The University of the State of New York

The State Education Department
State Review Officer
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No. 13-192

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

Appearances:
Goldfarb Abrandt Salzman & Kutzin LLP, attorneys for petitioners, Michael S. Kutzin, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, the 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 the 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 the 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 hearing record reflects that the student received a diagnosis of autism when he was four and a half years of age (Tr. p. 364; Dist. Ex. 2 at p. 2).[1] He received his first IEP in June 2007 and subsequently attended a special needs preschool for one year (Tr. p. 365). The following year, in September 2008, the student was placed by his parents at the Rebecca School where he currently continues to attend in a 7:1+3 class and receives speech-language therapy, occupational therapy (OT) and counseling services (Tr. pp. 170, 365; Parent Ex. C at p. 1). The student has also received

[1] An April 2011 social history report reflects that the student's mother reported that the student had received a diagnosis of a pervasive developmental disorder-not otherwise specified (PDD-NOS) (Parent Ex. U at p. 2).

diagnoses of an attention deficit hyperactivity disorder (ADHD), a sensory integration disorder, Tourette syndrome, and an obsessive compulsive disorder (OCD) (Tr. pp. 367-68; Parent Ex. U at p. 2). The student presents with deficits in cognition, academics, communication skills, sensory integration and regulation including food sensitivity, fine motor skills, visual attention and visual spatial skills, motor planning and sequencing, social interaction, and emotional regulation (Dist. Ex. 1; Parent Ex. S). The student also has a history of displaying tantrum behaviors when dysregulated, including screaming or crying as well as self-injurious behaviors such as head banging and hitting himself on the head when frustrated or overwhelmed and when in a large crowd or noisy environment (Tr. pp. 235-36, 367, 398; Dist. Ex. 1 at pp. 1, 4, 13).

On March 1, 2012, the CSE convened for an annual review of the student and to develop his IEP for the 2012-13 school year (Parent Ex. B). The resultant IEP reflected that the CSE determined the student was eligible for special education programs and related services as a student with autism and that the CSE recommended placement in a 6:1+1 special class in a specialized school with related services including speech-language therapy, OT, and counseling services, all on a 12-month basis (id. at pp. 10-11, 14-15).[2]

In May 2012, the parents signed an enrollment contract with Rebecca School as well as an addendum regarding the schedule of payments for the 2012-13 school year (Parent Ex. K).

On June 11, 2012 the district notified the parents of the public school site to which the student had been assigned (Parent Ex. J). By "Ten Day Notification Letter" through their attorney dated June 18, 2013, the parents informed the district that they would be visiting the public school site to which the student had been assigned to determine whether it was an appropriate public school placement for their son (Parent Ex. L). The letter indicated that, "absent an appropriate public school placement," the student would attend the Rebecca School summer program and the parents would request district funding for the tuition for and busing to the program (id. at pp. 3-4).

By letter dated July 9, 2012, the parents notified the district that they had visited the assigned public school site on June 25, 2012 and that, based on their visit, they believed that the school would not meet their son's needs (Parent Ex. M at p. 2). In their letter the parents noted particular failings of the assigned public school site including that the school did not have an occupational therapist on staff; the student would not receive any individual OT sessions; the school did not have a sensory gym; there was no separate speech-language therapy room; and that both OT and speech-language therapy services would be provided as a push-in service in violation of the student's IEP (id. at pp. 2-3). The parents also indicated in their letter that the student required "a more intimate and controlled environment" than that provided at the assigned public school, noting that the student was "extremely sensitive to noise" and "easily overwhelmed by his surroundings" (id. at p. 3). The letter also indicated that the parents were told that because the student had additional diagnoses beyond autism, the program at the assigned public school was "not right" for the student (id.). In their letter, the parents indicated that they would consider any other public school placements that the CSE might recommend for the 2012-13 school year but that the student would remain at the Rebecca School in the interim (id.). They reiterated their

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

intention to seek tuition reimbursement from the district and requested that the district provide busing to the Rebecca School (id.).

In a letter through their attorney dated August 17, 2012, the parents notified the district that the student would be attending the Rebecca School and they would be seeking funding from the district for the student's tuition at Rebecca School for the 2012-13 school year (Parent Ex. N at p. 3). The letter also included a request for busing of the student to Rebecca School (id.).

The student attended the Rebecca School for the entirety of the 2012-13 twelve-month school year (Parent Ex. D at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated December 19, 2012 the parents requested an impartial hearing (Parent Ex. A at p. 3). This notice alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year because (1) the parents never received a copy of the student's IEP from the district; (2) details regarding the annuals goals in the IEP were not discussed at the CSE meeting; (3) the IEP did not accurately reflect the student's present levels of performance and individual needs; (4) the goals in the IEP did not include measurement criteria; (5) the short-term objectives on the IEP relating to visual spatial skills and OT were "unrealistic"; (6) the speech-language short-term objectives on the IEP failed to take into account the student's "spatial issues"; (7) the IEP failed to include parent counseling and training; (8) the related services on the IEP could not be implemented at the assigned school; (9) the assigned school lacked a sensory gym; and (10) bus transportation to and from the assigned school would not be appropriate for the student (id. at pp. 4-5). The parents further alleged that their unilateral placement of the student at the Rebecca School during the 2012-13 school year was appropriate and that equitable considerations favored their request for tuition reimbursement (id. at pp. 5-6). The parents also asserted the student' right to pendency and requested an award for the cost of tuition at the Rebecca School for the 2012-13 school year (id. at p. 6).

