The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-118

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the McCarton School (McCarton).[1] The parents cross-appeal to seek clarification of the IHO's ordered relief. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school

[1] The student also attended and/or received related services through the Children's Academy (see, e.g., Tr. pp. 178-79, 332, 356-57; Dist. Ex. 3 at p. 1). This entity appears to be closely affiliated with McCarton (see, e.g., Tr. pp. 73-76, 535) and, as such, I find no basis in the hearing record to distinguish between the two for purposes of the parents' requests for relief; accordingly, both entities shall be referred to as "McCarton" in this appeal.

psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

With regard to the student's background, the hearing record reflects that the student received special education and related services through the Early Intervention Program (EIP) and, subsequently through the Committee on Preschool Special Education (CPSE) (Dist. Ex. 4 at p. 1). For the 2011-12 school year, the student attended a 12:1+2 special education preschool class and

received the following related services on a weekly basis: one thirty-minute session of individual speech-language therapy; one thirty-minute session of group speech-language therapy; two 45-minute sessions of individual speech-language therapy at a pediatric therapeutic facility; and two 150-minute special education itinerant teacher (SEIT) sessions in the student's home utilizing applied behavioral analysis (ABA) instruction (id.). It appears that the student continued in this setting for the beginning of the 2012-13 school year (see Tr. p. 492; Dist. Exs. 3 at p. 1; 4 at p. 1; 12 at p. 1).

The parents removed the student from the special education preschool class in the middle of the 2012-13 school year and, on January 3, 2013, the student began attending McCarton (Parent Ex. N at p. 1; see Tr. p. 492).

On March 14, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Parent Ex. E at pp. 1, 9).[2] Attendees at the March 2013 CSE meeting included a district school psychologist, who also served as the district representative, the parents, a parent consultant, and, by telephone, the student's speech-language pathologist, occupational therapist, and ABA provider (id. at p. 11). Finding the student eligible for special education as a student with autism, the March 2013 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school (id. at pp. 1, 6, 8).[3] The March 2013 CSE also recommended related services in the following durations on a weekly basis: five 30-minute sessions of individual OT; four 30-minute sessions of individual physical therapy (PT); and five 30-minute sessions of individual speech-language therapy (id. at p. 6). The March 2013 CSE further recommended supports for the student's management needs, such as reduced environmental distractions, a programmatic and consistently implemented sensory diet, and visual/verbal cues and prompts (id. at p. 2). The CSE also developed 12 annual goals to address the student's behavioral, academic, speech-language, social/emotional, and fine/gross motor needs (id. at pp. 3-5).

In a final notice of recommendation (FNR) dated May 24, 2013, the district summarized the 6:1+1 special class placement and related services recommended in the March 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (Parent Ex. F).

In a letter to the district dated June 14, 2013, the parents rejected the March 2013 IEP and outlined deficiencies with a public school location visited by the parents (Parent Ex. G at pp. 1-2). It appears that the assigned public school site identified in the May 2013 FNR was under construction during the summer of 2013 (Parent Ex. G at p. 2; see Tr. pp. 311-12, 520-21). Therefore, according to the parents, the district directed them to visit another school that "use[d] the same methods and approaches [as] the school [slated to] open in September" (Parent Ex. G at p. 2). With respect to the IEP, the parent's notice stated that it: did not provide sufficient 1:1 "teaching intervention"; included related service levels were "[i]nsufficient"; failed to offer individualized parent counseling and training; offered behavioral interventions and support that

[2] The evidence in the hearing record consists of two copies of this IEP (Dist. Ex. 1; Parent Ex. E; see Tr. pp. 96, 128). References in this decision to the March 2013 IEP shall cite to the parents' exhibit.

[3] 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]).

were "[i]nappropriate and insufficient"; promoted "undue dependence"; and failed to "genuinely promote [the student's] independence" (Parent Ex. G at p. 1). With respect to the visited public school site, the parents detailed their observation of a classroom (id.). According to the parents, this classroom was inappropriate for the student, because: it did not offer sufficient 1:1 support; it was too large for the student as compared to his current placement; the functional levels of the students in the classroom were "very different"; and ABA was "not part of the . . . curriculum" (id. at pp. 1-2). The parents indicated their intent to seek from the district the cost of the student's tuition at McCarton for the 2013-14 school year, as well as the costs of transportation and specified school and home-based related services and supports (id. at p. 2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated August 9, 2013, the parents alleged that the district failed to offer the student a FAPE for the 2013-14 school year, that McCarton, along with the related services obtained by the parents, constituted an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' sought relief (Parent Ex. D at pp. 1-14).[4]

With respect to the process by which the March 2013 IEP was developed, the parents argued that: the March 2013 CSE was improperly composed; none of the student's related service providers attended the meeting; the parents were not afforded an opportunity to participate in the meeting; and the CSE predetermined its recommendations (Parent Ex. D at pp. 5-7, 10). The parents also contended that the March 2013 CSE did not offer any educational program to the student for July and August of 2013 (id. at p. 3).

As for the March 2013 IEP, the parents contended that it was not appropriate because it failed to: offer individualized parent counseling and training; address the student's need for 1:1 instruction; address the student's sensory needs; offer appropriate levels of related services; promote generalization; address the student's need for self-sufficiency; and prescribe ABA instruction (Parent Ex. D at pp. 3, 5-8). The parents also challenged myriad aspects of the IEP's annual goals, contending that they: did not address all areas of the student's disability; were developed without the participation of the parents; did not address the student's behavior, transition, and generalization needs; could not be implemented in a classroom setting (i.e. not a 1:1 environment); were devoid of objective methods of measurement; and were not based on the IEP's description of the student's present levels of performance (id. at pp. 9-10). The parents further averred that the March 2012 CSE did not consider special factors; specifically, whether the student needed assistive technology or services or whether the student's behaviors impeded his learning (id. at pp. 4, 8). Accordingly, the parents contended that the March 2013 CSE should have developed a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) for the student (id. at p. 4).

