The University of the State of New York

The State Education Department
State Review Officer
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No. 13-088

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

Appearances:
Law Offices of Lauren A. Baum, PC, attorneys for petitioners, Lauren A. Baum, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Rebecca School (Rebecca) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

On February 7, 2011, the CSE convened to conduct the student's annual review and to develop her IEP for the 2011-12 year (Dist. Ex. 3 at p. 1).[1] Finding the student eligible for special education as a student with autism, the CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school with the following related services: four 45-minute sessions per week of individual speech-language therapy; four 45-minute sessions of individual occupational therapy (OT); and three 45-minute sessions of individual counseling (id. at p. 18).

[1] At the time of the February 2011 CSE meeting, the student had attended the Rebecca School since September 2006 (see Tr. p. 537). The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities. (see 8 NYCRR 200.1[d], 200.7).

The February 2011 CSE further recommended a full-time 1:1 "transitional" paraprofessional services for the student (id. at pp. 2, 18). The February 2011 IEP also contained 18 annual goals with corresponding short-term objectives as well as a transition plan and supports for the student's management needs (id. at pp. 3, 4, 6-15, 19).

In a final notice of recommendation (FNR) dated June 13, 2011, the district summarized the 6:1+1 special class placement, paraprofessional, and related service recommendations contained in the February 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 8).

In a letter dated June 28, 2011 the parents notified the district that they had visited the assigned public school identified in the FNR and that, based upon their observations and conversations with school staff, they found the assigned public school site inappropriate for the student (Parent Ex. C at pp. 1-2). The parents indicated that they were willing to consider "other programs" offered by the district but, "in the interim," would keep the student at Rebecca for the 2011-12 school year and seek tuition reimbursement from the district (id. at p. 2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated July 27, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see IHO Ex. 1a at pp. 1-5).[2] With regard to the procedure by which the February 2011 IEP was developed, the parents contended that the CSE was improperly constituted, did not possess sufficient evaluative material on the student, failed to consider the evaluative material before it, and precluded the parent from participating in the CSE meeting (id. at p. 1).

As for the February 2011 IEP, the parents alleged that the IEP did not fully and accurately reflect the student's present levels of performance (IHO Ex. 1a at p. 2). The parent also contended that the IEP did not contain a sufficient number of annual goals to address the student's "significant level of need" (id.). The parents further averred that the IEP's recommended paraprofessional services were "inappropriate" because they were "too restrictive" for the student (id.). The parents additionally alleged that the transition plan provided in the IEP was insufficient and vague and that the CSE did not specifically consider the student's preferences, needs, and interests in developing this plan (id.).

With regard to the assigned public school site, the parents alleged, based upon their observations, that it was not appropriate for the student because: (1) it did not include similarly functioning peers and peer models; (2) during non-instructional periods of the day such as lunch, arrival, dismissal, and travel between class, the student would not receive a sufficient level of individual attention; (3) the age range of the students in classes the parent observed was impermissibly broad; (4) some students experienced "meltdowns" which would make the student nervous and exacerbate her anxiety and sensory issues; (5) the methodologies employed in the

[2] The parents' original due process complaint notice was dated June 22, 2012 (Parent Ex. A at p. 1). It appears that both the amended due process complaint notice and an amended interim IHO order dated December 10, 2012 were entered into the record as IHO Ex. 1 (compare Tr. pp. 101-02, with IHO Decision at p. 21). For purposes of clarity, the amended due process complaint notice shall be referred to as "IHO Ex. 1a" and the amended interim IHO order as "IHO Ex. 1b" throughout this decision.

classroom were inappropriate for the student; (6) the level of instruction was inappropriate; (7) the staff was not appropriately trained and could not facilitate adequate communication with the parents; (8) a social worker and guidance counselor possessed insufficient training and experience to address the student's emotional issues; and (9) the school could not implement the counseling services identified in the February 2011 IEP (IHO Ex. 1a at p. 3).

The parents indicated that Rebecca was an appropriate unilateral placement because it provided special education and related services tailored to meet the student's needs (IHO Ex. 1a at pp. 3-4). With respect to equitable considerations, the parents indicated that they cooperated throughout the CSE process and gave timely notice of their rejection of the February 2011 IEP (id. at p. 4). For remedies, the parents sought the costs of the student's education from the district.

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 10, 2012 and concluded on April 1, 2013 after 11 days of proceedings (see Tr. pp. 1-538). On August 10, 2012 and September 18, 2012, the IHO conducted a prehearing conference to clarify the issues in dispute (Tr. pp. 1-153; see 8 NYCRR 200.5[j][3][xi]).[3] Afterward, the IHO issued an interim decision dated October 25, 2012 identifying the issues to be resolved during the impartial hearing (see IHO Ex. 3; see also IHO Ex. 1b).[4] In a final decision dated April 15, 2013, the IHO found that the district offered the student a FAPE for the 2011-12 school year and denied the parents' requested relief (IHO Decision at pp. 13-18).

First, the IHO found that certain issues raised by the parent at the impartial hearing were not raised in their due process complaint notice or the IHO's interim decision; namely, whether the student required a particular methodology on her IEP and whether the student's paraprofessional would have been appropriately qualified (IHO Decision at pp. 15, 18). Accordingly, the IHO found these issues beyond the scope of his jurisdiction and, in any event, without merit (id. at pp. 15-16, 18).

Turning to the process by which the February 2011 IEP was developed, the IHO found that the CSE was appropriately composed (IHO Decision at p. 18). The IHO further found that the CSE possessed sufficient evaluative material on the student and, further, that this material was appropriately considered at the CSE meeting (id. at p. 13). Additionally, the IHO found that the parents participated in the CSE meeting (id. at pp. 13, 18).

As for the February 2011 IEP, the IHO found that its statement of the student's present levels of performance accurately described the student (IHO Decision at pp. 13-14). The IHO also found that the IEP's annual goals were, "reasonably specific" when "read as a whole" and appropriate to meet the student's needs (id. at p. 16). In this regard, the IHO rejected the parents'

[3] At this prehearing conference, the IHO also resolved certain preliminary matters, including issues pertaining to the issuance of subpoenas (see 8 NYCRR [j][3][iv]).

[4] This interim order was amended on November 28, 2012 and, again, on December 10, 2012 (IHO Ex. 1b at p. 3). The final, amended version is identical to the original except that it clarified that the parent challenged both the sufficiency, and the CSE's consideration of, the evaluative material before the February 2011 CSE (compare IHO Ex. 1b at p. 3, with IHO Ex. 3 at p. 2).

contention that the goals were idiomatic to a particular methodology employed at Rebecca (id.). Turning to the parents' challenge to the IEP's transition plan, the IHO found that, although it "could have provided more detail," this deficiency did not rise to the level of a denial of FAPE (id. at p. 15). The IHO also found that the district was not required to develop a "transition" plan to assist the student's move from a private to a public school (id. at pp. 14-15).[5] The IHO further found that the IEP's recommended paraprofessional services, though undesired by the parents, would not result in a denial of FAPE to the student (id. at p. 18).

With regard to the parents' challenges to the assigned public school site, the IHO expressed doubt that, under R.E. v. New York City Department of Education, the parents could prevail on such a challenge absent "clear evidence in the [hearing] record . . . indicat[ing] that [the] [assigned public school] [wa]s unable to implement the IEP" (IHO Decision at p. 17; see R.E., 694 F.3d 167, 189-90 [2d Cir. 2012]). Nevertheless, the IHO proceeded to consider, and reject, the parents' challenges to the assigned public school site (see id. at pp. 17-18). Therefore, the IHO concluded that the February 2011 IEP, including the particular public school site recommendation, offered the student a FAPE (id. at pp. 14, 16, 18). The IHO did not consider whether the services obtained by the parents were appropriate or whether equitable considerations supported their requested relief.

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by finding that the district offered the student a FAPE for the 2011-12 school year. The parents further contend that Rebecca was an appropriate unilateral placement for the student and that no equitable considerations should reduce or preclude an award of tuition reimbursement to the parent. Accordingly, the parents request that the IHO's decision be reversed and that the district provide the costs of the student's education for the 2011-12 school year.

First, as for the procedure by which the February 2011 IEP was developed, the parents assert that the IHO erred by finding that the parents participated in the CSE meeting and that the CSE possessed and considered appropriate evaluative material.[6]

Regarding the February 2011 IEP, the parents contend that the IHO erred by determining that the CSE accurately ascertained the student's present levels of performance. The parents also aver that that the IEP's annual goals were inappropriate; specifically, that they were idiomatic to the DIR methodology and could not be implemented at the assigned public school site.[7] The parents also posit that the IHO erred by determining that deficiencies in the IEP's transition plan did not rise to the level of a denial of FAPE. The parents further argue that the IHO erred in finding that the district's recommended placement, i.e., a 6:1+1 special class with 1:1 paraprofessional

[5] In any event, the IHO found that the paraprofessional services recommended in the IEP would have supported such a transition (IHO Decision at p. 14).

[6] In their petition, the parents do not contest the IHO's determination that the February 2011 CSE was appropriately composed. Accordingly, this determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[7] DIR stands for "Developmental, Individual Difference, Relationship-based" and is a methodology employed at Rebecca (see Parent Exs. Q at p. 1; R at p. 1).

services, offered the student a FAPE. Additionally, for the first time on appeal, the parents aver that the CSE should have conducted a functional behavioral analysis (FBA) and that the IEP failed to prescribe instruction using DIR methodology on the student's IEP.

The parents also contend that the IHO erred in rejecting their challenges to the assigned public school site and argue that the assigned public school site could not implement the February 2011 IEP. The parents further submit that Rebecca was an appropriate unilateral placement for the student as it met her needs. Finally, the parents contend that no equitable considerations affect their request for tuition reimbursement.

In an answer, the district denies the parents' material assertions and argues that the IHO correctly determined that the February 2011 IEP offered the student a FAPE.[8]

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; 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.

[8] The parents additionally submit a response to the district's answer which asserts that the district's answer was a de facto cross-appeal. Upon review of the district's answer, I do not agree with this characterization. The district's answer responded to the parents' allegations and cited evidence in the hearing record that, it argued, supported the IHO's determination. This is permissible under State regulations (see 8 NYCRR 279.5). But even assuming for purposes of argument that the district attempted to interpose a cross-appeal, this would be improper because the district was not "aggrieved" by any aspect of the IHO's decision and, thus, not entitled to appeal (J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9-*10 [S.D.N.Y. Nov. 27, 2012] [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also D.N. v. New York City Dep't of Educ., 905 F.Supp.2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]).

Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

The parent has submitted a document together with her petition that was not included in the hearing record. 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 (Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). This evidence was available at the time of the impartial hearing and is not necessary to render a decision in this matter. Accordingly, I decline to accept it.[9]

2. Scope of Review

On appeal, the parents contend that the February 2011 CSE erred by failing to develop an FBA and failing to recommend DIR methodology on the IEP. With respect to these claims, a complaining party may not raise issues at the impartial hearing or for the first time on appeal that

[9] Moreover, the issue to which this evidence relates—the parents' financial obligation to Rebecca for the 2011-12 school year—is amply demonstrated in the hearing record (see Parent Exs. I; J; L; Tr. pp. 1109, 1131-1132).

were not raised in the 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 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][i][b]; see J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. 2014]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]). The parents' amended due process complaint notice cannot reasonably be read to include these claims (see Dist. Ex. 1). Further, a review of the hearing record shows that the district did not agree to an expansion of the scope of the impartial hearing to include these issues, nor did the parents attempt to amend the due process complaint notice to include these issues. Therefore, these allegations are outside the scope of my review and will not be considered.[10]

B. February 2011 CSE

1. Parent Participation

On appeal, the parents aver that that IHO erred in determining that the parents participated in the February 2011 CSE meeting. A review of the evidence in the hearing record supports the IHO's determination.

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 & Communc'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]).

The hearing record reflects that the parents attended the February 2011 CSE meeting (Dist. Ex. 3 at p. 2; see Tr. p. 1069). Additionally, according to the parents, a social worker

[10] Additionally, the district did not open the door to these claims by soliciting testimony from a witness "in support of an affirmative, substantive argument" as to these issues (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59, 2014 WL 2748756, at *2 [2d Cir. Jun. 18, 2014]; see M.H., 685 F.3d at 250-51; N.K v. New York City Dep't of Educ., 961 F. Supp.2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, at *9). Regarding the FBA, the district asked one of its witnesses whether thumb-sucking behavior described in a November 2010 classroom observation warranted a behavioral intervention plan and the witness responded "[n]o, no" (Tr. pp. 384-85; see Dist. Ex. 5 at pp. 1-2). However, the parents initially raised this issue on cross-examination of a district witness (see Tr. pp. 242-43). Therefore, this isolated reference to a behavioral intervention plan after the issue was originally raised by the parents did not open the door to this issue within the holding of M.H. (685 F.3d at 250-51).

attended the CSE meeting to provide support to the parents (Tr. p. 1069). The district representative who served on the CSE testified that the meeting lasted approximately an hour (Tr. p. 413). The parents testified that they contributed information to the CSE, including information regarding the impact of a family member's recent death on the student (Tr. pp. 1116-17; see also Dist. Ex. 4; Tr. p. 237). The parents further testified that the CSE discussed the December 2010 psychoeducational evaluation, the IEP's annual goals, a November 2010 classroom observation, the recommended placement, and paraprofessional services (Tr. pp. 1069, 1071-72, 1074-75, 1122, 1124). Additionally, prior to the CSE meeting, the parents had been provided with copies of all of the district's evaluations and had seen the December 2010 progress report from Rebecca (Tr. pp. 1071, 1074, 1115, 1116, 1120-21). This evidence demonstrates that the parent was afforded ample opportunity to participate in the February 2011 CSE meeting.

Although it is apparent that the parent disagreed with many of the CSE's recommendations, this does not mean that the parent was denied an opportunity to participate in the IEP meeting (see P.K., 569 F. Supp. 2d at 383). Therefore, a review of the evidence in the hearing record reveals that the IHO correctly concluded that the parent's right to participate in the CSE meeting was not significantly impeded (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a] [2]; 8 NYCRR 200.5[j][4][ii]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *14 [E.D.N.Y. Jan. 21, 2011], report and recommendation adopted, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd sub nom., R.E., 694 F.3d 167).

2. Sufficiency and Consideration of Evaluative Material

Next, the parents contend that the IHO erred in determining that the February 2011 CSE possessed and considered appropriate evaluative material. A review of the evidence in the hearing record supports the IHO's determination.

In general, 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 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 service 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).

No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require an IEP to report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

The hearing record reflects that the February 2011 CSE considered a November 2010 classroom observation, a December 2010 district psychoeducational evaluation, and a December 2010 Rebecca progress report (see Tr. pp. 207, 1071-72, 1074-75, 1115-16, 1121; see generally Dist. Exs. 4, 5, 6, 7, Parent Ex. E).

The November 2010 classroom observation was conducted by the same individual who served as the district representative on the February 2011 CSE (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 5 at p. 2; see also Tr. pp. 356-357). After observing the student for 30 minutes, the examiner concluded that the student was able to follow directions, was responsive to redirection, was able to identify pictures of class activities, was generally quiet, and did not engage in "overly disruptive" behaviors (Dist. Ex. 5 at p. 2).

The February 2011 CSE also considered a December 2010 psychoeducational evaluation report (Dist. Ex. 6 at pp. 1-9). The student was administered the Stanford Binet Intelligence Scales-Fifth Edition (SB-5), the Beery Buktenica Development Test of Visual Motor Integration, and the Woodcock-Johnson III Tests of Achievement (id. at p. 2). Administration of the SB-5 to the student yielded a nonverbal IQ of 59, a verbal IQ of 48, and a full scale IQ of 50 (id. at p. 3; see id. at pp. 3-6). The report further indicated that this student was in fair health, had a history of sleep problems which appeared to be resolving, and a history of lead poisoning for which she had been treated (id. at p. 2). The report also indicated that, based upon a clinical interview with the parents, observations, and anecdotal information, the student's "overall adaptive behavior composite/functioning" appeared to be within the low range relative to her communication, socialization, and daily living skills (id. at p. 6).

The February 2011 CSE additionally considered a December 2010 Rebecca progress report to develop the student's IEP (Dist. Ex. 7 at pp. 1-13). This progress report contained information from the student's then-current teacher and providers (see id.). The report indicated the student's functioning levels in education/functional/emotional developmental levels, the curriculum being used, and the student's levels in literacy (including word recognition, comprehension, fluency and reading), mathematics, social studies, and science (id. at pp. 1-5). The progress report described the student's adapted daily living skills and stated that the student was able to perform hygiene skills independently with brief reminders from an adult and that the student demonstrated

independence in packing and unpacking her belongings at school (id. at p. 4). The progress report also contained detailed reports from the student's occupational therapist, speech-language pathologist, and counselor (id. at pp. 5-9). The progress report further contained recommended goals for the student (id. at pp. 10-12).

The December 2010 Rebecca progress report included detailed information regarding the student's pragmatic language, receptive language, expressive language and oral/motor/speech production (Dist. Ex. 7 at pp. 7-8). The progress report extensively discussed the student's current levels of performance as pertaining to language and what the student needed to work on in her areas of deficit (id.). The progress report also detailed the student's current levels and needs in the areas of sensory issues, motor planning/sequencing, and visual-spatial processing (id. at pp. 5-6). While the parents are correct that the district did not perform a speech-language or OT evaluation of the student, the district instead relied upon the December 2010 Rebecca progress report to ascertain the student's present levels of performance in these areas. A district may utilize information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see D.B. v. New York City Dep't of Educ. 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. March 29, 2013], aff'd, 554 Fed Appx 56, 2014 WL 519641 [2d Cir. Feb. 11, 2014]; S.F., 2011 WL 5419847, at *10). This is especially true where, as here, the information obtained from the Rebecca School's progress report and the student's then-current providers was comprehensive and sufficient to determine the student's needs (compare Dist. Ex. 3 at pp. 3-5, with Dist. Ex. 7 at pp. 1-13).

The parent further argues that the CSE's failure to conduct a medical or health assessment resulted in a denial of FAPE to the student. A review of the hearing record reveals no information that the student had medical or health needs at the time of the February 2011 CSE meeting (see Dist. Ex. 6 p. 1). Specifically, the December 2010 Rebecca progress report gives no indication that any teacher or provider to this student had concerns regarding medical/health concerns of this student (see Dist. Ex. 7). Therefore, because there is no evidence in the hearing record that the student had medical or health needs at the time of the February 2011 CSE meeting, the district did not err by electing not to conduct such an assessment (see 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).

C. February 2011 IEP

1. Present Levels of Performance

A review of the February 2011 IEP reveals that the CSE utilized the information discussed above to develop the student's present levels of performance. The student's present levels of performance were largely derived from information contained in both the December 2010 psychoeducational evaluation and the December 2010 Rebecca progress report (compare Dist. Ex. 3 at pp. 3-4, with Dist. Exs. 6, 7). Additionally, the IEP incorporated some of the December 2010 psychoeducational evaluation's testing results (Dist Ex. 3 at p. 3). On appeal, the parent contests the IHO's finding that the present levels of performance were appropriate but does not identify any specific deficiencies with these levels. Accordingly, I find that the IHO did not err in concluding that the February 2011 IEP accurately stated the student's present levels of performance.

2. Annual Goals

The parents next contend that the IHO erred by finding that the February 2011 IEP's annual goals were appropriate and addressed the student's needs. The evidence in the hearing record reveals no error in the IHO's disposition of this issue.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The February 2011 IEP contains 18 annual goals with corresponding short-term objectives that address the student's reading, writing, mathematics, keyboarding, OT, speech-language, counseling, and transition needs (see Dist. Ex. 3 at pp. 6-15). These annual goals were developed based upon the information contained in the December 2010 Rebecca progress report as well as a discussion among the members of the CSE (compare Dist. Ex. 3 at pp. 6-15, with Dist. Ex. 7; see also Tr. pp. 217-18, 1069). Additionally, the CSE used the annual goals contained in the student's prior IEP as a "starting point" and supplemented these goals with updated information provided during the meeting (Tr. pp. 217-18). According to both the district school psychologist who served on the CSE as well as the parents, the IEP's annual goals were reviewed and read aloud during the meeting (Tr. pp. 217-18, 1069).

Nevertheless, the parents contend that these annual goals were inappropriate because they were idiomatic to instruction using DIR and could not be implemented by providers who did not employ this methodology. A review of the annual goals reveals no impediment to their implementation in a classroom that, or by a related service provider whom, used a methodology other than DIR (Dist. Ex. 3 at pp. 6-15; cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *12 [S.D.N.Y. Mar. 19, 2013]). The parents also argue that a decoding goal included in the February 2011 IEP was inappropriate for the student. Although the student's then-current teacher testified that Rebecca does not "formally teach decoding" and "typically use[d] the sight word approach," this pedagogical choice does not render the IEP's decoding goal inappropriate (Tr. pp. 803-04). This decoding goal was only one of this student's reading goals, and the other reading goals in the IEP generally address the student's sight word vocabulary and comprehension skills (id.). And even assuming that this goal was gratuitous or unnecessary as the parents urge, its inclusion in the February 2011 IEP would not have resulted in a denial of FAPE to the student (see Tr. pp. 572-73).

Therefore, a review of the February 2011 IEP's annual goals indicates that they targeted and addressed the student's identified areas of need (see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting courts' reluctance "to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress"], aff'd, 526 Fed. App'x 135, 2013 WL 2158587 [2d Cir. May 21, 2013]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]).

3. Vocational Assessment and Transition Plan

The parents allege that the IHO erred by concluding that deficiencies in the February 2011 IEP's transition plan did not rise to the level of a denial of FAPE. A review of the hearing record supports the IHO's ultimate conclusion on this issue.[11]

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C.§ 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1 [fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments 20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).[12]

An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]),[13] as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that a student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, the acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

Here, the February 2011 CSE developed a transition plan for the student and included this plan in the resultant IEP (Dist. Ex. 3 at p. 19). With regard to the student's long-term adult outcomes, the IEP indicated that the student would integrate into the community with "moderate supports" (id.). The IEP further stated that the student would pursue a "vocational training program" to achieve post-secondary employment (id.). The IEP also identified four transitional services that would assist the student in achieving the above goals: (1) trips into the community to make purchases and engage in enrichment activities to help the student negotiate her environment; (2) learning how to travel independently; (3) exploring "AHRC

[11] The parents also contend that the district erred by failing to support the student's transition from a non-public school into a public school. While such "transition" services may be beneficial, the IDEA and State law do not require districts to offer these services as part of their obligation to provide a FAPE (see E. Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom., R.E., 694 F.3d 167).

[12] In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their “vocational skills, aptitudes and interests” (8 NYCRR 200.4[b][6][viii]).

[13] These are supposed to be listed in the present levels of performance section of a student's IEP (see 8 NYCRR 200.4[d][2][ix][a]).

services" so that the student could find meaningful work related to her interests; and (4) learning how to handle an emergency situation including when and whom to call (id.).[14] The IEP identified the responsible parties for these services as the parent, school, and student (id.).

While the IHO concluded that this transition plan "could have provided more detail," a review of the plan reveals that it was sufficient to satisfy the requirements of the IDEA as well as State and federal regulations (IHO Decision at p. 15; see Dist. Ex. 3 at p. 19). Moreover, even assuming for purposes of argument that the district's failure to include additional information constituted a procedural violation of the IDEA, I would agree with the IHO that such a violation would not constitute a denial of FAPE under these circumstances (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

As for the CSE's completion of a vocational assessment, despite a notation in the IEP indicating that a vocational assessment was needed, the CSE did not do so (Dist. Ex. 3 at p. 19; see Tr. p. 434). Therefore, I conclude that the CSE's failure to conduct a vocational assessment constituted a procedural violation of the IDEA. Nevertheless, considering the IEP as a whole, including its transition plan, the CSE's failure to conduct a vocational assessment here did not rise to the level of a denial of FAPE to the student (see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013], D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *9 [S.D.N.Y. Oct. 12, 2011]; see also Patterson v. D.C., 965 F. Supp. 2d 126, 131 [D.D.C. 2013]).

4. 6:1+1 Special Class Placement with 1:1 Paraprofessional Services

The parents further assert that a 6:1+1 special class placement with 1:1 paraprofessional services was inappropriate for the student.[15] The evidence in the hearing record supports the IHO's determination.[16]

After ascertaining the student's present levels of performance and developing annual goals to address her areas of need, the February 2011 CSE recommended placement in a 6:1+1 special class. State regulations provide that a 6:1+1 special class placement is designed for 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]). Management needs, in turn, are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). Given the extent of the student's needs—in particular, those needs arising from her dysregulation—a 6:1+1 classroom was appropriate

[14] It appears from the hearing record that AHRC was an agency that provided vocational services vis-à-vis the district (see Tr. pp. 219-20, 1083).

[15] It is not clear that a challenge to the district's recommended placement of a 6:1+1 special class may be reasonably read into the parents' amended due process complaint notice (see IHO Ex. 1a at pp. 1-4). However, this issue was identified as an issue to be resolved at the impartial hearing in the IHO's October 25, 2012 interim order (IHO Ex. 3 at p. 2). Out of an abundance of caution, I address this issue in my decision.

[16] To the extent the parents continue to argue that a paraprofessional would not have possessed appropriate qualifications, this issue is not a proper topic for resolution through the IDEA's due process procedures (see 20 U.S.C. § 1412[a][14][E], 34 CFR 300.156[e]; see also 20 U.S.C. § 1401[10][E], 34 CFR 300.18[f]).

for the student (Dist. Ex. 3 at pp. 2-4; see Tr. pp. 228-29, 385). Moreover, at the time of the CSE meeting the student's classroom ratio at Rebecca was 8:1+3, a ratio substantially similar to the 6:1+1 configuration recommended by the February 2011 CSE (Dist. Ex. 7 at p. 1; see Dist. Ex. 3 at pp. 1, 17).

The parents contend on appeal that a 6:1+1 classroom ratio would not have provided the student with a sufficient "level of individual attention and support from teachers trained to meet her unique needs." However, to address this concern, the February 2011 CSE offered paraprofessional services which would, according to the IEP, assist the student in her "transition from her current private school setting to a public school environment" (Dist. Ex. 3 at p. 16). To the extent the parents contend that the student required 1:1 teaching instead of paraprofessional services, this is belied by the evidence in the hearing record, including the December 2010 Rebecca progress report (see Dist. Ex. 7). Moreover, although the student's then-current teacher testified that she did not agree with the 6:1+1 ratio recommended by the CSE, she did not explain why this would be inappropriate for the student (Tr. p. 853). While it is abundantly clear that the parents preferred the staffing ratio and services available at Rebecca, the district was not required to replicate these services (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also G. v. Fort Bragg Dependent Sch., 324 F.3d 240, 252 [4th Cir. 2003], opinion amended on reh'g sub nom., 343 F.3d 295 [4th Cir. 2003]).

As indicated above, the February 2011 CSE recommended 1:1 transitional paraprofessional services to provide the student with support as she made the change from a private school environment to a public school setting (Dist. Ex. 3 at pp. 2, 14-15). According to the school psychologist who served on the February 2011 CSE, these paraprofessional services were offered because the CSE recognized that the student had been at Rebecca for several years and the CSE endeavored to ease the student's transition into a public school (Tr. pp. 229, 291, 320). The school psychologist further explained that the paraprofessional would have been under the guidance, direction, and supervision of the classroom special education teacher (Tr. pp 321, 375).[17]

The CSE also included transition goals to be accomplished with the "individual support" of a paraprofessional (Dist. Ex. 3 pp 14-15; see Tr. pp. 318-319, 374-375). With paraprofessional support, these goals aimed to: (1) increase the student's problem solving skills; (2) give the student individual support to successfully transition from the private school to the public school; (3) increase the student's regulation and engagement with adults and peers across emotions; and (4) have the student use novel ideas to engage with adults and peers (Dist. Ex. 3 at pp. 14-15). Each of the goals included appropriate short-term objectives (see id.). These goals were reasonably calculated to promote the student's acclimation into the public school and to increase the student's ability to interact and engage with peers and adults.

The parent claims that 1:1 paraprofessional services would be inappropriate because the student could become too dependent on this support (see Tr. pp. 891-892). As discussed above, the purpose of the paraprofessional as stated in the IEP was to assist the student in

[17] I find this testimony relevant as it "explains or justifies the services listed in the IEP" (R.E., 694 F.3d at 186).

transitioning from the private school to the public school and to assist the student to engage with peers and adults in the public school setting (Dist. Ex. 3 at pp. 14-15, 17). Under these circumstances, I find that 1:1 paraprofessional services were reasonably calculated to enable the student to receive educational benefits by helping her transition to a public school and increase her ability to interact with both adults and peers.[18]

D. Assigned Public School Site

Finally, the parents set forth myriad reasons as to why the assigned public school site was inappropriate and could not have implemented the February 2011 IEP. For the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parents' claims are without merit. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. C; J), the district was not obligated to present evidence as to how it would have implemented the February 2011 IEP (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

However, even assuming for purposes of argument that such speculative claims could be entertained, a review of the evidence in the hearing record contradicts the parents' assertions.

1. Inappropriate Grouping

The parents allege that the recommended school would not be able to provide appropriate grouping as required by State regulations because the age of the students in the classes the parent visited ranged from 15 to 21 and she was advised that the students had a variety of disability classifications (IHO Ex. I p. 2-3). First, with regard to the purported ages of the students in the proposed classroom, the student would have been 16 years of age at the time she was to attend the assigned public school site (see Dist. Ex. 3 p. 1) and State regulations provide that "[t]he

[18] The IDEA does not require "transition plans" as a general matter whenever a student moves from a private school to public school environment (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167). To the extent that district's provision of the 1:1 paraprofessional in this case can be viewed as an element of a transition plan from a private to a public school setting, it would be offering something greater than the basic floor of opportunity guaranteed by the IDEA.

chronological age range within special classes of students with disabilities who are 16 years of age and older is not limited" (8 NYCRR 200.6[h][5] [emphasis added]). Therefore, even if I were to assume that the parents were correct and the only classes offered at this school had an age range from 15-21, this would not constitute a denial of FAPE to the student.

Second, as to functional grouping of the proposed classroom at the assigned public school site, State regulations require that in special classes, student must be suitably grouped for instructional purposes with other students having similar individual needs according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.1[ww][3][i]-[ii], 200.6[a][3], [h][2], [3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). Thus, the appropriateness of a particular special class grouping requires an assessment, not of the students' disability classifications or diagnoses, but of their functional levels. Because there is no evidence in the hearing record as to the functional levels of the students in the assigned school classroom—and, moreover, because the composition of a class may change prior to the start of the school year—this challenge must be rejected as speculative.

2. Other Implementation Claims

The parents' allegation that the staff at the public school would not appropriately communicate with each other or with parents is a broad, speculative assertion unsupported by any reference to evidence in the hearing record. Accordingly, it may not be considered to determine if the assigned school would have appropriately implemented the written IEP (see R.E. 694 F.3d at 186-88).

The parent also claims that the related services as set forth on the February 2011 IEP would not have been implemented by the school placement. In support of this argument, the parent introduced a report from the district's website into evidence which indicates that some students did not receive their related services during the course of the school year at issue in this case (Parent Ex. M). Aside from this document, there is nothing in the hearing record to indicate that this particular student would not have received her mandated services, and reliance on Special Education Service Delivery Reports to establish that the district will not provide services called for on a student's IEP has been rejected (M.S. v. New York City Dep't of Educ., 2010 WL 3377667, at *7 [E.D.N.Y. Aug. 25, 2010]). If the student attended the public school and did not receive her mandated services, then the parents would certainly have a claim in a "later proceeding" to show that the student was denied a FAPE because the necessary services as mandated by her IEP were not provided (see F.L., 553 Fed. App'x at 9; R.E., 694 F.3d at 187 n.3). At this juncture, however, these allegations are speculative and cannot be relied upon to show that the assigned public school would not have implemented the IEP's related services.

The parent further alleges that the assigned public school classroom employed two methodologies that had proven unsuccessful with the student. However, because the February 2011 IEP does not prescribe a particular methodology, this decision would have been within the discretion of the classroom teacher who implemented the IEP and the student's related service providers (see Tr. pp. 308-309, 494-495). Therefore, the parents' argument is speculative since there is no indication as to what methodology these providers would have used in instructing this

student if the student had attended the public school placement. If the student had attended the public school placement and the instruction provided was not appropriate the parent could, as discussed above, assert such a claim in a "later proceeding" (see F.L., 553 Fed. App'x at 9; R.E., 694 F.3d at 187 n.3).

VII. Conclusion

A review of the evidence in the hearing record supports the IHO's determination that the February 2011 IEP offered the student a FAPE for the 2011-12 school year. Therefore, it is not necessary to reach the issue of whether Rebecca was appropriate for the student or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *11 [S.D.N.Y. Aug. 21, 2014]; D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 30, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER