



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-144

### **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, attorney for petitioner, Jessica C. Darpino, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Maria C. McGinley, Esq., of counsel

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the McCarton School (McCarton) for the 2012-13 school year. The parents' cross-appeal from certain adverse determinations made by the IHO. The appeal must be sustained. The cross-appeal must be dismissed.

#### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

The student was first enrolled in the McCarton School in September 2009 and has remained there since (Tr. p. 604). The hearing record reflects that the student presents with significant delays in the development of cognition, academic achievement, communication, gross and fine motor skills, and social interaction and play skills (Tr. pp. 161, 409, 474; Dist. Exs. 1 at pp. 1, 27; 2 at p. 5). In addition, the student demonstrates difficulty maintaining focused attention, perseveration, as well as self-stimulatory and tantrum behaviors, all of which hamper the student's ability to acquire new skills (Tr. pp. 413, 425-27, 464-65, 472; Dist. Exs. 1 at pp. 1, 3; 2 at pp. 1-2, 5).

On May 23, 2012, the CSE convened to conduct the student's annual review and develop his IEP for the 2012-13 school year (Dist. Ex. 1). The CSE found the student remained eligible

for special education and related services as a student with autism (*id.* at p. 1).<sup>1</sup> The hearing record reflects that the student's mother, a district school psychologist, who also served as the district representative, a district special education teacher, and an additional parent member were present for the CSE meeting (*id.* at p. 29). In addition, the student's private school classroom teacher and speech-language pathologist also attended the May 2012 meeting (*id.*). In developing the student's program for the 2012-13 school year, the May 2012 CSE discussed the student's needs related to reading, writing, math, and social development, his fine and gross motor skills, and his management needs (Tr. pp. 113-57, 162-66; Dist. Ex. 1 at pp. 1-3, 25, 27). According to the district's special education teacher who attended the May 2012 CSE meeting, the private school staff provided much of the information that was discussed during the meeting (Tr. pp. 162-66).

The May 2012 CSE recommended a 12-month placement in a 6:1+1 special class program in a specialized school, with a full-time 1:1 crisis management paraprofessional (Dist. Ex. 1 at p. 22). The CSE also recommended five individual 45-minute speech-language therapy sessions per week and four individual 45-minute occupational therapy (OT) sessions per week (*id.*). With input from McCarton staff and the student's mother, the CSE developed annual goals and short-term objectives to address the student's needs in the areas of communication, including expressive and receptive language, reading, writing, math, social skills, daily living skills, gross and fine motor skills, and OT (Tr. pp. 154-57; Dist. Ex. 1 at pp. 4-21). In addition, because the May 2012 CSE determined the student's behaviors interfered with his learning, a functional behavioral assessment (FBA) and a behavior intervention plan (BIP) were developed (Tr. pp. 187-88; Dist. Exs. 1 at p. 3; 7).

In a letter dated June 15, 2012, the parents notified the district that they had not yet received a copy of the May 2012 IEP and, unless an appropriate program was offered, the student would continue to attend the private school "as a component of his educational program" (Parent Ex. E at p. 1 [emphasis in original]). The parents further asserted they would seek reimbursement and/or prospective funding for the student's tuition and the cost for additional services they deemed appropriate to meet the student's needs (*id.*). The additional costs identified in the parents' June 15, 2012 letter include home- and community-based instruction using an applied behavior analysis (ABA) methodology and physical therapy (PT), transportation to the private school, and an award of compensatory services for "any and all pendency services [the student] was entitled to but did not receive" (*id.*).

In a final notice of recommendation (FNR) dated June 19, 2012, the district summarized the contents of the May 2012 IEP and notified the parents of the particular public school site to which the student was assigned for the 2012-13 school year (Parent Ex. F). In a letter to the district dated June 21, 2012, the parents responded to the district's FNR, stating that they had not been afforded an opportunity to participate in a discussion of site selection, indicating they would make an effort to visit the assigned school, and submitting a list of questions regarding the proposed placement, indicating that answers to these questions would help them make an "informed decision" (Parent Ex. G at pp. 1-2).

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<sup>1</sup> The student's eligibility for special education programs and services as a student with autism is not in dispute in this proceeding (Parent Ex. I at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On June 26, 2012, the student's mother visited the assigned school and, by letter of the same date, the parents informed the district that they found the proposed district program and public school site to be inappropriate for the student and cited several concerns as the basis for this conclusion (Parent Ex. H). With respect to the IEP, the parents asserted that it offered insufficient 1:1 teaching, insufficient level of services, no individualized parent counseling and training, and provided inappropriate and insufficient behavior interventions (*id.* at p. 1).<sup>2</sup> With respect to the public school site, the parents asserted that the amount of 1:1 instruction the student would receive was unclear, the public school could not guarantee that the student's related services would be provided by a district employee at the assigned school, the site did not offer a sufficient level of parent counseling and training, and there were insufficient opportunities for after-school support and instruction (*id.* at pp. 1-2). The parents' June 26, 2012 letter also notified the district that the student would continue to attend McCarton and receive ABA and physical therapies on a weekly basis year round and that the parents intended to seek reimbursement for these services (*id.* at pp. 2-3).

### **A. Due Process Complaint Notice**

The parents filed a due process complaint notice, dated July 17, 2012, alleging, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, that McCarton was appropriate to address the student's unique educational needs, and that equitable considerations justified an award of tuition reimbursement for the student's 2012-13 school year at McCarton (Parent Ex. A). The parents enumerated 119 allegations in their due process complaint notice; those relevant to this appeal essentially claim: that the May 2012 CSE predetermined the student's program for the 2012-13 school year; that the May 2012 CSE was improperly composed; that the district failed to conduct timely evaluations of the student; that the May 2012 IEP failed to accurately reflect the student's levels of educational performance and omitted test scores; that the May 2012 IEP failed to include group OT; that the May 2012 CSE failed to develop a proper FBA and BIP; that the IEP contained inadequate annual goals and short-term objectives; that the CSE failed to consider assistive technology and parent counseling and training; that the IEP failed to provide for extended-day services; that the IEP failed to provide a transition plan and transition goals; that the IEP's assignment and intended use of a 1:1 paraprofessional was inappropriate; that the recommended 6:1+1 placement was inappropriate in that the IEP failed to provide sufficient 1:1 instruction with the appropriate methodology for the student; that the district failed to provide the parents with a timely FNR; and that the district assigned the student to a particular public school site without input from the parents (*id.* at pp. 3-11). Additionally, the parents contended that the district failed to disclose or comply with a stipulation and consent order in a federal class action suit (*id.* at pp. 8-9).

Relative to implementation of the IEP at the assigned public school site, the parents also alleged: that the assigned school building and personnel would have "materially" changed in September 2012.; that the student's May 2012 IEP could not and would not have been properly implemented at the recommended public school site; that the assigned school employed a methodology that was inappropriate for use with the student; that staff at the assigned school were inadequately trained to implement the IEP; that the related services mandated on the May 2012

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<sup>2</sup> The parents also indicated that they had not yet received a copy of the student's IEP and, accordingly, did "not know what the [district] is recommending for [the student]" (Parent Ex. H at p. 2).

IEP could not have been implemented at the assigned school and that the use of related services authorizations (RSAs) would not appropriately remedy that failure; that there was an inappropriate and range of ages and functional abilities among the students in the particular class at the assigned school; and that the assigned public school site constituted an unsafe environment for the student (Parent Ex. A at pp. 7-12).

The parents asserted that the unilateral placement was appropriate for the student for the 2012-13 school year because it offered a special education program that was reasonably calculated to provide the student with meaningful educational benefits, and that equitable considerations favored their requests for relief because they acted reasonably and in good faith during the IEP review process (Parent Ex. A at pp. 2, 12-13). For relief, the parents requested reimbursement for the costs of the student's tuition at McCarton for the twelve-month 2012-13 school year; related services consisting of 4 hours per week of 1:1 home- and community-based instruction using the ABA methodology ; two 45-minute sessions per week of 1:1 home- and community-based PT; transportation to and from McCarton on an air-conditioned bus with limited travel time; and up to four hours per month of individualized parent counseling and training, all on 52-week basis (Parent Ex. A at p. 15). Additionally, the parents sought compensatory education for any and all pendency services that the student was entitled to but did not receive (*id.*). On August 23, 2012, the parents submitted an amended due process complaint notice adding a claim for compensatory education related to the district's alleged failure to provide the parents with "individualized parent counseling and training as a related service on [the student's] IEP" (Parent Ex. C. at pp. 12-13).<sup>3</sup>

## **B. Impartial Hearing Officer Decision**

After a prehearing conference conducted on August 8, 2012, an impartial hearing convened on September 4, 2013 and concluded on May 1, 2013, after seven days of proceedings (Tr. pp. 1-632). The first day of the impartial hearing was limited to determining the student's pendency (stay-put) placement during the course of the proceedings (Tr. pp. 9-29; see Interim IHO Decision). In an interim decision dated September 10, 2012, the IHO noted that the parties agreed that a prior IHO determination, dated July 7, 2010, ordering the district to reimburse the parents for the costs of the student's tuition at McCarton and associated transportation costs for the 2009-10 school year, constituted the student's last agreed upon program, and that the program provided for pursuant to that decision would remain in effect during the course of the proceedings (Interim IHO Decision at p. 2; see Parent Ex. B).

In a final decision dated July 1, 2013, the IHO determined, among other things, that the district failed to offer the student a FAPE for the 2012-13 school year, that McCarton was an appropriate placement for the student for the 2012-13 school year, and that equitable considerations supported the parents' request for reimbursement for the costs of the student's tuition (IHO Decision at pp. 14-25).

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<sup>3</sup> The parents limited their request for relief during the impartial hearing to reimbursement for the costs of the student's attendance at McCarton, transportation costs, and reimbursement for any pendency costs not paid by the district (Tr. pp. 626-27). Although the parents originally sought compensatory education for an alleged failure to provide pendency services and parent counseling and training in their due process complaint notices, they have not requested such services in this appeal.

The IHO determined that the district failed to offer the student a FAPE during the 2012-13 school year. The IHO found that the hearing record showed that the student required 1:1 instruction in order to learn new material or make meaningful progress and that the IEP did not offer sufficient 1:1 instruction (IHO Decision at pp. 22-24). She noted that although paraprofessionals can provide behavioral support, they are not permitted to provide instruction as a matter of State education policy and that a paraprofessional was not an adequate substitute for 1:1 instruction (*id.* at pp. 23-24). The IHO found not credible the statement from a district witness that 1:1 instruction was offered at the assigned school "throughout the day" because there would be only one teacher in the classroom with six students, and that there was no evidence in the hearing record that the paraprofessionals at the assigned public school site were trained to provide instruction (*id.* at pp. 21-22). More specifically with regard to the assigned school, the IHO found that the district had failed to establish that the student's IEP could be implemented at the assigned public school site (*id.* at pp. 21-22). The IHO found that although the hearing record showed that an appropriate methodology was used in classrooms at the assigned school, there was no evidence presented regarding how instruction would be differentiated for the student, how much 1:1 instruction the student would receive or whether teachers or paraprofessionals at the assigned school were trained in provision of instruction using an ABA methodology (*id.* at p. 21). The IHO noted that the district provided no proof regarding the ages of the students in the classes in which the student could potentially have been placed (*id.*). The IHO also found that the hearing record established that the assigned school could not provide the related services mandated on the student's IEP because the record showed that speech-language therapy and OT were delivered in 30-minute sessions, whereas the IEP called for 45-minute sessions, and that none of the students at the assigned school received related services in 45-minute sessions, even where their IEPs called for it (*id.* at p. 22). The IHO found that the "notion" that RSAs could be employed to fulfill the required mandates was "unconvincing" (*id.*). She further found that the hearing record showed that the assigned school could not provide the individual OT that was required by the IEP, constituting a denial of a FAPE, and that she need not determine if the CSE should have also recommended that the student receive group OT services (*id.*).<sup>4</sup>

The IHO further found that McCarton was an appropriate placement for the student for the 2012-13 school year, because it provided the 1:1 teaching support and services the student required and that the hearing record showed that the student was making progress at McCarton (IHO Decision at p. 24). The IHO also concluded that equitable considerations supported the parents'

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<sup>4</sup> The IHO made several findings adverse to the parents regarding claims raised in their due process complaint notices, including: that the May 2012 CSE was properly composed; that the evaluative information available to the May 2012 CSE was adequate to develop the student's IEP; that the goals and objectives in the May 2012 IEP were appropriate; that the omission of a particular methodology from the IEP did not constitute a denial of a FAPE; that the failure to provide for parent counseling and training on the student's IEP did not rise to the level of a denial of a FAPE; that the IEP was not required to include a plan to transition the student from McCarton to the public school; that the parents were not denied a meaningful opportunity to participate in the development of the student's IEP when the district assigned the student to a particular public school site without their input; and that the methodology used at the assigned school was appropriate to meet the student's needs (IHO Decision at pp. 16-19). The IHO found that the FBA and BIP were appropriate to meet the student's needs and, even if the FBA and the BIP were not received by the parents, the IEP sufficiently addressed the student's behavioral needs without them (*id.* at pp. 19-21). Additionally, aside from those findings described above, the IHO declined to address individually the remainder of the claims raised in the parents' due process complaint notice, finding those claims that were not addressed in the parties' post hearing briefs to be "abandoned or . . . incorporate[d] in the discussion of other allegations" (*id.* at p. 14).

request for relief, because the parents provided adequate notice to the district of their concerns with the offered program and the parents established that they cooperated with the CSE during the IEP development process (*id.* at pp. 24-25). The IHO ordered the district to reimburse the parents for any costs of the student's tuition at McCarton for the 2012-13 school year that had not already been paid pursuant to her order on pendency (*id.* at p. 25).<sup>5</sup>

#### **IV. Appeal for State-Level Review**

The district appeals from the IHO's decision, arguing that the IHO erred in determining that the district failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations supported the parents' claims for relief.<sup>6</sup> Specifically, the district asserts that, contrary to the IHO's findings, the 1:1 paraprofessional provided by the May 2012 IEP would have appropriately addressed the student's educational and behavioral needs because the student's need for 1:1 support arose from his needs for prompting, refocusing, and redirection, not 1:1 instruction. The district also asserts that the recommended 6:1+1 placement with a 1:1 paraprofessional would have provided sufficient 1:1 instruction for the student and would have additionally met the student's behavior and social-emotional needs.

The district contends that the parents' claims, as well as the IHO's findings, concerning the assigned school are "speculative as a matter of law" because the student never attended the recommended placement. Nonetheless, the district contends that the IHO erred in finding that the assigned school could not have implemented the student's IEP because the hearing record established that the assigned school provided differentiated instruction, used various teaching methodologies including "ABA principals", offered 1:1 instruction, and kept data. The district also contends that the IHO erred in finding that the assigned school could not have implemented the student's related services as set forth in the May 2012 IEP because the hearing record shows that to the extent the assigned public school site could not provide the mandated level of related services, RSAs would have been issued to make up for any shortcomings, as is permitted under State policy guidance.

Regarding equitable considerations, the district maintains that the parents were "only going through the motions in order to make a case for tuition funding for McCarton while [the district] was paying for the student's tuition at McCarton pursuant to pendency," and because the parents signed a contract with McCarton and made a non-refundable deposit before the May 2012 CSE meeting and before the deposit was due to be paid. The district asserts that these facts indicate that the parents would not have accepted an appropriate placement from the district and always intended to maintain the student's enrollment at McCarton.

In an answer and cross-appeal, the parents answer the district's petition, admitting and denying the allegations raised by the district. The parents contend that the IHO correctly found that the district denied the student a FAPE for the 2012-13 school year, and that equitable considerations supported the parents' claims. The parents ultimately seek to uphold the IHO's

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<sup>5</sup> The IHO denied the parents' request for transportation costs because "[t]here was no evidence presented" thereof (IHO Decision at p. 26 n.2).

<sup>6</sup> The district does not challenge the IHO's determination that McCarton was an appropriate unilateral placement for the student's 2012-13 school year (Pet. ¶ 6; *see* Pet. p. 19).

decision but request nine modifications to her findings, which they characterize as a "cross-appeal." In addition, the parents assert six "additional responses."

Specifically, the parents request that the following allegations pleaded in their due process complaint notice be found to constitute additional violations of the IDEA: (1) the district failed to include the student's related service providers at the May 2012 CSE meeting; (2) the district failed to conduct any of its own evaluations despite the parents' written request ; (3) the district relied on private evaluations that recommended 1:1 instruction using an ABA methodology for the student and the district's failure to specify a particular methodology on the IEP or note the student's success with ABA methodology denied the student a FAPE; (4) the IEP goals were taken directly from the student's goals at McCarton and were not appropriate for use in the context of the recommended 6:1+1 program; (5) the omission of parent counseling and training from the IEP denied the student a FAPE; (6) the FBA and BIP were inappropriate to address the student's needs; (7) the district's failure to put the parents on notice as to what behavior plan would be in place for the student; (8) the district's failure to provide the parents with a copy of the FBA and BIP prior to the start of the 2012-13 school year denied the student a FAPE; and (9) excluding the parents from the public school site selection process denied the student a FAPE.<sup>7</sup>

The parents also argue in their answer and cross-appeal that the May 2012 CSE impermissibly predetermined its recommendation for a 6:1+1 special class in a specialized school and that because the student's IEP does not mention ABA methodology, the parents could not rely on ABA being a part of the student's recommended program. The parents also contend that the hearing record shows that the student required 1:1 instruction in order to learn new material and make meaningful progress, that the student's IEP makes no recommendation for any 1:1 instruction, that a district witness testified at the impartial hearing that the May 2012 CSE did not consider any 1:1 instructional programs, and that the IHO correctly determined that the district failed to offer the student a FAPE for these reasons. Relatedly, the parents contend that the IEP's recommendation of a 1:1 paraprofessional was insufficient to meet the student's needs because the hearing record shows that the student required 1:1 instruction and not simply 1:1 assistance for behavioral support, such that the district's recommended program was insufficient. In addition, the parents contend that the assigned public school site was inappropriate for the student because the parents were informed that related services mandates were not being met prior to rejecting the recommended program and, at the time of the impartial hearing, related services mandates were still not being met for most students in the school. The parents also assert that RSAs are not sufficient to cure the district's inability to provide the services it recommended on the student's May 2012 IEP and that, in any event, RSAs are not provided for in the student's IEP and are accordingly not a part of the student's recommended program, which required the related services to be provided in school.

As additional responses, the parents assert: (1) that the parents continue to invoke the student's right to pendency and that because the student's 2012-13 program at McCarton has been or will be paid for under pendency, any decision on the merits of the district's appeal is moot; (2) that the district has failed to challenge the IHO's finding that McCarton was an appropriate placement for the student and as such that finding cannot be overturned on appeal; (3) that if an SRO is unable to render a timely decision in this matter, "the SRO should recuse itself" from the

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<sup>7</sup> The parents raise no claims regarding the lack of a "transition plan" or "transition goals."



matter; (4) that because the district has "failed to remedy [IEP defects] during the statutory, ten-day notice period, and again during the thirty-day 'resolution period,'" it may not attempt to cure any defects in the May 2012 IEP by use of evidence outside the IEP itself; (5) that the district's use of retrospective testimony must be rejected; and (6) that the SRO should allow the parents to supplement the record with certain additional evidence. The parents also attach ten documents to the answer and cross-appeal.

In a reply and answer to the cross-appeal, the district answers the parents' cross appeal and responds to the six "additional responses" pleaded in the parents' answer and cross appeal. Specifically, the district contends first that with the exception of Exhibit A to the parents' answer and cross-appeal, the SRO should decline to review the additional evidence submitted by the parents because the offered evidence was available at the time of the impartial hearing and is unnecessary for an SRO to render a decision. The district also argues that SRO recusal is not warranted in this matter. The district also contends that its appeal is not moot and that, in any event, the appeal falls within the exception to the mootness doctrine. Next the district contends that because the May 2012 IEP was appropriate, there are no issues concerning the 10-day notice period and the 30-day resolution period for an SRO to adjudicate. The district next argues that it did not rely on impermissible retrospective testimony in offering testimony about how the 6:1+1 program with a 1:1 paraprofessional would be implemented because such testimony explained and justified a portion of the student's May 2012 IEP. The district next contends that the parents' cross-appeal was "improperly made" in this matter for a variety of reasons.<sup>8</sup> Lastly, the district argues that although the parents' cross-appealed issues were improperly pleaded, the IHO properly determined that the May 2012 CSE was properly composed, that the CSE relied upon sufficient evaluations, that the IEP goals were appropriate, that the IEP was not required to specify a teaching methodology, that the lack of parent counseling and training in the IEP did not deny the student a FAPE, that the parents were not entitled to participate in the determination of the public school site the student would attend, and that the FBA and BIP sufficiently identified and addressed the student's interfering behaviors.

## **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d

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<sup>8</sup> Although the parents' organization of the answer and cross-appeal is, at times, internally inconsistent, and difficult to follow in that parts of a single argument may be found in several places in the pleading, overall the answer and cross-appeal adequately identifies the findings, conclusions, and orders of the IHO with which the parents disagree and indicates the relief that they would like the SRO to grant (8 NYCRR 279.4).

Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Parents' Request for Recusal**

Regarding the parents' request that I recuse myself, I note that 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]).<sup>9</sup>

Here, I am not personally familiar with the parties in this case, nor do I have any personal, economic, or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Moreover, the New York State Education Department is not a party in this matter. To the extent that the parents' counsel opines that I am biased in favor of the district, they offer no evidence to support such an assertion. Moreover, with regard to allegations that decisions from the Office of State Review have been untimely due to staffing, such contentions are not relevant to a recusal inquiry. Additionally, recusal in such a context 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 part 279 do not require recusal in this instance.

## 2. Pendency and Mootness

Initially, I note that the district has been required to fund the student's placement at McCarton as a result of its obligation to provide the student with his pendency (stay-put) placement for the duration of these proceedings, including the entirety of the 2012-13 school year for which reimbursement is sought (see Interim IHO Decision at p. 2; Application of the Dep't of Educ., Appeal No. 12-092).<sup>10</sup> As all of the relief sought by the parents has been achieved by virtue of pendency, the challenged May 2012 IEP has expired by its own terms, and planning for the 2013-14 school year should have been completed, the parties' dispute regarding the 2012-13 school year has been rendered moot and the discussion of the parties' arguments below is entirely academic. Regardless of the merits of a decision concerning whether the district offered the student a FAPE for the 2012-13 school year, no further meaningful relief may be granted to the parents because they have received all of the relief they seek pursuant to pendency (IHO Decision at p. 25; Parent Ex. C at p. 13).<sup>11</sup> Even if a determination on the merits demonstrated that the district did not offer the student a FAPE for the 2012-13 school year, in this instance it would have no actual effect on the parties because the 2012-13 school year expired on June 30, 2013 and the student remains entitled to have his pendency placement—at McCarton—funded by the district through the conclusion of the administrative process (IHO Interim Decision at p. 2). Thus, I agree with the

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<sup>9</sup> 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]).

<sup>10</sup> I note that a previous decision issued by this office indicates that the student was entitled to public funding for his placement at McCarton pursuant to pendency beginning September 20, 2011, and that at the time the pendency order in this matter became effective on July 17, 2012, the previous matter was still pending (see Application of the Dep't of Educ., Appeal No. 12-092). Hence, and contrary to the district's contention, the student's right to funding of his tuition at McCarton pursuant to pendency was in effect for the entirety of the 12-month 2012-13 school year.

<sup>11</sup> Although the parents sought transportation costs in addition to tuition at McCarton in their due process complaint notices (Parent Exs. A at p. 13; C at p. 13), the parents have not appealed from the IHO's order to the extent that it did not award relief beyond tuition reimbursement at McCarton for the 2012-13 school year and, in any event, the district provided the student with transportation to McCarton during the 2012-13 school year pursuant to pendency (Tr. p. 623; see Interim IHO Order at p. 2).

parents' argument that the case has been rendered moot, and the district will be directed to pay for the costs of McCarton, if it has not done so already.

However, in light of recent district court decisions holding that tuition reimbursement cases may, in some circumstances, not be moot even when the requested relief has been achieved as a result of pendency, in the interest of administrative and judicial economy I continue to address the merits of the parents' appeal in the alternative (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at \*2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at \*9-\*10 [E.D.N.Y. July 29, 2011]; but see Thomas W. v. Hawaii, 2012 WL 6651884, at \*1, \*3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254-55[S.D.N.Y. 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010] [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]).

### **3. Additional Evidence**

The parents submit the following documents as additional evidence labeled exhibits A through J attached to their answer and cross appeal: (A) the IHO's decision in this matter; (B) documentation regarding the New York Center for Autism Charter School; (C) an August 9, 2013 letter from the City of New York Law Department; (D) a December 5, 2012 letter from parents' counsel to the Office of State Review; (E) a December 18, 2012 letter from the Office of State Review to counsel for the parents; (F) a January 17, 2013 complaint to the Commissioner of Education made by counsel for the parents; (G) a chart purporting to analyze the results of various appeals decided by SROs; (H) an April 29, 2013 response to a Freedom of Information Law request regarding the Office of State Review made by counsel for the parents; (I) a March 21, 2013 response to the complaint attached as exhibit F; and (J) findings regarding the complaint (see Answer Exs. A-J). 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; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Regarding Exhibit A attached to the parents' answer and cross appeal, it is unnecessary to accept the exhibit as additional evidence because it is already part of the record on appeal (see IHO Decision). Regarding Exhibit B attached to the parents' answer and cross appeal, the exhibit is not necessary in order for me to render a decision because the New York Center for Autism Charter School was not a placement recommended by the CSE for the student's 2012-13 school year, nor was it the parents' unilateral placement for the student, and information regarding the school thus is not relevant to the issues on appeal. Regarding Exhibits

C through J attached to the parents' answer and cross appeal, these exhibits are also not necessary for me to render a decision in that they are not relevant considerations relating to the issue of SRO recusal in this matter, for the reasons set forth above, and they concern matters appealed to the Office of State Review that are not related to the matter to be determined herein.

## **B. May 23, 2012 CSE Meeting**

### **1. Parent Participation / Predetermination**

The parents contend that the CSE's failure to discuss what would constitute an appropriate instructional methodology for the student impeded the parents' right to participate in the development of the student's IEP and that the 6:1+1 special class placement recommended in the IEP was predetermined inasmuch as that setting is the smallest student-to-teacher ratio available in public schools in the district and the CSE did not consider providing a 1:1 instructional program.

The IDEA sets forth procedural safeguards that include providing parents with the 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. 2012], aff'd, 725 F.3d 131 [2d Cir. 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]; 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]).

In this case, the hearing record indicates that the May2012 CSE did not predetermine the student's placement or impede the parents' right to participate in the formulation of the student's IEP. The CSE meeting was attended by the student's mother, a district special education teacher, a district school psychologist, an additional parent member, the student's then-current classroom teacher from McCarton, and the student's speech-language pathologist from McCarton (Tr. pp.

152-54, 562; Dist. Ex. 1 at p. 29). The student's mother testified that prior to the May 2012 CSE meeting, she provided the district with reports from McCarton and asked the student's providers from McCarton to attend the meeting "[s]o that the people from [the district] could have a clear understanding of my son, his progress, his needs, who he is as a child" (Tr. p. 564). She further testified that she described the student's program at McCarton to the CSE and discussed the fact that the student was receiving 1:1 instruction (Tr. p. 565). She also testified that she related her concerns to the CSE that the recommended program would not provide the student with enough 1:1 instruction and that the recommended 1:1 paraprofessional would not have the necessary expertise to "understand" the student's behavioral needs and appropriate interventions thereto (Tr. pp. 570-71). She further related that the CSE discussed the role of the paraprofessional in the recommended classroom—but did not describe the difference between a classroom paraprofessional and a 1:1 paraprofessional—and discussed extended day services, which the student's mother believed the student required and the CSE did not provide (Tr. pp. 571-73, 603). She testified that the CSE discussed the student's behavioral needs and that the student's classroom teacher at McCarton provided information regarding the student's behaviors (Tr. pp. 605-06). The student's McCarton teacher confirmed that the CSE discussed the student's behavioral needs (Tr. p. 419).

According to the district special education teacher who attended the May 2012 CSE meeting, the CSE reviewed a December 2011 McCarton educational progress report, a May 2012 classroom observation and teacher interview, a January 2012 speech-language progress report, a McCarton school IEP for the 2011-12 school year, and a May 2012 McCarton OT goals document at the May 2012 CSE meeting, and that the CSE discussed the content of each of those documents at the meeting (Tr. pp. 154-157; Dist. Exs. 2-6). The special education teacher also testified that the CSE discussed the student's academic progress and performance in school, his social development, and his physical development (Tr. pp. 161-65). The special education teacher also testified that the CSE obtained information directly from the student's McCarton providers at the CSE meeting and discussed the student's management needs and the goals and objectives that were incorporated in the student's IEP (Tr. pp. 165-84). The special education teacher also testified that there was no discussion at the CSE as to whether the goals developed at the meeting were to be implemented "strictly in an ABA-type program" and no discussion of listing ABA on the IEP as the recommended methodology (Tr. p. 184-85, 211). She further testified that she was familiar with ABA methodology, that the goals in the May 2012 IEP could be implemented with a methodology other than ABA, and that the CSE did "[n]ot necessarily" intend for the student to be placed in a district program that provided "strictly ABA" instruction (Tr. p. 185).

In light of the above, I find that the hearing record supports a conclusion that the student's mother was provided with an opportunity to participate in the May 2012 CSE meeting with respect to the identification, evaluation, and educational placement of the student, that she did, in fact, participate in the meeting, and further that the failure of the CSE to discuss specific methodologies at the meeting did not impede the parents' participation right, especially in light of the fact that generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 208; M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045; see also 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]).

Turning to the parents' contention that the May 2012 CSE predetermined the student's placement, I note that according to the IEP summary, the CSE also considered other program recommendations for the student including general education, special education teacher support services (SETSS), integrated co-teaching services (ICT), and home instruction (Dist. Ex. 1 at p. 27-28; but see Tr. p. 220-21). The summary further reflects that the CSE rejected general education, SETSS, and ICT because those programs would not meet the student's academic and social-emotional delays and that home instruction was rejected because it would be too restrictive for the student (Dist. Ex. 1 at pp. 27-28). According to the district special education teacher who attended the May 2012 CSE meeting, the CSE discussed the student's placement on the continuum of services at the end of the CSE meeting and the district school psychologist who attended the meeting identified the recommended placement (Tr. pp. 226-27). She also testified that although the CSE did not consider placing the student in a program that would provide a 1:1 student-teacher ratio, the CSE did consider, discuss, and recommend that the student be provided with the support of a 1:1 paraprofessional (Tr. pp. 219-21). The student's mother confirmed that the CSE discussed the fact that the student had a 1:1 student-teacher ratio at McCarton and that a 1:1 paraprofessional was considered and recommended by the CSE (Tr. p. 565, 570).

Although the district did not agree to the student's mother's request for the provision of 1:1 instruction to the student, I note that while the district's obligation to permit parental participation in the development of the student's IEP should not be trivialized, the IDEA does not require districts to accede to the parents' program demands (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999]; see Rowley, 458 U.S. at 205-06). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at \*30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Based on the foregoing evidence, I find that the evidence does not support a conclusion that the district predetermined the student's program for the 2012-13 school year, but instead that the student's mother meaningfully participated and contributed to the development of the student's IEP during the May 2012 CSE meeting.

## **2. CSE Composition**

As noted above, participants in the May 2012 CSE meeting included the student's mother, a district special education teacher, a district school psychologist, an additional parent member, the student's teacher from McCarton, and the student's speech-language pathologist from McCarton (Tr. pp. 152-54, 562; Dist. Ex. 1 at p. 29). The parents contend, without further explanation, that the district failed to include the student's related service providers at the CSE meeting despite modifying the recommended amount of related services to be provided to the student.

Here, despite the parents' claim to the contrary, the hearing record establishes that the May 2012 CSE was constituted in accordance with State and federal regulations. There is no



requirement that related services providers be in attendance at a student's CSE meeting. Instead, the IDEA and State and federal regulations provide that in addition to the required special education teacher or, where appropriate, special education provider of the student, the CSE may include "other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate" (8 NYCRR 200.3[a][1][iii], [ix]; see 20 U.S.C. § 1414[d][1][B][iii], [vi]; 34 CFR 300.321[a][3], [6]). A district special education teacher participated throughout the meeting and the student's McCarton classroom teacher and speech-language pathologist also participated at the meeting (Tr. p. 152-54; see Dist. Ex. 1 at p. 29). Additionally, the district representative testified that much of the information contained in the student's IEP was presented at the meeting by the student's McCarton providers and, as discussed above, the parents were not impeded from participating in the decision-making process (Tr. pp. 162-67).

Based on the foregoing, the hearing record establishes that the May 2012 CSE was properly composed. Furthermore, there is no evidence in the hearing record that the lack of attendance of additional related service providers amounted to a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415 [f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5 [j][4]). Accordingly, the hearing record provides no basis to disturb the IHO's finding that all required participants were present at the CSE meeting.

### **3. Parental Participation in the Selection of the School Site**

Next I will address the parents' argument 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[b][1][i], [c]). However, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at \*2 [2d Cir. March 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at \*6). The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; K.L.A., 2010 WL 1193082, at \*2; Concerned Parents, 629 F.2d at 756; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. 2011]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 CFR 300.320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that "school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement"]).

The Second Circuit in R.E. reaffirmed that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and "[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 A.S. v. New York City Dep't of Educ., No. 10-cv-00009, slip op. at 18-19 [E.D.N.Y. May 25, 2011] [holding that "the parents' right to participate in the development of their child's IEP does not extend to the [district]'s decision regarding the particular school site that their child would attend"]; see also Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013] [noting that a parent "does not have a procedural right in the specific locational placement of his child, as opposed to the educational placement"]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013] [holding that the parents' rights to participation "extend only to meaningful participation in the child's 'educational placement'," not to selection of a particular school building]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*12 [S.D.N.Y. Oct. 16, 2012]; 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. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12, \*14 [S.D.N.Y. Nov. 9, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*8-\*9 [S.D.N.Y. Oct. 28, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [2011]; S.H. v. New York City Dep't of Educ., 2011 WL 666098, at \*5 [S.D.N.Y. Feb. 15, 2011]). 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. May 23, 2012 IEP**

#### **1. Behavioral Needs**

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at \*3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at \*1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

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 [among other things, a

student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, 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, the "student's need for a [BIP] must be documented in the IEP" (*id.*).<sup>12</sup> 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 (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234, at \*4). 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). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors" (*id.*).

Here, the parents assert that the district failed to develop an appropriate FBA and BIP for the student. I note that the student was attending McCarton at the time of the May 2012 CSE meeting and conducting an FBA to determine how the student's behavior related to that environment would have diminished value where, as here, the CSE did not have the option of recommending that the student be placed at the private school and was charged with identifying an appropriate publicly funded placement for the student. (see 8 NYCRR 200.1[r]; see also Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at \*3 [2d Cir. Oct. 27, 2006]). Nonetheless, the hearing record taken as a whole supports the IHO's conclusion that the CSE was aware of the

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<sup>12</sup> While the student's need for a BIP must be documented in the IEP and, prior to the development of the BIP, an FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at \*3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student is enrolled at the proposed district public school placement]).

student's behaviors that interfered with his instruction and that not only were they identified on the IEP, but the CSE also developed academic management needs and annual goals designed to address the student's behavioral needs.

The district special education teacher and the student's mother testified that the May 2012 CSE engaged in discussion of the student's behavioral needs (Tr. pp. 186-87, 605-06). The CSE considered a number of McCarton-generated documents that provided additional evidence of the student's ongoing behavioral concerns, including his engagement in self-stimulatory actions, vocalizations, darting, and dropping (Tr. pp. 186-7; Dist. Exs. 2 at pp. 1-2; 3 at p. 3; 4 at p. 1; 5 at pp. 4-5, 12). The hearing record also includes multiple references to the student's history of engaging in tantrum behaviors, such as hitting and kicking (Tr. pp. 240, 413; Dist. Exs. 1 at pp. 1-3; 2 at p. 2; 3 at p. 3). The IEP additionally includes repeated references to the student's limited attention span and high degree of distractibility, and notes that he did not sit appropriately or attend "for long periods of time" during group instruction (Dist. Ex. 1 at pp. 1-2).

The hearing record reflects that the CSE considered the December 2011 educational progress report, which was co-authored by the student's McCarton classroom teacher and ABA therapist (Tr. p. 155, 417-418; Dist. Ex. 2).<sup>13</sup> This report provided detailed descriptions of behaviors that interfered with the student's learning, including perseverative speech and actions, such as arranging and positioning objects, and "inappropriate walking" (Dist. Ex. 2 at p. 2). The December 2011 report also references a collection of behaviors categorized as "tantrum behaviors," which included hitting, kicking, running from staff, stomping his feet, and dropping to the floor (*id.*). According to data collected between October and December 2011, the student engaged in tantrums on a regular basis, averaging two episodes per day, for an average of fourteen minutes per day (*id.*). In addition, the educational report described the student's difficulty maintaining focused attention, which hampered his ability to acquire new skills (*id.* at pp. 1-2, 5).

The educational progress report provided insight into the private school's efforts to reduce the student's tantrum behaviors by first identifying the antecedent to these tantrums, such as when the student's request for a favored activity or item was not honored (Dist. Ex. 2 at p. 2). When this occurred, the student would initially engage in perseverative speech or action, but then escalate to a tantrum if his wishes continued to be thwarted (*id.*). Instructional strategies were developed to reduce and/or prevent these behaviors, including providing reinforcements when the student was able to accept something other than his original request and providing the student with a sensory diet by engaging him in a sensory activity, such as yoga or swinging, about every 45 minutes (*id.* at pp. 2-3). In addition, the May 2012 CSE reviewed the private school's IEP, which provided detailed "behavior skills" goals and objectives, with clearly defined expectations for the desired behavioral outcome (Tr. p. 154, 157; Dist. Ex. 5 at pp. 11-13).

Based upon information from the educational progress report and additional input from the McCarton staff and the student's parent, an FBA was developed, targeting inappropriate behaviors as tantrums, preservation, vocal stereotypy, motor stereotypy and inappropriate eye gaze (Tr. 187-88, 191-195; Dist. Exs. 1 at pp. 1-3; 2 at pp. 1-3; 7 at p. 1). The FBA delineated frequency and duration of the tantrums, the conditions under which they might be more likely to occur, and a

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<sup>13</sup> One of the co-authors of the educational progress report is identified as both the student's ABA teacher and his ABA therapist. For the purpose of clarity, henceforth, he shall be referred to as the student's ABA therapist.

number of triggers associated with the targeted behaviors, all of which were discussed at the CSE meeting and incorporated in the proposed 2012-13 IEP (Tr. pp. 191-93; Dist. Exs. 1 at pp. 1-3; 2 at p. 2; 7 at p. 1). The FBA indicated that "avoidance" and "sensory regulation" as the student's possible motivations for engaging in the inappropriate behaviors (Dist. Ex. 7 at p. 2).

The FBA included strategies the private school had employed to decrease the frequency of inappropriate behaviors and increase the likelihood of positive outcomes, such as providing praise, token reinforcements, prompts, and a sensory diet (Dist. Ex. 7 at p. 1; see Tr. pp. 470-71). Interventions to encourage appropriate behavior included gestural prompting, verbal prompting, praise, and positive reinforcement with checks and tokens (Dist. Ex. 7 at p. 2). The FBA indicated the expected behavior changes included a reduction in tantrums and behavioral and vocal perseverations (id.). The hearing record shows that the student's mother participated in this discussion during the CSE meeting, voiced her opinion regarding the accuracy of the discussion, added her thoughts about what "she would like to see being done with [her son]," and identified her son's preference for certain activities, such as watching video games and performing activities more independently, to help reduce his frustration (Tr. pp. 187, 194).

The special factor procedures set forth in State regulations further require 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 (regarding disciplinary action taken against a student as a result of conduct that was a manifestation of the student's disability) (8 NYCRR 200.22[b][1]). As noted above, "[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]).<sup>14</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, 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

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<sup>14</sup> 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]).

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]).

The BIP identified personnel responsible for its implementation, a progress monitoring schedule for achieving the targeted behaviors, and a schedule for communicating the results to the parents (Dist. Ex. 7 at p. 3). The BIP also delineated targeted behaviors, expected behavior changes, and methods and/or criteria for measuring the outcome of the intervention initiative (*id.* at pp. 3-4). Specifically, the BIP identified self-stimulatory non-contextual hand play, vocalizations and darting/dropping as targeted behaviors to be addressed (*id.*).

The expected behavior change for each of the student's interfering behaviors included developing an extinction schedule for these behaviors "where they are interrupted, not reinforced and appropriate opposing behaviors are reinforced" (Dist. Ex. 7 at pp. 3-4). The methods/criteria for outcome measurement included establishing a baseline rate over a period of five days, setting the criterion as "an 80% reduction from baseline in the target per interval on three consecutive probes" (*id.*). The BIP indicated that those behaviors that interfered most with the student's learning and social adaptation would be targeted first and, once the criteria for those behaviors was met, the next most intrusive behavior would be targeted (*id.*).

As set forth above, the hearing record shows that the student's behavioral needs were discussed at the May 2012 CSE meeting and that, as the IHO found, the FBA and BIP were finalized in June 2012 (Tr. pp. 189-90; Dist. Ex. 7 at p. 1). The district's special education teacher who attended the May 2012 CSE meeting stated that the district mailed a copy of the FBA and BIP to the parents, but the student's mother testified that she did not see them until the impartial hearing (Tr. pp. 238, 569). I make no finding as to whether the FBA and BIP were mailed to the parents or whether the parent had them prior to the impartial hearing, but I note that copies of these documents should be made available the parents by the district. In any event, I concur with the IHO's determination that the absence of an FBA and BIP would not result in a denial of FAPE where, as here, the CSE addressed the student's interfering behavior and created an IEP based upon information provided by the student's teachers, providers, parents and observation by the district (see *R.E.*, 694 F.3d at 190-91; *T.Y.*, 584 F.3d at 419). While the FBA and BIP do not address every interfering behavior identified and discussed by the CSE, the student's IEP does identify these behaviors and includes an annual goal and multiple short-term objectives to address them, as well as providing a 1:1 paraprofessional to assist in addressing the student's interfering behaviors (Dist. Exs. 1 at pp. 1-3, 19-20, 22; 7 at pp. 1-4; see Tr. pp. 197, 228). As a result, the hearing record supports the IHO's finding that the IEP sufficiently addressed the student's behavioral needs (*M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*5, \*8 [S.D.N.Y. Mar. 21, 2013] [even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"], quoting *T.Y.*, 584 F.3d at 419).

## **2. Annual Goals**

The parents contend that the IEP goals were taken from McCarton's program and were inappropriate and insufficient for implementation in, and inconsistent with, the recommended

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

Initially, I note that, under the IDEA and State and federal regulations discussed above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a particular classroom setting or student-teacher ratio, but rather whether the goals and objectives are consistent with and relate to the needs and abilities of the student (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]). In this case, the May 2012 IEP contains annual goals and short-term objectives targeting the student's needs in the areas of reading, writing, math, social development, self-regulatory behavior, self-care and daily living, speech and language, OT, visual motor, and fine and gross motor skills (Dist. Ex. 1 at pp. 1-21). Each goal included criteria for measuring the achievement of the goal and corresponding objectives, and clearly defined the desired behavioral outcome of instruction (id. at pp. 4-21). The methods of measuring progress for each goal was identified as teacher/provider observation on a daily basis (id.).

The district special education teacher, who was present for the May 2012 CSE, testified that the CSE considered several documents prepared by McCarton staff as well as input from the student's mother when developing the student's proposed program for the 2012-13 school year (Tr. pp. 148, 152-58, 562; Dist. Exs. 2, 4, 5, 6). Specifically, the CSE reviewed a December 2011 educational progress report and January 2012 speech-language report, both prepared by McCarton staff (Tr. pp. 154-56; Dist. Exs. 2; 4). The CSE also considered a May 2012 teacher interview/classroom observation that was co-authored by the district special education teacher and the student's classroom teacher at McCarton (Tr. pp. 155-56; Dist. Ex. 3). Finally, the May 2012 CSE also considered the McCarton IEP for the 2011-12 school year and the private school's OT goals (Tr. pp. 156-57; Dist. Exs. 5; 6).

As the reports listed above provided detailed information regarding the student's current levels of functioning across time and in varied settings, they provide an important foundation upon which to build the student's IEP. Based upon the CSE's discussion of these documents, the CSE developed the present levels of performance section of the May 2012 IEP, providing estimates of the student's academic achievement in reading, writing, and math, as well as his communication skills and social/emotional and behavioral needs (Tr. pp. 154-61; Dist. Ex. 1 at pp. 1-3). The CSE's review of the reports, combined with input provided by McCarton staff and the student's mother, is also reflected in the descriptions of the student's instructional needs, optimal learning conditions, and methods of managing behavioral concerns that interfere with the student's ability to benefit from instruction (compare Dist. Ex. 1 at pp. 1-3, with Dist. Ex. 2 at pp. 1-3, 5, 7-9, and Dist. Ex. 4 at pp. 1-5).

Although the May 2012 IEP drew heavily upon the catalog of annual goals and short-term objectives included in the McCarton 2011-12 IEP, the CSE did not incorporate a number of annual goals and short-term objectives annotated as "met" in the McCarton IEP (Dist. Exs. 1 at pp. 4-21; 5). The district IEP included numerous goals and objectives designed to improve the student's expressive and receptive language skills, as well as his math, reading, oral language, and social and leisure skills (Dist. Ex. 1 at pp. 4-16). The district IEP also included goals and objectives intended to build the student's daily living skills, increase his repertoire of social behavior skills, address his occupational therapy needs, and increase his ability to maintain focused attention and on-task behavior (*id.* at pp. 17-22). Finally, the IEP included a goal and short-term objectives addressing the student's need to "maintain behavioral control" when confronted with "reasonable variations in [his] environment" and improve the student's home and community safety skills (*id.* at pp. 5-6). The criteria for achievement of this goal required the student to refrain from "exhibiting signs of distress or escape behaviors" when faced with unexpected or unannounced changes to his environment and demonstrate the use of appropriate safety skills across home and community settings (*id.* at p. 6).

Although the McCarton staff asserted the student "requires" an ABA instructional model and the student's mother indicated she felt it was "most effective," I note that the district special education teacher testified that meeting participants had not indicated that the goals and objectives could only be implemented in a program using an ABA methodology, nor had there been any discussion regarding listing ABA on the IEP (Tr. pp. 184-85, 211, 312). Furthermore, the special education teacher—who was familiar with ABA and had received training in alternative models of instruction—added that the goals in the 2012-13 IEP could have been implemented in programs other than those based on ABA (Tr. p. 185).

Based upon the above, I find that the annual goals and short-term objectives in the May 2012 IEP appropriately targeted the student's areas of need, contained sufficient specificity by which to guide instruction, intervention, and evaluation of the student's progress. Further, I find nothing so unique in the May 2012 IEP annual goals and short-term objectives as to preclude their implementation in a setting other than a classroom providing instruction using an ABA methodology.

### **3. 6:1+1 Special Class Placement with 1:1 Paraprofessional**

The parents contend that the hearing record shows that the student required 1:1 instruction in order to learn new material and make meaningful progress, that the student's IEP made no recommendation for any 1:1 instruction, and that the IEP's recommendation of a 1:1 paraprofessional was insufficient to meet the student's needs because the student required 1:1 instruction and not simply 1:1 assistance for behavioral support.

As discussed above, the hearing record reflects that the CSE considered and rejected a number of other program options that were rejected because they would not adequately meet the student's academic and social/emotional needs (Dist. Ex. 1 at pp. 27-28). 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]). Consistent with the student's needs as described in detail above and State regulations, the May 2012 CSE recommended a 12-month placement in a



6:1+1 special class in a specialized school with a 1:1 paraprofessional together with related services to address the student's needs in the area of academics, language processing, social/emotional/behavioral functioning, and motor skills (Dist. Ex. 1 at pp. 1-4, 22).<sup>15</sup>

According to McCarton's educational director, the McCarton "one to one" teaching ratio means that the student is not paired with a single staff member, but with a teaching class and the teaching staff in that classroom (Tr. p. 539). During the various group lessons, the director testified that the lead teacher is in front of the group and the "one-to-one supports would be behind the students helping them in either delivering reinforcement or in helping them attend, prompting them to attend to the teacher" (Tr. p. 540).<sup>16</sup>

With regard to the student, the responsibilities of the student's 1:1 instructor at McCarton, as portrayed in the educational progress report, included teaching the student's cognition goals, helping the student with managing his behavior during group activities, and acting as a shadow during group lessons (Dist. Ex. 2 at pp. 5, 8). The progress report indicated that the student did not always know when to respond during group activities and by using gestural prompts, the student was learning to improve the timing of his responses (*id.* at p. 8). Furthermore, McCarton's educational director testified that in the student's case, he "has goals where he's working in a small group . . . in the group he has more of a shadow. So he's learning to look at the teacher," adding that the staff used "visual support [and] contingency to help him stay on task, to help him acquire skills" (Tr. pp. 520-521). Because the student exhibited a limited attention span, the 1:1 shadowing adult provided a reinforcement system, including token rewards and verbal praise, for sitting appropriately, paying attention, and participating during group sessions (Tr. p. 521; Dist. Ex. 2 at p. 8).

The student's speech-language pathologist at McCarton specified reasons the student required a 1:1 "instructor" throughout the day; however, the needs for which the therapist indicated the student required 1:1 instruction were those that could be met by a paraprofessional, such as providing prompts throughout the school day and assisting during transitions from one provider to another or within the school (Tr. pp. 375-76). The student's supervising teacher at McCarton noted that the student needs "a lot of individualized teaching in order to gain new skills. He can't gain any skills in group instruction. It has to be conducted in a one to one setting with lots of repetition and a lot of steps broken down for him" (Tr. p. 414). She stated that during group instruction the student required a 1:1 instructor to help him attend (Tr. p. 416). The educational director at McCarton testified about the student's need for 1:1 assistance and stated:

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<sup>15</sup> I also note a guidance document issued by the Office of Special Education in January 2012 indicates that with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (*id.* at p. 2).

<sup>16</sup> While the McCarton classroom teacher indicated the student is unable to "gain any skills in group instruction," the private school's OT director indicated that group sessions are "an integral part of his program" to learn how to generalize skills (Tr. pp. 326-27, 414).

He has difficulty with attention. He has difficulty controlling behavior. He has difficulty learning in a group. He does very well if it's a routine. So for groups that have a routine, he's done very well like morning meeting. And that's like we're able to move back, we still haven't faded out totally the one-to-one, but we're able to move the one-to-one back so that he is following the instructions of the lead teacher in front of the room.

So for some groups that are more routine we're able to move back the one-to-one, but for the individual teaching time for the time when it's a novel group or if something changes, which is difficult for him and he may become perseverative, we need the support of the one-to-one.

(Tr. p. 523).

It is worth noting that while each of the witnesses from McCarton stated that the student required 1:1 instruction to learn new material, they also described the student's need for 1:1 support as being primarily for behavior, for prompting and redirection, as a "shadow" and for attending to the lead teacher in the room.

In preparation for the May 2012 CSE, the district special education teacher conducted a classroom observation while the student was engaged in a group lesson at the private school (Tr. pp. 155-62; Dist. Ex. 3 at pp. 4-6). According to the hearing record, the class in which the district teacher observed at McCarton consisted of seven students with three "one-to-ones," one of whom was providing 1:1 support to the student (Tr. p. 158-59; Dist. Ex. 3 at p.4). During the visit to the student's McCarton classroom, the district teacher observed the student following directions provided by the lead teacher and completing various aspects of the activity with "minimal prompting from his teachers" (Dist. Ex. 3 at p. 4). The observer indicated that the student's 1:1 support came in the form of redirection when the student was momentarily distracted and pointing to a specific item to facilitate the student's ability to complete the task at hand (Tr. p. 160; Dist. Ex. 3 at p. 4). In response to off-task behaviors such as hand play or gazing off to the side, the district special education teacher noted the McCarton 1:1 teacher provided a verbal reminder and an occasional gentle, physical prompt to refocus the student (Tr. p. 160).

When describing her reaction to the CSE recommendation for a 6:1+1 special class, the student's mother testified to her disagreement with the placement because the student "presents with attention issues . . . [h]e needs a lot of redirection to stay on task" (Tr. p. 566). The student's mother added that the student needed more support than was available in the district program because he needed "more one-to-one . . . more attention . . . more redirection, more intervention than a [6:1+1 special class] could offer him" (Tr. pp. 569-570). When asked why the additional support of the 1:1 crisis management paraprofessional was not appropriate, she answered that her understanding was "they do not have the expertise to understand [my son] and the potential triggers and the behaviors and the challenges and the appropriate interventions" (Tr. pp. 570-71). I note, however, that the parent also revealed a potential misconception about the proposed assignment of the 1:1 paraprofessional, stating her belief that the "one-to-one was going to be distributed among six other children" in the district

proposed placement, as opposed to being his full-time 1:1 support staff (Tr. p. 571).

When describing the role of the 1:1 paraprofessional in the proposed placement, the district special education teacher testified that if the student were to attend the public school, the student's 1:1 paraprofessional would "work with him to help him with his behaviors as well as academic support in the class," a description that parallels the student/teacher interaction the district special education teacher observed at McCarton (Tr. pp. 160-61, 197; Dist. Ex. 3 at pp. 4-6). She further testified that the 1:1 paraprofessional, along with the rest of the classroom team, would be responsible for implementing the student's BIP (Tr. p. 228). I note that this description of the 1:1 paraprofessional's proposed role in the classroom does not conflict with recent State guidance on the role of teaching assistants and teacher aides in the classroom, which states in part that "[o]ne-to-one aides may not be used as a substitute for certified, qualified teachers for an individual student or as a substitute for an appropriately developed and implemented behavioral intervention plan or as the primary staff member responsible for implementation of a behavioral intervention plan . . . [a] teacher aide may assist in the implementation of a behavioral intervention plan, but may not provide instructional services to a student" (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at p. 1, Office of Special Educ. Mem. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>; see "Teaching Assistants and Teacher Aides Compared," Office of Teaching Initiatives [Aug. 31, 2009], available at <http://www.highered.nysed.gov/tcert/career/tavsta.html>).

Neither party disputes that "being in a group environment with appropriate support" is an important aspect of the student's program (Tr. pp. 230, 309, 326-27, 347, 364, 415-16). The management needs section of the IEP contains a notation that the student "requires a highly structured learning environment with individualized attention either in a 1:1 setting or in a group setting with an individual shadowing instructor" (Dist. Ex. 1 at p. 3). Testimony from the assistant principal at the recommended public school site explains how "individualized attention" could be accomplished in the recommended 6:1+1 placement, indicating that "all of our teachers use the principles of ABA. We use a lot of repetition. There are multi-sensory lessons, a lot of one-to-one, and all of our teachers and staff keep data" (Tr. p. 262; see R.E., 694 F3d at 186 [holding that testimony may be received that explains or justifies the services listed in the IEP]). The assistant principal was asked whether there was "one-to-one teaching available throughout the day in the 6:1:1 program" and responded, "[y]es, there absolutely is" (Tr. p. 263). The district special education teacher who attended the May 2012 CSE meeting described that portion of the management needs section of the IEP and stated that the "recommendation in a one-to-one setting with an individual shadowing because . . . the students can be broken up and work one-to-one while the para is working with another set of students" (Tr. pp. 219-20).

While there is a difference of opinion with regard to the title of the individual who can provide the student with "appropriate support" within a group environment, I find considerable alignment between the proposed roles and responsibilities of the district 1:1 paraprofessional and those of the private school 1:1 teacher, despite the difference in their titles (Tr. pp. 372-4, 416, 523; Dist. Exs. 2 at pp. 5, 8; see K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at \*5 [2d Cir. July 24, 2013] [finding that an IEP that provided a 1:1 paraprofessional in addition to other services was appropriate where the student's "need for 1:1 assistance seems principally to have borne on her behavioral and attention problems, and not on her learning needs per se"]). Based on the foregoing, the hearing record demonstrates that the student exhibited highly intensive

management needs that required a high degree of individualized attention and intervention, such that the CSE's recommendation to place the student in a 6:1+1 special class in conjunction with a 1:1 crisis management paraprofessional and related services was designed to address the student's academic, social and behavioral needs, and accordingly, was reasonably calculated to enable him to receive educational benefits. While I understand the parents' and McCarton staff's viewpoints that the student should receive instruction solely on a 1:1 basis, this amounts to conflicting viewpoints among educators over the best manner in which to deliver special education instruction and services to the student (see, e.g., J.A. v. New York City Dep't of Educ., 2012 WL 1075843, \*9-\*10 [S.D.N.Y. Mar. 28, 2012] [resolving conflicting views over the quality and extent of adult support services that must be provided to a student]; D.S. v. Hawaii, 2011 WL 6819060, at \*10 [D.Haw., Dec. 27, 2011] [commenting that the IDEA does not set forth with specificity the level of adult support services to be provided to particular students]). The IEP in this case was individualized to address the student's needs, and the district was not required to guarantee a specific level of benefit to the student and instead was required to offer an IEP that was designed to offer the opportunity for greater than trivial advancement (A.C., 553 F.3d at 173; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 130; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at \*5-\*6 [S.D.N.Y. 2009]). Accordingly, I decline to find that the lack of 1:1 full-time teaching and instructional support in the IEP rose to the level of a denial of a FAPE, given the CSE's recommendation of a 6:1+1 special class with a 1:1 behavior management paraprofessional, in conjunction with the recommended related services, and the program accommodations and strategies—including noting the student's need for individualized attention either in a 1:1 or group setting—described above.

#### **4. Parent Counseling and Training**

Turning next to the parties' claims regarding whether the omission of parent counseling and training from the May 2012 IEP resulted in a denial of a FAPE to the student, 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 require the provision of parent counseling and training to parents of students with autism for the purpose of enabling them "to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]). Parent counseling and training is defined by State regulation 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, the Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) 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; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit 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).

In the instant matter, it is undisputed that the May 2012 CSE did not include the provision of parent counseling and training in the May 2012 IEP, which violated the requirement for setting forth this related service in the student's IEP and the student's mother testified that during the May

2012 CSE meeting, no one from the district offered her parent counseling and training (Tr. p. 584; Dist. Ex. 1). She further testified that she and the student's father required parent training in order to help with the student's challenging behaviors and to observe techniques used in the student's classroom (Tr. pp. 583-84). The district special education teacher who attended the May 2012 CSE meeting stated that parent counseling and training was discussed at the meeting, and that the district school psychologist informed the student's mother that "in the [recommended] program parent training is available, and it would go through the parent coordinator" (Tr. p. 199-200). She also testified that "each program provides something a little bit differently", that it was a "programmatic thing," and that various agencies, teachers, and providers "come in and help provide support and knowledge for parents" (Tr. p. 199). The assistant principal at the recommended public school testified that parent counseling and training was available at the school and that parents could receive training even if the service was not set forth in their child's IEP (Tr. p. 260-61). Thus, the hearing record suggests that parent counseling and training was programmatic in the specialized school setting and was offered at the assigned public school site (Tr. pp. 199-200, 260-61).<sup>17</sup> Additionally, the hearing record indicates that the parents received parent counseling and training during the time the student attended McCarton (Tr. pp. 533-34, 583-84).

Based upon the foregoing, I find that although the May 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (*see K.L.*, 2013 WL 3814669, at \*6; *M.W.*, 725 F.3d at 141-42; *R.E.*, 694 F.3d at 191; *A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at \*11-\*12 [S.D.N.Y. Mar. 19, 2013] [finding that where the parents had "adequate access to parental training and counseling for several years . . . the failure of the IEP to explicitly provide for parental training did not rise to the level of a denial of a FAPE"]; *F.B. v. New York City Dep't of Educ.*, 923 F. Supp. 2d 570, 585-86 [S.D.N.Y. 2013]; *F.L.*, 2012 WL 4891748, at \*9-\*10; *C.F.*, 2011 WL 5130101, at \*10; *M.M.*, 583 F. Supp. 2d at 509).

To be clear, however, the fact that the district views parent counseling and training as "programmatic" and therefore unnecessary to specify on a student's IEP continues to remain a procedural violation, and while not amounting to a denial of a FAPE in this proceeding, compliance with State IEP development procedures is nevertheless mandated. In light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I will order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; *see* 8 NYCRR 200.1[oo]).

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<sup>17</sup> Contrary to the parents' assertion, State regulations do not require "individualized" parent training and counseling (*see* 8 NYCRR 200.13[d]).

In summary, based on the evidence above, the hearing record demonstrates that the recommended 6:1+1 special class program with 1:1 paraprofessional and related services was appropriate to address the student's needs as identified in the evaluative information before the CSE and was reasonably calculated to enable him to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Consequently, in view of the foregoing evidence, I find that the parents' claims that the May 2012 IEP was so deficient that it denied the student a FAPE are without merit, and the IHO's determination that the district denied the student a FAPE during the 2012-13 school year must be reversed.

#### **D. Challenges to the Public School Site**

In her decision, the IHO also addressed some of the parents' concerns raised regarding the particular public school site to which the district assigned the student to attend during the 2011-12 school year. On appeal, the district contends that the IHO erred in reaching the parents' contentions about the assigned school since the student did not attend the assigned school, and alternatively, even if the IHO properly addressed these issues, the hearing record does not support her conclusions. As set forth in greater detail below, neither the law nor the facts of this case support the IHO's conclusions.

##### **1. Implementation of the IEP at the Assigned School**

I will next turn to the parties' contentions surrounding the appropriateness of the assigned public school site. In their answer and cross-appeal, the parents contend that the district failed to show that the recommended school site would be able to implement the student's IEP, and that the hearing record shows that related services mandates would not have been appropriately implemented, while the district contends that these arguments are speculative and that in the alternative the hearing record shows that the IEP's related services could have been implemented at the recommended school site. 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., 2013 WL 3814669, at \*6; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; 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. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [Sept. 29, 2012] [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 Dep't of Educ., 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]).<sup>18</sup>

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at \*26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because the "appropriate inquiry is into the nature of the program actually offered in the written plan"]).

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<sup>18</sup> 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., 584 F.3d at 420 [a 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.

In this case, the district developed the student's 2012-13 IEP and offered the student a placement prior to the beginning of the school year.<sup>19</sup> Consequently, as further described below, the district correctly argues that because the parents rejected the proposed IEP and enrolled the student in McCarton, the district was not required to show that there would have been no delays in implementing the IEP with regard to the related services. However, I have reviewed the evidence in the hearing record in order to discuss what alternative findings could be made, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site. As further explained below, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE 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., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2008]; see D.D-S., 2011 WL 3919040, at \*13; A.L., 812 F. Supp. 2d at 502-03).

## **2. Related Services at the Assigned School**

In finding that the district did not offer the student a FAPE, the IHO relied in part on testimony from the assistant principal of the assigned public school site, who indicated that speech-language therapy and OT related services were available on the first day of the 12-month school year at the school, but that students could only receive 30-minute sessions, and that as the school year progressed portions of the related services mandates for some of the students at the school remained unfulfilled (Tr. p. 276-78, 282-84; IHO Decision at p. 22). The IHO found the notion that unmet related services mandates could be met by RSAs "unconvincing" (id.) I disagree with the IHO's conclusion, and find that the hearing record supports a finding that the district was capable of providing the student with his related services mandates had he attended the assigned public school site. Even assuming for the sake of argument that the student had attended the public school, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEPs in a material or substantial way (R.C., 2012 WL 5862736, at \*16; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at \*3 [S.D. Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]; Burke v. Amherst Sch. Dist., 2008 WL 5382270, at \*8-\*10 [D.N.H. Dec. 18, 2008][discussion of implementation standards]).

A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document, districts:

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<sup>19</sup> The district offered the student a placement on June 19, 2012 (Parent Ex. F 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]).



have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's [IEP] in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority . . . to enter into contracts with qualified individuals as employees or independent contractors to provide those related services . . . .

("Questions and Answers Related to Contracts for Instruction" [June 2, 2010], available at <http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html>).

Here, the assistant principal of the proposed public school site testified that during summer 2012, all related services mandates at the school were being met and no RSAs were required to be issued (Tr. p. 291). She also testified that prior to September 2012, for students at the school who had 45-minute sessions mandated on their IEPs, the school was "fulfilling mandates five times 30. However, starting in September of this year we've been doing five times 45, but in the past the five times 45, we were doing the five times 30 and the extra time was going to an RSA. But now this year we're trying to fulfill the whole 45" (Tr. p. 282). Although the assistant principal testified that she was "waiting for one more OT and all mandates should be fulfilled", she also testified that, "[w]e've been giving all children the 45 minutes" (Tr. pp. 283-84). Notwithstanding the assistant principal's testimony that the student's related services needs as prescribed by the May 2012 IEP may not have been filled in their entirety on-site, the hearing record also reflects that the assigned public school would have provided the student with RSAs in order to satisfy the balance of his related services mandates (Tr. pp. 246-47, 282, 291).

Lastly, although the parents submitted evidence during the impartial hearing that they argue demonstrates that that some students at the assigned school site did not receive all of their related services as of September in the 2012-13 school year (Parent Ex. NN), "data indicating that a school has not always delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding" (F.L., 2012 WL 4891748, at \*16 [internal quotation marks omitted]; see K.L., 2012 WL 4017822, at \*15; M.S., 734 F. Supp. 2d 271 at 279). Therefore, even if the district had needed to provide the student with an RSA for related services, this would not itself have denied the student a FAPE (see F.L., 2012 WL 4891748, at \*15-\*17).<sup>20</sup>

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<sup>20</sup> In reaching this conclusion, I acknowledge the parents' position that because RSAs are not specified in the student's IEP, RSAs are not a part of the recommended program. However, in light of the State guidance set forth above indicating that it is permissible for a school district to contract for the provision of special education related services, I am unconvinced by this argument.

## **VII. Conclusion**

Having determined that the district offered the student a FAPE for the 2012-12 school year, it is not necessary to consider the appropriateness of the McCarton School or to consider whether equitable factors weigh in favor of an award of tuition reimbursement (see 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 DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated July 1, 2013 is modified, by reversing those portions that concluded that the district failed to establish that it offered the student a FAPE in the LRE for the 2012-13 school year and ordered the district to reimburse the parents for the costs of the student's McCarton tuition; and.

**IT IS FURTHER ORDERED** that at the next annual review regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision; and

**IT IS FURTHER ORDERED** that the district, if it has not already done so, is directed to pay for the costs of the student's tuition at McCarton for the 2012-13 school year pursuant to pendency.

**Dated:**           **Albany, New York**  
                          **October 22, 2013**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**