's sensory needs would have been appropriately addressed at the assigned public school site were not raised on appeal and have become final and binding (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; IHO Decision at pp. 16-17).

3. Waiver of Claims

The parents due process complaint notice also included issues that were not addressed by the IHO and were not raised by the parents on appeal—specifically that the IEP did not include a recommendation regarding assistance with toilet training and that the January 2011 CSE meeting was held only eight months subsequent to the prior school year's IEP and four months before to the start of the 2011-12 school year (Dist. Ex. 3 at pp. 1-2).[6, 7] As the parents did not raise these matters in their petition, I must consider them waived.

[6] I note that although the IEP does not include any goals related to toilet training, the IEP does note that the student is in the process of being toilet trained and the student's BIP, which was included as a part of the IEP, includes a goal related to toilet training reading that the student would indicate the need to use the bathroom when presented with visual choices at scheduled bathroom times each day (Tr. p. 42; Dist. Ex. 1 at pp. 3, 15).

[7] If I were to consider the timing of the CSE meeting as having been raised properly, the parent's argument still does not have any merit. The January 2011 IEP was developed prior to the beginning of the student's 2011-12 school year, as required by the IDEA (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). Moreover, there is no indication in the hearing record that having the CSE meeting in January 2011 impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making

B. Evaluative Information

Upon review of the entire hearing record, there is no reason to disturb the IHO's finding that, to the extent any failure on the part of the district to evaluate the student may have constituted a procedural violation, it did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision making process, or deny the student educational benefits (IHO Decision at pp. 15-16, 18). The hearing record supports a finding that the January 2011 CSE had sufficient evaluative data to recommend an appropriate program for the student. 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 and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). 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]). Any 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 S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; 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]). An 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).

The hearing record reflects that the January 2011 CSE reviewed several documents including a 2011 Rebecca School progress report, a 2010 classroom observation, and a 2009 psychoeducational evaluation update (Tr. pp. 19-20, 74-76; Dist. Exs. 2; 4-6). In developing the IEP, the CSE also considered input from the student's parents and the student's teacher at the Rebecca School (Tr. pp. 433-35, 561-63).

The hearing record indicates that the student was initially evaluated in June 2005, after which a reevaluation was conducted in December, 2007, which reevaluation was then updated in

process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513; 8 NYCRR 200.5[j][4]; see e.g. Application of the New York City Dep't of Educ., Appeal No. 12-070). Although I can understand that a parent may want a CSE meeting to be conducted closer to the start of the school year, the parents in this instance attended the January 2011 CSE meeting without objection and never requested that the meeting be postponed or that another meeting be called. Under these circumstances, there is no basis to find that the timing of the January 2011 CSE was improper.

a psychoeducational evaluation update dated January 7, 2009 (Tr. p. 79; Dist. Ex. 5 at p. 1-2).[8] The January 2009 psychoeducational evaluation update was based on multiple assessments, including classroom observations on December 23, 2008 and January 5, 2009, interviews with the student's special education teacher and speech therapist, and the administration of the Child Autism Rating Scale (CARS) (Dist Ex. 5 at p. 1).[9] The parent had referred the student for this reevaluation due to concerns regarding his then-current 12:1+1 special class placement which she believed was too academically advanced for him (Dist. Ex. 5 at p. 1). The evaluative report provided background information on the student which indicated that the student had received a diagnosis of Down's syndrome as well as presented with severe cardiac anomalies and a condition of hypothyroidism (id.). The evaluative report further indicated that the student's intellectual functioning was previously assessed and determined to be in the "Deficient range" and reflected that the student exhibited global developmental delays, distractibility, self-direction, noncompliance, a lack of motivation as well as difficulties with motor planning (id.).

The 2009 psychoeducational evaluative report included results from a December 2007 assessment of the student using CARS which indicated the student was on the autism spectrum (Dist. Ex. 5 at p. 2). The student reportedly exhibited poor social skills, limited eye contact, self-stimulatory behaviors as well as an absence of imitative behavior and lack of interest in his environment (id.). The 2009 psychoeducational evaluation update included a December 2008 classroom observation of the student conducted during a literacy session in his special class (Dist. Ex. 5 at p. 2). During the observation, the student licked and bit his hands when not engaged (id.). Overall, the student was not engaged during the lesson and demonstrated little to no eye contact with the teacher (id.). As part of the update, the evaluator also conducted a classroom observation of the student in January 2009 in his special class during a lesson regarding counting and colors (id.). The report indicated that the student neither engaged in the lesson nor responded to the teacher (id.). The evaluator noted that the student "seemed to be totally not aware of what was going on around him" (id.). Further, as part of the evaluation, the evaluator interviewed the student's teacher who indicated that the student was nonverbal and engaged in self-stimulatory behaviors such as hand flapping, licking his hands, and mouthing objects (id.). The teacher indicated that the student did not participate in any activities and appeared to be unaware of his surroundings (id.). The teacher indicated that the student "need[ed] constant supervision in order to maintain his safety" (id.). To enable the student to engage, the teacher used hand over hand assistance but often the student refused (id.).

For the psychoeducational evaluation update, the CARS assessment was completed with the student's teacher serving as informant (Dist. Ex. 5 at p. 3). The student's score of 54 was indicative of an autism spectrum disorder falling within the severe range of functioning (id.). The student's social skills were severely impaired including that he usually appeared to be unaware of his surroundings (id.). The report indicated that the student did not imitate sounds, words, or movements even with prompts (id.). The report also indicated that the student exhibited frequent stereotypic movements such as licking, mouthing objects, and hand flapping which appeared to provide him with sensory stimulation (id.). The student's participation in class was only with

[8] Neither the initial 2005 evaluation report nor the 2007 reevaluation report are included in the hearing record.

[9] The 2009 evaluation report references a December 2007 administration of the test that indicated the student was on the autism spectrum (Dist. Ex. 5 at p. 1).

constant prompts and hand over hand assistance (id.). The teacher also indicated that the student did not express emotions in the classroom but if his "string [wa]s taken away he w[ould] resist and may cry" (id.). The teacher indicated that at times the student exhibited difficulties with transitions between activities and classrooms and needed physical assistance (id.). The student did not respond to his name, exhibit eye contact with peers or adults, and lacked focus to visual and oral presented stimuli (id.). With respect to social/emotional functioning, the student demonstrated significant difficulties with socialization including reciprocal interactions, lack of imitation and social play, severe delays in verbal and nonverbal communication, delayed imaginative play skills, and an inability to develop peer friendships (id.).

It is not required that a reevaluation be based on clinical tests, however a reevaluation must use a variety of assessment tools and strategies and must also "be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (34 CFR 300.303[a], 304[b][1], [2]; 8 NYCRR 200.4[b][4]; Pericelli 2007 WL 465211 at *10-11). In this instance, the district has produced an evaluation update that is dated within the three years prior to the date of the January 2011 CSE meeting, and the report was, at least in part, based on classroom observations and teacher input that was also completed within those three years (Dist. Ex. 5 at p. 1). However, the report does not rely on clinical testing of the student, other than the CARS—which was conducted in December 2007 (id.). Based on the hearing record, it appears that the January 2009 reevaluation report contained sufficient information to properly assess the student and was based on a multitude of assessments; however, because the 2009 evaluation update was based in part on the administration of the CARS assessment in December 2007, the student was not formally tested within the three years prior to the January 2011 CSE meeting. To the extent that the lack of formal testing may be considered a procedural violation, in this instance—because the district had other current evaluative data available to adequately assess the student as described below—any such failure did not impede the student's right to a free appropriate public education, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. §1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In October 2010, the district school psychologist conducted a 35-minute classroom observation of the student in his Rebecca School classroom during morning meeting (Dist. Ex. 6 at p. 1). During the observation, one teacher, two assistant teachers, and four students were present (id.). The student chewed on his hand and was disengaged from the lesson (id.). When provided assistance, the student bounced on the springboard several times as instructed by the teacher (id.). At times, the student "wander[ed] around the classroom throwing a "chewy" given to him by the teacher across the room while making inaudible vocalizations (id.). The assistant teacher attempted to play a problem solving game with the student using a "fuzzy scarf" to which the student was able to partially respond (id. at pp. 2-3). The teacher indicated that the student tended to be unresponsive and required modeling to engage in group activities (id. at p. 3).

In developing the January 2011 IEP, the CSE also relied on a recent December 2010 Rebecca School interdisciplinary progress report of the student (Dist. 4 at p. 1). The report indicated that the student attended a 6:1+2 classroom and received related services of OT, speech-language, and PT as well as adapted physical education (id.). The report indicated that the student was nonverbal and communicated primarily through gestures, vocalizations, and facial expressions

(id. at pp. 1-2). When motivated, the student used verbal approximations to communicate his needs (id. at p. 2). With much assistance, the student maintained attention for up to 10 minutes (id. at p. 1). The report indicated that when the student was upset his rate of movement and vocalizations would increase in both speed and volume (id.). The report further indicated that the student showed an interest in others and reacted to others (id.). The report also indicated that the student demonstrated significant difficulties with sensory regulation and often needed support to remain regulated (id. at pp. 1-2). With respect to academics, the student showed an emerging ability to recognize symbols and his sight work target was between one and five words (id. at p. 2). The student was moderately interested when a story was read aloud to the class (id. at p. 3). The student also exhibited emerging abilities regarding number sense and worked on one-to-one correspondence with numbers up to two with prompts (id.).

The December 2010 Rebecca School report indicated, with respect to OT, the student received two sessions per week of individual OT and one session per week of OT in a group (Dist. Ex. 4 at p. 4). The report indicated that the student was aware of his environment and "watche[d] his peers as they and he move[d] about the classroom" (id.). The OT sessions addressed the student's needs in the areas of sensory regulation, body awareness, muscle tone, gradation of movements, ADL skills, and motor planning (id.). The report also indicated that the student exhibited a hypo-responsive and an under-responsive sensory system (id.).

The December 2010 Rebecca School report also reflected that the student received two 30-minute sessions per week of individual PT (Dist. Ex. 4 at p. 5). The PT sessions addressed the student's needs in optimal positioning, postural control, motor planning, visual-spatial abilities, balance, and trunk strengthening (id.). The report indicated that the student received three 30-minute sessions per week of individual speech-language therapy and one session per week of a cooking group with two peers (id. at p. 6). The speech-language therapy sessions addressed the student's needs in receptive, expressive, and pragmatic language as well as oral motor skills (id. at pp. 7-8). The student used nonverbal language to request, reject, and gain attention (id. at p. 7). The student's ability was inconsistent regarding orientation to his name and sounds but when regulated he was more interactive with others (id.). The student communicated through gestures such as reaching and pulling adults to desired objects and places as well as used modified sign language (id.). The student presented with difficulties regarding eating including the amount of food he puts in his mouth and taking appropriately sized bites, which together with poor tongue coordination, led to difficulty with chewing and controlling the food in his mouth (id. at p. 8).

The evaluative documents described the student's needs in the areas of cognition, language skills, attention, social skills, academics, sensory processing, and communication as well as fine and gross motor skills all of which were incorporated into the January 2011 IEP (compare Dist. Ex. 1 at pp. 1-15, with Dist. Exs. 4-6). The student's IEP reflected the evaluative data including describing the student's diagnoses of Down's syndrome and autism spectrum disorder as well as noting that the student was nonverbal and communicated his needs through vocalization, word approximations, and reaching for objects (Dist. Ex. 1 at p. 3). In addition, the IEP indicated that the student was in the process of being toilet trained and was described as sensory seeking (id.). The IEP also indicated that the student exhibited difficulty with attention and lacked skills including the inability to identify colors, shapes, letters, and numbers (id.). The student demonstrated prekindergarten skills in decoding, listening comprehension, and computation (id.). With respect to the CARS results, the student functioned within the severe range of autism (id. at

p. 5). The January 2011 IEP indicated that the student interacted with adults regarding highly motivating activities, exhibited emerging skills to engage with peers regarding preferred objects, and enjoyed social interactions with adults and peers (id. at p. 4). Furthermore, the IEP indicated that the student exhibited difficulties with body and safety awareness as well as fine and gross motor skills (Dist. Ex. 1 at p. 5).

