The University of the State of New York

The State Education Department
State Review Officer
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No. 14-040

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, 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 Manhattan Children's Center (MCC) for the 2013-14 school year. The parents interpose a cross-appeal regarding two aspects of the IHO's decision. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party February seek a specific extension of time of the 45-day timeline, which the IHO February 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 February 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 February seek a specific extension of time of the 30-day timeline, which the SRO February 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

I was appointed to decide this appeal on November 5, 2014. I have conducted an impartial review of the hearing record and offer the following independent decision (see 20 U.S.C. § 1415[g]; Educ. Law 4404[2]; 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

On February 28, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Parent Ex. C at pp. 1, 23).[1] Finding the student

[1] At the time of the February 2013 CSE meeting, the student attended MCC (see, e.g., Tr. p. 75; Parent Ex. C at p. 30). The Commissioner of Education has not approved MCC as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

eligible for special education as a student with autism, the February 2013 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school as well as the services of a full-time 1:1 crisis management paraprofessional (id. at pp. 19, 20, 22).[2] In addition, the February 2013 CSE recommended the following related services to be delivered in 30-minute sessions on a weekly basis: six individual occupational therapy (OT) sessions; one group OT session; five individual speech-language therapy sessions; and one group speech-language therapy session (id. at pp. 19-20). The CSE also recommended supports for the student's management needs, 24 annual goals with corresponding short-term objectives, assistive technology, special transportation, and the use of a behavioral intervention plan (BIP) (id. at pp. 3, 4-20, 22).

By final notice of recommendation (FNR) dated June 14, 2013, the district summarized the 6:1+1 special class placement and related services recommended in the February 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Parent Ex. G).

In a letter dated June 14, 2013, the parents rejected the February 2013 IEP and indicated their intent to place the student at MCC for the 2013-14 school year (Parent Ex. F at pp. 1-3).[3] The parents argued that the February 2013 IEP was deficient because the district failed to: (1) conduct its own evaluations; (2) consider recommendations made by MCC; (3) prescribe an appropriate level of speech-language therapy; (4) consider "1:1 teaching programs"; (5) develop appropriate annual goals; (6) ascertain "baseline" data; (7) offer individualized parent counseling and training; (8) prescribe transition supports; (9) consider "after-school or extended day services" for the student; (10) specify a particular educational methodology on the IEP; (11) develop an appropriate functional behavioral assessment (FBA) or behavioral intervention plan; (12) include the parents in the development of the FBA; and (13) address the student's sensory needs (see id.). The parents further averred that the recommended 1:1 crisis management paraprofessional was inappropriate to meet the student's needs and that the student required "1:1 instruction" rather than 1:1 paraprofessional support (id. at p. 2). Therefore, the parents rejected the February 2013 IEP and indicated that they would continue the student's enrollment at MCC and seek the costs of this placement from the district (id. at p. 3).

In a subsequent letter dated June 26, 2013, the parents reiterated several of their previously expressed concerns with the February 2013 IEP and, based upon information ascertained from a visit to the assigned public school site, identified several reasons why they believed the school would be unable to implement the February 2013 IEP (Parent Ex. I at pp. 1-2).[4]

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

[3] The parents stated in this letter that they had not received the FNR (Parent Ex. F at p. 3). The parents acknowledged receipt of the FNR in a subsequent letter dated June 26, 2013 (Parent Ex. H at p. 1).

[4] The hearing record also contains a June 26, 2013 letter containing 23 questions the parents posed to the district pertaining to the assigned public school (see Parent Ex. H at pp. 1-2). The date of this letter may have been a typographical error, as the letter detailing the parent's concerns with the assigned public school site, also dated June 26, 2013, references a visit to the assigned public school site that took place on June 25, 2013 (compare Parent Ex. H at pp. 2-3, with Parent Ex. I at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated June 27, 2013, the parents contended that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year, that the unilateral placement and services selected by the parents were appropriate, and that equitable considerations supported the parents' sought relief (Parent Ex. A at pp. 1-16).

The parents' due process complaint notice contains a large number of factual allegations embodied within 135 numbered paragraphs (see Parent Ex. A at p. 1-16). The IHO issued findings as to what he determined to be the main issues in dispute, finding that the other claims were "without merit or insufficiently asserted" (IHO Decision at p. 32). Because the parents have not appealed this finding—which has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v])—I will summarize only those due process complaint notice allegations that are germane to the IHO's decision and/or the issues presented by the parties on appeal (see Application of a Student with a Disability, Appeal No. 13-083; Application of a Student with a Disability, Appeal No. 14-152).

With regard to the process by which the February 2013 IEP was developed, the parents alleged that the district did not develop, and thus consider, its own evaluations (Parent Ex. A at p. 11). As a result, argued the parents, the February 2013 CSE did not possess sufficient evaluative material on the student (id.). Turning to the February 2013 IEP, the parents argued that it was inappropriate because it did not: prescribe a particular methodology (id. at p. 8); provide the student with 1:1 instruction (id. at pp. 6-7); include transition services (id. at p. 6); offer parent counseling and training (id. at pp. 5, 6); or recommend extended day services (id. at p. 6; see also id. at p. 7). As for special factors, the parents argued that a functional behavioral analysis (FBA) and a BIP developed for the student were insufficient and did not address his behavioral needs (id. at pp. 3, 4). The parents also argued that the district failed to meaningfully include them in the "placement selection process" and that the assigned public school site could not implement the February 2013 IEP and was otherwise inappropriate for the student (id. at pp. 7, 12-14).

The parents further argued that MCC was an appropriate unilateral placement and that no equitable considerations affected the parents' sought remedy (Parent Ex. A at pp. 2, 15). Therefore, the parents requested that the district provide the costs of the student's education at MCC, transportation to MCC, and after-school special education itinerant teacher (SEIT) and related services (id. at p. 15).