B. Impartial Hearing Officer Decision

After a prehearing conference on February 8, 2013 and a pendency hearing held on April 5, 2013, an impartial hearing was convened on April 15, 2013 and, following four non-consecutive days of testimony, concluded on July 22, 2013 (Tr. pp. 1-423).[3] In a decision dated September 5, 2013, the IHO found that the district offered the student a FAPE and denied the parents' request for reimbursement of the student's tuition at the Rebecca School for the 2012-13 school year (IHO Decision). However, the IHO's decision does not directly address the parties' contentions; rather, it summarizes the arguments made by either side and does not clearly reach conclusions as to each issue addressed (id. at pp. 10-25; see IHO Exs. I; II). Among the conclusions that were clearly stated, the IHO found, among other things, that the parents were provided with a meaningful opportunity to participate in the CSE meeting, the CSE had evaluations specifying the student's present levels of performance, the student was properly classified with a speech or language impairment, the recommendation for a 6:1+1 special class with related services was an appropriate placement in the least restrictive environment, and the district made a timely offer of a specific

[3] The IHO issued an interim order regarding pendency on May 2, 2013 (Interim IHO Decision).

public school site (IHO Decision at pp. 25-26).[4] Having found that the district offered the student a FAPE for the 2012-13 school year, the IHO found that the appropriateness of the parents' unilateral placement and equitable considerations did not need to be addressed (id. at p. 26).

IV. Appeal for State-Level Review

In a petition dated October 8, 2013, the parents appeal the IHO's determination. The parents contend, among other things, that the district significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student because by the time they received the student's IEP in June 2012, it was too late to reconvene the CSE and remedy the problems they identified in the recommended program. Their participation was also impeded, the parents argue, because although the goals from a December 2011 Rebecca School progress report were read at the CSE meeting, there was no discussion of the goals that went into the March 2012 IEP. The parents also contend that the IEP's description of the student's levels of educational performance was inaccurate because it did not fully repeat the description of the student provided by the Rebecca School progress report. The parents contend that the goals in the IEP were unmeasurable because they did not make distinctions between annual goals and short-term objectives, and that an annual goal that merely references short-term objectives is insufficient. The parents also contend that the IEP should have contained more goals to address the student's spatial deficits and that one of the two goals addressing spatial issues in the IEP contained no measurement criteria. Also, concerning goals, the parents contend that some of the goals in the IEP were anticipated to have been met before the start of the 2012-13 school year, that the goals were written to be implemented in a 8:1+3 special class employing the specific methodology used at the Rebecca School, and that some of the goals were vague, confusing, nonsensical, or otherwise inappropriate. The parents next contend that the failure to include parent counseling and training on the IEP was particularly important given the student's "multiple diagnoses." The parents also contend that the IEP should have reflected the student's diagnosis of Tourette syndrome as well as the student's need for a sensory gym. The parents also claim that the recommended 6:1+1 placement would not be appropriate for the student because the student required a 2:1 student-to-teacher ratio.

The parents additionally argue that they were entitled to rely on what is in the student's IEP and what they were told during their visit to the assigned public school site in making the decision whether to unilaterally place the student. Initially, the parents assert that they were told that the public school site was not appropriate for the student. They next assert that they were told that the public school site did not have an occupational therapist on staff, that individual OT sessions would not be provided, and that OT and speech-language therapy were conducted in the classroom rather than in a separate location as required by the student's IEP. The parents also contend that the room described as a sensory gym was not sufficient for the student, that the presence of general education students and the overall school environment would create a "chaotic" setting that was not

[4] The bulk of the discussion contained in the section of the decision entitled "Findings of Fact and Conclusions of Law" appears to have been taken directly from the parties' posthearing briefs (compare IHO Exs. I and II, with IHO Decision at pp. 10-24). While the IHO may have intended to incorporate elements of these statements as his findings of fact, this section of the decision contains numerous contradictory statements and it becomes impossible to distinguish which statements the IHO intended to adopt as his findings and conclusions from those which were not adopted.

appropriate for the student, that the public school site's inability to hear food would prevent the student from eating many foods due to his sensory issues, the student required a feeding group that the public school site did not offer, and that the long bus ride to and from the assigned school would cause the student to become dysregulated and unable to learn. Lastly, the parents assert that the IHO erred in finding that the testimony of the student's mother regarding the assigned public school placement was inconsistent and lacked credibility.

Regarding the appropriateness of their unilateral placement of the student at the Rebecca School as well as equitable considerations, the parents direct the SRO to their post hearing brief submitted to the IHO.

The district answers the petition and denies the parent's material allegations therein. In addition, the district contends that it offered the student a FAPE for the 2012-13 school year, that the parents' unilateral placement at the Rebecca School was not an appropriate placement, and that equitable considerations do not support an award of tuition reimbursement because the parents never seriously considered placement in a public school and did not provide proper notice of their intent to unilaterally place the student. More specifically, the district asserts that the parents had a meaningful opportunity to participate in the development of the student's IEP and received a copy of the IEP prior to the beginning of the school year, the CSE based the goals on information provided by Rebecca School staff at the CSE meeting and in the progress report, the CSE adequately discussed the IEP goals, the parents timely received a notice of the location of the assigned school, and the lack of parent counseling and training on the IEP did not deprive the student of a FAPE. The district also contends that the IEP contained an accurate description of the student's needs and abilities, that the goals on the IEP were appropriate and measurable, that the IEP did not need to specify a sensory gym and the CSE addressed the student's sensory needs, and that the IEP did not need to address the student's diagnosis of Tourette syndrome because the hearing record did not support a finding that the CSE was or should have been aware of the diagnosis. The district also contends that the parents' arguments regarding the assigned school were speculative or, in the alternative, that the assigned school could have implemented the IEP. Lastly, the district argues that the petition did not contain any arguments to appeal the IHO's lack of findings regarding the appropriateness of the Rebecca School or equitable considerations, that the reference in the petition to the parents' closing brief submitted to the IHO is not a substitute for a properly drafted petition and, in any event, the parents failed to establish that the Rebecca School was appropriate to meet the student's needs and equitable considerations did not support their request for relief. The district requests that an SRO sustain the IHO's decision and dismiss the petition.

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 the parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 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 the 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 the parents for their expenditures for private educational services obtained for a student by his or her the 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 the 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 the parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, a review of the hearing record reveals that the IHO exceeded his jurisdiction by addressing the following issues in the decision: (1) whether the March 2012 IEP adequately reflected the student's diagnosis of Tourette syndrome; and (2) whether the

shared playground and cafeteria at the assigned school would have been appropriate for the student (IHO Decision at pp. 21, 23-24; see Parent Ex. A).

Second, a review of the hearing record also reveals that the parents raise the following issues in the petition—that did not appear in their due process complaint notice and on which the IHO did not rule—as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year: (1) some of the goals in the March 2012 IEP were anticipated to have been met before the start of the 2012-13 school year; (2) the goals in the IEP were written to be implemented in a 8:1+3 class employing the methodology used by the Rebecca School; (3) the 6:1+1 placement was inappropriate for the student because the student required a 2:1 student-to-teacher ratio; (4) the presence of general education students and the school environment at the assigned school would not be appropriate for the student; (5) the food preparation and lack of a feeding group at the assigned school was inappropriate; and (6) the parents were told during their visit that the assigned school would not be appropriate for the student given his additional diagnoses (compare Pet. ¶¶ 14-16, 65-68, 70-71, 75, with Parent Ex. A).

With respect to the issues raised by the IHO in the decision and the allegations now raised by the parents on appeal, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08- 056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012

WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the challenges enumerated above and raised in the parents' petition as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. A). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-423 see also Tr. pp. 37-38).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded his jurisdiction by addressing in the decision whether the March 2012 IEP adequately reflected the student's diagnosis of Tourette syndrome, and whether the shared playground and cafeteria at the assigned school would have been appropriate for the student and those particular findings must be annulled. In addition, the allegations that some of the goals in the March 2012 IEP were anticipated to have been met before the start of the 2012-13 school year, that the goals in the IEP were written to be implemented in a 8:1+3 class employing the methodology used at the Rebecca School, that the 6:1+1 placement was inappropriate for the student because the student required a 2:1 student-to-teacher ratio, that the presence of general education students and the school environment at the assigned school would not be appropriate for the student, that the food preparation and lack of a feeding group at the assigned school was inappropriate, and that the parents were told during their visit that the assigned school would not be appropriate for the student given his additional diagnoses raised now on appeal are outside the scope of my review, and therefore, these allegations will not be considered (see N.K., 2013 WL 4436528, at *5-*7; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F.

Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at *7 [D. Maryland Sept. 29, 2009]).[5]

B. Parental Participation in the Development of the Student's IEP

1. Participation at the March 2012 CSE Meeting

The parents contend that there was no discussion of the goals to be added to the student's 2012-13 IEP at the March 2012 CSE meeting, which precluded their meaningful participation in developing the student's program. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept.

[5] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, *9; B.M., 2013 WL 1972144, at *5-*6), most of the issues raised and addressed sua sponte by the IHO in the decision and the allegations raised in the parents' petition for the first time on appeal were initially raised by counsel for the parent in his opening statement, on cross-examination of a district witness or through testimony of witnesses for the parent (see, e.g., Tr. pp. 89-90, 126, 153-54, 173, 183-84, 188, 206, 215, 238, 259-63,). Here, the district did not initially elicit testimony regarding the student's Tourette syndrome diagnosis, whether some of the goals were anticipated to have been met before the start of the program, whether the goals were written for a program using the methodology utilized at the Rebecca School, whether the student required a 2:1 student teacher ratio, whether the student required a feeding group, and whether the parent was told that the assigned school would not be appropriate for the student due to his additional diagnoses, and therefore, the district did not "open the door" to these issues under the holding of M.H.. Additionally, the district explicitly stated during the opening statement made by district's counsel that the issues before the IHO were limited to those raised by the parents in their due process complaint notice (Tr. pp. 37-38). To the extent that the district noted the appropriateness of the recommended 6:1+1 placement during the opening statement made by district's counsel, I find that that was merely background information (Tr. p. 37). I also note that while the district introduced testimony regarding the cafeteria and the playground and the presence of general education students at the assigned school (Tr. pp. 46-53), arguments concerning implementation of the IEP at the assigned public school site are speculative, as discussed at length below.

26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).[6]

A review of the hearing record indicates that both parents attended the March 2012 CSE meeting—which lasted between one and two hours—and that the student's social worker from the Rebecca School attended the meeting and the student's classroom teacher also participated by telephone (Tr. pp. 106-07, 121-22, 275-76, 380-81). The student's mother testified that annual goals and short-term objectives were discussed at the CSE meeting, but when asked about the level of detail in those discussions, she replied, "I don't really remember, I don't remember, not too much detail, anyway" (Tr. pp. 382-83). The student's classroom teacher at the Rebecca School testified that the goals on the IEP were taken from the December 2011 Rebecca School progress report, that they were read aloud at the meeting, and that she "vaguely" recalled discussion of creating goals for the student at the CSE meeting (Tr. pp. 276-78; Dist. Ex. 1). According to the district school psychologist who participated in the March 2012 CSE meeting, the parents had an opportunity to participate in the meeting, all of the goals in the IEP were discussed at the meeting, and it was his practice to review each goal with the CSE to see if the student's classroom teacher considered the goals to still be appropriate (Tr. pp. 108-10, 141-42). More specifically, the district school psychologist testified that:

> During the course of the meeting we had a lengthy discussion as to what [the student] was working on at that time and, in fact, the report that we had received from the school had indicated goal areas that had been identified that were appropriate, that should be worked on. And we had a discussion with the teacher and the folks at the meeting as to his progress towards those goals and whether or not in the teacher's estimation these were still relevant areas and skills and goals to be worked on towards the future.

(Tr. p. 110).

In light of the above, the evidence in the hearing record shows that parents had an opportunity to discuss the goals in the IEP at the March 2012 CSE meeting and, moreover, there is nothing in the hearing record that indicates that the parents' opportunity to participate in the development of the goals in the student's IEP was significantly impeded.

2. Provision of the IEP to the Parents

The parents next contend that their participation in the development of the student's IEP was impeded because the district did not send the parents a copy of the March 2012 IEP and the parents did not receive a copy of the IEP until mid-June 2012, when it was "too late" to reconvene

[6] The IDEA, rather than requiring parental consent to an IEP, "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [noting that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

the CSE to "remedy problems" with the IEP. The hearing record shows that the parents received a copy of the IEP from their counsel on June 15, 2012, before the start of the statutory 2012-13 school year, which began on July 1, 2013 (Parent Exs. A at p. 4 n.1; W at p. 1, see Educ. Law § 2[15]). Accordingly, there was an IEP in effect for the student at the beginning of the school year, which satisfies the requirements of federal and State regulations (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). Additionally, the parents were informed of the particular school site to which the student had been assigned by the district, in a June 2012 notice that also summarized the offered program (Parent Ex. J). There is no indication in the hearing record that the parents requested that the CSE reconvene after they received a copy of the IEP (see Parent Exs. L; M). In light of the above, I find that the manner and timing of the parents' receipt of the student's IEP did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.

C. March 2012 IEP

1. Present Levels of Performance

Among the required elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Testimony by the district representative at the March 2012 CSE meeting indicated that the information contained in the present levels of performance and individual needs sections of the IEP, including the student's academic achievement, functional performance, learning characteristics, and social and physical development, was derived by discussing with the parent and Rebecca School staff how the student was performing in the Rebecca School and also by referencing the written reports from the Rebecca School, specifically the December 2011 progress report (Tr. pp. 104-06, 110-11, 113-14, 125-26; Dist. Ex. 1).[7] The district representative further testified that, as a matter of course, he always asked teachers if they felt their report was an accurate reflection of the student's functioning and noted that he recalled the student's teacher had indicated that it was accurate (Tr. p. 107). The IEP reflected that the student's functional level in reading and math was at the kindergarten level and specifically identified the student's need to learn his phone number, to improve his skill at answering "when" and "why" questions, and to make money

[7] The December 2011 Rebecca School progress report included an update of the student's progress in all domains by the student's classroom teacher as well as by his speech-language therapy, OT, and counseling providers (see Dist. Ex. 1).

combinations with coins (Parent Ex. B at pp. 1, 15).[8] Consistent with information reflected in the December 2011 progress report, the present levels of performance in the IEP also reflected that the student exhibited deficits in the areas of speech-language skills, sensory processing and regulation, maintaining continuous interaction, tolerating frustration, problem solving/negotiating with a peer, and fine motor skills, including handwriting skills (letter formation, sizing, spacing and alignment) (Dist. Ex. 1; Parent Ex. B at pp. 1-2). Although it is not clear whether the April 2011 psychoeducational evaluation report and the April 2011 social history from the preceding year were available to all of the participants during March 2012 CSE meeting, the evaluative information in these reports is also not inconsistent with information in the present levels of performance in the March 2012 IEP (compare Parent Ex. B at pp. 1-2 with Parent Exs. S and Parent Ex. U).

2. Annual Goals and Short-Term Objectives

Turning to the parents' remaining contentions concerning the goals and short-term objectives in the student's March 2012 IEP, I note that 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 also required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]). 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]).

After a careful review of the hearing record and the annual goals and objectives contained in the student's IEP I find that, for the reasons described below, the goals and objectives in the IEP were appropriate to address the student's needs that resulted from his disability. The March 2012 IEP reflects that, consistent with the deficits and needs identified in the IEP's present levels of performance sections, the CSE included annual goals and short-term objectives to address the student's needs in the areas of reading including sight word vocabulary, comprehension, and sentence construction; mathematics including addition, word problems, money, and measurement; science; activities of daily living (ADL) skills including identifying his phone number and birthdate and differentiating a stranger from a person he knows; sensory processing and regulation;

[8] Although the parents allege in their petition that the IEP failed to contain an accurate description of the student's then-present levels of academic achievement, arguing specifically that the IEP did not reflect that the student was "inconsistent with 'when' questions," I note that the IEP identified the student's need related to "when" questions in the section of the IEP designated to describe the "academic, developmental and functional needs of the student, including consideration of student needs that are a concern to the parent" (Parent Ex. B at p. 1).

motor planning and sequencing related to fine and gross motor tasks; visual spatial skills; pragmatic, receptive, and expressive language skills; symbolic play skills; and shared problem solving (Parent Ex. B at pp. 3-10). The IEP also included an annual goal and short-term objective addressing the student's oral sensitivity in a feeding group (id. at p. 9).

Although the parents allege that the student's goals were not tailored to his needs because they were unrealistic, I disagree. As described above, the hearing record demonstrates that the goals and objectives contained in the IEP were carried over from the December 2011 Rebecca School report. Specifically, with regard to the development of the student's academic goals, the district school psychologist testified that the CSE discussed the student's progress toward the goals that had been identified in the December 2011 Rebecca School report and whether, in the Rebecca School teacher's estimation, these were still relevant areas, skills, and goals to be worked on in the future (Tr. p. 110). Accordingly, the IEP reflects annual goals and short-term objectives from the December 2011 Rebecca School progress report that the student had not yet met at the time of the CSE meeting, as well as a number of "new goals" that were established in December 2011 at the time of the report (compare Dist. Ex. 1 at pp. 9-16, with Parent Ex. B at pp. 3-10). As such, the hearing record indicates that the goals carried over to the IEP were not unrealistic, but rather, were based on input by the student's teacher at the CSE meeting as well as on information regarding the student's progress described in the Rebecca School report by the student's related services providers, who knew the student best. Therefore, there is no basis for the parents' allegation that the objectives on the IEP pertaining to visual spatial skills and OT were unrealistic.

Furthermore, with regard to the parents' contention that the student's speech-language objectives failed to take into account his spatial issues and that the IEP should have included more than one spatial goal, I note that the student's needs related to spatial skills were addressed in the IEP by two annual goals with six corresponding short-term objectives (Parent Ex. B at pp. 5, 7). Specifically, the short-term objectives addressed the student's need to increase his ability to copy a teacher's design using pattern blocks; to write his first and last name using appropriate upper and lower case lettering; make a plan and map out a short community outing; participate in one novel visual-spatial activity in OT per week; identify six familiar symbols from the community (e.g., stop sign, subway sign, exit sign) from a partially covered picture; and write a five word sentence with correct letter sizing, spacing, alignment and fluidity (id.). I note that these objectives relate specifically to improving the student's visual spatial skills and are consistent with information reflected in the December 2011 Rebecca School progress report regarding the student's needs (Dist. Ex. 1 at pp. 12-13). As such, they adequately address the student's visual spatial needs in the IEP. Additionally, I note that the December 2011 progress report does not reflect that the student's spatial needs had a negative impact on his speech-language functioning. However, while the IHO found that there was no witness testimony concerning the student's spatial issues and their effect on his speech-language abilities, I note that testimony by the speech-language pathologist who worked with the student during the 2012-13 school year at the Rebecca School indicated that she believed the receptive and expressive language goals on the student's IEP lacked the level of visual support that the student benefited from due to "difficulties that he has with visual spatial activities and such like that" (Tr. pp. 310, 318-19, 321). However, the speech pathologist's testimony did not identify the type of support she believed the student required and moreover, I note that this was not information that was before the CSE at the time of the March 2012 meeting when the student's goals were developed.

Additionally, although the parents allege there was no discussion of goals that were being developed by the CSE independently of the goals taken from the Rebecca School progress report, under the circumstances of this case it was unnecessary for the CSE to develop additional goals because the goals and objectives drawn from the Rebecca School progress report were appropriate and adequately addressed the areas of need identified in the IEP.

With regard to measurability, a review of the annual goals and short-term objectives included in the March 2012 IEP reveals that, although the annual goals contained in the March 2012 IEP identified "teacher/provider observations" and/or "teacher made materials" as their methods of measurement, all of the annual goals lacked criteria to determine if a goal had been met (Parent Ex. B at pp. 3-10). However, the majority of their corresponding short-term objectives "contain[ed] sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress," thereby remedying any deficiencies in the annual goals themselves (Tarlowe, 2008 WL 2736027, at *9 [internal citations omitted]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13-*14 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-147; Application of the Dep't of Educ., Appeal No. 11-134; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). In explaining the interplay between the annual goals and the short-term objectives in the IEP, the district school psychologist who attended the March 2012 CSE meeting stated that, "the goal[is] comprised of an annual overall level of ability which is defined by further specific short[-]term objectives" (Tr. p. 134). The school psychologist clarified further that the objectives "compose part of the annual goal," and that, "in order to really be considered as having mastered this particular goal, the child would have mastered the very short[-]term objectives" (id.). Although the goals and short-term objectives related to mathematics lacked the criteria required in order to determine mastery, they nevertheless specifically inform the instructor of the instructional objectives related to mathematics and were appropriate to address the student's needs. As such, the lack of criteria for mastery in this case did not result in a denial of a FAPE (see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).[9] I caution the district, however, to be careful in relying upon a private school's formulation of the goals that it employs with the student within the private school in developing goals and objectives for an IEP. It is the district's responsibility to ensure that a student's IEP contains adequate goals, and relying upon inadequate goals provided by another source, even from a unilateral placement that a parent might assert is appropriate for the student, will not necessarily meet the district's obligation (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 conclusion, I find that overall, the annual goals and short-term objectives in the March 2012 IEP appropriately targeted the student's areas of need, contained sufficient specificity by which to direct instruction and intervention, and contained sufficient specificity by which to

[9] I note also that the March 2012 IEP indicated that the student's progress toward meeting the annual goals and short-term objectives would be measured three times per year (Parent Ex. B at pp. 3-9).

evaluate the student's progress or gauge the need for continuation or revision. Moreover, based on the above, and the fact that the student's current speech-language pathologist testified that she would be able to implement the goals on the student's IEP, the parents' allegations that the goals were vague, confusing and inappropriate, and would be of no use to a teacher, is also without merit.[10]

Based on the foregoing, any deficiency in the student's annual goals did not deprive the student of educational benefits or impede the parent's opportunity to participate in the development of the IEP so as to deny the student a FAPE (see J.L., 2013 WL 625064, at *13; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *11 [S.D.N.Y. Aug. 23, 2012], aff'd, 2013 WL 3814669 [2d Cir. July 24, 2013]; J.A. v. New York City Dep't of Educ., 2012 WL 1075843, at *7-*8 [S.D.N.Y. Mar. 28, 2012]; P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 108-09 [E.D.N.Y. 2011], aff'd, 2013 WL 2158587 [2d Cir. May 21, 2013]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289 [S.D.N.Y. 2010]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294-95 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; M.C., 2008 WL 4449338, at *11; Tarlowe, 2008 WL 2736027, at *9).

3. Parent Counseling and Training

Turning next to the parties' claims regarding whether the omission of parent counseling and training from the March 2012 IEP resulted in a denial of a FAPE to the student, State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide

[10] Briefly addressing two arguments that the parents did not properly raise at the impartial hearing as described above, I note that: (1) Contrary to the parents' contention, of the 16 annual goals and 37 short-term objectives that were carried over to the student's IEP from the December 2011 Rebecca School progress report, only one of the short-term objectives had been rated as "progress made: anticipates meeting goal" (Dist. Ex. 1 at p. 10); and (2) contrary to the parents' contention that the annual goals and short-term objectives carried over from the December 2011 Rebecca School progress report were designed to be implemented in an 8:1+3 setting using the methodology utilized at the Rebecca School, 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, methodology, or student-to-teacher ratio, but rather whether said goals and objectives are consistent with and relate to the needs and abilities of the student, and testimony by the student's current speech-language pathologist indicated that she could implement the goals on the IEP even if she was not working at the Rebecca School using the DIR methodology in an 8:1+3 classroom setting (Tr. p. 325; 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]).

parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see 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).

The hearing record reflects that the IEP did not include a provision for parent training and counseling (Tr. p. 124: see Parent Ex. B). The district was required to comply with State regulations by identifying parent counseling and training on the student's March 2012 IEP (8 NYCRR 200.4[d][2][v][b][5]). However, there is no indication in the hearing record that the failure to place parent counseling and training on the IEP resulted in a denial of a FAPE. The hearing record does not indicate that the parents had significant need for parent counseling and training at the time of the CSE meeting. Testimony by the program director of the Rebecca School indicated that the Rebecca School provides extensive parent counseling and training, including assigning a social worker to each family to assist with resources and referrals; counseling by the social worker and the psychology department including family counseling, individual counseling, couple's counseling, and sibling counseling; parent education, parent support, and sibling groups on a weekly basis; a four-week training program in the methodology used at the Rebecca School, with ongoing training provided either at the school or in the home; and support at home versus school depending on the needs of the family (Tr. p. 166). I note that at the time of the March 2012 CSE meeting, the student had attended Rebecca School for four years and testimony from the student's mother indicated that the parents had previously availed themselves of parent counseling and training available from the Rebecca School (Tr. pp. 170, 374-75). She stated that during the school year she would visit the school at least twice per month to sit in the classroom or go on field trips; that she was permitted to attend the student's therapy sessions; participated in a support group; and receive training in the methodology used by the Rebecca School, such that the parents were "certified to be in the classroom" (Tr. pp. 374-75). The student's mother also testified that at the time of the hearing the parents were in the process of trying to put into place training for Rebecca school staff on Tourette syndrome (Tr. pp. 375-76).

The district school psychologist who attended the March 2012 CSE meeting stated that the reason parent counseling and training was not on the IEP was because it was "not a specific service that's provided to the [student]" and that it was "considered programmatic, so they were provided by the school program" the student would have attended, had he attended the recommended program (Tr. pp. 124-25, 145).

Based upon the foregoing, I find that although the March 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 R.E., 694 F.3d at 191; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9-*10 [S.D.N.Y. Oct. 16, 2012]; C.F., 2011 WL 5130101, at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 2010]; M.M., 583 F. Supp. 2d at 509; M.W., 725 F.3d at 141-42).

To be clear, however, the fact that the district views parent counseling and training as "programmatic" and therefore unnecessary continues to remain a procedural violation, and while not amounting to a denial of a FAPE in this proceeding, compliance with the 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]).

D. Assigned Public School Site

The district argues that any inquiry into the appropriateness of the assigned public school site is speculative because the parents unilaterally enrolled the student at the Rebecca School prior to the beginning of the 2012-13 school year. I agree.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has 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 at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L., 530 Fed. App'x at 87; 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 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; 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., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City

Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. 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., 526 Fed. App'x 135, 141 [2d Cir. 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [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]).

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. 2013]; see R.B., 2013 WL 5438605, at *17; 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 also N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"']).

In view of the forgoing, the parents cannot prevail on the claims that the district would have failed to implement the May 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the March 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Exs. L; M).

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. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. March 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. Aug. 19, 2011]).

1. Implementation of Related Services

The parents allege that they were told during their visit to the assigned public school site that the student's related services could not be implemented there, and the student's mother testified to that effect during the impartial hearing (Tr. p. 394-97). However, testimony by the social worker who gave the tour reflected that when giving tours, she would not provide information regarding the school's ability to provide related services and did not have any specific knowledge of the manner in which related services were provided (Tr. pp. 63, 389). The social worker at the assigned school testified that during the 2012-13 school year, the assigned public school site provided related services including counseling, OT, physical therapy, and speech-language therapy (Tr. p. 56). She indicated that during the 2012-13 school year, there were one full-time and one part-time counselors; two full time speech-language therapists; two full-time occupational therapists (one a district employee and the other a contracted occupational therapist); and one full-time physical therapist (Tr. pp. 56-57). With regard to the 2011-12 school year, the social worker testified that the assigned school had the same number of counselors and speech-language therapists as it had during the 2012-13 school year and also had one full-time contracted occupational therapist and one contracted for three days per week (Tr. pp. 57-58). Based on the above, there is no reason appearing in the hearing record to disturb the IHO's finding that the assigned school could have met the student's related services needs.

2. Sensory Gym

The parents' due process complaint notice asserts that the assigned public school site lacked a sensory gym, however, I concur with the IHO's determination that the public school contained a sensory gym as well as appropriate sensory equipment .[11] The IHO based his finding upon the

[11] Although the parents did not raise this in their due process complaint notice as being a deficiency in the March 2012 IEP, to the extent the parents now allege for the first time in their petition on appeal that the IEP should have specified a sensory gym, I conclude that even if the issue was properly before me, the IEP adequately addressed the student's sensory regulation needs. For example, the IEP recommended the student receive four 30-minute individual OT sessions per week and one 30-minute group (of 2) sessions per week in the provider's room (Parent Ex. B at pp. 10-11). In addition to this, the IEP noted that the student benefitted from "increased proprioceptive and vestibular input to help him remain regulated, increase his alertness, and fully participate in group activities such as yoga" (id. at p. 2). The IEP further reflected that the student benefited from a "variety of sensorimotor games involving heavy work proprioceptive and vestibular input which provide him with necessary support to keep his sensory system regulated" (id.). The IEP also indicated that the student's abilities related to handwriting activities (i.e., letter formation, sizing, spacing, and alignment) was enhanced by the provision of activities that allowed him to receive proprioceptive input such as writing with "Make A Dot" markers, making letters or numbers from Theraputty, and writing letters in Theraputty by pushing beads into it (id.). Additionally, several goals and short-term objectives contained in the IEP addressed the student's sensory needs (id. at pp. 6-7). Specifically, short-term objectives targeted improving the student's ability to engage in messy play during a science experiment; asking to take a break when his environment became overwhelming; participating in a structured movement activity with peers for 20 minutes while maintaining self-regulation and behavioral organization; tolerating various types of sensory input during sensorimotor activities (e.g., treadmill, swinging,

testimony of the district social worker at the assigned school that the school contained a gym, had equipment to address sensory motor issues including yoga mats, tricycles, weighted vests, balancing balls, brushes, a trampoline, and balance beams, that the equipment was in place during the 2011-12 school year and had been there for some time, but that the parents visited "two days before the school year ended" and therefore may not have seen a "fair representation" of what the school had available (Tr. pp. 46-49, 88). Upon review of the testimony relied upon by the IHO, I find no reason to disturb the IHO's finding.

3. Transportation

The parents maintain that the amount of time the student would have to spend on a bus if he were to attend the assigned public school site would "render him dysregulated and unable to learn"; however, there is no evidence in the hearing record that the student required limited travel time to and from school. While the IEP reflected that the student required specialized transportation, it did not include any details regarding specific special transportation accommodations and services (Parent Ex. B at pp. 14, 16).

The hearing record does, however, provide information regarding the conditions under which the student typically became dysregulated. For example, testimony by the student's mother indicated that when the student was in a large crowd or with a large number of people he became overwhelmed and dysregulated, as well as when surrounded by too much noise or too much visual or auditory stimulation (Tr. pp. 367, 391-92). Testimony by the Rebecca School program director also noted the student's difficulty remaining regulated when the environment became too loud or when he was expected to process a large amount of language (Tr. pp. 179-80, 232). Testimony by the student's Rebecca School teacher reflected that the student became overwhelmed during fire drills when the whole building left the school at one time (Tr. p. 262). The hearing record also reflected that the student became dysregulated when he was not in control of a situation but that he was improving as he became more reflective about this (Dist. Ex. 1 at p. 1; Parent Ex. B at p. 1). However, I note that the hearing record does not contain evaluative information that suggests that the student would become dysregulated as a result of being on a bus after any particular period of time. Moreover, there is no indication that the parents or Rebecca School personnel shared any concerns with the district regarding the student's transportation before or during the CSE meeting.

Based on the above, I decline to find that had the student attended the assigned school the district would have 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., 370 Fed. App'x at 205; Van Duyn, 502 F.3d at 822; see D.D-S., 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502-03).

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trampoline, etc.); modulating the rate and intensity of his movements during sensorimotor groups; creating and executing a three-step activity plan involving various types of sensorimotor activities without behavioral overreactions; and writing a five word sentence with correct letter sizing, spacing, alignment, and fluidity (id.). The IEP also addressed the student's oral sensory needs via an annual goal and short-term objective which targeted normalizing the student's oral sensitivity and increasing his ability to taste novel foods (id. at p. 9). Based on the above, the IEP adequately and appropriately addressed the student's sensory regulation needs without the provision of a sensory gym.

VII. Conclusion

Based on the information in the hearing record, the parents' challenges to the March 2012 IEP and the assigned public school site are not supported by the evidence and did not result in a denial of a FAPE to the student. Accordingly, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13). By the same token, I need not reach the issue of whether the reference in the petition to arguments regarding the appropriateness of the parents' unilateral placement as well as equitable considerations found in their closing brief submitted to the IHO prior to his decision is sufficient to raise those arguments at this stage of the proceeding (see Pet. ¶¶ 76-78; Answer ¶ 53). However, I encourage counsel for the parents' to carefully review the practice regulations governing pleading requirements ,specifically those that preclude using a closing brief submitted to the IHO as a substitute for a properly drafted petition because, among other reasons, page limitations cannot be circumvented through incorporation of the parents' entire 28 page-closing brief by reference (see 8 NYCRR 279.4; 279.6; 279.8[a][5]). I note in this instance, however, that it appears that this was likely an oversight due to unfamiliarity with this forum as the parents' counsel did not utilize the maximum page limits either before the IHO nor before me on review yet effectively achieved the primary objective of clearly and specifically identifying the alleged errors of the IHO; nevertheless, I encourage counsel to avoid the practice of incorporation by reference in the future.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

IT IS 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.

Dated: **Albany, New York**
December 19, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER