The University of the State of New York

The State Education Department
State Review Officer
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No. 13-006

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, Jessica C. Darpino, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Tracey Spencer Walsh and Gary S. Mayerson, Esqs., of counsel

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Manhattan Children's Center (MCC) 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 sustained in part.

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

III. Facts and Procedural History

At the time of the proceedings in this case specific to the 2011-12 school year, the student was eight years old and had been attending MCC since September 2008 (Dist. Ex. 12 at p. 1; see

Parent Ex. F at p. 1).[1, 2, 3] On March 16, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Parent Ex. F). The March 2011 CSE determined that the student was eligible for special education programs and services as a student with autism and developed an IEP, recommending a 12-month special education program consisting of, among other things, a 6:1+1 special class in a specialized school; a full-time 1:1 crisis management paraprofessional; related services of individual occupational therapy (OT) and individual and group speech-language therapy; and various modifications within the classroom environment, addressing the student's academic, social/emotional, and health/physical management needs (Parent Ex. F at pp. 1, 6, 8, 11, 25).[4]

By letter dated June 15, 2011, the parents notified the district that they had not yet received a final notice of recommendation (FNR), that the student would continue to attend MCC for the 2011-12 school year, and that they would seek reimbursement from the district for tuition, related services, and transportation (Parent Ex. L at p. 1). By FNR dated June 16, 2011, the district summarized the recommendations made by the March 2011 CSE and notified the parents of the particular public school site to which it had assigned the student (Parent Ex. M at p. 1).[5]

The parents visited the assigned school on June 23, 2011 (Parent Ex. P at p. 1). By letter to the district dated June 28, 2011, the parents rejected the assigned public school as not appropriate for the student and stated the reasons for their objections (id. at pp. 1-2). Specifically, the parents asserted that the student-to-adult ratio of the recommended special class was not appropriate for the student and indicated that the student required a 2:1 ratio (id. at p. 1). The parents also expressed various concerns about the assigned public school site (id. at pp. 1-2). For these reasons, the parents rejected the March 2011 IEP and the assigned school and notified the district of their intention to continue the student's enrollment at MCC and her after-school instruction in applied behavior analysis (ABA) and speech-language therapy and OT services, for which they intended to seek public funding (id. at p. 2). On July 1, 2011, the parents signed an enrollment contract

[1] There are a number of duplicate exhibits in the hearing record. The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). I also remind the IHO of his obligation to exclude from the hearing record what he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Unless otherwise specified, where exhibits are duplicated, I have cited to the corresponding parent exhibit.

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

[3] This student has previously been the subject of an administrative proceeding. Relating to the student's March 2008 IEP, the SRO reversed the decision of an IHO, which had ordered the district to pay for the student's at MCC tuition, as well as home-based related services, for the 2008-09 school year (Application of the Dep't of Educ., Appeal No. 08-140). Subsequently, the Southern District of New York reversed the SRO (P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90 [E.D.N.Y. 2011], aff'd, 2013 WL 2158587 [2d Cir. May 21, 2013]). According to the district, the district also funded the student's tuition at MCC for the 2009-10 and 2010-11 school years pursuant to settlement agreements (Reply ¶ 29).

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

[5] The FNR was originally dated June 11, 2011 but the date was crossed out and "June 16, 2011" was handwritten (Parent Ex. M at p. 1).

with MCC and remitted a nonrefundable deposit to reserve the student's seat for the 2011-12 school year (Parent Exs. Q; AA).

A. Due Process Complaint Notice

The parents filed a due process complaint notice dated March 9, 2012 with over 70 enumerated claims, 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).[6, 7] The parents alleged, among other things, that: (1) the March 2011 CSE was improperly constituted; (2) the district engaged in impermissible "predetermination" and deprived the parents the opportunity to meaningfully participate in developing the student's IEP; (3) the district failed to adequately assess and evaluate the student and failed to meaningfully consider private evaluations and, therefore, the March 2011 IEP did not accurately describe the student's present levels of performance; (4) the annual goals listed in the March 2011 IEP were not sufficient to meet the student's needs; (5) the CSE's recommended placement was not appropriate for the student; (6) the March 2011 CSE recommended inadequate levels and frequencies of related services; (7) the March 2011 IEP did not promote generalization of the student's skills; (8) the district failed to discuss, develop, or recommend a transition plan for the student, despite the student's need for consistency in his program; (9) the March 2011 IEP did not provide for parent counseling and training services; (10) the district failed to conduct an appropriate functional behavioral assessment (FBA) or develop an appropriate behavioral intervention plan (BIP); (11) the district failed to offer any extended day services for the student; and (12) the district failed to recommend transportation for the student (id. at pp. 3-8). The parents also alleged that the district failed to timely notify the parents of the assigned public school site and impermissibly abdicated the school assignment decision to an inadequately informed administrator, and that the assigned school was not appropriate for the student because it: was not ready and able to implement the student's IEP recommendations, including related service recommendations; consisted of a 12-month program that would materially change in September; utilized an inappropriate teaching methodology; utilized a time-out room; utilized inadequately trained staff; presented an unsafe and hostile environment; and offered the student a classroom in which she would be inappropriately grouped (id.).

In addition, the parents alleged that the student's placement at MCC was appropriate and that the equities favored the parents (Parent Ex. A at p. 8). Initially, for pendency (stay put), the parents sought ten hours of home-based ABA and three 30-minute sessions per week each of 1:1 speech-language therapy and 1:1 OT, as part of a twelve month program, pursuant to a purported last agreed-upon IEP, dated January 28, 2008 (id. at p. 2). As relief, the parents requested that an IHO award them, among other things, the costs of the student's tuition at MCC for the 2011-12 school year and direct the district to provide and pay for: 10 hours per week of ABA services; one

[6] 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.

[7] The hearing shows that the parents previously filed, and subsequently withdrew, impartial hearing requests relative to the same March 2011 IEP on June 30, 2011 and July 8, 2011 (Dist. Exs. 3; 4; 5).

and a half hours per week of home-based speech-language therapy; one hour per week of home-based OT; and transportation to and from MCC (id. at p. 9). 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 May 3, 2012, an impartial hearing was convened in this matter, and concluded on June 27, 2012, after five days of proceedings (Tr. pp. 1-832). On the last day of the impartial hearing, the student's pendency placement was addressed (Tr. pp. 782-832). In an interim decision dated August 15, 2012, the IHO noted that the placement advocated for by the parents at the impartial hearing was based upon a decision of the district court that was pending appeal to the Second Circuit Court of Appeals (IHO Interim Decision at p. 3). Explaining that the question of whether the district court decision could be deemed "final enough to constitute a basis for pendency" was an "unsettled area of law," the IHO "deferred" his decision, awaiting clarity from the Second Circuit on the issue or a decision on the merits of the pending matter (id. at p. 4).

By decision dated December 7, 2012, and by corrected decision dated December 11, 2012, the IHO found, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that MCC was an appropriate placement for the student, and that equitable considerations favored the parents (IHO Decision at pp. 21-22).[8] The IHO determined that the March 2011 IEP presented the parents with a predetermined outcome, in that only a 6:1+1 special class was considered by the CSE, and that no evidence was presented at the CSE meeting that would demonstrate that the student could function successfully in a 6:1+1 special class setting (id. at pp. 15-18). The IHO also addressed the assigned school, finding that the summer curriculum offered at the school was "relaxed" and that the student would receive only 30-45 minutes of 1:1 instruction from the special education teacher and the paraprofessional in the assigned class (id. at p. 17).

The IHO also found that the parents satisfied their burden of proving that MCC was an appropriate placement for the 2011-12 school year, citing evidence that the student was making progress at MCC (IHO Decision at pp. 19-20). Rejecting the district's argument that the parents' lacked standing because there was no signed contract between the parents and MCC in evidence, the IHO found that the parents had a course of dealing with MCC and had made payments towards the student's tuition for the 2011-12 school year (id. at p. 20). 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 MCC (id. at pp. 20-21). Consequently, the IHO ordered the district to pay the costs of the student's tuition at MCC for the 2011-12 school year and for the costs of the related services received by the student outside of the school (id. at p. 22).

[8] Review of the IHO's decision and corrected decision in the instant case reveals that the IHO corrected typographical errors only (compare IHO Decision dated December 7, 2012, with IHO Decision dated December 11, 2012). Therefore, hereinafter citations to the IHO's decision shall refer only to the December 11, 2012 corrected decision.

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 MCC was an appropriate placement for the student for the 2011-12 school year; and that the equities favored the parents. Initially, the district alleges that the parents did not sufficiently raise an issue relating to the March 2011 CSE's recommendation for a 6:1+1 special class in their due process complaint notice and, thus, that it was outside the scope of the impartial hearing. The district asserts that the March 2011 CSE considered all evaluative data and, with the participation of the parents and representatives from MCC, developed appropriate present levels of performance for the student, as well as goals, modifications, and a BIP. With respect to the March 2011 IEP program recommendation, 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 other program options.

Relative to the assigned school, the district asserts that, since the parents rejected the IEP, the district was not required to demonstrate that the assigned school was appropriate. The district argues, however, that even if the parents were willing to consider the public school, the hearing record demonstrates that: upon assessment, the student would have been placed with students with similar functional levels; the assigned school does not use a time-out room; and the student would have received individualized instruction, related services, and a paraprofessional.

The district also alleges that the IHO erred in finding MCC to be an appropriate placement because the school was too restrictive, did not offer opportunities for appropriate social interactions and access to peers, and caused the student to regress. Turning to the equities, the district alleges that the parents did not seriously intend to enroll the student at the public school and gave the district inadequate notice of their intent to enroll the student at MCC. Finally, the district argues that the parents' contract with MCC was illusory. 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, among other things, including additional findings that the district denied the student a FAPE. In response to the district's allegation, the parents assert that the due process complaint notice sufficiently set forth the parents' claim that the recommended program was not appropriate. Further addressing the petition, the parents assert that the information and recommendations in the evaluations before the March 2011 CSE constituted an accurate description of the student at the time they were written but that the March 2011 CSE's recommendations were not based on such evaluative information. Turning to the district's assertions regarding the assigned school, the parents counter that: the parents were not required to try out an inappropriate public school program; the mother's observations upon visiting the assigned school were not speculative and demonstrated the inappropriateness of the school; the school did not complete assessments of the students for the purposes of functional grouping until September; the school utilized a de facto time-out room; and it was unlikely that the student would have received her related services.

The parents assert a cross-appeal challenging the IHO's interim order, alleging that the student's pendency should have been based on a district court decision in their favor, regarding the student's March 2008 IEP, even though such decision was pending appeal to the Second Circuit

Court of Appeals. With respect to issues unaddressed by the IHO, the parents assert that: (1) the omission of parent counseling and training in the IEP denied the student a FAPE; (2) the district's failure to conduct an FBA resulted in development of an inappropriate BIP and denied the student a FAPE; and (3) the district's failure to provide the parents an opportunity to meet with a placement officer to determine the student's assigned school constituted a procedural violation of the IDEA that denied the student a FAPE and impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE. The parents also assert a general preservation of "any and all claims advanced in the due process complaint, during the hearing, or in post-hearing submissions that were not ruled on by the IHO." Finally, the parents request that I recuse myself as the SRO "on the grounds of bias in favor of school districts and due to its inability to timely render a decision."

In its reply, the district denies the allegations in the parents' cross-appeal and objects to Exhibit B attached to the parents' answer, which is a letter from the parents' attorneys to the Office of State Review. With respect to the parent's cross-appeal of the IHO's interim order, the district asserts that the student's pendency placement should consist of the home-based services set forth in the January 2008 IEP. As to the parents' cross-appeal relating to the March 2011 IEP, the district asserts that the fact that the district did not conduct an FBA or include parent counseling and training on the March 2011 IEP did not rise to a denial of FAPE and that the parents were not entitled by the IDEA to meet with a placement officer regarding the selection of the assigned school. Finally, the district also alleges that the parents' attempt to preserve all remaining issues for cross-appeal is deficient because it fails to indicate the reasons for challenging the IHO's decision and the relief requested from the SRO.

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; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869 [2d Cir. June 24, 2013]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered

individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132 [quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 (2d Cir. 1989)] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195 [quoting Walczak, 142 F.3d at 130] [citations omitted]); see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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. Preliminary Matters

1. Request for Recusal of State Review Officer

The parents have requested that I recuse myself as the SRO on the grounds of bias in favor of the district and due to the Office of State Review's untimely rendering of decisions. 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]).[9] The statutory and regulatory schemes for state-level review in New York

[9] 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]).

were held not to violate federal law (Bd. of Educ. 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 to these due process proceedings. To the extent that the parents' counsel opines that I am biased in favor of the district, she offers no evidence to support such an assertion. Moreover, to the extent that decisions from the Office of State Review have been untimely, such contentions are not relevant to a recusal inquiry. Additionally, recusal makes little sense insofar as it would only have the opposite effect and exacerbate any delay. 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.

Relatedly, the district objects to the parents' submission with their answer of a letter from the parents' attorney to the Office of State Review. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-041). In this instance, the letter submitted with the parents' answer is not additional evidence necessary to render a decision on the substance of the district's appeal or the parents' cross-appeal. Furthermore, as addressed above, the evidence is not relevant to the parents' request that I recuse myself. Therefore, it is not necessary to admit the letter as additional evidence.

2. Scope of the Impartial Hearing

Next, the district alleges that the IHO exceeded the scope of his jurisdiction by deciding an issue that was not raised in the parent's due process complaint notice. Specifically, the district asserts that the IHO erred in determining that the March 2011 IEP's recommendation for a 6:1+1 special class was not appropriate for the student. With respect to this contention, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 611 [E.D.N.Y. 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *11-*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8.

In the present case, by alleging that the program recommendation set forth in the March 2011 IEP was not appropriate, the parents due process complaint may be reasonably read as raising

the issue of the appropriateness of CSE's recommendation in the IEP for a 6:1+1 special class (see Parent Ex. A at p. 8), and the district's argument to the contrary is rejected.

3. Scope of Review

I now turn to the district's contention that the parents' attempt to preserve all remaining issues for cross-appeal is deficient because it fails to indicate the reasons for challenging the IHO's decision and the relief requested from the SRO.

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 "fifth cross-appeal" does not describe why the additional claims should lead to a different result than the one reached by the IHO. 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).

B. Predetermination / Parent Participation

I will next address the IHO's ruling that the CSE impermissibly predetermined the March 2011 IEP program recommendations and the parent's contention that they were denied an opportunity to meaningfully participate in the development of the IEP (see IHO Decision at p. 218).

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], aff'd, 2013 WL 3868594 [2d Cir. July 29, 2013]; 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 [2d Cir. Feb. 18, 2010]).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's March 2011 IEP. The parents attended the CSE in person, and, from MCC, the education director, as well as the student's leading teacher, speech-language therapist, and occupational therapist attended via telephone (Tr. pp. 402-04; Dist. Ex. F at p. 2). Additional attendees included the school psychologist, who also participated as the district representative, a district special education teacher and an additional parent member (id.).

The school psychologist explained that the district had a working relationship with MCC for the purpose of "collaboratively . . . developing IEPs for the children" attending the private school (Tr. p. 405). As discussed in more detail below, the hearing record reflects that the March 2011 CSE received and considered a private psychological evaluation provided by the parents, as well as multiple reports from MCC in the development of the IEP (Tr. pp. 406, 413-15; Dist. Exs. 12; 13; 14; Parent Exs E; Y). The student's teacher from MCC also updated the March 2011 CSE on the student's functioning since the date of her November 2010 educational progress report (Tr. p. 416; see Dist. Ex. 12). The hearing record also shows that the parents had copies of the written reports reviewed by the CSE before the meeting started and that the documentary evidence used

by the CSE in developing the March 2011 IEP was available at the CSE meeting (Tr. pp. 456, 724-26).[10]

The school psychologist testified that all attendees actively participated in the meeting, noting that there was an "open discussion" or a "dialogue," wherein the members asked questions, made "comments and remarks" and involved themselves in the discussion (Tr. p. 421, 426). The school psychologist further explained that the IEP summarized and "hopefully capture[d] the details of the discussion" (Tr. p. 427). According to the school psychologist, no member disagreed with any portion of the discussion relating to the student's present levels of performance (Tr. pp. 427-28, 433). The hearing record further reveals that, although the student's goals were largely adopted from submissions from MCC, they were, in fact, discussed at the March 2011 CSE meeting and "small modifications" were made (Tr. pp. 435-38). Furthermore, the school psychologist indicated that the goals had previously been discussed between MCC and the parents and that all parties had agreed they were appropriate for the student (Tr. pp. 435-36, 474-75).

The hearing record reflects that the CSE was in consensus that the student required a 12-month program and a special class in a specialized school (Tr. pp. 443-44; see Parent Ex. F at p. 1). Consistent with the March 2011 IEP, the school psychologist noted that the CSE considered other placement options for the student (Tr. pp. 444; Parent Ex. F at p. 24). The school psychologist further noted that, although the CSE considered the input from MCC attendees that the student required a higher staff to student ratio, such as the 6:1+6 class that the student attended at MCC, such a high staff ratio was not warranted for the student, noting the student's need for additional peer interaction and the ability of the behavior-management paraprofessional, in conjunction with the BIP, to address the student's behavioral issues (Tr. pp. 445-46).

Based upon foregoing, the evidence in the hearing record does not support the IHO's conclusion that district predetermined the student's program for the 2011-12 school year and I find that the district did not significantly impede the parents from the 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).

C. March 2011 IEP

1. Evaluative Information and Present Levels of Performance

With respect to the evaluative information considered by the March 2011 CSE, while the district affirmatively alleges in its petition that the March 2011 IEP was based on sufficient evaluative data, school progress reports, and information from the parents and the student's teachers, both the IHO's decision and the parents' position seem to focus, not on CSE's failure to duly consider the available information, but rather on the CSE's failure to adopt recommendations appearing therein (see IHO Decision at p. 15; see also J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10 [S.D.N.Y. Aug. 5, 2013]). In any event, an independent review of the information considered by the March 2011 CSE, as detailed below, reflects that the CSE

[10] Although the school psychologist could not say exactly when the parents received a copy of the December 2010 classroom observation, he recalled, at the very least, that they were afforded an opportunity to review the report before the CSE meeting (Tr. p. 412).

had before it current evaluative information relative to the student which was sufficient to enable the CSE to develop the student's March 2011 IEP.

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 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]).

Initially, I note that, contrary to the parents' allegation that the CSE failed to conduct its own evaluations the evidence shows that a classroom observation was conducted by the school psychologist (Parent Ex. D). Additionally, 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 and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 12-165. As part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation

meets the school district's criteria (34 CFR 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H., 2013 WL 1285387, at *15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, at *15 [S.D.N.Y. Mar. 21, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).

In this case, consistent with documentary evidence, the school psychologist testified that in advance of the March 2011 CSE, the CSE obtained various reports from MCC and the parents (Tr. pp. 405-07). The school psychologist indicated the CSE reviewed a November 2010 MCC educational progress report, December 2010 MCC speech-language therapy and OT progress update reports, a December 2010 classroom observation report that he wrote after he observed the student at MCC, a January 2011 FBA from MCC, and a February 2011 private psychological evaluation report submitted by the parents (Tr. pp. 405-09, 411-14; Dist. Exs. 8 at pp. 1-4; 12 at pp. 1-7; 13 at pp. 1-2; 14 at pp. 1-3; 15 at pp. 1-11; Parent Exs. C at pp. 1-10; D at pp. 1-2; E at pp. 1-4; F at pp. 1-26).[11] In addition, the March 2011 CSE reviewed the student's cumulative folder that contained a 2009 neurodevelopmental evaluation report regarding the student (Tr. pp. 419-20; Dist. Ex. 19). According to the school psychologist's testimony, the participants from MCC and the parents provided input with regard to the student's academic functioning based on the private psychological evaluation report, and with regard to the student's present levels of performance, needs, and goals (Tr. pp. 402-04, 414-15; Dist. Ex. 8 at pp. 1-4). The school psychologist testified that the March 2011 CSE used the documentary evidence it received from MCC and the parents, as well as the classroom observation it conducted in developing the 2011-12 IEP (Tr. p. 414; Dist. 8 at pp. 1-4). A March 16, 2011 CSE rationale, written by the school psychologist, notes the specific pieces of documentary evidence used to develop the March 2011 IEP (Dist. 8 at p. 4).[12] Consistent with the March 2011 IEP, the rationale includes significant details about the student that the CSE gleaned from the various written reports and updated verbal reports from the MCC participants during the two-hour CSE meeting (Tr. pp. 412-19, 421; Dist. Ex. 8 at pp. 1-4; Parent Ex. F at pp. 3-7). Testimony by the education coordinator from MCC indicated the March 2011 CSE used the information in the documentation it received from MCC

[11] The hearing record includes two copies of a document dated January 2011, which were revisions of an FBA conducted in December 2009 (Dist. Ex. 15 at pp. 1-11; Parent Ex. Y at pp. 1-13). Parent Ex. Y contains some handwritten information on the first two pages of the document that appears to have been included in the district's exhibit, as well as two unsigned signature pages at the end of the document that were not included in the district's exhibit (Dist. Ex. 15 at pp. 1-2; Parent Ex. Y at pp. 12-13). For purposes of the instant case, any reference to the January 2011 FBA will site to District Ex. 15.

[12] Testimony by the school psychologist indicates the "rationale" is an informal document he created during and at the conclusion of the March 2011 CSE meeting (Tr. p. 423-24). The school psychologist explained the rationale was a summary of the details "from aspects" of the CSE meeting in regard to documentation considered and information used by the CSE, content that was "thrashed out," and some of the reactions of the participants to that content (Tr. pp. 423, 425; Dist. Ex. 8 at pp. 1-4). This document appears to have some elements of a "prior written notice" (see 8 NYCRR 200.5[a][1]); however, district did not include the prior written notice form in the hearing record (see also "New York State Model Forms: Prior Written Notice (Notice of Recommendation) Relating to Special Education," VESID Mem. [Jan. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/PWN/).

(Tr. p. 622). The education coordinator further noted the CSE discussed the student's present levels of performance with the MCC teacher and related service providers who participated in the meeting, and incorporated goals from MCC into the student's March 2011 IEP (Tr. p. 623).

On the March 2011 IEP, the student's present levels of performance in the areas of academic performance and learning characteristics consisted of detailed information consistent with the February 2011 psychological evaluation report, the November 2010 MCC educational progress report, and the December 2010 speech-language therapy report (Dist. Exs. 12 at pp. 1-4; 13 at pp. 1-2; Parent Exs. E at pp. 1-3; F at pp. 1, 3-5). The March 2011 IEP included a narrative description of the student that incorporates the MCC lead teacher's detailed oral update of the student's academic performance and learning characteristics since November 2010 when she wrote the educational progress report (signed by the lead teacher on December 17, 2010) (Tr. pp. 415-16; Dist. Ex. 12 at p. 1; Parent. Ex. F at pp. 3-6).[13] The school psychologist also indicated that there was no disagreement among any of the CSE participants with regard to any portion of the student's present level of academic performance (Tr. p. 427). The March 2011 IEP included grade level reading and math instructional levels based on "interpretation of school reports" (Parent Ex. F at pp. 5-6). The March 2011 IEP indicated that the student demonstrated reading decoding and comprehension and basic writing skills within the kindergarten grade level range (id. at p. 5). According to the March 2011 IEP, the student also demonstrated basic math skills within the kindergarten grade level range (id. at p. 6).

The student's present levels of performance in the area of academic and learning characteristics in the March 2011 IEP reflected, consistent with the February 2011 psychological evaluation report, that results of formal testing indicated relative strength in the student's nonverbal cognitive functioning and placed the student's overall cognitive functioning in the "Mild Range" of intellectual deficiency with commensurate delays in adaptive living skills (Dist. Ex. 8 at p. 2; Parent. Exs. E at p. 3; F at p. 4). The IEP also contained a list of formal cognitive and adaptive behavior testing results taken directly from the February 2011 psychological evaluation report (Parent Exs. E at p. 3; F at p. 3). In addition, the March 2011 IEP included information, consistent with the February 2011 psychological evaluation report, about the student's history, her behaviors that the evaluator observed during the psychological evaluation, and the evaluator's conclusion that improvement in the student's play activities, use of language, and social interactions suggested a current diagnosis of PDD-NOS rather than autism (Parent Exs. E at p. 2; F at p. 3).

Consistent with the school psychologist's testimony that the lead teacher from MCC updated the CSE regarding the student's progress since the time of the November 2010 educational progress report, the March 2011 included a detailed description of the student's "academic literacy" (Dist. Ex. 12 at p. 1; Parent Ex. F at p. 4). The IEP reflected that, in the past, the student displayed difficulty remembering how many objects she was asked to count and give, but, by the time of the March 2011 CSE, she mastered counting one to fifteen objects from a larger set (Dist. Ex. 12 at p. 1; Parent Ex. F at p. 4). The IEP indicated that the student mastered commenting using pronouns and, at the time of the CSE meeting, was working on using the target pronouns in the natural environment and in random succession (Dist. Ex. 12 at p. 3; Parent Ex. F at p. 4). Also consistent

[13] According to the school psychologist, all members of the CSE had the November 2010 educational progress report before them, whereupon the lead teacher "verbally paraphrased and amended and discussed [the student's] functioning" as the basis of her discussion (Tr. p. 416).

with the November 2010 educational progress report, the IEP stated that the student was working on memory skills by delivering and recalling messages within the classroom, across all school environments, and between home and school, and described her accuracy regarding these skills as variable (id.). The March IEP indicated the student was working on conversation skills with her instructors (id.). While the student was able to respond to social questions, the March 2011 IEP reported that she displayed difficulty generating a response or comment to a statement such as, "Let's talk about the park," whereby she tended to repeat or negate what she heard (id.). At the time of the March 2011 CSE, the student was learning to converse by making one exchange with an instructor when provided with visuals of activities she previously engaged in during the school day (Dist. Ex. 12 at pp. 3-4; Parent Ex. F at p. 4). The IEP indicated the student mastered giving multiple responses for toys with the use of some visual prompts, and was working on generating responses without the visual prompts (Dist. Ex. 12 at p. 3; Parent Ex. F at p. 4). At the time of the March 2011 CSE, the IEP reported that the student mastered filling in two features (i.e., "something a dog has" or "a dog has") for a few items without a visual prompt, and was working on filling in features of other familiar items with the use of visual prompts (Dist. Ex. 12 at p. 4; Parent Ex. F at p. 4). The IEP indicated that, for math, the student independently matched coins (penny, nickel, dime, quarter) to purchase items, and was required to match the coin to its value on a menu (Parent Ex. F at p. 4). The March 2011 IEP further indicated that student had mastered basic one to one correspondence, was identifying one and two-digit numbers, but had not yet begun to add and subtract (id.).

In regard to the student's language functioning, testimony by the school psychologist noted that the MCC speech-language pathologist discussed the speech-language therapy December 2010 progress note (Tr. p. 416). The March 2011 IEP indicated that, consistent with the December 2010 speech-language therapy progress update, the student's receptive language continued to be a relative strength (Tr. p. 416; Dist. Ex. 13 at p. 1; Parent Ex. F at p. 4). The IEP provided significant detail, consistent with the speech-language therapy progress update, with regard to the student's understanding and use of temporal concepts, locative concepts, challenges with language flexibility, comprehension of wh-questions during structured and real life activities, and the student's need for scaffolding and visual cues as supports to recall information sequence (Dist. Ex. 13 at pp. 1-2; Parent Ex. F at p. 4). The IEP indicated the student's expressive language goals [at MCC] addressed first person pronouns, prepositions, use of descriptors, and sentence formulation for commenting purposes (Dist. Ex. 13 at p. 1; Parent Ex. F at p. 4).). Expressively, the student's ability to comment was slow but steadily improving, and her comments were more relevant and appropriate when she was engaged in highly structured concrete activities rather than abstract activities (Dist. Ex. 13 at p. 2; Parent Ex. F at p. 4). When a discussion became less concrete and more abstract the student's comments often became less appropriate and more off-topic, whereupon the student tended to engage in scripting and delayed echolalia (id.). The IEP indicated that "[v]isuals continue to be important for [the student's] learning" and that, without the incorporation of these aids, off-topic behavior frequently arose (id.). The IEP described the student as a social child who sought interaction with adults, but that she had not internalized the rules for appropriate conversational turn taking (id.)

The social/emotional present levels of performance in the March 2011 IEP indicated, consistent with the November 2010 MCC educational progress report, that the student played various games with peers with minimal prompting (Dist. Exs. 12 at p. 5; Parent Ex. F at p. 7). The IEP indicated that the student had mastered playing catch and throw with a peer, and at the time

of the March 2011 CSE, she was learning to play cooperatively with a peer to complete a puzzle (id.). The IEP included significant detail about the student's independence with familiar school routines involving peers, classroom materials, personal calendar activities, and snack, and her ability to respond to and initiate greetings with peers (id.). At the time of the March 2011 CSE, the student was working on varying the way she asked for snacks and in how she responded to peers' requests for snack (i.e., "sure" or "here you go") (id.).

As addressed in further detail below, the CSE discussed the student's behavior and instructional process and incorporated that discussion, along with information from the MCC FBA into the March 2011 IEP (Tr. p. 418; Dist. Ex. 15 at pp. 1-11; Parent Ex. F at p. 9). The school psychologist noted that no one at the CSE meeting disagreed with the BIP created by the March 2011 CSE (Tr. p. 431).

The student's present health and physical development information, included in the March 2011 IEP, was consistent with the February 2011 psychological evaluation report and reported that the student had been diagnosed with celiac disease for which she required a gluten free diet and took medication at home (Parent Exs. E at p. 1; F at p. 9). The IEP also incorporated information provided by the parents that the student suffered from sinusitis as a result of airborne seasonal allergies (Tr. p. 432; Parent Ex. F at p. 9). The March IEP described the student's hearing and vision as "within the norm" (Parent Exs. E at p. 1; F at p. 9).

Testimony by the school psychologist indicated that "[h]alf of the summary of the present health status and physical development" came directly from the occupational therapist that participated in the March 2011 CSE, about which no one disagreed (Tr. p. 433-34). Review of the student's health status and physical development included in the March 2011 IEP with respect to the OT related information reveals that the CSE incorporated the December 2010 OT progress report from MCC into the IEP (Dist. Ex. 14 at pp. 1-3; Parent Ex. F at pp. 9-11). Consistent with the OT progress report, the IEP reported that the student's OT treatment sessions focused on improving the student's sensory integration abilities, so that she could participate in classroom tasks with improved attention and diminished stereotypical behaviors (Dist. Ex. 14 at p. 1; Parent Ex. F at p. 9). The IEP also reported that OT focused on: increasing the student's functional shoulder, arm, and hand control for greater success with fine motor tasks; improving motor planning skills to enhance the quality of her movement and organization of self, while enhancing her postural control to provide a stable base of support needed to facilitate better hand use; and increasing her visual motor skills for greater success in home and classroom activities (id.). According to the IEP, OT sessions also focused on building attention, increasing the student's ability to follow two to three-step verbal directives and visual models, increasing overall strength and endurance, and improving her ability in efficiently and safely navigating her environment (id.). Consistent with the December 2010 OT progress report, the IEP included detailed information about the student's difficulty and progress up to the time of the March 2011 CSE involving activities in each target area noted above and her need for verbal assistance and modeling (Dist. Ex. 14 at pp. 1-2; Parent Ex. F at p. 10).

Consistent with the OT progress report, the March 2011 IEP indicated the student presented with decreased ability to regulate her sensory system which interfered with her ability to follow daily routines, engage in structured tasks, participate in leisure activities, socialize with peers and adults, and initiate and follow through with verbal requests (Dist. Ex. 14 at pp. 1-2; Parent Ex. F

at p. 10). The student frequently presented with impulsivity (eloping, grabbing objects), compulsivity (touching therapist's face), and behavioral overreactions (laughing, repeated vocal and physical stereotypy), as well as behaviors that affect her ability to transition to tasks and complete them (Dist. Ex. 14 at p. 2; Parent Ex. F at p. 10). When tasks required an increased focus, the student needed a higher level of visual, verbal, and physical prompting to increase her attention and ability to follow through with requests with a calm body (id.). The March 2011 IEP indicated that, when provided with controlled sensory input, the student presented with less verbal stereotypy, increased focus, greater alertness and organization, and better responsiveness to visual and auditory stimulation (Dist. Ex. 14 at p. 2; Parent Ex. F at pp. 10-11).

In regard to graphomotor skills, consistent with the OT progress report, the March 2011 IEP indicated the student participated in a structured handwriting program in OT, as well as in the classroom, to address appropriate letter formation (Dist. Ex. 14 at p. 2; Parent Ex. F at p. 11). In addition, the IEP indicated the student continued to work on visual scanning, and tracking, hand and finger control, and other fine motor skills (id.). The student worked on writing tasks with verbal prompts, physical guidance, and tracing to increase her awareness of spacing and letter formation (id.). The student participated in memory matching board games to work on sequencing steps, taking and waiting for a turn, and building attention (id.). When looking for hidden puzzle cards or objects in the therapy room, the student required prompts to increase her frustration tolerance and success with the task (id.). The student required faded physical prompting and assistance in placing the scissors maturely in order to cut straight lines (id.).

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 MCC lead teacher's and related service providers' input regarding 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 303.306[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). Additionally, the district was not required to consider reevaluation 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 even 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. 427, 431, 433-34).

2. March 2011 Program Recommendation

The district asserts that the IHO erred in determining that no evidentiary documents included in the hearing record provide a rationale for the March 2011 CSE's recommendation of a 6:1+1 special class placement for the student (IHO Decision at p. 18). An independent review of the evidence in the hearing record leads to 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

a 1:1 behavior management paraprofessional and related services was appropriately designed to address the student's special education needs, as identified in the evaluative information available to the CSE.

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 regulations and with the student's needs, as indicated in the evaluative data reflected in the student's IEP, 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. 442; Parent Ex. F at pp. 1, 23).

The district's school psychologist testified that the CSE's recommendation of a 6:1+1 special class was based in part on its discussion and consensus that the student needed a 12-month program, that her needs could not be met in a community school setting, and that she needed a specialized school setting (Tr. pp. 441-43). The March 2011 IEP indicated that the student's academic deficits, social/emotional, and behavioral needs precluded her participation in the general education environment (Parent Ex. F at p. 7). Furthermore, in addition to the March 2011 CSE's recommendations for speech-language therapy and OT, the CSE recommended the student have a 1:1 behavior management paraprofessional, whose role would be to assist in implementing the student's BIP and to record data coming directly from such implementation, as well as to assist the student throughout the day by addressing her distractibility and other classroom behaviors and assuring her supervision (Tr. pp. 442-43; Parent Ex. F at p. 25).

The hearing record indicates the CSE also discussed the option of a 12:1+4 special class for the student (Tr. p. 444; Parent Ex. F at p. 25). The March 2011 IEP indicated the CSE rejected this option because the student did not display the severity of disability or require the level of treatment and habilitation that a 12:1+4 special class program was designed to address (Tr. p. 444; Parent Ex. F at p. 25).[14] The school psychologist noted that, at the time of the March 2011 CSE, despite the student's need for a BIP and a 1:1 behavior management paraprofessional, she did not present with such excessive interfering behaviors or severely delayed physical needs that required a staffing level as high as 12:1+4 (Tr. pp. 445-46). The school psychologist indicated that a primary weakness of the student involved her need to learn to function socially by asserting herself within her community of chronological peers (Tr. p. 446). According to the school psychologist, the March 2011 CSE attempted to afford the student maximum opportunity to fully address her needs in the presence of appropriate peers, and he agreed with the recommended 6:1+1 placement (Tr. pp. 446-47). The school psychologist's description of the student's social development is consistent with evaluative information considered by the CSE, as discussed above, including reports that the student's play activities and social interactions were improving, and descriptions of the student as a social child (see Dist. Exs. 12 at p. 5; 13 at p. 2; Parent Exs. E at p. 2; F at pp. 3-4, 7).

In his decision, the IHO cited the MCC reports, which recommended a smaller class size for the student, to support his conclusion that a 6:1+1 special class was not appropriate for the

[14] State regulations provide that a 12:1+4 special class placement is designed to address students "with severe multiple disabilities, whose programs consist primarily of habilitation and treatment" (8 NYCRR 200.6[h][4][iii]).

student (IHO Decision at pp. 15-16, 18; see Dist. Exs. 12 at p. 7; 17 at p. 3; 19 at pp. 7-8; Parent Ex. E at pp. 3-4). Although the specific class ratio and methodology referenced in the recommendations made by the private evaluation reports were not selected for inclusion in the student's IEP, as noted above, the district was required only to consider the parents' privately obtained evaluations; it was not required to adopt all of the private evaluators' recommendations over those of district personnel (Watson, 325 F. Supp. 2d at 145; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641 [7th Cir. 2010]; G.W., 2013 WL 1286154, at *19; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *10 [S.D.N.Y. Jan. 13, 2013]; DiRocco, 2013 WL 25959, at *23; M.H., 2011 WL 609880, at *12; Pascoe, 1998 WL 684583, at *6). Moreover, while a review of the record demonstrates that the student presented with significant educational needs, none of the evidence reflects that the student required more adult support than that which would be available in a 6:1+1 special class, which State regulations describe as intended for students requiring a high degree of individualized attention and intervention (8 NYCRR 200.6[h][4][ii][a]).

The March 2011 IEP also provided additional supports to the student by recommending various strategies aligned to the student's unique academic, social/emotional, and health/physical needs (see Parent Ex. F at pp. 6, 8, 11). Such supports are appropriately implemented in a 6:1+1 special class, which State regulations describe as designed to address highly intensive management needs (8 NYCRR 200.6[h][4][ii][a]). The March 2011 CSE identified the student's academic management needs for redirection to task, repetition in order to understand directions and tasks, repetition or clarification of questions, instructions or directions as needed, teacher prompts to help manage moments of distractibility and retrieval difficulties, previewing educational materials before classes, help in highlighting relevance, physical cues and breaking down directions into small clear steps, extended processing time and having the student repeat directions back to teacher, multisensory sequential structured approach, visual aids plus auditory directions, hands on activities and use of manipulatives to help visualize content presented, teacher scaffolding to help regulate the student's body and organize her ideas, guided pre-programming, prompting and supportive redirection to facilitate on-task behavior and more reflective task approaches, and frequent check-ins (id. at p. 6). The March 2011 CSE also identified the student's social/emotional management needs for: modeling; cuing; verbal praise and support from teaching staff, and reinforcement of age appropriate social/emotional behavior, including but not limited to compliance with adult directives and classroom and school procedures, and participation in age appropriate peer interactions (id. at p. 8). Furthermore, the March 2011 CSE identified the student's health and physical management needs, including her need for a gluten free diet (id. at pp. 1, 9).

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, pre-academic, academic, and play and social/leisure skills, as well as multiple OT related functions (i.e., motor planning, fine motor, shoulder arm and hand control for fine motor activities, balance/equilibrium, postural control, proprioception/kinesthesia, spatial relations, organization, and body awareness), speech-language therapy related functions (i.e., engagement/conversational/pragmatic, receptive language, expressive language), activities of daily living (i.e., hair brushing, teeth brushing, fasten buttons and zippers, tie shoes, wash face), and behavior (i.e., task completion and self-management in the

absence of inappropriate target behaviors consistent with those listed in the BIP) (Tr. pp. 437-39, 452-54; Parent Ex. F at pp. 12-22, 26).

The hearing record also does not support the IHO's finding that the March 2011 CSE "cursorily dismissed" the MCC program and specifically the ABA discrete trial methodology utilized therein (IHO Decision at p. 16). Initially, regardless of classroom size or student-to-adult ratio, the district was not required to consider removing the student altogether from the public school and placing of the student in a nonpublic school if it believed that the student could be satisfactorily educated in the public schools (W.S., 454 F.Supp.2d at 148-49 ["If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort"]; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F.Supp.2d at 430-31).

Furthermore, with respect to the IHO's reference to the ABA methodology utilized at MCC (IHO Decision at p. 16), a CSE is generally 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.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.D., 2013 WL 1155570, at *12; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 6, 2012]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *12 [S.D.N.Y. Aug. 23, 2012], aff'd, 2013 WL 3814669 [2d Cir. July 24, 2013]; Ganje, 2012 WL 5473491, at *11-*12; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012], aff'd, 2013 WL 3155869 [2d Cir. June 24, 2013]; A.S. v. New York City Dep't of Educ., 10–cv–00009, at 25–28 [E.D.N.Y. May 25, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-165; Application of a Student with a Disability, Appeal No. 12-017. Thus, although the parents elicited testimony at the impartial hearing indicating that the student benefited from the ABA instruction (see Tr. pp. 563-64), the district was not required to recommend such a methodology in developing the student's March 2011 IEP.[15]

[15] With regard to ABA instruction, the parents primarily alleged, and the IHO determined that the CSE failed to recommend a program for the student that would utilize the ABA methodology during the school day (IHO Decision at p. 16; see Parent Ex. A at pp. 5, 6). In contrast, in the previous litigation involving this student, the district court held that the March 2008 CSE had erred by failing to recommend, among other things, 1:1 home-

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 a 1:1 behavior management paraprofessional and related services was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year. Furthermore, although the March 2011 IEP did not specify an instructional methodology that the student required, I decline to find under the circumstances of this case that it resulted in or contributed to a denial of a FAPE, and the IHO's findings must be reversed.

3. Parent Counseling and Training

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 M.W. v. New York City Dep't of Educ., 2013 WL 3868594, at *7 [2d Cir. July 29, 2013]; R.E., 694 F.3d at 191; 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. 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] 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; see 8 NYCRR 200.13[d]; M.W., 2013 WL 3868594, at *7). 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" (R.E., 694 F.3d at 191; see A.D., 2013 WL 1155570, at *12; F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *11-*13 [S.D.N.Y. Feb. 14, 2013]; F.L., 2012 WL 4891748, at *10; K.L., 2012 WL 4017822, at *14).

based ABA services for the student (see P.K., 819 F. Supp. 2d at 111). It is also noteworthy that, in affirming the district court's decision on this point, the Second Circuit explicitly declined to base its ruling on the particular methodology, stating: "without regard to educational method—that the IEP was substantively inadequate because it failed to provide sufficient 1:1 instruction" (P.K., 2013 WL 2158587, at *4). In any event, in the present matter, while the parents raised the issue of extended day services and, specifically, requested home-based ABA services as a remedy in their due process complaint notice (see Parent Ex. A at pp. 7, 9), the IHO did not address whether or not the district's failure to recommend home-based services constituted a failure to offer the student a FAPE (although he did award home-based services as a remedy) and the issue has not otherwise been raised on appeal (see generally IHO Decision).

In this case, the record reflects that the CSE did not explicitly recommend parent counseling and training as a related service on the student's 2011-12 IEP (Tr. p. 709; see Parent Ex. F at p. 25).[16] However, the IEP indicated that the recommendation included the "parent training component to program" (Parent Ex. F at p. 23). The school psychologist also testified that the parent counseling and training was "incorporated" in the recommended program (Tr. p. 490). Thus, I find no merit to the parents' claim that the March 2011 CSE failed to recommend parent counseling and training.

Moreover, 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]). Where, as here, the hearing record does not contain evidence showing that this defect rose to the level of denying the student a FAPE, I find that the parents' argument must be dismissed.

4. Consideration of Special Factors—Interfering Behaviors

I now turn to the parents' assertions that the March 2011 CSE should have conducted an FBA of the student and that the BIP developed was not appropriate. As set forth in greater detail below, the hearing record supports a finding: that MCC provided the March 2011 CSE with an FBA for the student (Dist. Ex. 15); that, in considering the FBA provided by MCC, the CSE properly addressed special factors related to the student's behavior that impeded her learning, and that the March 2011 IEP and the proposed BIP otherwise appropriately addressed the student's behavioral needs (see generally Parent Ex. F).

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];

[16] Although not dispositive, I also note testimony from the unit coordinator at the assigned public school site that the school provided, among other offerings, orientation for all new parents, a monthly parent/sibling support group, meetings with individual parents to address challenging behaviors exhibited by a student, as well as trainings for parents provided by the Young Adult Institute (YAI) (Tr. pp. 129-30). She also testified that if a parent required, the school would facilitate additional counseling or training (Tr. p. 131).

34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; M.W., 2013 WL 3868594, at *5; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 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.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

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

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

State regulations call for the procedure of using an FBA when developing a BIP, and the Second Circuit has explained that when required "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all (R.E., 694 F.3d at 190). However, the failure to comply with this procedure does not automatically render a BIP deficient (M.W., 2013 WL 3868594, at *5; R.E., 694 F.3d at 190; A.D., 2013 WL 1155570, at *9; A.H., 2010 WL 3242234, at *4; see F.B., 2013 WL 592664, at *8-*1; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 269, [S.D.N.Y. 2012]; F.L., 2012 WL 4891748, at

*8; K.L., 2012 WL 4017822, at *11; T.M. v. Cornwall Cent. Sch. Dist., 900 F.Supp.2d 344, 354 [S.D.N.Y. 2012]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8-*9 [S.D.N.Y. Dec. 8, 2011]; P.K. v. New York City Dep't of Educ., (Region 4), 819 F. Supp. 2d 90, 106 [E.D.N.Y. 2011], aff'd, 2013 WL 2158587 [2d Cir. May 21, 2013]; 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]).[17] 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 [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

According to the March 2011 IEP, the student's behavior seriously interfered with instruction and required additional adult support (Parent Ex. F at p. 8). Testimony by the parent indicated that the March 2011 CSE discussed the student's behaviors specific to crying, vocal refusal, nail biting, "a bit of elopement," and other behaviors (Tr. pp. 677-78). The December 2010 MCC progress report noted that the private school developed an FBA for the student behaviors consisting of crying, nail biting and picking (Dist. Ex. 12 at p. 6). In addition, the March 2011 IEP indicated that the student's parents and MCC reported two behaviors that were health and/or safety concerns for the student (Parent Ex. F at p. 9). One long-standing behavior involved

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

the student's "habit" of picking/biting her cuticles/nails to the extreme and rubbing her nails against her clothing, whereby she might injure her fingernail beds to the point of bleeding and risked infection (Dist. Ex. 12 at p. 6; Parent Ex. F at p. 9). The other behavior involved a behavior that could constitute a safety hazard, as the student tended to tilt her head back with closed eyes when walking and while on stairs (Parent Ex. F at p. 9). The March 2011 IEP indicated the student's behavior seriously interfered with instruction and required adult support and that a BIP addressing these and other behaviors had been developed (id. at pp. 8, 26). The school psychologist indicated that the BIP developed during the CSE meeting was based on the January 2011 FBA from MCC (Tr. pp. 418, 430-31, 483; Dist. Ex. 15 at pp. 1-11; Parent Exs. F at p. 26).[18] He noted that no one at the CSE meeting disagreed with the BIP created by the CSE (Tr. p. 431).

Review of the BIP developed during the March 2011 CSE reveals that the CSE described the target behaviors of crying, the student's tendency of closing her eyes, vocal refusal by rephrasing demands as negations, and nail biting/picking (Parent Ex. F at p. 26). Consistent with the MCC FBA, the BIP developed at the March 2011 CSE defined the expected behavior changes (i.e., significantly decrease crying, decrease vocal refusal, increase on-task behavior), the strategies to be used to try to change the student's target behaviors (i.e., response interruption and redirection for vocal behavior; replacement of target behaviors with appropriate functional communication; repetition of the task with appropriate response; functional analysis of nail picking and biting habit reversal; differential refusal of other behavior; and awareness training), and the supports to be used to help the student change her behavior (i.e., total staff collaboration with implementation of BIP) (Dist. Ex. 15 at pp. 1-11; Parent Exs. F at p. 26).

I also find that the student's interfering behaviors were sufficiently addressed by the March 2011 IEP itself, and therefore, any technical violations associated with the FBA or BIP did not result in a denial of a FAPE to the student (M.W., 2013 WL 3868594, at *6; A.C., 553 F.3d at 172.). The March 2011 IEP incorporated supports to assist the student in changing her behavior, including a 1:1 behavior management paraprofessional (see Parent Ex. F at pp. 6, 8, 11, 25; see M.Z., 2013 WL 1314992, at *5, *8 [even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits … in addressing the problematic behaviors"]. Moreover, as previously discussed, the March 2011 IEP included a description of the student's social/emotional present levels of performance and health/physical development, which incorporated 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 (Parent. Ex. F at pp. 6-11). The IEP also included a goal and multiple short-term objectives that addressed the

[18] I note that, even if the district were not entitled to rely on the FBA provided by MCC, as noted above, the district's failure to conduct an FBA prior to developing the student's 2011-12 BIP would not, by itself, automatically render the May 2011 IEP so deficient as to deny the student a FAPE (A.D., 2013 WL 1155570, at *9-*10; A.H., 2010 WL 3242234, at *4). While the student's need for a BIP must be documented in the IEP, upon such a recommendation, the CSE must ensure that an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis added]). It is not necessary that 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, at *3 [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]).

student's performance of daily activities in the absence of the inappropriate behaviors targeted on the BIP attached to the March 2011 IEP (id. at pp. 19, 26).

However, I note that the proposed BIP did not follow the procedures for including the baseline measure of the student's problem behaviors or the schedule to measure the effectiveness of the interventions, as required by State regulations (Parent Ex. F at p. 26; see 8 NYCRR 200.22 [b][4][i][iii]). Because the district formulated a BIP based on information from the evaluative reports available to the CSE and input from the student's parents and MCC representatives, and developed management needs designed to target the student's interfering behaviors, I find that the absence of a baseline measure of the student's problem behaviors and a schedule to measure the effectiveness of interventions neither resulted in any substantive harm to the student that rose to the level of a denial of a FAPE (R.E., 694 F.3d at 190-91; S.H., 2011 WL 6108523, at *8-*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, 2009 WL 3335760, at *4).

In summary, based on the evidence above, the hearing record demonstrates that the recommended 6:1+1 special class program with a 1:1 behavior management paraprofessional and related services, as set forth in the student's March 2011 IEP and attached BIP, was appropriate to address the student's needs as identified in the evaluative information before the CSE, including the FBA provided by MCC, and was reasonably calculated to enable him to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

D. Assigned School

Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 2012 WL 4891748, at *14-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C., 906 F. Supp. 2d at 273 [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ.,

2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[19] In view of the forgoing and under the circumstances of this case, I find that the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's May 2011 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186 [2d Cir. 2012]; K.L., 2013 WL 3814669 at *6; R.C., 2012 WL 5862736, at *16) . In this case, the district developed the student's 2011-12 IEP and offered the student a timely placement.[20] It is undisputed that the parents enrolled the student at MCC prior to the time that the district became obligated to implement the March 2011 IEP (Parent Ex. Q) and rejected the IEP after visiting the assigned school (Parent Ex. P).

However, even assuming for the sake of argument that the parents could make such speculative claims and that the student had attended the district's recommended program at the assigned public school site, as further explained below, the evidence that was adduced at the hearing record would not support the conclusion that the district would have violated the FAPE

[19] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

[20] The district offered the student a placement on June 16, 2010 (Parent Ex. M at p. 1). This date was prior to the start of the 12-month school year, and therefore in conformity with State and federal regulations (34 CFR 300.323[a]; 8 NYCRR 200.4[e][(1][ii]).

legal standard related to IEP implementation, that is, deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297, at *2 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D. D-S, 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

Notwithstanding by determination above, I have conducted a review of the evidence in the hearing record to offer findings in the alternative, even though I do not believe they are required in these circumstances. In his decision, the IHO addressed the appropriateness of the assigned public school site and characterized the summer curriculum as "relaxed" (IHO Decision at p. 17). The IHO also found that the student would not receive sufficient 1:1 instruction in the assigned classroom (id.). Assuming for the sake of argument that the student had attended the public school and that the district had the obligation to show that it implemented the IEP, the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see T.L. v. Dep't of Educ., 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]; D. D-S, 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502-03].

The district offered evidence regarding the elements of the student's program that werer offered in the IEP. Had the student enrolled at the assigned school as of July 2011, testimony by the special education teacher of the 6:1+1 class indicated she would likely have been the student's teacher, and that she had received professional development training in a variety of areas including ABA, and developing FBAs and BIPs (Tr. pp. 238-42, 516-18).[21] Her teaching responsibilities included assessing and educating her students, keeping data on her students' academic, social, emotional, and ADL progress and on behavior (Tr. pp. 243-44).[22] As of July 1, 2011 the teacher's 6:1+1 classroom consisted of five students in grades two to three who had reading and writing levels between kindergarten and first grade, and math levels between pre-kindergarten/kindergarten and first grade (Tr. pp. 245-46, 513). All of the students in the 6:1+1 class were verbal and had an IEP with goals that the teacher addressed (Tr. p. 259-60).

The teacher of the assigned class explained that she used a theme-based curriculum for the summer session, entitled SPLASH that incorporated math and reading (Tr. pp. 247, 272, 504).[23] Furthermore, the teacher indicated she used another reading curriculum in conjunction to the SPLASH curriculum (Tr. p. 523). In his decision, the IHO characterized SPLASH as a "relaxed summer-oriented curriculum" (IHO Decision at p. 17). While I do not find that characterization to be supported by the hearing record, I note that a 12-month program, such as that recommended for the student, is intended to prevent substantial regression, defined as a "loss of skill or

[21] The teacher's testimony reflected that as of July 2011 she had one paraprofessional assigned to her classroom (Tr. p. 306, 505).

[22] Testimony by the teacher of the 6:1+1 class indicated she sat with each student on a 1:1 basis and conducted trials or had them complete worksheets, and she recorded data on the instructional target (Tr. p. 293). The teacher noted she took data on all the students' goals (Tr. p. 293). She graphed the data specific to each student and kept it in binders she maintained specific to each student (Tr. pp. 294-94).

[23] I note that the parent incorrectly referred to the SPLASH curriculum as a "teaching methodology" about which the parents were unfamiliar (Tr. p. 692).

knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], 200.6 [k][1], [k][1][v]; see 34 CFR 300.106).[24] Thus, as long as the mandates of the student's IEP were implemented, a more relaxed summer program would not be inconsistent with the underlying purpose of a 12-month program (C.H., 2013 WL 1285387, at *12-*13 [explaining that the maintenance of skills to prevent regression rather than the introduction of new materials is permissible in light of the objectives of an extended school year program]).

Moreover, testimony by the teacher of the proposed 6:1+1 class revealed she used, among other things, the same reading program with her students as a particular sight word reading program used by MCC, as described in the November 2010 MCC educational progress note, (Tr. p. 247; Dist. Ex. 12 at p. 2). Also similar to MCC, the public school special class teacher and occupational therapist used the same structured program to teach handwriting (Tr. pp. 252-53; Dist. Ex. 12 at p. 2). The teacher noted she used a math curriculum designed especially for students with special needs, whereby she taught different levels of math according to her students' individual needs as a whole group, in small groups, and on a 1:1 basis, depending on each student's level and goals and the skill being addressed (Tr. pp. 262-63). According to the teacher, each student received 30 to 45 minutes per day of 1:1 instruction with either herself or the paraprofessional (Tr. p. 512).[25] In addition, the teacher indicated her 6:1+1 class received 50 minutes of reading instruction, two to three periods per day, as well as writing and math instruction one to two periods per day (Tr. p. 264). Other subject areas, taught one to two times per week using the SPLASH curriculum, included social studies and science (Tr. pp. 264-667). The 6:1+1 class also attended a music class three times per week taught by a music and movement teacher, at which the paraprofessional assigned to the class was present (Tr. p. 265). The class also had use of the gym where the teacher adapted activities in consultation with a physical education teacher involving bike riding, basketball, dance, and aerobics (Tr. pp. 267-68). The teacher conducted coloring and painting art activities with the class (Tr. p. 268). Students had access to a laptop and a desktop computer for reading and math games as well as for computer time earned (Tr. pp. 268-69). In addition, the teacher and the occupational therapist used the computer in conjunction with a Smart Board to provide students with video modeling during their participation in a yoga program (Tr. p. 269).

In regard to related services, the special education teacher of the 6:1+1 class indicated her class received all of their mandated related services in speech-language therapy, OT, physical

[24] The IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE to the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the [CSE]" (8 NYCRR 200.6 [k][1], [k][1][v]; see, e.g., Holmes v Sobol, 690 F Supp 154, 157 [W.D.N.Y. 1988] [citing evidence that it would take four to five months to recoup the student's anticipated loss of skills without 12-month services]).

[25] According to the teacher's testimony this 1:1 instruction did not include students' individual time with their related service providers (Tr. p. 512).

therapy, and counseling during the school day on a push-in and/or pull-out basis depending on each student's needs (Tr. pp. 269-271, 521). The teacher noted she collaborated with the related service providers (Tr. p. 270). The teacher collaborated with parents through a notebook each student had that went home three to four times per week (Tr. p. 271). The teacher noted she responded to parents' assorted requests, such as requests for homework that addressed specific skills or that addressed the breakdown of skills into smaller parts, as well as helping parents with schedules for the home (Tr. pp. 371-72).

Regarding interfering behaviors in the teacher's 6:1+1 class, the teacher indicated that all of her students had their own behavior plans that she developed (Tr. p. 273). Consistent with my review of the FBA from MCC that the March 2011 CSE considered in developing the student's BIP, the teacher of the 6:1+1 class indicated that in developing the behavior plans for her students, she used the Motivation Assessment Scale (MAS) to determine the function of a student's particular behaviors prior to writing a behavior plan for use in her classroom to terminate targeted behaviors (Tr. pp. 273, 309-10). She also indicated she took data on the duration of the target behaviors when they manifested themselves and recorded antecedents and consequences to the behavior (Tr. pp. 312, 519). The teacher testified that had the student enrolled in her class, she would have taken some data specific to the interfering behavior identified on the BIP to see how often the behavior occurred, and if the student displayed behavioral improvement since the time the CSE created the BIP (Tr. p. 534; Parent Ex. F at p. 26). She would have gotten to know the student and how the student communicated, prior to determining an appropriate replacement behavior for the student (Tr. pp. 514-15). The teacher indicated she would have used strategies per the BIP to address the student's target behaviors (Tr. p. 535). The teacher indicated she would have discussed the student's behavior with the parents (Tr. p. 536).

Upon reviewing the student's March 2011 IEP, the teacher of the 6:1+1 class opined that the student would have fit into her classroom (Tr. pp. 274-76). She testified that some of the student's present levels of performance and goals were similar to those of some of her students in the assigned classroom and that she could have implemented the goals in March 2011 IEP, as written (Tr. pp. 274-79, 295, 301).[26] In addition, the student's academic and social/emotional management needs (i.e., modeling, repetition, breaking down tasks into smaller steps, visual aids, use of manipulatives, prompting, redirection, verbal support, and praise) were similar to academic and social/emotional management strategies she used with her students (Tr. pp. 279-80, 285). Specific to the student's health and physical management needs, the teacher noted she had another student in the class that required a gluten free diet, whereby the teacher communicated with that student's parent to send in appropriate snacks for that student (Tr. p. 287). The teacher explained that she, the classroom paraprofessional, and the school nurse were careful to monitor that student's

[26] The teacher of the 6:1+1 class indicated the student's March 2011 IEP included some goals and/or short-term objectives that were the same or similar to goals and/or short-term objectives of student's enrolled in her class (Tr. pp. 288-89). The teacher noted similar goals and/or short-term objectives for telling time, time of day when different activities happen, money concepts, wh-questions, puzzle completion and playing turn taking games with peers, and shoe tying (Tr. pp. 289-90). The teacher further indicated that she would have been able to implement the academic goals included in the March 2011 IEP, and that if a goal as written appeared vague, the corresponding short-term objectives broke down and clarified the goal (Tr. p. 291).

eating to ensure she consumed only her own appropriate food and that there was no food sharing between students (Tr. pp. 287-88).

Accordingly, based upon the foregoing, I do not find support in the hearing record for the IHO's conclusion that the assigned 6:1+1 special class would not have provided the student with the requisite level of individualized instruction or that the summer SPLASH curriculum was not appropriate for the student; nor do I find that staff in the assigned 6:1+1 classroom would have deviated from substantial or significant provisions of the student's IEP in a material way.

1. Parental Participation in Selection of the Assigned School

Next I will address the parents' cross-appeal asserting 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. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; 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" (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'" (id. 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," 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. 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. v. City Sch. Dist., 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]). Therefore, based upon the foregoing, the parents could not prevail on a claim that the student was denied a FAPE because they were deprived of the opportunity to participate in the selection of the student's specific public school site/classroom because neither the IDEA nor its implementing regulations provides them this right (C.F., 2011 WL 5130101, at *9; A.S., at 18–19).

E. Pendency

I will now address the parents' contention that the IHO erred in deferring his decision on pendency and that the student's pendency should have been based on the district court's decision in P.K., 819 F. Supp. 2d at 96, which reviewed the student's March 2008 IEP.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; 8 NYCRR 200.16[h][3][i]; see M.G. v. New York City Dep't of Educ., 2013 WL 3974165, at *4 [S.D.N.Y. Aug. 1, 2013]; Student X, 2008 WL 4890440, at *20; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-009). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; M.G., 2013 WL 3974165, at *4; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]; see T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4069299, at *3 ([S.D.N.Y. Aug. 7, 2012]). The pendency provision does not require that a student must remain in a particular site or location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753-54, 756 [2d Cir. 1980]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; Application of the Bd. of Educ., Appeal No. 99-90); see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16). Furthermore, the pendency provisions of the State regulations do not require that a student who has been identified as a preschool student with a disability remain in a preschool program for which he or she is no longer eligible for reasons of age pursuant to Education Law § 4410 (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004] [citing Zvi D., 694 F.2d at 906]; M.G., 2013 WL 3974165, at *4; T.M., 2012 WL 4069299, at *4). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (M.G., 2013 WL 3974165, at *4; T.M., 2012 WL 4069299, at *4; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The United States Department of Education (DOE) has opined that a student's then current placement would "generally be taken to mean the current education and related services provided in accordance with a child's most

recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Schutz, 290 F.3d at 483-84; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]).

The Second Circuit has described three variations on the definition of "then current educational placement:" (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163, see Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625-26 [6th Cir. 1990]; T.M., 2012 WL 4069299, at *4; Application of a Student with a Disability, Appeal No. 09-125; Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006). Additionally, if a "private school placement funded by the school district is the pendency placement, then the school district must continue to pay for that placement for the duration of the proceedings regardless of the final outcome of the dispute" (T.M., 2012 WL 4069299, at *4; see Zvi D., 694 F.2d at 906, 908; Vander Malle v. Ambach, 673 F.2d 49, 52 [2d Cir. 1982]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1, *6, *8-*9 [S.D.N.Y. Mar. 17, 2010]; Ambach, 612 F. Supp. at 233-34).

By way of background, the hearing record reveals that, on January 28, 2008, a CPSE met to develop the student's IEP and recommended that the student continue to attend a special 8:1+3 special class at Interdisciplinary Center for Child Development (ICCD) for five hours per day, five days per week, along with ten hours per week of ABA though a private agency, New York Therapy, three 30-minute sessions of speech-language therapy per week, and three 30-minute sessions of OT per week (Parent Ex. B at pp. 1, 18). Subsequently, on March 31, 2008, the CSE convened to review the student's program and develop an IEP for the 2008-09 school year, when the student would be entering kindergarten, and recommended a 12-month program consisting of a 6:1+1 special class in a specialized school and related services of three 30-munite individual sessions of OT per week and three 30-minute sessions of speech-language therapy per week in a group of three (see P.K., 819 F. Supp. 2d at 96). The March 2008 IEP was successfully challenged by the parents after an impartial hearing,[27] but the IHO's decision was reversed by the SRO (see Application of the Dep't of Educ., Appeal No. 08-140).[28] Subsequently, the District Court in the Southern District of New York reversed the SRO and found in favor of the parents in August 2011 because the district provided insufficient individualized support with regard to the student's speech-language services (P.K., 819 F. Supp. 2d 90, 95, 118). The District Court's decision was duly appealed to the Second Circuit Court of Appeals by the district, and while that matter was

[27] The IHO's decision relating to the March 2008 IEP is not included in the hearing record.

[28] The pendency placement in the case stemming from the March 2008 IEP was set by an unappealed interim order of the IHO and consisted of 10-hours per week of ABA instruction, one 30-minute individual session each of speech-language therapy and OT (Application of the Dep't of Educ., Appeal No. 08-140, at p. 11; see Tr. p. 787-88, 790; see also P.K., 819 F. Supp. 2d at 102).

pending the due process complaint notice in the instant proceeding was filed approximately six months later.

Initially, I will address the IHO's decision to "defer" his decision on pendency (see IHO Interim Decision at p. 4).[29] Because pendency is an automatic entitlement that is initiated at the moment that the parents file a due process complaint notice, (20 U.S.C. § 1415[j]; 34 CFR 300.518[a], [d]; Zvi D., 694 F.2d at 906; see T.M., 2012 WL 4069299, at *4), I remind the IHO that it is preferable, if there is a dispute over pendency, to address the issue as soon as possible at the outset of the due process proceeding.[30] Furthermore, to the extent that the IHO "deferred" judgment, he also expressed at the impartial hearing that his final decision in the case would likely be issued before he would be able to make a decision about pendency (Tr. p. 827).[31]

With regard to the analysis of the issued of pendency, initially, it appears that there was no agreement by the parties with respect to identification of the student's pendency placement for the 2011-12 school year.[32] As acknowledged by the parents in their due process complaint notice in this case, the last-agreed upon IEP developed by the parties was the student's January 28, 2008 IEP (Parent Ex. A at p. 2) and, at that time, there had been no final administrative or judicial order determining the parties dispute with regard to the March 2008 IEP (see Parent Ex. A at p. 2; see also Application of the Dep't of Educ., Appeal No. 08-140). As the SRO in the prior proceeding did not issue a decision in an administrative appeal agreeing with the parents that a change of placement is appropriate, there is no basis for concluding that there was an agreement between the State agency and the parents for purposes of determining the child's current placement during subsequent appeals (see 34 CFR 300.518[d]; 8 NYCRR 200.5[m][2]). While there had been a judicial determination in favor of the parents at the time the due process complaint notice had been filed (P.K., 819 F. Supp. 2d 90), it had been, as the parties have acknowledged, appealed to the

[29] It appears that the IHO may have based his decision to defer the pendency determination, in part, upon representations by counsel for the parents that an application for a change of pendency would be made to the district court in the P.K. litigation (see Tr. pp. 826-27).

[30] It would also be preferable to address pendency early on in the proceeding which would avoid the very issue encountered by the IHO in this case; that is, the district's objection to any offer of proof on the part of the parents as to what services the student was receiving at the time of the impartial hearing (Tr. pp. 809-14). Although counsel for the parents indicated that the information requested by the IHO would be included with the parents' memorandum of law to the IHO on the issue of pendency (Tr. p. 814), the parties' submissions, if any, were not entered by the IHO into the hearing record. Accordingly, it remains unclear what services the student has received during the course of this litigation.

[31] It is conceivable that at times, the issue(s) to be determined in the merits of a proceeding may be a less complex analysis than the pendency determination, especially when collateral proceedings or the interpretation of intervening settlement agreements (see n.34) are disputed in the stay put determination, and I can understand that in the interests of judicial economy that an IHO may find it prudent to expeditiously issue a merits determination and pendency determination in the same order. However, in view of the number of issues raised in the due process complaint in this proceeding, this was not a case in which deferral of the stay put issue until the final decision was prudent.

[32] According to the district, the parents also brought impartial hearing requests to challenge the student's IEPs for the 2009-10 and 2010-11 school years, but those school years were settled by stipulations between the parents and the district, which specified that the stipulations would not form the basis of a pendency placement (Reply ¶ 29). The stipulations themselves are not included in the hearing record.

Second Circuit and therefore the District Court determination did not serve as the pendency determination at the outset of this proceeding (see Joshua A. v Rocklin Unified Sch. Dist., 559 F3d 1036, 1038-39 [9th Cir 2009] [finding that the "automatic" nature of the stay continues to apply in any of the statutory proceedings, including to appeals at the circuit court level and to hold otherwise would not "follow the general policy behind IDEA, which is to keep from disturbing the child throughout the statutory process"]).[33] Accordingly because the "then current educational placement" at the time this proceeding was initiated was the student's January 28, 2008 IEP, that document constitutes the basis for the student's pendency program, at least through May 21, 2013, the date of the Second Circuit's determination in favor of the parents (P.K., 2013 WL 2158587). Whether this becomes a final judicial determination (which it may very well) remains to be seen as the time for filing a writ of certiorari has not yet elapsed as of the date of this decision (US Sup Ct R rule 13). In view of the forgoing, parents, by virtue of pendency, are entitled to recover the costs, if any, of any services they procured in providing the student with services as set forth in the January 28 2008 IEP from the March 9, 2012 through the date of this decision.

[33] Parents in this circumstances are not left without options. Although courts tend to apply the automatic injunction provided for under the IDEA, they have from time to time also found it necessary to apply the traditional injuctive relief standards to create or modify a student's pendency placement when circumstances warrant such relief (see, e.g., Cosgrove v Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F Supp 2d 375, 391 [N.D.N.Y. 2001].

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 a 1:1 paraprofessional and 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 MCC was appropriate for the student or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D. D-S., 2011 WL 3919040, at *13).

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 11, 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 and/or directly fund the student's tuition at MCC for the 2011-12 school year and the cost of related services; and

IT IS FURTHER ORDERED that, pursuant to pendency, the district shall reimburse the parents for costs of the student's pendency services, if any, pursuant to the January 2008 IEP in a manner consistent with the body of this decision.

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

JUSTYN P. BATES
STATE REVIEW OFFICER