As for the assigned public school site, the parents argued that it could not implement the March 2013 IEP (including its annual goals), the parents were not included in the selection of the

[4] The parents' amended due process complaint notice enumerates a large number of claims, many of which overlap (see Parent Ex. D at pp. 1-14). The IHO failed to address many of these claims (see IHO Decision at pp. 16-23); however; neither party is requesting that this matter be remanded to the IHO. Therefore, only those allegations which the IHO addressed and/or of which the parents seek review are set forth and discussed in this decision.

school site, and the school was improperly selected by a district administrator (Parent Ex. D at pp. 11-12). The parents further argued that the school was unsafe, improperly utilized a time-out room, and employed improper functional/age grouping (id.). The parents also alleged that school employees were improperly trained and that the school could not provide ABA instruction that the student required (id.).

For relief, the parents sought the costs of the student's tuition at McCarton, as well as the costs of the following (1) five weekly sessions of 1:1 speech-language therapy; (2) two 45-minute sessions per week of "home and community based" speech-language therapy; (3) five weekly sessions of 1:1 OT; (4) two weekly session of 1:1 PT; (5) "1:1 [p]arent training and counseling"; (6) seven weekly hours of 1:1 ABA services; (7) two weekly hours of 1:1 ABA "supervision"; (8) "[c]onsultation/team addressings"; (9) five weekly hours of "home and community based SEIT services"; ; and (10) social skills training (id. at p. 13). Additionally, the parents requested "transportation on an air-conditioned minibus with limited time travel or other appropriate transportation costs" (id.). Finally, the parents sought compensatory additional services to the extent the student did not receive services pursuant to pendency (id. at p. 13).

B. Impartial Hearing Officer Decision

On July 30, 2013, an impartial hearing convened and concluded on January 16, 2014, after seven days of proceedings (Tr. pp. 1-692). In a decision dated June 25, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at pp. 16-23). The IHO proceeded to find that McCarton and the related services obtained by the parents constituted an appropriate unilateral placement for the student and that no equitable considerations served to diminish or preclude an award of direct payment and/or reimbursement to the parents (id. at pp. 23-27).

First, the IHO found that the district failed to offer the student an educational program for July or August of 2013 (IHO Decision at pp. 18-19). According to the IHO, given that the March 2013 IEP specified that it was to be implemented beginning in September 2012, the district provided no evidence at the impartial hearing regarding the student's program for July and August of 2013 (id. at p. 19). The IHO rejected the district's argument that a prior IEP developed by a CPSE governed these months, contending that "the [district] b[ore] ultimate responsibility for both the CSE and the CPSE" (id.).

Next, considering the March 2013 IEP, the IHO found that the process by which this IEP was developed was improper as the CSE lacked a regular education teacher and an additional parent member (IHO Decision at p. 20). Next, turning to the IEP, the IHO found that the March 2013 CSE provided "no documentation" in support of its recommendation that the student receive related service sessions in 30-minute increments (id. at pp. 19-20). The IHO further faulted the district for failing to "provide for the generalization of the skills learned at school to the home" (id. at p. 20). The IHO also found that the district's 6:1+1 placement recommendation was inappropriate because it failed to provide the student with a sufficient level of "attentive individualized support" (id. at p. 21; see id. at p. 20). The IHO additionally found that the IEP did not provide sufficient "sensory supports and accommodations" for the student (id.; see id. at pp. 21-22). Finally, the IHO found that the March 2013 IEP did not make "provision . . . for required parent counseling and training" (id. at p. 22).

As for the March 2013 CSE's consideration of special factors, the IHO found that the March 2013 CSE failed to conduct an FBA and develop a BIP or otherwise provide sufficient support to manage the student's interfering behaviors (IHO Decision at p. 21). The IHO first found that, based on the testimony of the district representative who served on the March 2013 CSE, the student exhibited interfering behaviors at the time of the CSE meeting (id.). Next, the IHO observed that the IEP explicitly "refer[red] to the [student's] need for the principles of behavioral analysis and behavior modification" (id.). Based upon these conclusions, the IHO found that the March 2013 CSE should have conducted an FBA and developed a BIP (id.). The IHO then concluded that the "cumulative effect" of the violations outlined above resulted in a denial of FAPE for the 2013-14 school year (id. at p. 22). The IHO elected not to issue findings as to the assigned public school site's ability to implement the March 2013 IEP, finding that "how well the program . . . could [have] be[en] implemented [was] a non-issue in [his] decision" (id.).

As for the appropriateness of the parents' unilateral placement, the IHO found that McCarton, with the various school and home-based related services, was an appropriate placement for the student that provided specially designed instruction to meet his needs (IHO Decision at pp. 24-26). The IHO referred to testimony by McCarton provides who opined that the student's current services were necessary to meet his needs (id. at pp. 24-25). The IHO also cited testimony from several witnesses who opined that the student made academic and/or behavioral progress in this setting (id. at pp. 24, 25).

The IHO next considered whether equitable considerations supported the parents' requested relief (IHO Decision at pp. 26-27). The IHO found that the parents cooperated through the CSE process, providing consent, as well as timely notice of the student's removal from the public school (id. at p. 26). Therefore, the IHO ordered that the district reimburse and/or directly pay the costs of the student's tuition at McCarton for the 2013-14 school year (id. at p. 27). The IHO further ordered the district to provide, or compensate the parents for the following services: (1) five weekly sessions of 1:1 speech-language therapy; (2) two 45-minute sessions per week of "home and community based" speech-language therapy; (3) five weekly sessions of 1:1 OT; (4) "1:1 parent training and counseling"; (5) seven weekly hours of 1:1 ABA services; (6) two weekly hours of 1:1 ABA "supervision"; and (7) five weekly hours of "home and community based SEIT services" (id.). Additionally, the IHO ordered that the district provide "transportation on an air-conditioned mini-bus with limited time travel or other appropriate transportation costs" (id.). The IHO further ordered that the district provide "cab fare for each round-trip" the parents made from their home to McCarton in the amount of $24 per trip (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year. The district further contends that McCarton and the various related services received by the student did not constitute an appropriate unilateral placement.

First, the district contends that the IHO erred in determining that the March 2013 CSE was responsible for determining the student's program for July and August of 2013. The district further contends that the parents' challenges to the provision of FAPE during July and August 2013 were barred by res judicata. The district next argues that the March 2013 CSE was appropriately composed and that the IHO's findings to the contrary were in error. The district further avers that

the failure to include individualized parent counseling and training on the student's IEP did not rise to the level of a denial of FAPE. The district additionally contends that the student did not require an FBA or a BIP and that the March 2013 IEP addressed the student's behavior needs. With respect to the March 2013 IEP's placement recommendation, the district contends that a 6:1+1 special class was appropriate and would have provided "adequate 1:1 support" to the student. The district also posits that considerations regarding the assigned public school are speculative but that, in any event, the assigned public school site could have implemented the March 2013 IEP.

As for the parents' unilateral placement, the district contends that it was inappropriate to meet the student's needs. Specifically, the district avers that McCarton was too restrictive for the student and that the student was not functionally grouped when attending the Children's Academy. Moreover, the district argues that the student did not receive necessary related services at McCarton.

The district further objects to several portions of the IHO's ordered relief. First, the district argues that the IHO improperly awarded home-based services to the student, as these services focused on generalization of the student's skills and were not necessary for the student to receive educational benefit. Second, the district argues that the IHO improperly ordered the district to reimburse the parents for taxi fare because the parents refused the bus service offered by the district for the 2013-14 school year. Third, the district contends that the IHO's award of 1:1 parent counseling and training was "vague and overbroad."

In an answer, the parents deny the district's material assertions and argue that the IHO's decision should be upheld in its entirety. The parents additionally raise several claims contained in their due process complaint but unaddressed by the IHO as additional bases for a finding that the district failed to offer a FAPE. Specifically, the parents argue that: (1) the parents were not permitted to meaningfully participate in the March 2013 CSE meeting insofar as the district predetermined its recommendations; (2) the student required ABA instruction to receive educational benefit; (3) the March 2013 IEP's annual goals could not be implemented in a 6:1+1 classroom environment; and (4) the March 2013 IEP did not identify the student's assistive technology needs. The parents also contend that the IHO erred by failing to consider the assigned public school site's ability to implement the March 2013 IEP.

The parents also interpose a cross-appeal to seek "clarification" of the IHO's ordered relief of "7 hours per week of 1:1 ABA therapy." The parents seek to confirm that this award "refer[s] to . . . after-school ABA" services the student received at home. In an answer to the parents' cross-appeal, the district asserts that this portion of the IHO's ordered relief, as evidenced by the parents' request for clarification, is vague and should be annulled. Even assuming for purposes of argument that this portion of the IHO's award pertained to home-based services, the district reiterates its position that home-based services were an inappropriate remedy under the facts of this case.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. 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. Summer 2013

At the outset, I will address the district's contention that the IHO improperly issued findings regarding the provision of FAPE to the student during July and August 2013. Upon review of the

hearing record, I agree with the parents that the district failed to sustain its burden that it offered the student a FAPE for July and August of 2013.

The New York State Education Law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school . . ." (Educ. Law § 4410[1][i]).[5] Therefore, the district is correct in arguing that the student would have been eligible for special education and related services through the CPSE during July and August of 2013. The district made this argument at the impartial hearing, further asserting that a prior IEP offered the student services during July and August of 2013 (see Tr. p. 161). Thus while it is theoretically possible that the district offered the student a FAPE for the summer 2013; however, it is not clear what any CPSE IEP covering services for summer 2013 prescribed as the district failed to introduce it into evidence at the impartial hearing. The only evidence in the hearing record relating to this prior IEP are references contained within a July 2, 2013 IHO decision in a previous due process proceeding relative to the student's 2012-13 school year (see Parent Ex. C at pp. 3, 11). This July 2013 IHO decision references a June 2012 IEP, but is silent as to whether this IEP found the student eligible for services on a twelve-month basis (id. at p. 3).[6] Similarly unhelpful in this regard is the portion of the July 2013 IHO decision that ordered relief through "the end of the 2012-2013 school year" (id. at p. 11). While the district is correct that, in accordance with the Education Law, a CPSE was responsible for developing a program for July and August of 2013, I will not simply presume that it did so here, especially where the parents filed a due process complaint notice alleging otherwise.

I need not reach the district's argument that res judicata barred a discussion of this issue at the impartial hearing because the district did not produce sufficient evidence to demonstrate, in fact, that this matter was previously adjudicated (see Assoc. Industries of N.Y. State, Inc. v. U.S. Dept. of Labor, 487 F.2d 342, 350 [2d Cir. 1973] ["[o]nly what is adjudicated can be res judicata"]; see also Venes v.Community School Bd. of Dist. 26, 43 N.Y.2d 520, 525, 373 N.E.2d 987, 989 [N.Y. 1978]).[7] Therefore, I agree with the IHO that the district failed to establish that it offered the student a FAPE for July and August of 2013.

For the reasons detailed above, it is unclear whether or not the district has already been deemed responsible for the student's tuition at the unilateral placement for the summer of 2013 pursuant either to the decision of the IHO in the previous proceeding relative to the 2012-13 school year or pursuant to a pendency placement. Thus, to the extent it has not already done so, the district is required to pay for the costs of the student's tuition at McCarton and for the services received during that time frame, in the frequencies and durations identified in the IHO's decision relative to the 2012-13 school year (see Parent Ex. C at p. 11; see also Second Interim IHO Decision).

---

[5] The State Education Law further provides that students "over five and under twenty-one years of age who ha[ve] not received a high school diploma [are] entitled to attend the public schools maintained in the district in which such [students] reside[] without the payment of tuition" (Educ. Law § 3202[1]).

[6] In this prior proceeding, the district conceded that it did not offer the student a FAPE for the 2012-13 school year (Parent Ex. C at p. 8).

[7] Federal courts within the Second Circuit have applied res judicata in the IDEA context (see K.B. v. Pearl River Union Free School Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [citing cases]). However, given the district's evidentiary shortcomings in this respect, I need not reach this issue.

B. CSE Process

1. March 2013 CSE Composition

The IHO found that the March 2013 CSE was improperly composed because it lacked a regular education teacher and an additional parent member. A review of the hearing record reveals, as the district contends, that the IHO's findings were improper.

First, as to the regular education teacher, the IDEA and State law require a CSE to include, among others, not less than one regular education teacher of the student if the student is, or may be, participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; Educ. Law § 4402 [1][b][1][a][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]). The parent correctly argues that the March 2013 IEP indicates that the CSE considered and rejected a placement for the student in a general education environment (Parent Ex. E at p. 10). However, at no time in this proceeding has either party seriously suggested that the student was or should have been participating in a general education environment. This conclusion is supported by the evaluative information in the hearing record (see, e.g., Dist. Exs. 3-6, 12). Therefore, the March 2013 CSE was not required to include a regular education teacher because the evidence does not support the conclusion that there was a reasonable likelihood that the student would have participated in a general education setting (20 U.S.C. § 1414[d][1][B][ii]; Educ. Law § 4402; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see J.G. v. Kiryas Joel U.F.S.D., 777 F. Supp. 2d 606, 644-45 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 365-66 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *5-*6). .

Second, effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, the student, or another member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][b]; 8 NYCRR 200.3[a][1][viii]). In this instance, the parents do not allege and the hearing record does not show that any person requested the attendance of an additional parent member at the CSE meeting. Therefore, one was not required there was no error in the composition of the March 2013 CSE.

2. Parent Participation/Predetermination

Turning to the parents claims regarding their opportunity to participate in the March 2013 CSE and the district's predetermination of the student's placement, 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]).

A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp.

2d 283, 294 [S.D.N.Y. 2009], aff'd, 366 Fed. App'x 239, 2010 WL 565659 [2d Cir. Feb. 18, 2010]). In addition, district personnel are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]). Districts may also "prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (Dirocco, 2013 WL 25959, at *18).

A review of the evidence in the hearing record reveals that the parents were afforded an opportunity to participate in the March 2013 CSE meeting. Prior to the CSE meeting, the parents submitted reports generated by McCarton to the district for the CSE's review (Tr. p. 496). After doing so, the parents met with the district representative who served on the March 2013 CSE on at least two occasions prior to the CSE meeting to "discuss all the reports" (id.; see Tr. pp. 495-96, 548-49). Both parents attended the March 2013 CSE meeting and testified that they were given the "opportunity to voice concern[s] about anything [the CSE] w[as] discussing" and to provide input (Tr. p. 551; see Tr. pp. 550-52). The March 2013 IEP reflects this input (see Dist. Ex. 1 at pp. 2, 9). Further, the hearing record indicates that the McCarton employees and providers who participated in the March 2013 CSE were allowed to present information during the meeting (Tr. pp. 551-52). This evidence reveals that the parents were afforded a meaningful opportunity to participate in the March 2013 CSE.

Additionally, the parent alleges that the CSE predetermined its recommendations for the student insofar as it did not consider 1:1 paraprofessional services and offered related services in 30-minute sessions without consideration of the student's needs in this respect. Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language & Communc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). Given the evidence in the hearing record reflecting the parents' opportunity to participate in the March 2013 CSE meeting and voice their concerns and preferences, their claim of predetermination also fails. Moreover, the hearing record shows that the specific recommendations were the product of the exercise of reasonable judgment on the part of the CSE and were appropriate for the student, as further discussed below.

C. March 2013 IEP

1. Sensory Needs

On appeal, the district contends that the IHO erred in finding that the March 2013 IEP did not "provide[] for appropriate sensory supports and accommodations" (IHO Decision at p. 21). A review of the hearing record supports the district's contentions.

A November 2012 OT evaluation considered by the March 2013 CSE contains an assessment of the student's sensory needs (see Dist. Ex. 6). This evaluation found that the student

presented with "decreased core and shoulder girdle strength, as well as sensory processing and attentional difficulties" (id. at p. 19). A sensory profile conducted as part of this evaluation revealed vestibular and multisensory processing performance in the probable difference/more than others range, and auditory and oral sensory performance in the definite difference/more than others range (id. at p. 3). This evaluation recommended, among other things, implementation of "sensory diet activities" that would "assist [the student] in managing his behavior at home and school" (id. at p. 19). The evaluation also recommended that the student continue to receive individual OT services (id.).

The March 2013 IEP explicitly noted that the student "exhibited delays in the area[] of . . . sensory seeking" and "sensory processing" (Parent Ex. E at pp. 1, 2). Further, in accordance with the recommendation set forth in the November 2012 OT evaluation, the IEP recommended a "programmatic and consistently implemented sensory diet" to support the student's management needs (id. at p. 2). The March 2013 IEP also included a notation that the student benefitted from reduced environmental distractions as well as ongoing visual and verbal cues and prompts (id.; see Tr. pp. 191-92). The March 2013 IEP further provided related services—specifically, individual OT (five 30-minute sessions per week) and individual PT (four 30-minute sessions per week)—to address the student's sensory needs (Parent Ex. E at pp. 2, 6). Therefore, a review of the March 2013 IEP reveals that the CSE identified, and prescribed supports and related services to address, the student's sensory needs.

In reaching a contrary conclusion, the IHO used the services the sensory supports received at McCarton as a conceptual framework to assess the appropriateness of the services offered by the district (IHO Decision at pp. 21-22). This was an inappropriate means of analysis. In designing a student's educational programming, districts are not required to replicate the identical setting used in private schools (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]). Therefore, as discussed above, evidence demonstrates that the March 2013 CSE considered and addressed the student's sensory needs in the March 2013 IEP.

2. Annual Goals

On appeal, the parents contend that the annual goals contained in the March 2013 IEP could not be implemented in a 6:1+1 special class configuration "without any 1:1 instruction or support." This argument is without merit.

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

The March 2013 IEP contains 12 annual goals that target the student's behavioral, academic, speech-language, social/emotional, and fine/gross motor needs (Parent Ex. E at pp. 3-

5). Although one of the annual goals indicates, in part, that the student "will improve academic readiness skills by exhibiting 1:1," a review of the annual goals, as a whole, does not indicate that they are idiomatic to 1:1 instruction (id. at p. 3; see id. at pp. 3-5). Moreover, many of the annual goals—including the student's speech-language and OT goals—would be implemented in 1:1 related services sessions (see id. at pp. 3-5, 6). Therefore, although one annual goal contains a singular "1:1" reference, there is no indication that the district could not have implemented the IEP's annual goals in a 6:1+1 special class and/or in 1:1 related service sessions (id. at pp. 3-5).

3. ABA Methodology

Next, the parents contend that the student could only receive educational benefit from instruction utilizing ABA methodology. 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; A.S. v. New York City Dep't of Educ., 2014 WL 3715461, at *2 [2d Cir. July 29, 2014]; M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; see K.L. v New York City Dep't of Educ., 2012 WL 4017822, at *12 [S.D.N.Y. Aug. 23, 2012], [noting that it is "well established that once an IEP satisfies the requirements of the [IDEA], questions of educational methodology may be left to the state to resolve"], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]). 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., 2014 WL 3715461, at *2 [finding that it could not "be said that [the student] could only progress in an ABA program"]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *11 [S.D.N.Y. Sept. 27, 2013] [deferring "to the SRO's finding that there [wa]s no evidence in the record that DIR/Floortime was the only methodology from which [the student] could have received an educational benefit . . ."]).

It appears that the March 2013 IEP, in fact, recommended instruction utilizing the principles of ABA (Parent Ex. E at p. 2). To the extent that the parents argue that the IEP should have exclusively recommended ABA instruction, a review of the hearing record does not support the conclusion that the student could only achieve educational benefit from ABA instruction. The student was five years old and had been enrolled at McCarton for less than two and one-half months at the time of the March 2013 CSE meeting (Parent Exs. E at p. 1; N at p. 1; see Tr. p. 492). While the student's providers at McCarton testified at the impartial hearing that the student received only ABA therapy, these providers did not assess the student's strengths and weaknesses while receiving instruction incorporating other teaching methodologies (see Tr. p. 349, 468-69).[8] Moreover, although the hearing record is clear that the parents inquired as to the availability of ABA instruction when she visited a public school in the district after the March 2013 CSE meeting, it is unclear whether the parents mentioned their interest in exclusive ABA instruction at the March 2013 CSE meeting (see Tr. pp. 521-22, 524, 592-94).

[8] Similarly, a November 2012 McCarton comprehensive evaluation considered by the March 2013 CSE recommended home-based ABA instruction but did not explain why other methodologies would be inappropriate for the student (Dist. Ex. 4 at p. 10).

Therefore, given the student's young age, limited time enrolled at McCarton, the McCarton providers' exclusive focus on the necessity of ABA services, and the ambiguous evidence in the hearing record as to whether the parents expressed their interest in the sole use of ABA instruction at the March 2013 CSE meeting, I find that the March 2013 CSE appropriately declined to limit the student's educational instruction to an exclusive regimen of ABA methodology on the student's IEP.

4. Special Factors—Interfering Behaviors and Assistive Technology

Next, the district contends that the IHO erred by finding that the March 2013 CSE was obligated to conduct an FBA and develop a BIP. The parents further appeal the IHO's decision insofar as he failed to address the parents' claim that the March 2013 CSE did not consider whether the student required assistive technology devices or services. 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 and shall consider whether the child needs assistive technology devices and services (20 U.S.C. § 1414[d][3][B][i], [v]; 34 CFR 300.324[a][2][i], [v]; see 8 NYCRR 200.4[d][3][i], [v]; 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., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3], [6]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *13-*16 [E.D.N.Y. Mar. 31, 2014]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

I first turn to the district's assertion that the IHO erred by finding that the March 2013 CSE should have conducted an FBA and developed a BIP for the student. In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, the "student's need for a [BIP] must be documented in the IEP" (id.). 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]).

In the present case, the hearing record supports the district's contention that the student did not require an FBA or a BIP at the time of the March 2013 CSE meeting, that the CSE properly

considered special factors related to the student's behavior that impeded his learning, and that the March 2013 IEP appropriately addressed the student's behavioral needs.

Although the information reviewed by the March 2013 CSE indicated that the student demonstrated interfering behaviors within a 12:1+2 classroom, it did not indicate that, at the time of the meeting, the student presented with interfering behaviors that necessitated an FBA or a BIP. An October 2012 school/classroom observation of the student in his preschool 12:1+2 special class indicated that the student engaged in a significant amount of non-compliant and off-task behaviors (Dist. Ex. 12 at pp. 1-3). However, the observer noted that the student responded well to individualized support, redirection, and a range of prompts to complete activities and participate in the classroom routines (id. at p. 3).

A November 2012 McCarton OT evaluation report described the student as a happy, playful, energetic participant who actively engaged in many of the activities presented and required some assistance and reinforcements in order to engage in the evaluation (Dist. Ex. 6 at p. 1). A November 2012 McCarton "comprehensive" evaluation described the student's behavior during testing, indicating that the student held and sucked on a lollipop and remained seated with his feet on the floor, with little shifting of his position and only one break after an hour of testing (Dist. Ex. 4 at pp. 3-4). The student presented as good natured, content, pleasant, and cooperative through the McCarton comprehensive evaluation session (id. at p. 4). The evaluation further indicated that the student: responded well to structure, clear limits, and animated praise; followed test directions; was goal directed; and showed good persistence (id.). The evaluator further reported that the student was sensory seeking, as evidenced by his pressing material against his face, leaning his body back against the wall, and putting his head down on the testing table (id.).

A December 2012 McCarton comprehensive speech-language evaluation indicated that the student did not exhibit any unmanageable behaviors during a two-hour assessment (Dist. Ex. 5 at p. 2). At the start of the evaluation, the student was able to transition from the waiting room to the testing room with no difficulty (id.). The evaluator reported that the student presented with minimal to fleeting eye contact, was able to respond appropriately to questions, demonstrated a great deal of interest in the toys in the room, and verbally requested toys within his visual field (id.). The December 2012 evaluation further reported that during structured activities/testing, regular breaks and reinforcers were needed to sustain the student's motivation and attention (id.). Further, the evaluator indicated that, when the student was given a lollipop to hold while he worked at the same time, his attention span improved and the sensory stimulating behaviors reduced (id.).

The parents testified that the student exhibited interfering behaviors in the preschool 12:1+2 special class setting and theorized that these difficulties arose as a result of the preschool's failure to address the student's sensory needs (Tr. pp. 557, 558). The parents further testified that the amount of students in the preschool classroom, the noise level, and the presence of other children who exhibited interfering behaviors contributed to the student's difficulties in this setting (Tr. p 557). The parents also testified that, at the time of the March 2013 CSE meeting, the behaviors the student engaged in at the preschool were reduced or "trending" toward a more appropriate direction (Tr. p. 555).

The district representative concurred with the parents in this regard, opining that the student could be successful in a classroom setting if he was provided with appropriate sensory supports

and strategies (Tr. pp. 200-01).[9] The district representative explained that the March 2013 CSE considered the student's sensory seeking tendencies and designed supports to meet these needs (Tr. pp. 297-98). These sensory supports were, according to the district representative, designed to serve a preemptive function, ensuring that the student "w[ould] . . . be engaged and continue to learn" and, thus, not engage in interfering behaviors (Tr. p. 298). The district representative further explained that this motivated the March 2013 CSE's recommendation for "principles of behavioral analysis and behavior modification" to support the student's management needs (id.).

The March 2013 IEP offered additional strategies to address the student's behavior needs (see Parent Ex. E at pp. 1-2). For example, the IEP indicated that the student benefitted from praise, positive reinforcement, redirection, repetition, visual and verbal prompts, and a programmatic and consistently implemented sensory diet (id.). The IEP also reflected the student's need for support in the social/emotional realm, indicating that the student required cues to play appropriately and safely, repetition and reminders, and routines/predictability (id. at p. 1). The IEP further identified areas of concern to the parent; namely, that the student could become overwhelmed, anxious, and fearful when subjected to large settings, loud sounds, or unstructured settings (id. at p. 2). The IEP further indicated that large setting, loud sounds, and unstructured settings were believed to be the antecedents that prompted "melt-downs and tantrums" (id.). The parent testified at the impartial hearing that she agreed with the student's present levels of performance as described in the IEP, including its description of the student's behaviors (Tr. pp. 551-54; Parent Ex. E at pp. 1-2).[10]

Therefore, an independent review of the hearing record reflects that the March 2013 IEP accurately described the student's behaviors at the time of the meeting (see Dist. Exs. 4-6; Parent Ex. E at pp. 1-2). Further, notwithstanding the lack of a formal FBA or BIP, the March 2013 IEP included sufficient information and services to address student's behavior needs, and therefore, even assuming that there was a procedural deficiency with regard to the student's behavior, it did not result in a substantive denial of a FAPE in this instance (Parent Ex. E at pp. 1-2).

Next, the parents contend that the March 2013 CSE erred by not considering whether the student needed assistive technology devices or services. This argument is presented on appeal in summary fashion and the parents have not taken care to identify the specific nature of this claim (see Ans. & Cross-Appeal at p. 14). Testimony adduced at the impartial hearing indicates that the student utilized an iPad at the time of the impartial hearing (see Tr. pp. 250, 347, 435-36, 509). However, it does not appear that the student required an iPad in order to address his educational needs (see Tr. p. 347). Therefore, even if the March 2013 CSE did not discuss the student's use of an iPad, its failure to do so did not impede the student's right to a FAPE; significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or cause 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]).

[9] The extent to which the March 2013 IEP included supports and services to meet the student's sensory needs is discussed in detail above.

[10] A board certified behavior analyst (BCBA) employed by McCarton testified at the impartial hearing that McCarton did not develop a behavior plan for the student until July 2013 (Tr. pp. 339, 375). The hearing record does not contain a copy of this plan.

5. Parent Counseling and Training

The parents further argue that the March 2013 CSE failed to prescribe parent counseling and training services mandated by State regulations (8 NYCRR 200.13[d]; see 8 NYCRR 200.1[kk], 200.4[d][2][v][b][5]; see also 34 CFR 300.34[c][8]). The district concedes as much in its petition, but argues that this deficiency did not result in a denial of FAPE to the student. Upon review of the hearing record, I agree with the district. As noted by the Second Circuit Court of Appeals, the presence or absence of parent training and counseling in 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 also R.B. v. New York City Dept. of Educ., 2014 WL 1618383, at *7-*8 [S.D.N.Y. Mar. 26, 2014]; A.D. v. New York City Dept. of Educ., 2013 WL 1155570, at *11-*12 [S.D.N.Y. Mar. 19, 2013]). Thus, while failing to provide parent counseling and training in an IEP in this instance constituted a procedural violation of State regulations, and while in some cases it may contribute to a denial of a FAPE "particularly when aggregated with other violations", I find that there is no evidence in the hearing record indicating that the district's failure to include parent training and counseling in the IEP, by itself, resulted in a denial of a FAPE (R.E., 694 F.3d at 191).

Nevertheless, given the district's unexplained failure to provide parent counseling and training services, 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[a], [b]; 8 NYCRR 200.1[oo]; 200.5[a]).[11]

6. Length of Related Service Sessions

The district contends that the IHO erred by finding that the district offered "no justification" as to why it recommended the delivery of related services in 30-minute increments. The evidence in the hearing record supports the district's argument.

At the time of the March 2013 CSE meeting, the student received related service sessions in 45-minute increments at McCarton (Parent Ex. N at p. 1). Specifically, the student received five weekly 45-minute sessions of speech-language therapy and four weekly 45-minute sessions of OT (id.). The March 2013 IEP recommended five 30-minute sessions of individual speech-language therapy, five 30-minute sessions of individual OT, and four 30-minute sessions of individual PT (Parent Ex. E at p. 6). The IHO faulted the March 2013 CSE for not explaining why it deviated from the service duration offered to the student by McCarton. As explained above with regard to the student's sensory needs, districts are required to provide students with a FAPE, not

[11] This order shall supersede the IHO's award of parent counseling and training; therefore, I need not address the district's contention that the IHO's ordered relief in this respect was impermissibly vague.

to replicate the level of services used in private schools (Z.D., 2009 WL 1748794, at *6; Watson, 325 F. Supp. 2d at 145).

On appeal, the parents do not contend that the type of related services offered to the student were inappropriate, but only that they were insufficient in length and that this resulted in a denial of FAPE. The district representative indicated that the CSE recommended 30-minute sessions because the length of a class period in the district's elementary schools lasts 30-minutes (Tr. pp. 276-77). The test regarding a FAPE for a student is that the educational services are appropriate, not that they are perfect. While the student's providers at McCarton testified that 45-minute sessions were necessary for the student and clearly they wanted the student to receive more services, but these providers did not go so far as to opine that the student could not receive educational benefits from the 30-minute sessions (Tr. pp. 396-97; see Rowley, 458 U.S. at 206-07). Moreover, the March 2013 IEP offered different approach that instead emphasized more related services sessions overall when given the PT services offered to the student (Parent Ex. E at p. 6). After reviewing the evidence I find, that these were legitimate educational options in which reasonable minds could differ and that the March 2013 CSE overall prescribed related services to meet the student's areas of need and, further, that there is no basis in the hearing record to conclude that the student could not receive a FAPE with 30-minute related service sessions.

7. 6:1+1 Special Class

Turning to the March 2013 IEP's placement recommendation, the district argues that the IHO erred in finding that the March 2013 IEP's provision of a 6:1+1 special class setting with related services was inappropriate to address the student's educational needs and would have provided the student with inadequate 1:1 support. The evidence in the hearing record indicates, as the district argues, that the March 2013 CSE recommended an appropriate placement that was reasonably calculated to provide educational benefit to the student.

The parties' familiarity with the facts in the hearing record is presumed, including the evaluative information that was before the March 2013 CSE (see Dist. Exs. 3-6, 12). Although the parents do not contest the March 2013 IEP's present levels of performance, the substantive content of its annual goals, or its strategies to address the student's management needs, a brief summary is provided below as relevant to the CSE's placement recommendation.

With regard to the student's social development, the March 2013 IEP indicated that the student was able to play comfortably alongside his peers with cues to play appropriately and safely, and that he occasionally showed interest in his peers by commenting on what they were doing or imitating their actions (Parent Ex. E at p. 1). Further, the IEP indicated that the student participated in teacher-directed cooperative games so long as received repetition and reminders to remain seated and keep his hands in his lap (id.). This information was consistent with information reported in a December 2012 McCarton speech-language evaluation, which indicated that the student's social skills were emerging as he introduced himself to other children (Dist. Ex. 5 at p. 1). The December 2012 speech and language evaluation further reported and that the student talked about the students from school at home, although he experienced difficulty participating in conversations with these students in the school environment (id. at pp. 1-2).

The portion of the March 2013 IEP devoted to addressing the student's management needs detailed some of the strategies and support that would be used with the student, such as reduced

environmental distractions and a programmatic and consistently implemented sensory diet (Parent Ex. E at p. 2). The district representative testified that he agreed with the parents at the CSE meeting that these strategies would be "important for [the student] in regulating his arousal level and focus" (Tr. p. 191; see Parent Ex. E at p. 2). The March 2013 IEP also indicated that the student required ongoing visual and verbal cues and prompts, praise and positive reinforcement, explicit instruction incorporating the principals of behavioral analysis and behavior modification, task analysis to break down all new skills into component skills/tasks, and reinforcement for successive approximations (Parent Ex. E at p. 2; see Tr. pp. 191- 92).

The district representative who served on the March 2013 CSE offered testimony explaining how the CSE arrived at its placement recommendation. The district representative testified that a 6:1+1 classroom was appropriate for the student because a large class in a community school would not provide sufficient individual support and there would be too much distraction, confusion, and stimulation (Tr. p. 225). The district representative further testified that a 6:1+1 special class setting would provide the student with opportunities to receive individualized support from a special education teacher and paraprofessional (Tr. p. 191). In arriving at its placement recommendation, a review of the evidence in the hearing record reveals that the March 2013 CSE considered and rejected placement in a general education setting with or without integrated co-teaching services, as well as placement in a 12:1+1 special class in a community school (Parent Ex. E at p. 9-10). According to the IEP, the March 2013 CSE rejected these placements because the student required instruction in a small, specialized setting to adequately meet his educational needs (id. at p. 10).

State regulations provide that the "maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]). The student's present levels of performance, as ascertained by the March 2013 CSE, reveal that the student's management needs in the areas of academics, language processing, social/emotional/behavioral functioning, and motor skills were sufficiently intensive to meet this regulatory standard (Parent Ex. E at pp. 1-2, 9). Further, in addition to the supports within a 6:1+1 classroom, the March 2013 CSE recommended a substantial amount of speech-language therapy, OT, and PT that comprised a large portion of the student's educational program (see id. at p. 6). Therefore, the information in the hearing record demonstrates that a 6:1+1 special class placement, together with related services and strategies to address the student's management needs, was reasonably calculated to provide educational benefit to the student.

The parents contend that a 6:1+1 special class placement would not provide the student with a sufficient amount of 1:1 support. It further appears that the parents desired the student to receive 1:1 support throughout the school day. At the outset, I note that the March 2013 IEP provided the student with 1:1 instruction for all of his related service sessions, which comprised seven hours total each week (see Parent Ex. E at p. 6). Second, although it appears that the student benefitted from 1:1 instruction, it does not appear that the student required 1:1 support at all times in order to benefit from instruction (see Parent Ex. E at pp. 1, 2). In making its recommendations, the March 2013 CSE struck a balance between the student's need for support and the benefit he would obtain in a classroom setting. (see Tr. pp. 190-91, 225-26). A review of the evidence in the hearing record indicates that this balance in form of a 6:1+1 classroom and 1:1 related services was appropriate under the circumstances (see Dist. Ex. 5 at pp. 1-2). Indeed, two of the reasons

the parents provided to the district as to why they rejected the March 2013 IEP were that it "[p]romote[d] undue dependence" and "[did] not genuinely promote [the student's] independence" (Parent Ex. G at p. 1). This valid concern of the parents would not be advanced by requiring 1:1 teacher or paraprofessional services for the student at all times during the school day. Accordingly, the hearing record supports the district's argument and the IHO's findings to the contrary must be reversed.

D. Assigned Public School

On appeal, the district contends that the IHO properly refused to consider the parents' claims regarding the assigned public school site's ability to implement the March 2013 IEP. The parents aver that the IHO erred in declining to issue findings on this issue and that the evidence demonstrates that the district would not have been able to implement the March 2013 IEP.

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. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; 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"]).

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, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]). 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]).[12] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the March 2013 IEP because a retrospective analysis of how the district would have implemented the student's March 2013 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the March 2013 IEP (see Parent Ex. G). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow a parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp.

[12] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]); see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). 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). The Second Circuit recently reiterated that 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., 746 F.3d at 79). 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., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the 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.

2d at 273). Accordingly, the parents cannot prevail on claims that the assigned public school site would not have properly implemented the March 2013 IEP.[13]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end and it is not necessary to reach the issue of whether McCarton, in combination with the Children's Center and other related services, constituted an appropriate unilateral placement for the student or whether equitable considerations support the parents' claim (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]; D.D-S., 2011 WL 3919040, at *13). I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

[13] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]; B.K., 2014 WL 1330891, at *20-*22; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 996 F.Supp.2d 269, 271-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B., 2013 WL 5438605, at *17; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; 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 [2d Cir Dec. 23, 2013]; A.D., 2013 WL 1155570, at *13; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012], rev'd on other grounds, 760 F.3d 211 [2d Cir. 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

IT IS ORDERED that the IHO's decision dated June 25, 2014 is modified by reversing those portions which ordered the district to pay for the cost of the student's tuition and accompanying services at McCarton from September 2013 to June 2014; and

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

IT IS FURTHER ORDERED that, to the extent it has not already done so, the district shall pay for the costs of the student's tuition and related services at McCarton received during July and August 2013 in the manner described in the body of this decision.

Dated: **Albany, New York**
October 3, 2014

_____
JUSTYN P. BATES
STATE REVIEW OFFICER