B. Impartial Hearing Officer Decision

An impartial hearing convened on July 18, 2013 and concluded on December 3, 2013 after four days of proceedings (see Tr. pp. 1-388). In a decision dated February 3, 2014, the IHO found that the district failed to offer the student a FAPE for the 2013-14 school year, that MCC was an appropriate unilateral placement, and that equitable considerations supported an award of tuition reimbursement (IHO Decision at pp. 15-32).

First, as stated above, the IHO indicated that he would only address the allegations in the parents' due process complaint notice that were addressed at the impartial hearing, deeming the others "without merit or insufficiently asserted" (IHO Decision at p. 32). Next, the IHO ordered the district to comply with the interim order on pendency based upon representations by the parents

regarding the district's noncompliance with the student's pendency entitlements (id. at p. 30; see Interim IHO Decision at pp. 2-3).

The IHO found that the district failed to generate and, thus, consider sufficient evaluative material pertaining to the student (IHO Decision at pp. 15-16). The IHO noted that the February 2013 IEP referenced a June 2010 neuropsychological evaluation, but found that this evaluation was outdated and not considered by the CSE "in any meaningful way" (id. at p. 16, n. 2). While the IHO found that the CSE considered "reports" from MCC that were "comprehensive," he found that the district did not develop sufficient evaluative material in order to assess the student's needs (id. at p. 16).[5] This deficiency was particularly problematic, opined the IHO, because the February 2013 IEP recommended a "less restrictive" setting than the student's then-current placement at MCC (id. at pp. 16, 17).

Turning to whether the February 2013 CSE should have specified that the student required instruction using applied behavioral analysis (ABA) on his IEP, the IHO found that the February 2013 CSE failed to consider this issue and that this failure "contributed to a denial of FAPE" (IHO Decision at pp. 18-19). The IHO found that the CSE should have been on notice regarding the student's need for ABA because he received it for a number of years and it was described in MCC reports considered by the CSE (id. at p. 18). Additionally, the IHO noted that the district did not conduct "further evaluations . . . to see if [the student] was amenable to other instructional methodologies" (id.).

The IHO further found that the district's recommended placement, consisting of a 6:1+1 special class with 1:1 paraprofessional services, was inadequate to meet the student's needs (IHO Decision at pp. 21-22). The IHO reasoned that a paraprofessional would not be "trained sufficiently" to manage and address the student's behavioral issues (id. at pp. 21-23). The IHO also found "no evidence . . . that [the student] no longer required the substantial 1:1 instruction" he received at MCC (id. at p. 21). The IHO further found that the CSE should have "considered" transition support services, such as consultant teacher services (id. at pp. 21-22).

The IHO found that the February 2013 CSE's failure to include parent counseling and training on the IEP was a procedural violation of the IDEA (IHO Decision at p. 23). The IHO further found that the district's failure to hold a "meaningful placement meeting to discuss implementation of the IEP" whereby parent counseling and training would be discussed affected the parents' right to participation in the development of the student's educational program (id.).

With respect to the February 2013 CSE's consideration of special factors, the IHO found that the February 2013 CSE relied on "sufficient information" in developing a BIP that "would at least provide a basis for addressing the student's . . . behaviors at the start of the 2013[-]14 school year" (IHO Decision at p. 17). Specifically, the IHO found that the district relied upon an FBA and BIP conducted and developed by MCC, documents he characterized as comprehensive (id.). The district's reliance was also appropriate, according to the IHO, because behavioral observations are "preferably obtained in [a] student's then current environment" (id. at p. 18).

[5] The IHO also found that "MCC staff participated" in the February 2013 CSE meeting (IHO Decision at p. 16).

The IHO also found that the February 2013 CSE's related service recommendations were inappropriate to meet the student's needs because the services would be delivered during the school day which "would necessarily detract from the time available for [classroom] instruction" (IHO Decision at p. 24). The IHO intimated that after-school delivery of the related services would have been more appropriate (id.). In any event, the IHO found that it was the CSE's "responsibility to fully discuss the issue at the CSE meeting" and, moreover, to "articulate its reasons for taking such a position" (id.).

Turning to the parents' contentions regarding the assigned public school site, the IHO found that these contentions were properly presented because "the parents continue[d] to express interest in a public school placement and wish[ed] to participate in the [assigned public school selection] process" (IHO Decision at p. 25). The IHO found that the parents were denied "meaningful participation in . . . the selection of a school placement" (id. at p. 20). The IHO further held that the parents were "entitled by law" to a "placement meeting" whereby their concerns with the assigned public school site would be addressed (id. at p. 26). Finding that the district presented no proof on this issue at the impartial hearing, the IHO found that the district failed to meet its burden by "default" (id.). Also, the IHO noted that no member of the CSE had previously taught students with autism or taught in a 6:1+1 classroom ratio and, further, that no member of the CSE "adequately explained" to the parents "how special education services would be provided to [the student]" (id. at pp. 19, 20).

The IHO next found that MCC was an appropriate unilateral placement for the student during the 2013-14 school year (IHO Decision at p. 27). The IHO found that the student required "continued use of . . . 1:1 ABA teaching methodology in a very structured small class learning environment with . . . an intensive BIP," all of which were found at MCC (id.). The IHO also found that the student made "significant" progress at MCC during the 2013-14 school year, particularly in his "social and communication skills" (id. at p. 28). The IHO further found that an "extended day program" offered by a particular provider was appropriate for the student because "nothing in the [hearing] record indicat[ed] that [the student] did not continue to need this service" (id. at p. 29). The IHO additionally found that the student made progress receiving these services (id.).

As for equitable considerations, the IHO found no equitable factors that would reduce or preclude an award of tuition reimbursement to the parents (IHO Decision at pp. 30-31). Specifically, the IHO found that the parents were amenable to a public placement, consented to district evaluations, shared private evaluations with the district, and provided timely notice of the student's removal from the public school system (id.). Therefore, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at MCC and the particular extended day service provider for the 2013-14 school year (id. at p. 32).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by concluding that the district failed to offer the student a FAPE for the 2013-14 school year and that equitable considerations supported the parents' requested relief.[6]

First, the district argues that the IHO's finding that the February 2013 CSE erred by failing to explain how a 6:1+1 special class placement and 1:1 paraprofessional services would be implemented must be annulled as this specific allegation was not contained in the parents' due process complaint notice.[7] The district additionally avers that the IHO's finding regarding the adequacy of 1:1 paraprofessional services for the student related to the qualifications established by the district for paraprofessionals and, as such, was not an issue that may be resolved through the IDEA's due process procedures. The district further appeals the IHO's award of transportation to the student as "superfluous" as it does not dispute its obligation to provide special education transportation to the student and, moreover, has been doing so since 2011.

With regard to the provision of FAPE during the 2013-14 school year, the district asserts that the IHO erred by finding that the February 2013 CSE: (1) possessed an inadequate amount of evaluative material on the student; (2) failed to recommend a specific methodology on the student's IEP (i.e., ABA); (3) failed to address the student's need for 1:1 instruction; (4) neglected to prescribe transition services; (5) erroneously elected not to prescribe parent counseling and training; (6) failed to recommend "extended day services" for the student; and (7) did not convene a "placement meeting" to discuss the particulars of how the February 2013 IEP would be implemented.

The district additionally posits that the IHO erred by finding that the district was required to offer evidence relating to the assigned public school site's ability to implement the February 2013 IEP. The district contends that this issue is speculative in this proceeding as the parents rejected the IEP before it was due to be implemented. The district further appeals the IHO's determination that equitable factors do not affect an award of tuition reimbursement, arguing that the parents had no intent to enroll the student in a public school.

In an answer, the parents deny the district's material assertions and argue that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year for the reasons set forth in his decision. Additionally, the parents contend that they challenged the district's offered 6:1+1 special class placement in their due process complaint notice and, as such, the IHO properly made findings as to this issue. The parents further submit that the IHO properly ordered the district to provide transportation to the student.

The parents also interpose a cross-appeal that addresses two discrete portions of the IHO's decision. First, the parents appeal the IHO's conclusion that it was permissible for the February 2013 CSE to rely upon the FBA and BIP generated by MCC in creating an FBA and BIP for the

[6] The district does not take issue with the IHO's finding that MCC was an appropriate unilateral placement; accordingly, the IHO's finding in that respect has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[7] Alternatively, the district contends that this argument is without merit.

student. Second, the parents seek to remove a reference to a specific provider in the IHO's ordered relief as the student no longer receives services from this provider.

In an answer to the parents' cross-appeal, the district denies the parents' material assertions and argues that the IHO's findings with regard to the district's FBA and BIP were correct. Moreover, the district contends that it should not have to provide the extended day services identified by the parent but that, if it does, it should be allowed to select an appropriate provider.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

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

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Sufficiency of Evaluative Material

First, the district contends that the IHO erred in finding that the February 2013 CSE did not possess sufficient evaluative information about the student. Upon review of the hearing record, I agree with the district and reverse this portion of the IHO's decision.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

A CSE is not precluded from relying upon privately obtained evaluative information, even in lieu of conducting its own evaluations (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]). In addition, as part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the district's criteria (34 CFR § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]).

The hearing record reveals that the February 2013 CSE considered the following materials: (1) a December 2012 classroom observation; (2) a December 2012 educational progress report from MCC; (3) a December 2012 speech-language progress report from MCC; and (4) a December 2012 OT progress report from MCC (see Tr. pp. 64-65, 72; Dist. Ex. 1 at p. 1; see generally Dist. Ex. 2; Parent Exs. J; K; L).[8]

The December 2012 classroom observation conducted by the district representative who served on the February 2013 CSE detailed the student's performance in gym class, a "lunch/snack" period, and a period of individual instruction (Dist. Ex. 2 at pp. 1-2). At all times, the student was accompanied by a "one-to-one teacher" (id. at p. 1). The student transitioned appropriately to gym class and engaged in a game of catch with a teacher and, eventually, another student (id.). The student exhibited motor difficulties as well as "some stereotypic behaviors that involved jumping [and] flapping" (id.). Additionally, the student often became unfocused and wandered away from the activity (id.). Upon returning to the classroom, the student transitioned appropriately into a "lunch/snack" period (id. at p. 2). The student drank independently and, aided by occasional reminders, ate using a fork (id.). The teacher next initiated an academic instruction period where the student received tokens for correctly identifying objects on an iPad (id.). After successfully labeling several objects, the student earned enough tokens to receive awards such as a banana and a toy (id.).

A December 2012 speech-language progress report submitted by the student's speech-language pathologist detailed the student's progress in individual and group speech-language therapy sessions (Parent Ex. J at pp. 1-2). The pathologist began by noting that the student "exhibit[ed] stereotypic behaviors and behavioral issues . . . which interfere[d] with his speech and language progress" (id. at p. 1). However, the pathologist observed that the student's interfering behaviors decreased as he gained familiarity with her (id.).

With regard to the student's receptive language abilities, the report indicated that the student could "follow[] a variety of familiar one-step . . . and two-step related direction[s]" with minimal prompting (Parent Ex. J at p. 1). Additionally, with gestural prompts, the student was able to follow one-step directions incorporating attributes (id.). The student could also identify "a minimum of five actions" and sort pictures according to categories with "minimal gestural prompts" (id.). As for the student's expressive language skills, the provider reported that the student communicated through signs, gestures, and vocalizations produced by software on an iPad (id.). The student used the software to request "highly desirable items" but required gestural prompts to utilize it for communicative purposes (id. at pp. 1-2). The report noted that the "PROMPT" methodology was employed during therapy sessions and that the student "display[ed] difficulty imitating vowel sounds" (id. at p. 2).[9] The December 2012 speech-language progress report further indicated that, although the student requested a number of play activities, his "independent play skills [we]re limited" (id.). Therefore, the report indicated that therapy would

[8] The February 2013 CSE also considered a May 2012 FBA and BIP developed by MCC (see Dist. Ex. 1 at p. 1; see generally Parent Exs. V; X). Sometime after the February 2013 CSE meeting, MCC provided the CSE with an updated FBA dated November 2012 (Tr. pp. 72-73; see generally Dist. Ex. 3).

[9] PROMPT is not defined in the hearing record.

"focus on expanding [the student's] independent play skills" as well as his ability to play with peers (id.).

A December 2012 educational progress report described the structure of the student's program at MCC, his areas of instruction, and his progress to date (Parent Ex. K at pp. 1-5). According to the report, the student attended MCC for six hours each day (id. at p. 1). Five of these hours consisted of 1:1 instruction utilizing ABA (id.). An additional hour was devoted to "instructional lunch and leisure skills" in a 2:1 ratio (id.).

Regarding academic instruction, the student's program included "identifying letters, sorting objects, identifying objects[,] and identifying pictures" (Parent Ex. K at p. 1). Primarily, the student did so by making "selection-based respon[ses]" on an iPad to identify letters, pictures, and objects presented in a "three-stimuli array" (id. at pp. 1, 2). Also, at the time of the report, the student was learning to identify the parts of his body, labeling the colors of objects, and tracing (id. at p. 2). The report also indicated that the student mastered requesting food items and items in the school gym within a "structured setting" and was working on requesting three-icon sentences with the use of a software program on his iPad (id.). Additionally, the student was working on completing non-jigsaw puzzles and learning to develop appropriate play skills with the use of cause and effect toys (id. at p. 3).

With regard to the student's social skills, the report indicated that the student "participate[d] in several small classroom groups with 1:1 support" (Parent Ex. K at p. 3). Specifically, the student participated in a morning group and afternoon circle on a daily basis and a social skills group on a weekly basis (id. at pp. 3, 4). The student also participated in a "center" group and peer buddy program (id. at p. 4). In his morning group, the student required "full physical prompting" to label the students in the class and "light physical prompting" to follow along in an activity book (id. at p. 3). However, the student was able to "walk to the choice board and make a choice with gestural support." (id.). Within the center group, the student "demonstrated an increase in playing board games independently" (id. at p. 4).

As for the student's activities of daily living (ADL) skills, the student demonstrated an ability to walk to his cubby, take off his jacket, hang his jacket independently, stand appropriately for up to 15 seconds in his work area, and independently use the toilet (Parent Ex. K at p. 4). At the time of the report, the student was working on learning to unpack his backpack upon arrival at school, demonstrating appropriate behavior in the classroom, and washing his hands independently (id.).

The report also noted that MCC employed a behavior plan to address the student's "aggressive behaviors and flopping" (Parent Ex. K at p. 5). At the time of the report, the student exhibited aggressive behaviors between zero and twelve times per day with a mean of two per day (id.). Also, the student exhibited "flopping" between zero and ten times per day with a mean of 1.6 flops per day (id.). The report concluded by recommending that the student "continue in his current placement within a small ABA classroom" and, further, that he receive "one-to-one instruction throughout the day in order to maintain and generalize skills" (id.).

The CSE also considered a December 2012 OT progress report (Parent Ex. L at pp. 1-3). This report indicated that the student received two individual and one group session of OT per week, as well as one 30-minute OT lunch consultation per week (id. at p. 1). The report further

stated that OT addressed the student's sensory integration, motor planning skills, balance/coordination training, visual motor, fine motor, and attention skills (id.). The report also noted that the student "made gains in his ability to attend for longer periods of time and transition between . . . activities" (id.).

The report indicated that the student "present[ed] with a decreased ability to regulate his sensory system," which required sensory activities and input (Parent Ex. L at pp. 1-2). Application of these techniques—including deep pressure, heavy work, sensory motor activities (e.g., weighted ball exercises, dumbbell exercises, and yoga pose imitation)—resulted in an "increased ability [for the student] to focus on presented materials, engage with peers and adults, and follow directions" (id. at pp. 1-2). The student also worked on activities to develop his core and trunk strength (id. at p. 2). The therapist noted that the student "continue[d] to require practice and repetition" to accurately engage in "throwing, lifting, and catching activities" (id.). Generally, while engaging in these activities, the student evinced difficulty "following verbal directions without visual cues" (id.).

With respect to the student's fine motor skills, the student had "improved" in this area and was able to appropriately use both a pincer and three jaw chuck grasp to pick up small objects (Parent Ex. L at p. 3). The student also demonstrated the ability to grasp and hang on to tongs and tweezers, although he needed "maximum physical assistance and moderate verbal cues" to use those tools to pick up small items (id.). When focused, the student demonstrated the ability to trace vertical and horizontal lines using his index finger (id.). The student "continue[d] to work" on tracing lines with a small pencil and isolating the wrist and fingers when engaging in fine motor activities (id.). Further, the student's scissor skills "continue[d] to emerge"; at the time of the report, the student could "snip three times consistently with maximum verbal cues" (id.).

A review of this information indicates that the February 2013 CSE considered information describing the student's speech, academic, social/emotional, ADL, behavioral, gross motor, and fine motor needs. The hearing record further indicates that the February 2013 CSE incorporated this information, as well as information offered by the student's providers and the parents at the CSE meeting, into the February 2013 IEP (compare Parent Ex. C at pp. 1-3, with Dist. Ex. 2, and Parent Exs. J, K, L; see also Tr. p. 84). Although the IHO concluded that the MCC reports were "comprehensive," he nevertheless faulted the district for not conducting and relying upon its own evaluations (see IHO Decision at p. 16). This analysis improperly focused on the district's alleged evaluative shortcomings instead of the sufficiency of the information before the February 2013 CSE (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. Mar. 29, 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

The parents further argue that the February 2013 CSE improperly neglected to consider a June 2010 neuropsychological evaluation report (see Parent Ex. C at p. 1). To the extent that this evaluation might not have been reviewed in detail during the February 2013 CSE meeting, the IDEA "does not require that the [CSE] review every single item of data available, nor has case law interpreted it to mean such" (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013] [rejecting parents' claim that because an evaluation report "was not physically present at the CSE meeting, it was never consulted by any party to that meeting"]; see also J.C.S.

v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10 [S.D.N.Y. Aug. 5, 2013]). Moreover, the information about the student contained in the June 2010 neuropsychological evaluation report is described in the IEP and this description is consistent with the other information considered by the February 2013 CSE (compare Parent Ex. C at p. 1, with Dist. Ex. 2 and Parent Exs. J, K, L).

Therefore, I find that the February 2013 CSE considered sufficient evaluative information and that, in this instance, it was permissible for the CSE to rely on information obtained from the student's private school personnel, including comprehensive progress reports, in formulating an IEP (see D.B., 966 F. Supp. 2d at 329-31; G.W., 2013 WL 1286154, at *23; S.F., 2011 WL 5419847, at *10).

B. February 2013 IEP

1. Methodology

Next, the district argues that the IHO erred in determining that the February 2013 CSE failed to identify the parents' preferred instructional methodology on the February 2013 IEP and that this resulted in a denial of FAPE to the student.

Generally, a CSE is not required to specify a particular methodology on an IEP, as this is a matter ordinarily left to the discretion of classroom teachers (Rowley, 458 U.S. at 208; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct.16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; see K.L. v New York City Dep't of Educ., 2012 WL 4017822, at *12 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; see also R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1122 [9th Cir. 2011]). An exception to this general rule is if the facts of a particular case clearly reveal that a student could only receive educational benefit from instruction utilizing a particular methodology (see R.E., 694 F.3d at 192 [upholding SRO's determination that no evidence in the hearing record demonstrated that the student "could not make progress with another methodology and 1:1 paraprofessional support"]; see also A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]; R.B., 2014 WL 5463084, at *4).

As a preliminary matter, the IHO found that the members of the CSE employed by the district should have initiated a discussion as to the issue of whether the student required ABA on his IEP at the February 2013 CSE meeting. While this issue was of importance to the parents and should have been discussed, there is no evidence in the hearing record suggesting that the CSE's failure to broach this topic should necessarily result in a negative inference against the district (see T.B. v. Warwick Sch. Dep't, 2003 WL 22069432, at *13-*17 [D.R.I. Jun. 6, 2003], aff'd sub nom., 361 F.3d 80 [1st Cir. 2004]). Indeed, guidance from the State Education Department indicates that the CSE is a "student-centered process" and "[a]ll members of the [CSE] share the responsibility to contribute meaningfully to the development of a student's IEP." ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. [Dec. 2010], at p. 14, available at

http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). Therefore, to the extent the IHO found a denial of FAPE on this basis, this was in error.

A further review of the evidence in the hearing record does not support the conclusion that the student could only achieve educational benefit from ABA instruction. The student was six and one-half years old at the time of the February 2013 CSE meeting (Parent Ex. C at pp. 1, 23). While the student's providers at MCC recommended that the student received ABA, these providers did not assess the student's strengths and weaknesses while receiving instruction incorporating other teaching methodologies (see Tr. pp. 235-36, 242, 246; Parent Ex. K at p. 5).[10] To be sure, the providers' assertions that the student received exclusive ABA instruction at MCC and that he benefitted from this instruction are supported by the evidence in the hearing record (see, e.g., Tr. p. 82). However, it does not follow that the student could not receive educational benefit from any other methodology.

Therefore, given the student's young age and the MCC providers' exclusive focus on the necessity of ABA services, I find that the February 2013 CSE appropriately declined to limit the student's educational instruction to an exclusive regimen of ABA methodology on the student's IEP (Rowley, 458 U.S. at 208 [1982]; see also Lachman, 852 F.2d at 297; S.M. v. Hawai'i Dep't of Educ., 808 F. Supp. 2d 1269, 1279 [D. Haw. 2011]). Therefore, the IHO erred in finding to the contrary (see Cnty. Sch. Bd. v. Z.P., 399 F.3d 298, 308 [4th Cir. 2005] ["If an IEP is reasonably calculated to enable the child to receive educational benefits, the hearing officer cannot reject it because the officer believes that a different methodology would be better for the child"] [internal citations and quotations omitted]).

2. 1:1 Instruction

On appeal, the district contends that the IHO erred by determining that the student required 1:1 instruction, as opposed to 1:1 paraprofessional support, in order to receive a FAPE. A review of the evidence in the hearing record supports the parents' position.

At the impartial hearing, the parents introduced documentary evidence in the form of progress reports, as well as testimony from the student's teacher and the educational coordinator at MCC, that the student required 1:1 instruction to receive educational benefit (Tr. pp. 191-92, 271-72; Parent Ex. K at p. 5). For example, the student's head teacher at the time of the February 2013 CSE meeting (see Tr. pp. 140-41, 146; Parent Ex. C at p. 30) testified that the student needed 1:1 instruction for multiple reasons, including "in order to acquire new skills" (Tr. pp. 191-92). Also, the educational coordinator at MCC opined that the student "fully require[d] one to one instructional support" due to his behavior and attention needs (Tr. pp. 257, 271). The educational coordinator further testified that the student could not "sustain attention or make meaningful gains" even in a group of two students (Tr. p. 272). Moreover, the parents testified that they "kept stressing the importance for [the student] to continue with . . . one to one individualized instruction" at the February 2013 CSE meeting (Tr. p. 358).

[10] Similarly, the December 2012 educational progress report considered by the February 2013 CSE recommended ABA instruction but did not explain why other methodologies would be inappropriate for the student (Dist. Ex. 4 at p. 10).

The district, by way of contrast, produced little relevant evidence on this issue. The only piece of evidence that arguably speaks to this issue is the portion of the December 2012 classroom observation pertaining to classroom instruction at MCC (Dist. Ex. 2 at p. 2). This section of the classroom observation detailed the student's work with a 1:1 instructor (id.). The student identified potential rewards and, after correctly labeling items on an iPad, received tokens which he redeemed for the desired rewards (id.). During the observation, the student earned a banana, pretzels, and use of a "piano toy" which he "needed assistance [in order] to play with" (id.). This observation detailed the student's program at MCC, but does not demonstrate that the student did not require 1:1 instruction to receive a FAPE (see id.). Also unhelpful to the district's case is the admission of the district representative who served on the February 2013 CSE that, despite the parents' expressed interest in a 1:1 instructional program, the CSE did not consider this option (Tr. pp. 127-28, 358; see Parent Ex. C at p. 24). Additionally, the district representative indicated that she did not "necessarily know" if the student required 1:1 instruction from a teacher rather than 1:1 paraprofessional support in order to meet the February 2013 IEP's annual goals (Tr. pp. 85-86).

Weighing the parties' respective submissions on this issue, the hearing record does not support the appropriateness of the proposed educational placement (see Educ. Law § 4404[1][c]). Although it may have been theoretically possible for the district to offer other evidence to satisfy its burden of proof at the impartial hearing, it did not, in fact, do so. Accordingly, I decline to overturn the IHO finding that the evidence adduced at the impartial hearing indicated that the student required 1:1 instruction to receive educational benefit (see P.L. v. New York Dep't of Educ., 2014 WL 4907496, at *13-*15 [E.D.N.Y. Sept. 29, 2014] [classroom observation conducted by district insufficient to refute testimony from unilateral placement staff that "uniformly supported the . . . position that [the student] require[d] 1:1 instruction"]; C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *1 [S.D.N.Y. Jan. 3, 2013], aff'd, 552 Fed. App'x 81, 2014 WL 278405 [2d Cir. Jan. 27, 2014], as amended [Feb. 3, 2014]).[11]

To be clear, the student may have been able to achieve educational benefit in a 6:1+1 special class with 1:1 paraprofessional services. Therefore, the CSE is hereby ordered, when it next convenes, to consider whether the student needs 1:1 instruction in order to receive educational benefit and to provide the parent, consistent with State regulations, with prior written notice explaining any action that it takes or refuses to take and its basis for such decision (see 20 U.S.C. § 1415[b][3]; 34 CFR 300.503[a]; 8 NYCRR 200.1[oo], 200.5[a]).

3. Transition Support Services

The district further asserts that the IHO erred in finding that the February 2013 CSE should have recommended transition support services to the student. A review of the hearing record supports the district's position.

The IHO's finding was premised upon the supposition that, were the student to enroll the student in the district's recommended 6:1+1 special class, he would have entered a "less restrictive

[11] I do not adopt those portions of the IHO's decision indicating that a paraprofessional would not be "trained sufficiently" as this is not a proper topic for resolution through the IDEA's due process procedures (IHO Decision at p. 21; see 20 U.S.C. § 1412[a][14][E], 34 CFR 300.156[e]; see also 20 U.S.C. § 1401[10][E], 34 CFR 300.18[f]).

setting" thus triggering the district's obligation under State regulations to provide transitional support services (see IHO Decision at p. 21; see 8 NYCRR 200.1[ddd], 200.6[b][2]).[12] However, the student's theoretical move from a classroom with a ratio of "up to" 7:7 at MCC to a 6:1+1 classroom ratio would not be more or less restrictive as it would entail a move from a self-contained special class to another self-contained special class (see Parent Ex. C at p. 19; K at p. 1). Restrictiveness, as used in the IDEA, pertains to the extent to which students with disabilities are educated with students who are not disabled, and not to the number of adults within a classroom (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]).

Additionally, as a student with a classification of autism, State regulations would have required the district to provide transitional support services if the student was "placed in [a] program [ ] containing students with other disabilities, or in a regular class placement" (8 NYCRR 200.13[a][6]). These services, however, are designed to assist teachers. State regulations define transitional support services as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd] [emphasis added]). Moreover, because the student did not attend a public school for the 2013-14 school year, it is speculative as to whether he would have been "placed in [a] program [ ] containing students with other disabilities" (8 NYCRR 200.13[a][6]). Finally, it is not clear that these transition support services were intended for certified special education teachers of highly intensive special class settings such as the 6:1+1 special class placement recommended in this case. It is much more likely that an individual with such experience would be the provider of transitional support services to another teacher having either less familiarity or formal training in working with a student with autism (e.g., a regular education teacher).

Therefore, the hearing record contains no evidence that the February 2013 CSE was required to offer transitional support services or that its failure to do so negatively affected the student. Accordingly, this portion of the IHO's decision is reversed.

4. Parent Counseling and Training

On appeal, the district concedes that the IHO correctly determined that it failed to include parent counseling and training on the February 2013 IEP but argues that this deficiency did not result in a denial of FAPE to the student. A review of the hearing record supports the district's position. Nevertheless, given the above conclusion related to the issue of 1:1 instruction, this procedural violation nevertheless contributed to a denial of FAPE in this instance.

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

[12] The Office of Special Education issued a guidance document, which describes transitional support services for teachers and how they relate to a student's IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 27-28, Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

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, the presence or absence of parent counseling and training on an IEP does not necessarily have a direct effect on the substantive adequacy of the plan (see R.E., 694 F.3d at 191). Moreover, districts are required to provide parent counseling and training pursuant to State regulations and, therefore, "remain accountable for their failure to do so no matter the contents of the IEP" (id.; see 8 NYCRR 200.13[d]; see also R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 431-32 [S.D.N.Y. 2014]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11-*12 [S.D.N.Y. Mar. 19, 2013]). Thus, while a district's failure to provide parent counseling and training would not ordinarily constitute a denial of FAPE by itself, the district's failure to do so here contributed to a denial of FAPE (see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *10 [S.D.N.Y. Dec. 3, 2014] ["the failure to include parent counseling and training is insufficient, on its own, to amount to a FAPE denial"]).

Given the district's unexplained failure to provide parent counseling and training services (Tr. pp. 87-88), it is hereby ordered that, when the next CSE convenes, 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 (20 U.S.C. § 1415[b][3]; 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo]; 200.5[a]).

5. Extended Day Services

Next, the district argues that the IHO erred in finding that the student required extended day services in order to receive a FAPE. With respect to home-based or extended day services, several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also K.L., 2012 WL 4017822, at *14 [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17 [E.D.N.Y. Oct. 30, 2008]; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. April 21, 2008]).

A review of the evidence in the hearing record supports the district's position that the student does not require these services to receive a FAPE. At the outset, it appears that the extended day services in question consist of three 30-minute sessions of individual speech-

language therapy per week and three 30-minute sessions of individual OT per week (Interim IHO Decision at p. 3; Parent Ex. B at p. 36). It further appears from the hearing record that the district has been obligated to deliver these services to the student during the pendency of these proceedings, including the entirety of the 2013-14 school year, pursuant to the IHO's order which was based on an unappealed IHO decision in a prior administrative proceeding (see Interim IHO Decision at pp. 2-3; Tr. pp. 4-5; see generally Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Burlington, 471 U.S. at 372; Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 641 [9th Cir. 1990]).[13]

While the student likely benefitted from these services, it does not appear that he required these services in order to receive a FAPE. The February 2013 IEP recommended six 30-minute individual OT sessions per week; one 30-minute group OT session per week; five individual 30-minute speech-language therapy sessions per week; and one 30-minute group speech-language therapy session per week (Parent Ex. C at pp. 19-20). Neither party disputes that OT and speech-language therapy are appropriate for the student. Further, the frequency of these sessions offered in the February 2013 IEP represents a substantial commitment to the student's needs in these areas. Accordingly, the district was not required to maximize the student's potential by offering extended day services above and beyond the related services prescribed by the February 2013 CSE (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

In reaching a contrary conclusion, the IHO found that the related services prescribed by the February 2013 CSE would remove the student from his classroom and improperly "detract" from his classroom learning time (IHO Decision at p. 24). The IHO further suggested that the student's pendency arrangement, where he received related services after school, would have been preferable. The IHO is correct that pull-out related service sessions must, by definition, reduce the amount of time a student receives classroom instruction. However, the hearing record does not indicate that the balance struck by the CSE between the student's need for classroom instruction and related services was inappropriate in this instance. Moreover, the IHO improperly used the student's private services as a conceptual framework to assess the appropriateness of the services offered by the district (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; G. v. Fort Bragg Dependent Sch., 324 F.3d 240, 252 [4th Cir. 2003], opinion amended on reh'g sub nom., 343 F.3d 295 [4th Cir. 2003] [finding that, "[r]ather than assessing [the district's] ability to provide [the student] educational benefit under the April 1997 IEP, the IHO [erroneously] assessed [the district's] ability to replicate the [parents' privately obtained services"]). Accordingly, this portion of the IHO's decision is reversed.

6. Special Factors—FBA and BIP

The parents cross-appeal the IHO's determinations that it was appropriate for the February 2013 CSE to rely upon an FBA and BIP conducted by MCC and that the FBA and BIP developed

[13] The evidence in the hearing record suggests that the district may not have provided the student with some of these speech-language therapy services (Tr. pp. 379-80). Therefore, the district shall be ordered to provide the costs of the student's pendency placement through the date of this decision.

by the CSE addressed the student's behavior needs. A review of the hearing record reveals no error in the IHO's disposition of these issues.

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., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. 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]). 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]).

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]).

First, the hearing record supports the IHO's determination that it was permissible for the CSE to utilize an FBA and BIP conducted by MCC to develop its own version of those documents (see IHO Decision at p. 17). At the time of the February 2013 CSE meeting, the student attended MCC (see, e.g., Tr. p. 75; Parent Ex. C at p. 30). Therefore, to the extent the February 2013 CSE deemed it necessary to conduct an FBA and/or develop a BIP at or near the time of the CSE meeting, it would have been prudent to observe the student in his classroom setting at MCC (see 8 NYCRR 200.22[a][2], [3] [an FBA "shall, as appropriate, be based on . . . information obtained

from direct observation of the student" and "shall provide a baseline of the student's problem behaviors . . . across activities, settings, people and times of the day"]). Therefore, the IHO did not err by endorsing the district's reliance upon an FBA and BIP generated by MCC.

Second, regarding the parents' substantive challenge to the validity of the FBA and BIP, a review of these documents in conjunction with the supports in the February 2013 IEP reveals that they appropriately addressed the student's behavior needs. The February 2013 IEP indicated that the student "currently ha[d] a behavior plan" at MCC and described three behaviors that the plan addressed: (1) flopping; (2) aggression; and (3) physical stereotypy (Parent Ex. C at p. 3). The IEP described these behaviors in detail as well as the "expected behavior changes" contemplated by the behavior plan (id.). The IEP also addressed the student's behavior needs by prescribing "hand over hand facilitation for skills and inappropriate behaviors" (id.). The CSE also recommended 1:1 paraprofessional services on the IEP to provide support for the student's behavior needs (id. at p. 20).

In addition to the supports and services identified in the IEP, the February 2013 CSE developed an FBA and BIP (see Parent Ex. C at pp. 25-30; see also Tr. pp. 71-73). On appeal, the parents summarily allege that the district's FBA and BIP were "inadequate and defective versions" of those generated by MCC (Ans. & Cross-Appeal at p. 8). However, the parents provide no specific examples in support of this contention. A review of these documents reveals that the FBA and BIP comply with the aforementioned requirements imposed by State regulations except insofar as the FBA indicated that the frequency, duration, and intensity of the student's interfering behaviors "varie[d]" (Parent Ex. C at p. 25). This description falls short of the standard set forth in State regulations (see 8 NYCRR 200.22[a][3] ["[t]he FBA shall provide a baseline of the student's problem behaviors with regard to frequency, duration, intensity and/or latency . . ."]). Nevertheless, the hearing record does not support a finding that this shortcoming rose to the level of a denial of FAPE given the overall description of the student's behavioral needs and the recommended supports and services in the February 2013 IEP. Therefore, this portion of the parents' cross-appeal is dismissed.

C. Assigned Public School Site

On appeal, the district argues that the IHO erred by finding that the February 2013 CSE failed to convene a "placement meeting" to discuss the particulars of how the February 2013 IEP would be implemented.[14] The district further objects to the IHO's finding that the district's failure to submit evidence as to this issue constituted a "default."

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L., 2012 WL 4017822, at *13, aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's

[14] The district contends that the IHO's finding pertaining to the district's alleged failure to explain how a 6:1+1 classroom placement and 1:1 paraprofessional services would be implemented cannot be considered on appeal as it was not in contained in her due process complaint notice. However, given the discussion set forth above, it is not necessary to address this contention.

delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, 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, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553, 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; see also Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420).

Moreover, while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191–92 [district may select a specific public school site without the advice of the parents]; F.L, 2012 WL 4891748, at *11 [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]).[15] Given this authority, there is no basis in the IDEA, Education Law, or case law to require a district to convene a post-CSE meeting devoted to the suitability of an assigned public school site. The IHO's findings to the contrary are, therefore, without merit.

As to the IHO's contention that the district was obligated to introduce evidence regarding the assigned public school site's ability to implement the IEP, for the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), this was in error. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. F; I), the district was not obligated to present evidence as to how it would have implemented the February 2013 IEP (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014

[15] However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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 R.E. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F., 746 F.3d at 79; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

D. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]).

There is no reason to disturb the IHO's determination that the parents cooperated with the district. The district's argument that the parents did not intend to enroll the student in a public school placement is unavailing, as parents' "pursuit of a private placement [i]s not a basis for denying the[m] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]).

E. Other Relief

The district additionally posits that the IHO's order pertaining to special education transportation is "superfluous" in light of the district's dutiful transportation of the student to MCC since 2011 (Pet. at p. 3, n. 3). Given the fact that the parents requested transportation as a remedy in their due process complaint notice and that the district does not dispute its obligation to provide transportation to the student, the IHO did not err by ordering this relief (see Parent Ex. A at p. 15).

Finally, the parents interpose a cross-appeal challenging the portion of the IHO's decision ordering the district to provide speech-language therapy and OT via a named provider (see IHO Decision at p. 32). The parents correctly argue that the IHO's decision should be read so as to include an appropriate provider selected by the district, and not the particular provider identified

by the IHO. Indeed, the district appears to concede that this is an appropriate remedy under the circumstances of this case.[16] Therefore, this portion of the parents' cross-appeal is sustained.

VII. Conclusion

A review of the hearing record supports the IHO's ultimate determination that the district failed to offer the student a FAPE for the 2013-14 school year based upon its failure to demonstrate that the student did not require 1:1 instruction as well as its failure to offer parent counseling and training. The IHO's additional bases for finding a denial of FAPE, however, are not supported by the evidence in the hearing record. Further, the district did not appeal the IHO's finding that the unilateral placement was appropriate and a review of the hearing record shows that the IHO correctly determined that equitable considerations weigh in favor of the parents' requested relief.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, to the extent it has not already done so, the district shall provide the student with the services to which he is entitled pursuant to pendency;

IT IS FURTHER ORDERED that, at the next annual review regarding the student's special education programming, the district shall consider: (1) whether it is appropriate to include parent counseling and training on the student's IEP; and (2) whether the student requires 1:1 instruction as opposed to 1:1 paraprofessional support in order to receive educational benefit. After considering both of these issues, the district shall provide the parents with prior written notice consistent with the body of this decision; and

IT IS FURTHER ORDERED that the IHO's decision dated February 3, 2014 is hereby modified in accordance with the above decision. In particular, the IHO's decision is modified to the extent that the district shall be ordered to provide "speech and OT" services through selection of an appropriate provider.

Dated: **Albany, New York**
December 12, 2014

DANIEL W. MORTON-BENTLEY
STATE REVIEW OFFICER

[16] The district also argues that the student should not be "award[ed]" extended day services (see Answer to Cross-Appeal at p. 3). However, the district only appealed the IHO's finding that the CSE's failure to consider extended day services resulted in a denial of FAPE, not the IHO's award of these services (see Pet. at p. 18). Accordingly, the IHO's finding in this respect is final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).