The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-159

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana Eck, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Forum School and the cost of related services for the 2011-12 school year. The parents cross-appeal from the IHO's determination to the extent that claims raised in the due process complaint notice were not addressed therein. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

In this case, the student attended the Rebecca School from the 2006-07 school year until the 2010-11 school year (Tr. pp. 160, 264).[1] During the 2010-11 school year, he also received home and/or community based after-school related services for 52 weeks per year comprised of individual speech-language therapy for five hours per week, individual occupational therapy (OT) for five hours per week, and individual applied behavioral analysis (ABA) for 12 hours per week (Parent Ex. D at pp. 17-18). The student has received diagnoses of a pervasive developmental

[1] The student was the subject of a prior administrative appeal specific to the 2010-11 school year, which was dismissed by the SRO as moot because the school year in question had ended and the parents had already received the relief they sought at that time (Parent Ex. E at pp. 1-10; see Application of the Dep't of Educ., Appeal No. 11-085).

disorder (PDD), sensory integration dysfunction, and a disorder of relatedness and communication (Tr. p. 798; Dist. Ex. 15 at pp. 1, 7). The student exhibits cognitive deficits, difficulties socially, academically, and with self-regulation, as well as language, sensory, and fine motor delays (Tr. pp. 148, 196, 256-57, 582-83, 600; Dist. Exs. 12 at pp. 1-2, 6, 8; 15 at pp. 1-3).

The parents signed an enrollment contract with the Forum School on January 15, 2011 and paid a deposit on the student's tuition on January 18, 2011 for the student's attendance for the 2011-12 school year (Parent Exs. S; U at pp. 1, 2).

On March 2, 2011, the CSE met for the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 7 at pp. 1-2).[2] The March 2011 CSE continued the student's eligibility for special education programs and related services as a student with a speech or language impairment (Dist. Exs. 7 at p. 1; 8 at p. 1; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).[3] The March 2011 CSE recommended a 12-month 6:1+1 special class placement in a specialized school (Dist. Ex. 7 at p. 1). The CSE also recommended continuing related services of individual speech-language therapy three times per week for 40 minutes, group (2:1) speech-language therapy two times per week for 40 minutes, and group OT (2:1) two times per week for 40 minutes, all to be delivered in a separate location (Dist. Exs. 7 at p. 16; 8 at p. 2). At the parent's request, the CSE modified the student's individual OT sessions from three sessions per week for 40 minutes to one session per week for 40 minutes, and the student's PT sessions from two individual sessions per week for 40 minutes to one individual session per week for 40 minutes, all in a separate location (Dist. Exs. 7 at pp. 2, 16; 8 at p. 2). The March 2011 CSE recommended that group (3:1) counseling be initiated two times per week for 40 minutes in a separate location (id.). As discussed in detail below, the March 2011 CSE made multiple recommendations to address the student's management needs (Dist. Ex. 7 at pp. 3-5). In addition, the March 2011 CSE recommended the student participate in the Alternate Assessment due to his "significant global delays" (id. at p. 16).

During the March 2, 2011 CSE meeting, the parent signed a notice of recommended deferred placement which provided consent to defer placement until June 15, 2011, because the student's March 2011 IEP was developed for the 2011-12 school year (which was yet to commence) (Tr. p. 219; Dist. Ex. 5). The parent checked the option "I disagree with the Program Recommendation" (Dist. Exs. 5; 8 at p. 1). The parent also provided signed consent on a 12-month school year consent form, and checked the box which stated, "I have read the above notice and I agree to have my child receive special education services during July and August" (Dist. Exs. 6; 8 at p. 1).

A June 10, 2011 Final Notice of Recommendation (FNR) advised the parents of the specific location of the recommended 6:1+1 placement for the 2011-12 school year (Dist. Ex. 3). By facsimile correspondence, dated June 16, 2011, the student's mother informed the district of her earlier conversation with the transportation coordinator at the recommended program site who told

---

[2] The hearing record contains two exhibits identified as the student's March 2011 IEP (see Parent Ex. F; Dist. Ex. 7). For purposes of this decision, I will cite the district's Exhibit 7, as Exhibit F omits page four of the IEP. I remind the IHO that it is his responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

[3] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (Tr. pp. 798-99).

her the assigned public school site was closed for the summer (Parent Ex. J at pp. 1-2). The parent further indicated that the assigned public school site and proposed 2011-12 IEP were not appropriate for the student (id. at p. 1). The parent advised the district that, unless it offered the student an appropriate program and public school site, the student would attend the Forum School and the parent would seek reimbursement for tuition and associated costs (id.). In addition, the parent indicated that she would seek reimbursement for costs and expenses for extended day services consisting of 12 hours of 1:1 ABA services per week, five hours per week each of individual OT and individual speech-language therapy, and transportation to and from the Forum School and/or reimbursement for all transportation costs (id.).

In July 2011, the student began attending the Forum School, which is located outside the State and described in the hearing record as a school for children with neurologically based developmental disorders such as autism and attention deficit disorder (Tr. pp. 528, 607, 799-800; Parent Exs. Q; V). The Forum 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).

A. Due Process Complaint Notice

The parents filed an amended due process complaint notice dated July 11, 2011,[4] alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year on both substantive and procedural grounds (Parent Ex. A).[5] The parents alleged, among other things, that: (1) the district engaged in impermissible "predetermination" in developing the student's IEP; (2) the CSE's recommended 6:1+1 special class placement was not appropriate for the student; (3) the district failed to adequately assess and evaluate the student; (4) the district failed to offer any extended day services for the student; (5) the district failed to discuss, develop, or recommend a transition plan for the student, despite the student's need for consistency in his program; (6) the March 2011 IEP did not provide for parent counseling and training services; (7) the district failed to conduct a functional behavioral assessment (FBA) and the behavioral intervention plan (BIP) developed by the district was inappropriate; and (8) the goals listed in the March 2011 IEP were not sufficient to meet the student's needs (id. at pp. 3-6). The parents also alleged that the assigned public school site was inappropriate for the student because, although the student was recommended for a twelve-month program, the assigned public school site was not open during the summer and the student would have been inappropriately grouped in the assigned 6:1+1 special class (id. at pp. 3, 7). In addition, the parents alleged that the student's placement at the Forum School was appropriate and that the equities favored the parents (id. at p. 8). As relief, the parents requested that an IHO award them, among other things, the costs of the student's tuition at the Forum School for the 2011-12 school year and direct the district to provide and pay for 12 hours per week of ABA services; five hours per week of home-based speech-language therapy; five hours per week of home-based OT; and transportation to and from the Forum School (id.).

---

[4] The parents previously filed their original due process complaint dated June 30, 2011 (Parent Ex. B). For purposes of this decision, I refer to the parents' amended complaint as the "due process complaint notice."

[5] As a number of the enumerated allegations in the due process complaint notice were overlapping and even duplicative in some instances (see Parent Ex. A), I remind the IHO that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]) in order to determine which issues need to be addressed in the IHO's decision.

The parents also requested "compensatory education" for any and all services that the student failed to receive through pendency (id.).

B. Impartial Hearing Officer Decision

On September 7, 2011, an impartial hearing was convened in this matter, and concluded on April 19, 2012, after eight days of proceedings (Tr. pp. 1-997). On July 3, 2012, the IHO issued a final decision, finding, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that the Forum School was an appropriate placement for the student, and that equitable considerations favored the parents (IHO Decision at pp. 30-31). In his written decision, the IHO set forth the parties' respective positions (id. at pp. 8-20). The IHO next determined that: the March 2011 IEP presented the parents with a predetermined outcome, in that only a 6:1+1 program was considered by the CSE; no evidence was presented at the March 2011 CSE meeting that would demonstrate that the student could function successfully in a 6:1+1 special class setting; the assigned public school site was closed for the summer and the parents were never informed that an alterative site was designated for the summer months; and that the assigned class was nonetheless inappropriate because the other students in the class were lower functioning than the student in the instant case (id. at pp. 24-25). Relative to the functional grouping in the assigned class, the IHO found the testimony of the special education teacher of the summer program was not credible (id. at pp. 23-24).

The IHO also found that the parents satisfied their burden of proving that the Forum School was an appropriate placement for the 2011-12 school year, citing testimony describing the student's progress at the Forum School and detailing the individual attention received by the student in the 8:1+4 class at the Forum School (id. at pp. 27-28). Lastly, the IHO determined that equitable considerations favored the parents because the hearing record indicated that the parents cooperated with the district and acted reasonably in securing a spot for the student at the Forum School by paying a deposit to the school in January 2011 (id. at pp. 29-30). Consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the Forum School for the 2011-12 school year and for the costs of the related services received by the student outside of the school (id. at pp. 30-31).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year; that the Forum School was an appropriate placement for the student for the 2011-12 school year; and that the equities favored the parents. Specifically, with respect to the March 2011 IEP program recommendations, the district alleges that the 6:1+1 special class was not predetermined for the student, noting evidence in the hearing record that the CSE considered two other program options. The district further alleges that the 6:1+1 special class recommendation was appropriate, as it was based on the student's individual needs and not his classification of disability. In support of this contention, the district cites testimony that described the 6:1+1 special class as appropriate for students who require a high level of support and notes that such a ratio is no more restrictive than the 8:1+3 class attended by the student during the 2010-11 school year.

Relative to the assigned public school site, the district asserts that since the parent rejected the IEP, the district was not required to demonstrate that the public school site was appropriate. The district argues, however, that even if the parents were willing to consider the public school,

the hearing record demonstrates that the parents received notice of the assigned public school site and the alternate location of the summer classes. As to the functional grouping of that summer class, the district asserts that the class profile revealed that at least two of the five students were functioning at or above the student's level and the special education teacher's testimony showed that the students' levels in the class ranged from pre-k to fourth. The district also alleges that the IHO improperly discredited the testimony of the special education teacher of the summer class.

The district also alleges that the IHO erred in finding the Forum School to be an appropriate placement because it did not provide all of the student's mandated services, offering only speech-language therapy and not OT, PT, or counseling. According to the district, the Forum School did not provide a full twelve-month school year, since the Forum School's summer program consists only of eighteen days in July and no instruction during August. In addition, the district contends that the Forum School was too restrictive based on its location out of State. Turning to the equities, the district alleges that the parents did not seriously intend to enroll the student at the public school. The district seeks an order reversing the IHO's decision in its entirety.

In their answer and cross-appeal, the parents request that the district's appeal be dismissed and that the IHO's decision be modified by including additional findings that the district denied the student a FAPE. With respect to issues unaddressed by the IHO, the parents assert that: (1) the evaluations considered by the March 2011 CSE were inadequate; (2) the district failed to recommend extended day services for the student; (3) the district failed to offer an appropriate transition plan to the student; (4) the omission of parent counseling and training in the IEP denied the student a FAPE; (5) the district's failure to conduct an FBA denied the student a FAPE; and (6) the district violated the Jose P. stipulation by failing to include the parents in the school selection process. With respect to the assigned public school site, the parents allege that the IHO erred in his ruling from the bench, which found the district's burden of proof to be limited to establishing the availability of a class for the student upon commencement of the school year and, therefore, prevented the parents from inquiring about the September 2011-June 2012 portion of the school year.

As "additional responses," the parents aver that: (1) the sufficiency of the IEP should be determined from within the four corners of the IEP; (2) the district has appealed an "unprecedented number" of cases to an SRO; (3) the district is precluded from raising any defenses that were not raised in its response to their due process complaint notice (see Dist. Ex. 1); (4) the "IEP documents were missing mandatory federal and state regulatory provisions;" (5) the district should not be permitted to remedy a defective IEP through "revisionist testimony" adduced at the impartial hearing; (6) that by unilaterally selecting the assigned public school site for the student, the district violated a stipulation reached in the Jose P. class action suit; (7) that the district should have remediated deficiencies of the IEP during the resolution period; and (8) the district failed to comply with federal and State provisions requiring written notice of placement or change in placement. With respect to explicitly designated "cross-appeals in the alternative," the parents assert a general preservation of "all of their additional claims as additional Prong I FAPE deprivations that the IHO could and should have adjudicated" and reiterate their positions regarding the district's burden to establish that it would have provided the student a FAPE for both the summer portion and the remaining portion of the school year.

In its "answer to the cross-appeal," the district states that it is not required to set forth every defense in its response to the parents' due process complaint. The district also alleges that the parents' "First Cross-Appeal in the Alternative" is deficient because it fails to indicate the reasons

for challenging the IHO's decision and the relief requested from the SRO. The district further argues that it was not required to establish the appropriateness of the assigned public school site because the parents rejected the offered program.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132 [quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 (2d Cir. 1989)] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with

disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195 [quoting Walczak, 142 F.3d at 130] [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Recusal of State Review Officer

The parents have set forth footnotes in their answer requesting that I recuse myself as the SRO "on the grounds of demonstrable bias, lack of impartiality and by reasons of [my] close ties to the NYSED" and a "Second Additional Response" implying that I have acted with biased in favor of the district (Answer ¶ 2, n. 1; ¶ 4, n. 5; p. 17). According to the parents, upon judicial review, federal district courts have from time to time disagreed with and reversed the merits of several decisions issued by another adjudicator; however, assuming for the sake of argument that such decisions had been issued by me, this would still not be a basis on which to find bias or a need for recusal, as specifically held in several of the district court cases cited by the parents (see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 39-40 [S.D.N.Y. 2011], rev'd on different grounds, 694 F.3d 167 [2d Cir. 2012]; P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 103 n.7 [E.D.N.Y. 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *12-*13 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *3-*4 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; see also B.J.S. v. State Educ. Dep't, 815 F. Supp. 2d 601, 613 [W.D.N.Y. 2011]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *6 [S.D.N.Y. Mar. 30, 2011], aff'd 2012 WL 2218712 [2d Cir. June 18, 2012]; C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355, 360-61 [S.D.N.Y. 2010]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 435 [S.D.N.Y. 2010], aff'd 2012 WL 2615366 [2d Cir. July 6, 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 285-86 [S.D.N.Y. 2010]).

With respect to the parents' negative implication about the employees of the Office of State Review, no authority is cited to support a claim that administrative hearing officers are precluded from having a staff that assists them with their adjudicative duties. It is clear that courts have repeatedly looked to educational expertise by adjudicative decision makers as grounds for the application of deference to thorough and careful decisions of administrative hearing officers (see, e.g., R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189 [2d Cir. 2012]); M.H. v. New York City Dep't of Educ., 685 F.3d 217, 246 (2012); F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *5 [S.D.N.Y. Feb. 14, 2013]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *9 [S.D.N.Y. Jan. 22, 2013]); C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *5 [S.D.N.Y. Jan. 3, 2013]; see also K.A. v. Chappaqua Cent. Sch. Dist., 09-cv-0699, at *18-*19 n.5 [S.D.N.Y. Mar. 12, 2010] [stating that the content of advice given by Office of State Review staff to an SRO is not relevant to an SRO's ultimate determination because "[i]t is the SRO, not his [or her] staff, who has the authority to review IHO decisions"]).

It is not unusual for an administrative hearing officer to utilize staff whose function is to assist the adjudicator (see Halle v. U.S., 124 F.3d 216 [10th Cir. 1997] [rejecting a challenge to the use of staff case examiners who assist with adjudicatory functions, similar to the way a law clerk or staff attorney assists a court]; Koster v. U.S., 685 F.2d 407, 414 [U.S. Ct. Cl. 1982] ["it is not objectionable that a staff examiner assisted the board members in their consideration of the case"]; see generally State Administrative Procedure Act § 307 [noting that agency adjudicators "may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case"]; Dellenbach v. Letsinger, 889 F.2d 755, 763 [7th Cir. 1989] [noting that judicial adjuncts may assist with discretionary judicial acts without being subjected to claims of improper conduct by disappointed litigants]). It is I, and not my staff, who deliberates and is authorized to

render a decision in this case and that my staff may be present to my deliberations or even suggest the same or a different recommendation is irrelevant (see K.A., 09-cv-0699, at *18-*19 n.5).

I do further note that the parents' "Second Additional Response" sets forth no request for relief (Answer at p. 17). Thus, the only request for my recusal appears in the footnotes of the pleading (Answer ¶ 2, n.1; ¶ 4, n.5). Although it has been held that an argument raised on appeal in only a footnote need not be addressed (see R.R. v. Scarsdale Union Free Sch. Dist., 2010 WL 565659, at *3 [2d Cir. 2010]), I have nonetheless considered the parents' request to the extent that they seek my recusal. State regulations provide that an SRO must have no personal, economic, or professional interest in the hearing which he or she is assigned to review (8 NYCRR 279.1[c][4]) and must be "independent of, and may not report to, the office of the State Education Department which is responsible for the general supervision of educational programs for children with disabilities" (8 NYCRR 279.1[c][3]). An SRO shall recuse himself or herself and transfer the appeal to another SRO if he or she was substantially involved in the development of a state or local policy challenged in the hearing; was employed by a party or a party's representative in the hearing; or engaged in the identification, evaluation, program or placement of the student who is the subject of the hearing (8 NYCRR 279.1[c][4]).[6] The statutory and regulatory schemes for state-level review in New York were held not to violate Federal law (Bd. of Educ. of Baldwin Union Free Sch. Dist. v. Sobol, 160 Misc. 2d 539, 543-44 [Sup. Ct. Nassau Co. 1994]).

Here, I am not personally familiar with the parties in this case, nor do I have any personal, economic, or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Moreover, the New York State Education Department is not a party in this matter. To the extent that the parents' counsel opines that he disagrees with the reasoning in previous decisions or that the Office of State Review employs staff to assist SROs, as explained above, such contentions are not relevant to a recusal inquiry. Having given the parents' request due consideration, I find that I am able to impartially render a decision and that the provisions of 8 NYCRR 279 do not require recusal in this instance.

B. Waiver of Claims

The parents argue that the district should be estopped from asserting defenses or arguments that were not raised in the district's response to the parents' due process complaint notice. I find that this argument is unavailing. Here, the district submitted a response to the due process complaint notice that comported with federal and State regulations, and there is no indication in the hearing record that its failure to include an affirmative defense below resulted in a denial of a FAPE to the student (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]; see also Application of a Student with a Disability, Appeal No. 12-032; Application of a Student with a Disability, Appeal No. 08-151). Moreover, State regulation does not require the insertion of affirmative defenses in the response to the due process complaint notice, nor does it suggest that unasserted defenses will be waived (R.B. v. Dep't of Educ., 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011]), reconsideration denied, 2012 WL 2588888 (S.D.N.Y. Jul. 02, 2012); see also Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007] [determining that a default judgment was not the appropriate remedy for district's failure to conform to the requirements for a response to parent's due process complaint notice]; Filing a Due Process Complaint, 71 Fed. Reg. 46699

[6] The third criterion for recusal extends to cases in which an SRO has been involved with "other similarly situated children in the school district which is a party to the hearing" (8 NYCRR 279.1[c][4][iii]).

[August 14, 2006] [observing that the IDEA does not provide for consequences for a party's failure to respond to a due process complaint notice]. Accordingly, in this case, the district is not precluded from asserting the arguments or defenses set forth in its answer.

C. Scope of Review

I now turn to the district's contention that the parents' cross-appeal is insufficiently pled. Although the parents' label their pleading as an answer and cross-appeal, the pleading itself designates only two paragraphs as "cross-appeals in the alternative," the first of which states generally that: "Respondents preserve all of their additional claims as additional Prong I FAPE deprivations that the IHO could and should have adjudicated in respondents' favor." The district challenges this broad incorporation, noting that this cross-appeal fails to clearly indicate the reasons for challenging the IHO's decision and fails to indicate what relief should be granted.

A party appealing must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" and this includes clearly identifying which particular issues the that the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]).

The district is correct that the paragraph demarcated as a "first cross-appeal in the alternative" does not describe why the "additional claims" should lead to a different result than the one reached by the IHO. Throughout the parents' answer, however, they address the individual paragraphs of the district's petition, making affirmative assertions, requesting relief and elaborating on the parents' claims. While I have carefully reviewed the entire hearing record to consider those claims that the parents have specifically identified in their answer (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]), I will not sift through the parents' due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on their behalf and I find the answer and cross-appeal insufficient with respect to those issues that the parents have not taken the care to identify in their answer and cross-appeal (8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 12-032); Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

D. Predetermination / Parent Participation

I will next address the IHO's ruling that the CSE impermissibly predetermined the March 2011 IEP placement and program recommendations and denied the parents an opportunity to meaningfully participate in the development of the IEP (IHO Decision at p. 25). After careful review, there is insufficient evidence in the hearing record to support the IHO's finding with respect to predetermination.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation."]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice."]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. June 13, 2012]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K, 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D. D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd 2010 WL 565659).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's March 2, 2011 IEP and a willingness among the CSE members to consider different program options for the student. The student's mother and father attended the March 2011 CSE meeting in person and the student's teacher from Rebecca School participated via telephone (Tr. p. 163; Dist. Ex. 7 at p. 2). Additional attendees included the district representative who also participated as the special education teacher assigned to the CSE, the school psychologist, and an additional parent member (Tr. pp. 160, 162-63; Dist. Ex. 7 at p. 2).

Testimony from the parent and the district school psychologist, as well as the March 2011 CSE meeting minutes, reflect that the parent confirmed receipt of a December 2010 classroom observation; that the parent indicated her desire to "nail down" the student's academic functioning at a second grade level;[7] and that, with the Rebecca School teacher's agreement in tandem with the parent, the March 2011 IEP was modified to reflect the student's academic functioning levels and

[7] The district's school psychologist testified that the parent and the Rebecca School teacher expressed a desire to "reflect that [the student] had solidified his skills at the second grade level" (Tr. p. 190).

academic management needs (Tr. pp. 164-65, 190-96; Dist. Exs. 7 at pp. 3-4; 8 at pp. 1-2; 14 at pp. 1-2). In addition, the hearing record reflects that draft pages of the March 2011 IEP were reviewed and IEP goals were discussed and developed at the CSE meeting with the parent and the teacher from the Rebecca School fully participating (Tr. pp. 185-86, 200-01; Dist. Ex. 8 at pp. 1-2). Specifically, testimony by the district's school psychologist and information included in the minutes of the March 2011 CSE demonstrate that at the request of the parent and with participation of the parent and the Rebecca School teacher, two goals were added to better address the student's needs (Tr. pp. 197, 200-02, 204-05; Dist. Exs. 7 at pp. 5-13; 8 at pp. 1-2; 12 at pp. 9-11; 13 at p. 3). The minutes of the March 2011 CSE notes that the counseling goals included in the IEP were developed cooperatively with the parents and the Rebecca School teacher (Dist. Ex. 8 at p. 2). Moreover, the hearing record does not reflect that the parents were denied an opportunity to ask questions or offer input regarding the student's proposed program during the March 2011 CSE meeting (Tr. pp. 204-09; Dist. Ex. 8 at pp. 1-2). Rather, the hearing record reveals that the parents and the Rebecca School teacher were able to fully participate and communicate their concerns about the proposed program (Tr. pp. 207-09).

The school psychologist testified that the CSE was in consensus that the student required a 12-month program (Tr. p. 205). Consistent with the March 2011 IEP, the school psychologist noted that the CSE considered other placement options for the student, including placement in either a 12:1+1 or 8:1+1 special class in a special school, which were rejected as insufficiently supportive for the student because the student-to-teacher ratios were too large for the student to be able to achieve his IEP goals (Tr. pp. 205-06; Dist. Ex. 7 at p. 15). Based upon my review of the hearing record, I find that the district did not predetermine the student's program for the 2011-12 school year and the parents were afforded an opportunity to meaningfully participate in the IEP development process (T.P., 554 F.3d at 253; see M.W., 869 F. Supp. 2d at 333-34; R.R., 615 F. Supp. 2d at 294).

E. March 2011 IEP

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

1. Evaluative Information and Present Levels of Performance

Although not addressed in the IHO's Decision, the parents assert that the March 2011 IEP did not accurately reflect the student's functioning levels.[8] 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 E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *9-*10 [S.D.N.Y. Sept. 29, 2012]; 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).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments, as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR

---

[8] Without further elaboration as to its application to the present case, the IHO cited A.D. for the proposition that "if reports and assessments produced by or relied upon by the [district] are not sufficiently accurate and complete . . . , the responsibility for the deficiency lies with the school district, not the parents" (IHO Decision at pp. 25-26; see A.D. v. New York City Dep't of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010]). As further discussed below, this case distinguishable to the present matter. In A.D. the assessments produced by the district were insufficient because the methods were not consistent with the characteristics of the student (i.e., the student should have but did not receive a bilingual evaluation or a non-verbal test of cognitive functioning and the test that was administered was age inappropriate) (A.D., 690 F. Supp 2d at 207). The court found that although the IEP was deficient as a result, the parents' unilateral placement could not be found inappropriate on the basis of that school's reports (A.D., 690 F. Supp. 2d at 208).

300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

In this case, consistent with information noted in the minutes of the March 2011 CSE, the school psychologist testified that prior to the March 2011 CSE she reviewed the student's full record including a timely December 2010 psychodiagnostic evaluation report provided by the parents, the student's 2010-11 IEP,[9] information provided in the Rebecca School progress reports, and a December 2010 classroom observation report conducted by the district (Tr. pp. 161, 163, 174-75, 183; Dist. Exs. 8 at p. 1; 12 at pp. 1-12; 13 at pp. 1-4; 14 at pp. 1-2; 15 at pp. 1-7; 20 at pp. 1-20). In addition, during the March 2011 CSE meeting, the student's teacher from the Rebecca School[10] and the parents fully participated and provided input with regard to the student's academic functioning based on the psychodiagnostic evaluation report, and provided input with regard to goals (Tr. pp. 164, 208-09; Dist. Ex. 8 at pp. 1-2). The school psychologist indicated that the March 2011 CSE used all of the aforementioned documentary evidence in developing the 2011-12 IEP and that all of those pieces of documentary evidence were available during the CSE meeting (Tr. pp. 182-84, 186).

On the March 2011 IEP, the student's present levels of performance in the areas of academic and learning characteristics consisted of both teacher estimates of instructional levels and a narrative description of the student (Dist. Ex. 7 at p. 3). The student's teacher at the Rebecca School, who participated in the March 2011 CSE meeting, provided the teacher estimates (teacher observation) of the student's abilities in reading comprehension, math computation, and writing (id.). The March 2011 IEP indicated that the student demonstrated reading comprehension and writing skills in the second grade range (id.). According to the March 2011 IEP, the student also demonstrated math computation skills in the high first grade to second grade range (id.).

The student's present levels of performance in the areas of academic and learning characteristics in the March 2011 IEP indicated, consistent with the 2010 psychodiagnostic evaluation report, that results of formal testing placed the student's overall cognitive functioning in the "Moderate Delayed" range (Dist. Exs. 7 at p. 3; 15 at pp. 4, 8). In addition, the student's teacher reported that the student was able to read simple sentences from familiar texts, could read approximately 100 words, and was able to consistently answer both literal and inferential questions from first grade reading materials (Dist. Ex. 7 at p. 3). Furthermore, the student was able to sequence three to five events using picture clues, and was working on reading fluency and with affect (id.). The March 2011 IEP noted that in math, the student was able to consistently use terms such as "higher/lower, greater/less" to explain relationships between numbers (id.). Also, the March 2011 IEP indicated that the student had mastered addition and subtraction of single-digit

---

[9] The parents allege that the March 2011 CSE should not have reviewed the 2010-11 IEP. An IHO found a denial of FAPE for the 2010-11 school year based upon the following: (1) that there would be implementation issues at the assigned public school site; (2) that the IEP should have included a transition plan for the student's transition from the Rebecca School to the district's school; (3) that a FBA and a BIP should have been developed; and (4) that the latter omissions were substantial (Parent Ex. D at pp. 15-16). I am not persuaded that such adjudication would preclude the March 2011 CSE from considering the student's 2010-11 IEP as a resource in developing the student's present levels of performance and goals for the 2011-12 IEP.

[10] Testimony by the school psychologist indicates the Rebecca School teacher who participated in the March 2011 CSE had been the student's teacher for the past two years (Tr. p. 188). Review of the student's April 2010 IEP for the 2010-11 school year reveals the same Rebecca School teacher participated by telephone in the April 2010 CSE (Dist. Ex. 20 at p. 2).

numbers, was able to recognize all coins and bills, and was able to compare size and weight of given objects (id.). The student had a strong understanding of positional words such as "left/right" (id.). He was able to add and subtract two to three-digit numbers without regrouping (id.). At the time of the March 2011 CSE, the student was working on place value in monetary context, as well as making estimation of groups of objects and duration of time (id.).

The social/emotional present levels of performance in the March 2011 IEP indicated, consistent with the December 2010 Rebecca School progress report that the student presented with a mixed regulatory state (Dist. Exs. 7 at p. 4; 12 at p. 1). The IEP indicated that when regulated, the student was calm, focused, and organized in his ideas and interactions (id.). When under aroused, the IEP noted the student was less responsive to initiations from others (id.). When in an over stimulated state (which happened less frequently), the student tended to "jump hard," make a squealing noise, and try to wrestle with other people around him (id.).

The March 2011 IEP indicated that the most prominent emotional trigger that could over-stimulate the student was high playful affect (Dist. Ex. 7 at p. 4). The IEP described the student as able to engage in purposeful moments of interaction when well-regulated and in a calm and quiet environment (id.). The student struggled to remain engaged when the topic of interaction was not of intense interest, and although less often, when he felt something was too challenging (id.). As the student's confidence increased, his ability to engage in challenging tasks increased (id.). The March 2011 IEP further indicated that the student initiated interactions with others verbally (id.). According to the March 2011 IEP, the student's response to initiations from adults depended upon his regulatory state, whereby when under-aroused he might ignore interactions, when over-stimulated he tended to be overly physical, and when self-regulated the student might respond to adult initiations appropriately (id.). The March 2011 IEP also indicated that when a peer initiated an interaction with the student, he responded with "intrigue" and considered the engagement (id.). However, if the interaction was about something in which he was not interested, the student tended not to pursue the interaction (id.). The March 2011 IEP indicated the student was able to use pretend play toys symbolically, but did not consider them outside their concrete intention (id.). The student was challenged by exploring a wide range of emotions in play (id.). With regard to the student's behavior and the instructional process, the March 2011 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher and with the support of OT, PT, and speech-language therapy (id.).

The student's present health and physical development present levels of performance included the March 2011 IEP indicated, consistent with the 2010 psychodiagnostic evaluation report, that the student had been diagnosed with sensory integration dysfunction and disorder of relatedness and communication (Dist. Exs. 7 at p. 5; 15 at p. 1). The March IEP noted the student had chronic inner ear and sinus infections for which he underwent multiple surgeries (id.). The IEP noted that the student's regulatory state would vary greatly depending upon his sinus and ear health (Dist. Ex. 7 at p. 5). In addition, the IEP indicated the student was allergic to casein and peanuts, and he had seasonal allergies as well (id.).

The March 2011 IEP indicated, consistent with the Rebecca School OT note, in terms of the student's sensory system, he presented with mixed sensory reactivity (Dist. Ex. 7 at p. 5). The IEP described the student as over-responsive to some auditory input (id.). In addition, the student tended to seek strong vestibular and proprioceptive input (id.). He presented with diminished endurance and low muscle tone (id.).

While the parents allege that the evaluative information included in the March 2011 IEP was inadequate because the March 2011 CSE relied on evaluations and assessments from the private providers and failed to conduct any additional evaluations or assessments other than a classroom observation, I note that State regulations require that an IEP report the student's present levels of academic achievement and functional performance, but State regulations do not mandate precisely where that information must come from (see Application of a Student with a Disability, Appeal No. 11-137; Application of a Student with a Disability, Appeal No. 11-043). Furthermore, a CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student (Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]). As noted above, the hearing record demonstrates appreciable input from the student's Rebecca School teacher and related services providers during the development of the student's 2011-12 IEP relative to the student's needs and Courts have found that such input may be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at *10).

Accordingly, a review of the information considered by the March 2011 CSE, as detailed above, shows that the March 2011 CSE had before them sufficient information relative to the student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—which the CSE utilized in the development of the student's March 2011 IEP; and that, as viewed as a whole, the student's functional abilities were accurately documented throughout the IEP, which resulted in an IEP designed to help the student progress (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see Dirocco v Bd. of Educ., 2013 WL 25959, at *20 [S.D.N.Y. Jan. 2, 2013]; E.A.M., 2012 WL 4571794, at *9-*10; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see also Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dept't of Educ., Appeal No. 08-045). Additionally, I find that the district was not required to reevaluate the student prior to the March 2011 CSE meeting as the evaluation reports available to the CSE were timely (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]), the student's educational needs did not warrant a reevaluation, and the parents did not disagree with the student's academic management needs or request a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]; Tr. pp. 189, 892).

2. 6:1+1 Special Class

The district asserts that the IHO erred in determining that the "IEP developed for the child did not develop a suitable program calculated to confer a reasonable education benefit and thus failed to provide FAPE to the student" (IHO Decision at p. 26). An independent review of the hearing record compels the conclusion that the March 2011 CSE's recommendation of a 12-month school year in a 6:1+1 special class in a specialized school with related services was appropriately designed to address the student's special education needs, as identified in the evaluative information available to the CSE.[11]

---

[11] Testimony was elicited at the impartial hearing regarding the restrictiveness of the district's recommended 6:1+1 special class versus the 8:1+3 class that the student had attended at the Rebecca School (Tr. pp. 240, 709-10, 806-07). I note that the term "least restrictive environment" (LRE) does not refer to the student-to-adult ratio in the classroom. In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment

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]). Consistent with State regulation regarding students with intensive needs, the March 2011 CSE recommended a 6:1+1 special class placement in a specialized school for the student for the 2011-12 school year (Tr. p. 205; Dist. Ex. 7 at pp. 1, 14). Testimony by the district school psychologist indicated that the CSE's recommendation of a 6:1+1 special class was based on the student's needs and was not "classification driven" (Tr. p. 207).

In addition, the March 2011 IEP provided additional supports to the student by recommending various strategies aligned to the student's unique academic, social/emotional, and health/physical needs (see Dist. Ex. 7 at pp. 3-5). The March 2011 CSE identified the student's academic management needs for redirection to task,[12] repetition, visual and verbal cues, sensory breaks, and verbal praise (id. at p. 3). The March 2011 CSE also identified the student's social/emotional management needs specific to his level of regulatory arousal (id. at p. 4). The March 2011 IEP indicated that when under aroused, the student benefited from adult support in providing strategies to increase alertness and access to sensory materials and breaks for physical activities throughout the day (id.). "When in an over stimulated state, [the student] require[d] firm and clear limits a[bout] keeping his hands on his own body" (id.). In addition, the student benefited from co-regulation through modeling a calm state (deep breathing and using a calm voice), as well as support to help him with expressing his emotions (id.).[13] Furthermore, the March 2011 CSE identified the student's health and physical management needs, including close monitoring of his diet to avoid consumption of casein and peanuts (id. at p. 5). During meal times, if eating too quickly, the student required verbal and visual cues to slow down (id.). In addition, OT and PT continued to be warranted to address the student's physical needs (id.).

In addition to recommending the student for placement in a small, highly structured environment, the March 2011 CSE included multiple goals and short-term objectives on the IEP that were aligned to the student's needs, were specific and measurable, and comprehensively addressed the areas of reading, math, and writing, as well as multiple OT related functions (i.e., motor planning, visual spatial and perceptual, sensory processing and body awareness), multiple PT related functions (i.e., balance, coordination, visual spatial processing, motor planning and sequencing, muscle strength, endurance, graded muscle control), speech-language therapy related

---

may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc], 200.4[d][4][ii][b]; see 34 CFR 300.116).

[12] Testimony by the district school psychologist indicated the student required teacher prompting on a regular basis in order to attend to social and academic tasks (Tr. pp. 259-60).

[13] The March 2011 CSE continued the related service of speech-language therapy on both an individual and small group basis, as well as small group counseling, that would address the student's expressive pragmatic abilities as well as his ability to identify and express his array of emotions (Dist. Ex. 7 at pp. 11-12, 16).

functions (i.e., engagement/pragmatic, receptive language, expressive language), counseling (i.e., identification of a wide range of emotions, appropriate responses to emotions), and activities of daily living (Tr. pp. 198-99, 201; Dist. Ex. 7 at pp. 5-13).

Based upon the foregoing and contrary to the IHO's finding, I find that the evidence contained in the hearing record supports that the district's recommended 6:1+1 special class in a specialized school with related services was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

3. Related Services

a. Home and/or Community-Based Related Services

The parents allege that the March 2011 CSE should have included home or community based services on the student's 2011-12 IEP (Answer ¶ 31). Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also Application of the Dep't. of Educ., Appeal No. 11-031).

The March 2011 CSE recommended the following related services for the student: three 40-minute sessions of individual speech-language therapy three per week; two 40-minute sessions of speech-language therapy per week in a group of two; one forty-minute session of individual PT per week; one forty-minute session of individual OT per week; two forty-minute sessions of OT per week in a group of two; and two forty-minute sessions of counseling per week in a group of three (Dist. Ex. 7 at p. 16). Pursuant to the request of the student's mother, who expressed that she did not want the student to be pulled out of the classroom too often,[14] the March 2011 CSE reduced the individual PT and individual OT services listed above as compared to the 2010-11 IEP (Dist. Ex. 8 at p. 2; compare Dist. Ex. 7 at p. 16, with Dist. Ex. 20 at p. 16). Nowhere in the hearing record does it indicate that the parents requested that additional related services be included on the student's 2011-12 IEP[15] or that she desired the student to receive instruction in ABA.[16]

[14] The student's mother later testified that the student does not require related services "during the day anymore" (Tr. p. 914).

[15] In fact, the district school psychologist testified that she was not aware that the student was receiving a "specific other service" in addition to those provided by the Rebecca School (Tr. p. 268).

[16] Although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade Co., 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v. New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal

With respect to speech and language therapy, evaluative information reviewed by the March 2012 CSE about the student's communication skills indicated that he had "made significant strides in his ability to initiate and terminate conversations" (Dist. Ex. 15 at p. 2). Although the student struggled with general social conversation, he could maintain a conversation for a longer period than before (id. at p. 3). During the December 2010 classroom observation of the student at the Rebecca School, the district school psychologist reported that she observed that, when asked questions or directed to engage in an interaction with a peer, the student required prompting and redirection on multiple occasions (Dist. Ex. 14 at pp. 1-2). According to the report, when the observer stood up, the student asked "where are you going?", commented about being unable to hear and repeated the phrase, "back home" (id. at p. 2). December 2010 and January 2011 interdisciplinary progress reports prepared by the Rebecca School indicated that the student was a verbal child who used full sentences to communicate (Dist Exs. 12 at p. 1; 13 at p. 1). Though verbal, the student displayed difficulty in maintaining logical and continuous communication exchanges with peers and adults (Dist. Ex. 12 at p. 8). In addition to working on improving his engagement/pragmatic communication skills, the Rebecca School noted that the student worked on improving his receptive and expressive language abilities (id.). The January 2011 report indicated that the student used language "to request, reject, greet adults, and answer questions" (Dist. Ex. 13 at p. 1).

The March 2011 IEP present levels of performance indicated that the student initiates interactions with others verbally and that his response to initiations from adults and peers depends upon his regulatory state or his interest in the engagement (Dist. Ex. 7 at p. 4). Annual goals and short-term objectives provided in the March 2011 IEP addressed the students need to engage in sustained reciprocal interactions with adults and peers, follow multi-step directives, respond to a variety of "wh" questions, produce longer and more grammatically complex utterances, and utilize spatial words and phrases (id. at pp. 11-12). Although the March 2011 CSE did not recommended speech-language services outside of school, it provided three individual sessions and two group sessions per week (id. at p. 16).

With respect to OT, the December 2010 Rebecca School progress report describes the student as "an engaging and playful child who actively engages in activities" (Dist. Ex. 12 at p. 6). According to the report, the focus of the student's OT sessions at the Rebecca School was "improving sensory processing abilities, fine motor and gross motor skills, visual-perceptual and visual-motor skills, bilateral integration skills, and sustained attention/focus during activities" (id.). Information considered by the March 2011 CSE reflected that the student struggled in adapting steps involved in self-care tasks to the relevant situation, ate too quickly during mealtimes, and had not mastered differentiation of left and right sides of the body, but was, with minimal cues, able to navigate around the school environment and throw and catch a ball (id. at p. 7).

As described above, the March 2011 IEP provided descriptions of the student's sensory needs and recommended supports to address those needs (Dist. Ex. 7 at p. 5). Although the March 2011 CSE did not recommended OT outside of school, it provided one individual session (reduced

---

No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

from three sessions per the request of the mother) and two group sessions per week (Dist. Exs. 7 at p. 16; 8 at p. 2).

Since the parents have not specially objected to the student's recommended PT or counseling, I will not address these related service in detail. Turning to the ABA services, the hearing record reveals that there was no report, record, or evaluation before the March 2011 CSE that recommended the student receive ABA instruction or that the student receive ABA instruction in the home. Again, there is also no indication in the record that the parents requested this of the CSE or even informed the CSE that the student had been receiving such services (see Tr. p. 268).

Thus, upon review of the hearing record, I find that the information that was before the March 2011 CSE does not support a finding that the student required home-based services in order to receive educational benefits. A review of the evaluative information before the CSE reflects that home-based services were not recommended in those evaluations (see Dist. Exs. 12; 13; 14; 15). The hearing record further reflects that the CSE did not have reports from the student's current home-based providers (Tr. pp. 268). The hearing record reflects that the student's home-based related service providers were invited by the parents to attend the March 2011 CSE meeting but they were unavailable (Tr. pp. 688-89, 752, 788). There is nothing in the hearing record to indicate that the parents requested that the meeting be rescheduled so that the home-based related service providers could attend or that the CSE consider evaluations or other materials from those providers.

I find that the district offered the student an appropriate educational program that would address the student's significant needs during the school day and that the evidence does not establish that the student required the additional home-based services in order for the student to receive educational benefits. 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). Under the circumstances, while it is understandable that the parents, whose son has substantial needs, desire greater educational benefits through the auspices of special education, it does not follow that the district must be made responsible for them (Application of the Dep't. of Educ., Appeal No. 12-086). The IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132 [quoting Tucker, 873 F.2d at 567] [citations omitted]).

Under the circumstances of this case, the evidence described above shows that the district satisfied the more modest requirement of developing an IEP likely to produce "progress, not regression" (Walczak, 142 F.3d at 130 [2d Cir. 1998]), and I find that the lack of home or community based services on the student's March 2011 IEP did not result in a denial of a FAPE to the student.

b. Transition Plan

In this case, the parents argue that the district failed to develop a transition plan for the student with respect to the student's transfer from the Rebecca school to the district's school.[17] The IHO did not rule on this allegation.

---

[17] Distinct from the "transition plan" at issue in this case, the IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to

Initially, I note that the parents' allegation with respect to a transition plan can not be read to assert that the district failed to recommend transitional support services pursuant to State regulations governing the provision of educational services to students with autism (see 8 NYCRR 200.13[a][6]). That particular State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]).[18] Here, the hearing record indicates that had the student attended the proposed classroom in the assigned public school site beginning in July 2011, he would have been placed in a 6:1+1 special class in a specialized school with students classified as students with autism, which does not trigger the district's obligation to include a recommendation for transitional support services under 8 NYCRR 200.13(A)(6) in the student's IEP (Parent Ex. LL).[19]

Moreover, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d 167). Assuming for the sake of argument that there was a requirement for the district to provide a transition plan in this case, I am not persuaded that the absence of a private school to public school transition plan rose to the level of a denial of a FAPE to the student (see R.E., 694 F.3d at 195; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 6, 2012]). Based upon the foregoing, I find that the parents' argument must be dismissed.

---

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

[18] In April 2011, the Office of Special Education issued an updated guidance document entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

[19] I note that the hearing record reflects that the student is classified as a student with a speech or language impairment, not as a student with autism, and that the parents do not contest the student's classification (see Tr. pp. 184, 798-99; Dist. Ex. 7 at p. 1). However, because the issue is not determinative of this matter, I decline to consider the applicability of State regulations governing the provision of educational services to students with autism (see 8 NYCRR 200.13[a][6]) to individuals such as the student, who is diagnosed with PDD, an autism spectrum disorder, but is classified as a student with a speech and language impairment (see Tr. pp. 184-85, 237, 257, 798-99; Dist. Ex. 15 at pp. 1, 7).

c. Parent Counseling and Training

Also, not addressed by the IHO, the parents assert that the March 2011 IEP failed to provide for parent counseling and training. State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.W., 869 F. Supp. 2d at 335; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 25, 2010]; M.M., 583 F. Supp. 2d at 509). Recently, the Second Circuit explained that "because school districts are required by [State regulation][20] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191). The Court further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (id.; see F.B., 2013 WL 592664, at *11-*13; F.L., 2012 WL 4891748, at *10; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012]).

In this case, the record reflects that the CSE discussed parent counseling and training during the March 2011 CSE meeting (Tr. p. 175; Dist. Ex. 8 at p. 1), but did not recommend these services on the student's 2011-12 IEP (see Dist. Ex. 7). However, neither the parents' claim by itself nor the evidence adduced in the hearing record offer much in the way of insight or rationale regarding how the failure to specify parent counseling and training on the student's IEP in this instance rose to the level of a denial of a FAPE and, as stated above, the Second Circuit does not appear to support application of such a broad rule when the principal defect in the student's IEP is failure to set forth parent counseling and training services (R.E., 694 F.3d at 191, 195; see A.C., 553 F.3d. at 172 [citing Grim, 346 F.3d at 381] [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y. Oct. 30, 2008]). Thus, although the April 2010 CSE's failure to recommend parent counseling and training in the student's IEP was a violation of State regulation, such a violation is not sufficient in this case to support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; F.L., 2012 WL 4891748, at *9-*10; C.F., 2011 WL 5130101, at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 2010]; M.M., 583 F. Supp. 2d at 509; M.W v. New York City Dep't of Educ., 2012 WL 2149549, at *13 [E.D.N.Y. June 13, 2012]).

[20] 8 NYCRR 200.13[d].

4. Consideration of Special Factors—Interfering Behaviors

I now turn to the parents' assertions that the March 2011 CSE should have developed a BIP for the student. As set forth in greater detail below, the hearing record supports the district's contention that the student did not require a BIP, that the CSE properly considered special factors related to the student's behavior that impeded his learning, and that the March 2011 IEP appropriately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; 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, 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., 777 F.Supp.2d 669, 673 [S.D.N.Y. 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., 569 F. Supp. 2d at 380; 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.).[21] 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

[21] 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] [noting 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 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 (R.E., 694 F.3d at 190; A.H., 2010 WL 3242234, at *4; see F.L., 2012 WL 4891748, at *8; K.L., 2012 WL 4017822, at *11; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796, at *9 [S.D.N.Y. Sept. 26, 2012]; M.W., 869 F. Supp. 2d at 333; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8-*9 [S.D.N.Y. Dec. 8, 2011]; C.F., 2011 WL 5130101, at *9).

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]).[22] 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 Educ. [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

[22] 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]).

[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]).

In this case, the March 2011 IEP indicated that the student benefited from positive reinforcement, redirection, repetition, visual and verbal prompts, and sensory breaks (Dist. Ex. 7 at p. 3). The IEP reflected the student's social/emotional management needs for support to help maintain social engagement through CSE recommendations for sensory tools and breaks, imposition of firm and clear limits, and modeling a calm state (id. at p. 4). Although the IEP noted that the student, "[w]hen in an overstimulated state, which happens less frequently, . . . will jump hard, make a squealing noise and try to wrestle with other people around him," the school psychologist testified that, to her recollection, such behavior occurred infrequently, but that the description was included "because of the potential for it to happen" (Tr. p. 259; Dist. Ex. 7 at p. 4). According to the March 2011 IEP, the student's behavior does not seriously interfere with instruction and could be addressed by a special education teacher (Dist. Exs. 7 at p. 4; 8 at p. 2).

As noted above, the March 2011 CSE considered a December 2010 psychodiagnostic evaluation report provided by the parents, the student's 2010-11 IEP, information provided in the Rebecca School progress reports, and a December 2010 classroom observation report from the district, in addition to input at the CSE from the parents and the student's teacher from the Rebecca School (Tr. pp. 161, 163-64, 174-75, 182-84, 186, 208-09; Dist. Exs. 8 at pp. 1-2; 12 at pp. 1-12; 13 at pp. 1-4; 14 at pp. 1-2; 15 at pp. 1-7; 20 at pp. 1-20). The December 2010 psychodiagnostic evaluation report described the student as "a sweet youngster who was mild mannered and transitioned with ease;" as "quite charming to work with;" as someone who took pride in his work and who put forth his best effort to do well (Dist. Ex. 15 at pp. 2-3, 7). The same evaluation report further indicated the student required coaxing and reminders to stay on task, as well as frequent breaks, but could be brought back to task if he became distracted (id. at p. 7). Furthermore, the evaluation report indicated that the student was motivated, had a great sense of humor, and thrived on positive feedback (id.).

The December 2010 classroom observation report indicated that during the observation: the student "was seen to be able to follow directions but needed heav[y] prompting to participate in group activity;" "appeared to have presented with self-stimulatory behaviors;" and, "[i]n general, . . . was quiet and non-disruptive in class" (Dist. Ex. 14 at p. 2).

The December 2010 Rebecca School progress report indicated that the student required some adult support in order to transition from activity to activity within the classroom as well as from the classroom to activities outside of the classroom (Dist. Ex. 12 at p. 1). In particular, information concerning the student's mixed sensory reactivity included in the Rebecca School report as discussed above, indicated that at times the student required support from staff to remain engaged and regulated, or to be safe in relation to his body awareness and modulation of force with peers and staff (id. at p. 6). OT related strategies were built into the student's daily routine and guided by his Rebecca School occupational therapist and classroom staff to provide regulatory input to the student (id.). Testimony by one of the student's home-based teachers indicated the student's behavior was "a fraction" of his difficulties which involved a combination of cognitive and regulation difficulties (Tr. p. 754).

Furthermore, the district school psychologist testified that she sought specific input from the student's Rebecca School teacher during the March 2011 CSE with regard to her perspective

of the student's behavior in the classroom (Tr. pp. 192, 275). Consistent with testimony by the school psychologist, minutes of the March 2011 CSE reflected that the student's parent and teacher provided input to the CSE and helped revise the student's management needs (Dist. Ex. 8 at p. 2). Based on this input, including the lack of any objections regarding the discussions about the student's behavior in the classroom, the March 2011 IEP indicated that the student's behavior does not interfere with instruction and can be addressed by the special education teacher (Tr. p. 192; Dist. Ex. 8 at p. 2). Moreover, as previously discussed, the March 2011 IEP included a description of the student's social/emotional and health/physical present levels of performance which incorporated at all of the documentation available to the CSE, as well as the aforementioned multiple academic, social/emotional, and health/physical management strategies for use in the classroom (Dist. Ex. 7 at pp. 3-5).

In light of the above, I find that the lack of a BIP does not compel a finding that the district failed to offer the student a FAPE, particularly where as here, there was agreement between the information before the March 2011 CSE and the resultant IEP as to the function of the student's behaviors; the March 2011 CSE accurately identified the student's behavior needs in the March 2011 IEP, and the March 2011 CSE addressed the student's behavior needs based on information and documentation provided by the student's providers (see R.E., 694 F.3d at 190-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; A.C., 553 F.3d at 172-73; Cabouli, 2006 WL 3102463, at *3; F.L., 2012 WL 4891748, at * 7-*9; C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).[23]

F. Assigned School

I will next address the parties' contentions regarding the district's choice of the assigned public school site. Generally, challenges to an assigned school involve implementation claims, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11,[24] and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L., 2012 WL 4891748, at *15-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also R.C. v. Byram Hills Sch. Dist.,

---

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

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

2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; c.f. E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

In this case, it is undisputed by the parties that the parents rejected the IEP and enrolled the student at the Forum School for the 2011-12 school year (Parent Exs. J; U; V).[25] Thus, while the district was required to establish that the IEP was appropriate during the impartial hearing, the district was not required to establish that the IEP was actually implemented in accordance with State and Federal law in the proposed classrooms.[26, 27]

1. Summer and Fall Portions of the 2011-12 School Year

The IHO made a ruling from the bench that the district was required to demonstrate the appropriateness of the school to which the student was assigned for summer 2011, but not for the remainder of the school year (Tr. pp. 397-99). The parents object to this ruling, contending that the IHO erred in requiring the district to show only that it had a program and seat available to the student at the start of the 12-month 2011-12 school year.

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L., 2012 WL 4017822, at *13; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. Jan. 6, 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"]). The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City

---

[25] The parents indicated their disagreement with the program recommendation for the student on the Notice of Recommended Deferred Placement, dated March 2, 2011 (Tr. pp. 903-04; Dist Ex. 5) and formally rejected the recommended program by letter dated June 16, 2011 (Parent Ex. J at p. 1).

[26] In New York State, policy guidance offers an explanation of the steps that must be taken to ensure the implementation of an IEP ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 60-61, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

[27] Based on this outcome, I decline to review, in the alternative, the IHO's finding that the student was not suitably grouped for instructional purposes in the district's summer program, and specifically that four out of the five students in the class were non-readers and non-writers, as well as being not testable (IHO Decision at pp. 23, 25).

Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320).

When determining how to implement a student's IEP, however the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-147; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5). The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 CFR 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504).

In this case, the district developed the student's 2011-12 IEP and offered the student a placement by June 10, 2011, prior to the start of the 12-month school year, and was therefore in conformity with State and federal regulations (34 CFR 300.323(a); 8 NYCRR 200.4(e)(1)(ii); see Parent Exs. H-I). It is undisputed that the parents rejected the district's program prior to the start of the school year and enrolled the student at the Forum School (Parent Exs. J; U; V). The parents have not submitted any authority to show that a future change in school buildings amounts to an actionable claim pursuant to the IDEA (see K.L., 2012 WL 4017822, at *16). Accordingly, because the student in this case did not ultimately attend the assigned classroom after the parents rejected the student's IEP on June 16, 2011, I find that the district was not required to defend the assigned public school site from the fall to the end of the 2011-12 school year, and that the IHO's decision to limit his analysis to the appropriateness of the district's recommended class for summer 2011 was not improper and there is no reason to reverse it (K.L., 2012 WL 4017822, at *16; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 12-069; Application of the Dep't of Educ., Appeal No. 12-068).

Likewise, I am not persuaded by the parents' contention that the assigned 6:1+1 special class at the public school site was inappropriate for the student because its composition and staff would change from summer 2011 to September 2011. The United States Department of Education has clarified that a school district "may have two or more equally appropriate locations that meet

the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]; see Application of a Student with a Disability, Appeal No. 12-044). Additionally, a possible change in location of the delivery of the student's IEP cannot be considered to have significantly impeded the parents' opportunity to participate in the decision making process as there is no requirement that the district identify a specific school location (J.L. v. City Sch. Dist., 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *8-9 [S.D.N.Y. October 28, 2011]; A.S. v. New York City Dep't of Educ., No. 10–CV–00009, slip op. at 18–19[ARR][RLM][E.D.N.Y. May 25, 2011], see T.Y., 584 F.3d at 419).[28] The Second Circuit explained that in a case where the parents have rejected placement under the proposed IEP, the focus must be placed on the adequacy of the IEP and "[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).[29] In consideration of the above, even given the student's difficulty with transitions, I decline to find that, had he attended the assigned classroom, the changes in composition, staff, and location of the assigned classroom, by themselves, show that the district would have deviated from substantial or significant provisions of the student's IEP in a material way, thereby denying the student a FAPE.

2. Parental Participation in Selection of the Assigned School

Next, I will address the assertion by the parents that they were denied input or discussion as to the selection of the assigned public school site. Generally, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116, 300.327, 300.501[c]; 501[b][1][i]). However, as set forth above, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A., 2010 WL 1193082, at *2; T.Y., 584 F.3d at 419-20; White, 343 F.3d at 379.

In T.Y., the student's IEP did not "name the school [the student] would attend," but rather, the parents received notice "in the mail that recommended a specific school placement" (T.Y., 584 F.3d at 416). The parents visited the recommended site, but thereafter rejected it; the district recommended a second site, which the parents "called" but did not visit, and thereafter unilaterally placed the student in a nonpublic school (T.Y., 584 F.3d at 416). Pointing to the IDEA and its implementing regulations, the parents argued in T.Y. that "'procedural safeguards make clear that parents are to be afforded meaningful participation in the decision-making process as to the location and placement of their child's school and classroom'" (T.Y., 584 F.3d at 419). The T.Y. Court, however, relied upon precedent establishing that the "the term 'educational placement'" did not refer to the specific school, and expressly rejected the parents' argument (T.Y., 584 F.3d at 419-20; see also R.E., 694 F.3d at 191). Moreover, the R.E. Court found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site,"

[28] I note that the hearing record indicates that the educational program and placement for the 12-month 2011-12 school year would not have changed from that for summer 2011 (Dist. Exs. 7 at p. 1; 8 at p. 1).

[29] The Second Circuit has also made clear that just because a district is not required to place details such as the particular school site or classroom location on a student's IEP, the district is not to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y., 584 F.3d at 420 [explaining that a district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]).

and that "[t]he [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (694 F.3d at 191-92; see also F.L., 2012 WL 4891748, at *12); K.L., 2012 WL 4017822, at *13; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. Nov. 18, 2011]; S.F., 2011 WL 5419847, at *12, *14; C.F., 2011 WL 5130101, at *8-*9; A.L, 812 F. Supp. 2d at 504).

For the same reasons, the parents' argument on appeal must also be rejected because the parents' right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school building or classroom (T.Y., 584 F.3d at 416, 419-20; J.L., 2013 WL 625064, at *10). The district school psychologist testified that the parents expressed concern at the CSE meeting regarding the functional grouping in 6:1+1 classes (Tr. pp. 179, 206; see Dist. Ex. 8 at p. 1). In response to the parents' concerns, the district school psychologist included a note on the Placement Office Referral Form stating that the parents were seeking a higher functioning placement for the student (Tr. pp. 206-07; Dist. Ex. 4 at p. 1). The IHO noted that there was nothing in the record to establish that the district school psychologist pursued the parents concerns beyond that note on the Placement Office Referral Form (IHO Decision at p. 24); however, as set forth above, nothing in the law required the school psychologist to do so. Therefore, based upon the foregoing, the parents could not be deprived the opportunity to participate in the selection of the student's specific school site because neither the IDEA nor its implementing regulations entitles them to such a right.

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

3. Written Notice of the Assigned School

The IHO found that the district failed to provide adequate written notice of the school to which the student was assigned because the FNR indicated that the student would have attended the public school in one building, whereas the classes for the summer portion of the 12-month school year took place in another building (IHO Decision at pp. 24-25). However, "[b]ecause the parents' right to participate in the development of their child's IEP does not extend to the DOE's decision regarding the particular school site that their child would attend, the defective notice did

not impede this right" (A.S., 10–CV–0009, at 18–19; see also K.L., 2012 WL 4017822, at *16; S.H. v. New York City Dep't of Educ., 2011 WL 666098, at *5 [S.D.N.Y. Feb. 15, 2011] [finding that a notice's misidentification of the specific school in a multi-school building was "inconsequential"]).[30] Accordingly, the IHO's decision must be reversed.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year must be reversed as it is not supported by the hearing record. I find that March 2011 CSE's recommendation of a 6:1+1 special class with related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE in the LRE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). It is therefore unnecessary to reach the issue of 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).

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated July 3, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year, and directing the district to reimburse the parents for the student's tuition at the Forum School for the 2011-12 school year and for the cost of related services and to directly fund the remainder of the student's tuition at the Forum School and the cost of related services for the 2011-12 school year.

Dated: **Albany, New York**
March 28, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER

[30] There was a question at the hearing as to whether or not the parents received actual notice as to the alternate summer school location upon contacting the school listed on the IEP (see IHO Decision at p. 24). The transportation director of the assigned public school site testified that, although he could not remember specifically speaking to the parents, he informed all parents who inquired about the summer program that classes would be held at a different site (Tr. pp. 302, 306-07). The mother, on the other hand, testified that upon calling the assigned public school site, she was informed that the school was closed for the summer and was not provided any further information (Tr. pp. 813-14; Parent Ex. J at p. 1). Since the law applicable to this issue does not necessitate actual notice on the part of the parents, I need not resolve this credibility determination.