As shown above, the January 2011 CSE reviewed several evaluative documents that described the student's needs in the areas of cognition, communication, sensory regulation, academics, attention, fine and gross motor skills, social and play skills, ADL skills, feeding skills, as well as receptive, expressive, and pragmatic language (Dist. Exs. 2; 4-6). The school psychologist testified that an updated standardized assessment was not conducted of the student as it would not provide meaningful information due to the student's limited functional levels and lack of ability to communicate and interact (Tr. pp. 75-76, 79, 84). The school psychologist testified that the additional assessments would not have yielded new information regarding the student's functioning and that the January 2011 CSE was aware of the student's abilities (Tr. p. 102). Furthermore, the Rebecca School staff attempted to administer the Test of Word Reading Efficiency (TOWRE) to the student, a standardized assessment, but due to the student's significant receptive and expressive language delays it could only be administered in an informal manner (Tr. pp. 368-70; Parent Ex. K at p. 2). Based on the foregoing, the school psychologist's determination not to administer a standardized assessment to the student, but rather assess the student in other ways, was appropriate in that it appeared the student lacked the prerequisite language skills to engage in certain standardized assessments.

Regarding the parents allegation on appeal that the district's failure to conduct appropriate evaluations denied them an opportunity to participate in the placement process, the hearing record reflects that the parents had substantial input in developing the IEP. The minutes of the January 2011 CSE meeting indicated that the parents were asked for their input into the IEP and as a result the IEP was modified to include parent concerns regarding the student's needs, functioning, and annual goals (Dist. Ex. 2 at p. 1). The student's Rebecca School teacher provided further input into the development of the IEP (Tr. p. 562; Dist. Ex. 2 at p. 1). The Rebecca School teacher indicated that the instructional levels of the student and corresponding annual goals were accurate (Dist. Ex. 2 at p. 1). The January 2011 CSE increased the frequency of the student's related services as requested by the parents (Tr. p. 34; Dist. Ex. 2 at p. 1; 3 at p. 2). The parent testified that the January 2011 CSE was responsive to parental concerns and recommendations during the meeting (Tr. pp. 562-63). The school psychologist informed the parents that the CSE would reconvene upon parental request to amend the IEP as needed (Tr. pp. 63-64). The CSE minutes indicated that all CSE members agreed with the recommendation of the 6:1+1 placement (Dist. Ex. 2 at p. 1). The parents noted during the January CSE that no additional information needed to be added to the IEP (id.). Of particular note, neither the student's parents nor the parents' advocate—who were all present at the CSE meeting—raised any concerns regarding the insufficiency of the evaluations prior to filing the due process complaint notice.[10] Additionally, the parents have not identified any

[10] At least one Court has perceived a parent's failure to raise objections related to procedural violations during a CSE meeting as a "gotcha" litigation tactic, warning that parents should not be permitted to ignore easily correctable procedural matters during a CSE meeting then later raise them in the due process complaint notice as a basis for a denial of FAPE (J.L. v. New York City Dep't of Educ., 2013 WL 625064 at *14 [Feb. 20, 2013 S.D.N.Y.]).

areas where the IEP does not adequately describe the student's needs or present levels of performance.

Accordingly, a review of the information considered by the January 2011 CSE, as detailed above, reflects that the January 2011 CSE had before it adequate and appropriate current evaluative information with respect to the student, which sufficiently described the student's needs and which the CSE utilized in the development of the student's January 2011 IEP (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see S.F., 2011 WL 5419847 at *12; Application of the Dep't of Educ., Appeal No. 12-075; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

C. Annual Goals and Short Term Objectives

Upon a review of the hearing record, the annual goals and short term objectives included in the January 2011 IEP were consistent with the student's identified needs in the areas of academics, sensory processing, motor skills, language processing, and oral motor skills (Dist. Ex. 1 at pp. 6-11). An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

The annual goals and short-term objectives contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision (see Dist. Ex. 1 at pp. 6-11). Specifically, the student's January 2011 IEP incorporated 11 annual goals and 29 corresponding short-term objectives to address the student's identified needs in the areas of following directions, attention, listening comprehension, math and reading readiness skills, self-regulation, motor planning and sequencing, body strength and coordination, visual-spatial skills, core strength and endurance as well as receptive, expressive, and pragmatic language (id.).

According to the evidence in the hearing record, the January 2011 CSE drafted the annual goals and short-term objectives, relying upon the 2011 Rebecca School progress report and input from the student's then-current Rebecca School teacher (Tr. p. 35; Dist. Ex. 2 at p. 1). The annual goals were discussed during the CSE meeting including input from the Rebecca School teacher and the parents regarding the accuracy levels and related expectations regarding the annual goals for the 2011-12 school year (Tr. pp. 35, 433-35, 561-63). The IEP reflected annual goals related to reading and math skills which addressed the student's needs related to readiness skills (Tr. pp.

35-36; Dist. Ex. 1 at p. 6). With respect to drafting the annual goals for the student's related services, the CSE adapted the long-term and short-term goals directly from the December 2010 Rebecca School progress report into the January 2011 IEP (see Tr. p. 38; compare Dist. Ex. 1 at pp. 7- 11, with Dist. Ex. 4 at pp. 10-11). The student's Rebecca School teacher testified that the CSE also made alterations to some of the goals, as per his request at the CSE meeting (Tr. pp. 433-35). The other CSE members did not object to the annual goals during the January 2011 CSE meeting (Tr. p. 38; Dist. Ex. 2). Based on the foregoing, the student's annual goals and short-tem objectives, when read together, were sufficiently detailed and measurable and adequately addressed the student's identified educational needs.

The parents also assert that the January 2011 CSE failed to include goals related to adapted physical education as well as goals to be used by the 1:1 health services paraprofessional.[11]

While the parents are correct in asserting that the IEP did not contain adapted physical education goals, the IEP did indicate that the student would receive adapted physical education in a 6:1+1 ratio (Dist. Ex. 1 at pp. 5). The school psychologist's testimony described the district's provision of adapted physical education as programmatic within the 6:1+1 setting, and explained how the adapted physical education teacher would have used the student's IEP to assist in the provision of instruction (Tr. pp. 42, 56-57). State regulation defines adapted physical education as "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]). If a student with a disability is not participating in a regular physical education program, the IEP shall describe "the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education" (8 NYCRR 200.4[d][2][viii][d]). Although the IEP did not include specific goals referencing adapted physical education, in this instance, the IEP addressed the student's related needs in the areas of sensory regulation, motor skills, and behavior through the provision of accommodations and supports (see Dist. Ex. 1 at pp. 3-5). Moreover, the IEP management needs contained supports including sensory input, sensory breaks, visual supports, provision of two choices, co-regulation with an adult, slowing down strategies, reducing language, and modeling deep breathing (see Dist. Ex. 1 at pp. 3-5). To address the student's motor and sensory needs, the IEP also provided the student with four 30-minute sessions of individual OT and three 30-minute sessions of individual PT (Dist. Ex. 1 at p. 14). The IEP also included five annual goals and 11 corresponding short-term objectives related to OT and PT (Dist. Ex. 1 at pp. 7-9). The district school psychologist further explained that the adapted physical education teacher would have reviewed the IEP, and in particular the PT goals, and would have been able to use that information to recognize what areas the student needed to work on (Tr. pp. 56-57).

Although the January 2011 IEP does not include specific goals for the 1:1 health paraprofessional, the paraprofessional's role is adequately explained within the IEP.[12] The IEP

[11] It should be noted that the parents attended the January 2011 CSE meeting along with a parent advocate and did not make any objections to the lack of adapted physical education goals or goals for the 1:1 health paraprofessional during the meeting (Tr. pp. 38, 562-63).

[12] I note that neither the IDEA, nor federal and State regulations require that the duties of district staff be detailed in a student's IEP. Distinguishable from this point are cases in which IHOs or SROs have relied upon their

provides that a "health services paraprofessional continues to be warranted for health and safety awareness" (Dist. Ex. 1 at pp. 5, 13). Additionally, the BIP lists the health services paraprofessional as a support (Dist. Ex. 1 at p. 15). The school psychologist clarified the role of the health paraprofessional, explaining that the paraprofessional would have supported the student by addressing the academic and sensory related goals in the BIP and IEP including the goal regarding toilet training (Tr. p. 41; Dist. Ex. 1 at p. 15). The district's school psychologist further described the role of a typical 1:1 health paraprofessional as providing the student support in relation to all the annual goals on the IEP under the supervision of the special education teacher (see Tr. p. 41; Dist. Ex. 1 at pp. 6-11).

In reviewing and considering the goals contained in the IEP and the services provided by the IEP as a whole, in this instance I decline to find that the lack of annual goals related to adapted physical education or the use of the 1:1 health paraprofessional rose to the level of a denial of a FAPE (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).

D. Special Factors, Interfering Behaviors, and an FBA

As set forth in greater detail below, I find that although the January 2011 CSE did not conduct a formal functional behavioral assessment (FBA) of the student, it did properly consider the special factors related to the student's behavioral concerns that impeded his learning and developed an appropriate BIP for the student in accordance with State regulations.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability,

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

Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[13] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234). Nevertheless, the Second Circuit has explained that when required "[t]he failure to conduct an adequate FBA is

[13] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463 [2d Cir. Oct. 27, 2006]).

a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all (R.E., 694 F3d at 190). The Court also noted that when required "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[14] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Although the January 2011 CSE did not conduct an FBA the CSE did develop a BIP at the January 2011 meeting which included input from the student's Rebecca School teacher and social worker at the Rebecca School (Tr. p. 40; Dist. Ex. 1 at p. 15). The district school psychologist testified that the student's parent and teacher at the Rebecca School contributed to the development of the BIP including describing behaviors that significantly interfered with instruction (Tr. p. 40).

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

The student's BIP was attached to the January 2011 IEP (Dist. Ex. 1 at p. 15). The January 2011 BIP addressed the student's behavioral needs by containing a description of the target behaviors which were as follows: placed foreign objects in his mouth, licked foreign non-edible objects, bit himself, vomited due to stress and frustration regarding lack of communication abilities, and not being fully toileted trained including needing support while washing his hands (id.). The BIP indicated strategies which would be utilized to try to change the student's behaviors, including sensory breaks, sensory input, visual supports, visual cues, visual images, brushing, deep pressure, jumping, use of motivating items, provision of choices, advance notice for transitions, and oral motor input such as a chewy tube (id.). The January 2011 BIP also reflected supports that would be employed in order to assist the student in changing his behavior including the provision of a 1:1 health services paraprofessional, OT, speech-language therapy, PT, and the special education teacher (id.). Although the hearing record does not reflect that an FBA was completed prior to the development of the January 2011 BIP, I note that any lack of an FBA did not in this instance result in a denial of a FAPE where the IEP also identified the problem behaviors and prescribed strategies to address them.

The January 2011 IEP further addressed the student's behavioral needs indicating that the student's behavior seriously interfered with instruction (Dist. Ex. 1 at p. 4). The IEP indicated that the student required additional support from the special education teacher as well as the student's related service providers who would provide support during OT, PT, and speech-language therapy (id.). The January 2011 IEP also reflected that the student exhibited difficulties with sensory regulation resulting in self-stimulatory behaviors (id.). Accordingly, to address the fact that the student continued to have behaviors that interfered with his learning, the IEP provided for strategies including co-regulation with an adult using slowing down, reducing language, modeling deep breathing, sensory breaks, sensory input throughout the day, and visual/pictorial supports (id.).

I also note that, at the time of the January 2011 CSE meeting, the student was attending the Rebecca School, and conducting an FBA to determine how the student's behavior related to the student's environment at the Rebecca School has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at the Rebecca School and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; see also Cabouli, 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [stating that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

The district's failure to conduct an FBA in this case does not support a finding that the district failed to offer the student a FAPE, particularly where, as here, the CSE identified the student's behaviors based on reliable information from the student's Rebecca School teacher, Rebecca School progress report, as well as a classroom observation of the student and developed a BIP, which appropriately addressed the student's interfering behaviors (see R.E., 694 F.3d at 190-92; A.C., 553 F.3d at 172-73; Cabouli, 2006 WL 3102463, at *3; F.L., 2012 WL 4891748, at * 7-*9; C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).[15] In addition, where the IEP actually includes a BIP,

[15] I further note that, as set forth above, State regulations require in pertinent part that a CSE consider developing

the parents should at least provide an explanation as to how the lack of an FBA might have resulted in the BIP's inadequacy or prevented meaningful decision-making (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]).

E. 6:1+1 Placement Recommendation

The hearing record reflects that the January 2011 CSE recommended an appropriate placement for the student for the 2011-12 school year. The January 2011 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with a full time 1:1 health services paraprofessional (Dist. Ex. 1 at p. 14). The CSE further recommended four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a dyad, three 30-minute sessions per week of individual PT, and four 30-minute sessions per week of individual OT (Dist. Ex. 1 at p. 14).

The school psychologist indicated that the student demonstrated significant global delays including academic and cognitive deficits (Tr. pp. 25-26; Dist. Ex. 1 at p. 3). The student was nonverbal and communicated by vocalizations and reaching for objects (Tr. p. 283; Dist. Ex. 1 at pp. 3-4). The student performed at a prekindergarten level in all academic areas but did not exhibit readiness skills regarding letters and numbers, shapes, and colors (Tr. pp. 26-27; Dist. Ex. 1 at p. 3). The student's IEP indicated that the student exhibited difficulties with sensory regulation but could remain engaged in a preferred activity for up to 10 minutes with support (Dist. Ex. 1 at p. 4).

The CSE developed the IEP, including the student's management needs, based on information obtained from the student's Rebecca School teacher during the CSE meeting and the CSE members agreed with the 6:1+1 recommendation and the management needs included in the IEP (Tr. pp. 32, 64-65, 536). To address the student's cognitive and academic delays, the January CSE incorporated strategies such as sensory input and sensory breaks to allow the student to engage in instruction (Tr. pp. 29-30; Dist. Ex. 1 at p. 3). The CSE recommended visual supports to assist the student with comprehension (Tr. p. 27; Dist. Ex. 1 at p. 3). To address the student's social/emotional needs, the January 2011 CSE recommended a small classroom with a 12-month school year (Tr. pp. 30-31; Dist. Ex. 1 at p. 4). The CSE further recommended a full time 1:1 health services paraprofessional to assist the student with implementation of strategies such as "slowing down" and to model deep breathing (Tr. pp. 30-31; Dist. Ex. 1 at p. 4).

Based on the student's needs and instructional levels, including input from the student's Rebecca School teacher, the CSE recommended a 6:1+1 special class in a specialized school on a 12-month basis (Dist. 1 at pp. 1, 5). To address the student's significant global delays, the CSE believed a 6:1+1 setting would provide a highly structured and organized class as well as the support required by the student to address his significant needs (Tr. p. 24). The CSE also believed the student required a 12-month program to prevent substantial regression (Tr. p. 25). A 1:1 health

a BIP when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1]). Here, because the student has not attended the district's recommended program, there has been no opportunity to determine if the student's impeding behaviors would have persisted despite consistently implemented general school-wide or class-wide interventions.

services paraprofessional was provided to address behaviors such as mouthing as well as communication and health needs (Tr. pp. 25, 98-99; Dist. Ex. 1 at p. 15). The CSE also recommended related services of PT, OT, and speech-language to address the student's motor and communication needs (Dist. Ex. 1 at p. 14). The January 2011 CSE in response to the parents request for additional related services increased both the student's speech-language and OT from three sessions up to four weekly sessions and PT was increased from two sessions up to three weekly sessions (Tr. p. 34; Dist. Ex. 1 at p. 2).

The January 2011 CSE considered and rejected any program that did not include a 12-month component as well as a 12:1+1 special class in a specialized school and an 8:1 special class in a specialized school because they lacked the appropriate level of support (Dist. Ex. 1 at p. 13). The CSE believed that the student required a smaller student to teacher ratio such as a 6:1+1 in conjunction with a 1:1 health services paraprofessional to address the student's needs including placing objects into his mouth and occasional vomiting when he felt stress and frustration (Dist. Ex. 1 at p. 13).

The CSE recommended a small structured class setting together with assistance of a 1:1 health paraprofessional and related services to address the student's significant cognitive, academic, and language delays as well as notable health, sensory regulation, social/emotional, and motor needs. 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]). I find that the hearing record demonstrates that the student exhibited highly intensive management needs that required a high degree of individualized attention and intervention, such that the January 2011 CSE's recommendation to place the student in a 6:1+1 special class in a specialized school with a 1:1 health paraprofessional and related services was designed to address the student's academic, social and behavioral needs, and accordingly, was reasonably calculated to enable him to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

F. Assigned Public School

I next address the parties' contentions regarding the assigned public school site. In finding that the district offered a FAPE, the IHO separately analyzed the assigned public school site offered by the district for both the summer 2011, beginning in July 2011, and the 2011-12 ten month school year, beginning in September 2011 (see IHO Decision at pp. 17-18).[16] Although not technically harmed by the outcome of the IHO's decision regarding the assigned public school site, the district appeals requesting a determination that the IHO erred in analyzing both locations separately and that once it is clear the student will not attend the district's program, the district is not required to demonstrate the appropriateness of the assigned public school site throughout the school year.

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

[16] Both classrooms were a part of the same assigned school, however the classrooms were physically located in different buildings and the student would have had different teachers (Tr. 121-22).

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., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 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 a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

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 Dep't of Educ., 526 Fed. App'x 135, 141 [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., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). 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]).[17] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services

[17] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). 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). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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 R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the 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.

included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the January 2011 IEP because a retrospective analysis of how the district would have implemented the student's January 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the January 2011 IEP (see Tr. p. 547; Parent Exs. F; G; N)). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the January 2011 IEP.[18]

[18] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; 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 495, 502-03 [S.D.N.Y. 2011]).

1. Grouping

The parents' only argument regarding the assigned public school site that remains on appeal is that the functional grouping within the assigned class would have been inappropriate for the student. 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 the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall . . . provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics . . . in the class, by November 1st of each year" (8 NYCRR 200.6[h][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).

If the student attended the assigned school, in July 2011 he would have attended a 6:1+1 special class (Tr. pp. 162-63). The hearing record reflects that the 6:1+1 special class consisted of six students with autism (Tr. p. 166). In July 2011, the students in the assigned classroom ranged in age from 6 to 9 years old (Tr. pp. 167, 193). Although, none of the other students in the class had received a diagnosis of Down's syndrome, the students exhibited severe global delays similar

to the student (Tr. pp. 194-95). The students in the assigned class reading levels ranged from prekindergarten through first grade and math levels ranged from kindergarten through first grade which were aligned with the student's reading and math abilities (Tr. p. 167; Dist. Ex. 1 at p. 3). The student received a classification of autism and exhibited prekindergarten skills in decoding, listening comprehension, and computation (Dist. Ex. 1 at pp. 1, 3). The special education teacher of the assigned class testified that the student would have been appropriately placed within the 6:1+1 special class setting (Tr. p. 175). The special education teacher of the assigned class assessed the students and then placed the students into functional groups for academic instruction (Tr. pp. 168-69, 232). Additionally, to address the student's sensory needs the student would have received the support of a 1:1 health services paraprofessional as well as the supports indicated on his IEP such as sensory breaks, sensory input, and co-regulation with an adult (Dist. Ex. 1 at pp. 4, 15). Accordingly, based on the evidence in the hearing record, I am not persuaded that the student would not have been suitably grouped for instructional purposes within the district's recommended 6:1+1 special class in the assigned school beginning July, 2011 if the student would have enrolled in the public school placement.

VII. Conclusion

In summary, I find that after a thorough review of the hearing record and due consideration, there is no reason to disturb the finding of the IHO that the district met its burden to show that it 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 to reach the issue of whether McCarton was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have also considered the parties' remaining contentions and find that they are unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED

Dated: **Albany, New York**
July 31, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER