The University of the State of New York

The State Education Department
State Review Officer
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No. 17-097

Application of the BOARD OF EDUCATION OF THE MOUNT VERNON CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, LLP, attorneys for petitioner, by Thomas Scapoli, Esq.

Law Offices of Gerry McMahon, LLC, attorneys for respondent, by Danielle L. McGee, Esq.

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 was not capable of implementing the recommended educational program developed for the respondents' (the parents') son at its recommended placement and ordered it to fund the cost of their son's attendance at an out-of-district public school, for the 2016-17 school year. The parents cross-appeal from the IHO's determination that the district did not impede the parents' participation in the development of the student's program and placement; and from the IHO's failure to make a final pendency determination. The appeal must be sustained. 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 may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

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

III. Facts and Procedural History

The student received applied behavior analysis (ABA) "therapy" through the early intervention program, and was identified as a preschool student with a disability in January 2011 (Parent Ex. AA at p. 1; Dist. Ex. 9 at p. 1). Subsequently, the student attended an 8:1+2 special class where he received the related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Dist. Ex. 9 at p. 1). In 2013, the student was classified as a

student with autism[1] and attended a district 8:1+2 kindergarten class, with the related services of speech-language therapy, OT, home-based services, and parent training and counseling (Parent Ex. A at p. 1; Dist. Exs. 9 at p. 1; 13 at p. 1; see Parent Exs. W at p.; V at p. 1). For first and second grade, a district CSE recommended that the student be placed in an 8:1+2 special class at another public school district and receive the related services of speech-language therapy and OT, as well as a social skills group with general education students (Dist. Ex. 9 at p. 1).

A CSE convened on May 5, 2016 for the student's annual review and to determine his eligibility and recommend a program and placement for the 2016-17 school year (third grade) (Tr. pp. 223-24; see Parent. Ex. ZZZ). The May 2016 CSE recommended 12-month services in a district 8:1+2 special class, with the related services of individual speech-language therapy twice per week, small group speech-language therapy once per week, individual OT twice per week, adapted physical education, a social skills group one time per six-day cycle, quarterly parent counseling and training in a small group, and testing accommodations (Dist. Ex. 14 at pp. 13, 14). In addition, the May 2016 CSE recommended that the student receive summer services in a district 8:1+2 special class, with speech-language therapy and OT (id. at p. 13).

The parent visited the assigned school and observed the proposed 8:1+2 special class on June 3, 2016 and on another occasion (Dist. Ex, 13 at p. 1; see also Tr. 232).[2] A CSE reconvened on June 24, 2016 to finalize the student's 2016-17 IEP and to review the recommended program originally proposed during the May 2016 CSE meeting (Tr. pp. 246-47; see Parent Ex. LL; compare Parent Ex. ZZZ at p. 12, with Dist. Ex. 14 at p. 13). During the June 24, 2016 CSE meeting, the parents shared an eight-page written statement detailing their objections and ultimate rejection of the CSE's recommended placement (see Dist. Exs. 1; 13). The student's mother read the written statement during the June 2016 CSE meeting and stated that based on her visit to the proposed classroom, the parents found there was "no substantial difference" between the proposed program and the student's last in-district (Mount Vernon) program, in which the student had failed to make progress (Dist. Ex. 14 at p. 1; see also Dist. Ex. 13 at p. 1). In addition, the parents asserted that the district's ABA program was not "sufficiently established," and further alleged that the student's "daily living" goals could not be met in the proposed in-district class, the assigned school did not have an established mainstream social skills group, and that the assigned school would deny the student the sensory breaks he required (Dist. Ex. 13 at pp. 1-5).

A. Due Process Complaint Notice

By due process complaint notice dated July 25, 2016, the parents alleged that the district denied the student a FAPE because its recommended placement could not implement the student's June 24, 2016 IEP (Dist. Ex. 1 at p. 3).[3] Specifically, the parents alleged that the recommended

[1] 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]).

[2] The parent later testified that the date of the classroom visit included in her statement to the June 24, 2016 CSE was not correct (compare Dist. Ex. 13 at p.1 with Tr. p. 732).

[3] The due process complaint notice incorporates by reference the parents' eight-page statement presented at the June 24, 2016 CSE meeting (Dist. Exs. 1 at p. 3; 13).

placement could not provide community outings, a mainstream social skills group, the appropriate amount of ABA instruction, and was not the least restrictive environment (LRE) for the student (id.). The parents also alleged that the district's recommended placement did not have a proven record of success and was not the student's home school (id). The parents further contended that they were prevented from doing their due diligence regarding the recommended program because their evaluator was not permitted to observe the recommended program and the district did not respond to a request for information about the program (id). As relief, the parents requested direct funding of the out-of-district public school the student had been attending since the 2014-15 school year (id. at p. 4). Additionally, the parents requested that an IHO order the district to comply with the parents' request for records, order that the student's pendency placement (stay put) was the out-of-district public school the student attended for the 2015-16 school year, and order compensatory educational services (id.).

B. Impartial Hearing Officer Decision

Following several prehearing conferences held between October 19, 2016 and May 11, 2017, the parties convened for an impartial hearing on May 15, 2017, which concluded on August 16, 2017, after seven days of proceedings (Tr. pp. 1-1042).

During the hearing, the IHO addressed the parents' July 2017 motion for clarification of the issues raised in the due process complaint notice (see IHO Ex. II), and determined, in an interim order dated July 27, 2017, that the parents' due process complaint notice did not raise the issue of "whether the [d]istrict failed to offer the [s]tudent an appropriate IEP and d[id] not allege deficits in the program or service recommendations on the IEP" (Interim IHO Decision at pp. 10-11). The IHO further found that the district did not "open the door" to this issue during the hearing and that the only issue properly in front of the IHO was "whether the [d]istrict could implement the [s]tudent's 2016-17 IEP at the recommended placement" (id. at p. 11).

By decision dated October 13, 2017, the IHO reiterated her ruling that the sole issue presented was whether the district could implement the June 2016 IEP at the recommended placement and then determined that the district public school was not capable of implementing the student's IEP (IHO Decision at pp. 5, 11-23). More specifically, the IHO found that the assigned school was not capable of implementing the student's daily living goals, providing an appropriate level of 1:1 and 2:1 instruction, providing a mainstream social skills group, or providing "the sensory supports, services and equipment the [s]tudent needs to meet his sensory needs" (id. at pp. 11-20). The IHO further found that the district did not "disabuse" the parents' concerns regarding mainstreaming for lunch, academics, and specials at the district public school site (id. at p. 19). In addition, the IHO determined the district public school was not able to provide the services and supports the student required, and as set forth in the IEP, because district staff were not experienced in implementing an ABA program and were not adequately trained in ABA (id. at pp. 20-23).

With regard to ABA programming, the IHO agreed with the parents' witness that the assigned school staff were not adequately trained to implement the district's ABA program independently (when the district's consultant was not present) and that overall, the district's placement was only able to provide extremely limited discrete trial instruction and as such would not address the student's need for discrete trial instruction (IHO Decision at pp. 16, 22).

Relative to the student's social needs, the IHO noted that the parents' concerns over the lack of an established social skills group were set forth in the comment section of the IEP, but were not otherwise addressed therein (IHO Decision at pp. 16-17). The IHO found there was insufficient evidence that the assigned school was able to provide support via a recommended mainstream social skills group and further that the assigned school did not have an adaptive skills program (IHO Decision at p. 17). The IHO also indicated that it was unclear whether the assigned school was able to provide sufficient adult support, and unclear whether the student would have access to typical peers (id. at pp. 18-19).

Concerning the parents' claim that their right to participate in the development of the student's program and placement was denied when their educational consultant was unable to observe the recommended placement at a particular time, the IHO determined that the district was not obligated to successfully schedule an observation of the recommended district public school site for the parents' consultant (IHO Decision at p. 24). The IHO then determined that the parents' record requests had been fulfilled by the district and were therefore moot (id. at p. 24). The IHO found that the parents' objections to the recommended placement were not based on "mere speculation" and therefore determined that the district had denied the student a FAPE (id. at p. 25). As relief, the IHO ordered the district to fund the student's cost of attendance at the out-of-district public school (id.).

IV. Appeal for State-Level Review

The district appeals alleging that its recommended placement was capable of implementing the student's June 2016 IEP. The district contends that the IHO (1) erred in determining that Mount Vernon could not implement the student's daily living skill goals, specifically asserting that the IHO misapplied the law by determining that generalization of a skill was a necessary component of a FAPE and ignored evidence that the school could have implemented the daily living skill goals in the classroom; (2) erred in determining that the school could not provide an appropriate level of 1:1 instruction, asserting that the June 2016 IEP did not state an amount of time the student would receive 1:1 instruction, the recommended program would have provided 1:1 instruction based on the student's need, and that the student's out-of-district program included group instruction; (3) erred in determining that the district public school could not provide a mainstream social skills group, asserting that the district informed the parents that the student would have received the services listed on the IEP; (4) erred in determining that the district public school could not provide the student with mainstream opportunities in accordance with the IEP, asserting that the IEP did not identify a specific level of support required in the mainstream setting; (5) erred in finding that the district public school could not meet the student's sensory needs, arguing that the IHO ignored evidence showing that sensory input could have been delivered in the classroom or OT room and that the teacher would have obtained any necessary equipment; (6) erred in determining that Mount Vernon staff could not implement the IEP, alleging that the IHO erroneously determined that the student required an ABA program and that the staff lacked experience and training to implement the program, ignored evidence that the student did not require a strict ABA program in order to make progress, and improperly established qualifications for a teacher, which exceeded the criteria set by the New York State Education Department (NYSED). In addition, the district asserts that to the extent that any of the services listed on the June IEP 2016 could not be implemented in the Mount Vernon school district, any such inability to implement did not rise to the level of a denial of FAPE.

In an answer with cross-appeal, the parents respond with admissions and denials and argue that the IHO's decision that Mount Vernon was not capable of implementing the June 2016 IEP should be upheld. The parents also argue that the district has improperly raised the defense, that any failure to implement did not rise to the level of a denial of a FAPE, for the first time in its request for review. The parents further cross-appeal the IHO's determination that the district was not obligated to schedule a visit to the recommended placement for their educational consultants. The parents also allege that the IHO failed to make a final determination regarding the student's program and placement during the pendency of the proceedings.

In an answer to the parents' cross-appeal, Mount Vernon responds to the allegations raised in the cross-appeal, argues that the IHO did not err by failing to issue a decision on pendency because the parents did not request an order on pendency in the due process complaint notice or during the hearing and contends that the IHO correctly determined that the district was not required to provide an opportunity for the parents' educational consultant to observe the recommended placement. With regard to the student's pendency placement, the district further argues that extended school day services are not a part of the last agreed upon IEP and were not requested in the parents' due process complaint notice. The district also argues that extended school day services were waived as part of the 2014-15 settlement agreement that resulted in the student's attendance at the out-of-district public school. The district included a copy of the settlement agreement in its answer to the cross-appeal.

In a reply to the district's answer to the parents' cross-appeal, the parents object to the district's disclosure of the 2014-15 settlement agreement alleging that the district has improperly violated a confidentiality provision. The parents also allege that an interim agreement allowed the provision of extended school day services during the 2016-17 school year; however, the dispute remains unresolved.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]).

The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[4]

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).

VI. Discussion

A. Preliminary Matters

1. Scope of Hearing

As noted above, in both an interim decision and her final decision, the IHO determined that the only issue properly raised in the due process complaint notice was "whether the [d]istrict could implement the [s]tudent's 2016-17 IEP at the recommended placement." Neither party has challenged the IHO's decision regarding the scope of the hearing. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, this determination will not be reviewed on appeal and the scope of the impartial hearing is limited to determining whether Mount Vernon was capable of implementing the June 2016 IEP at the assigned public school site.

2. Pendency

In their answer with cross-appeal, the parents allege that the IHO erred in failing to render a pendency determination. In its answer to the parents' cross-appeal, the district contends that the IHO correctly declined to issue a determination on pendency because it was not raised in the due process complaint notice or during the hearing. The district also provided a copy of the agreement which settled the parties' dispute for the 2014-15 school year. In a reply to the district's answer to

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

the cross-appeal, the parents allege that the settlement agreement is not relevant to the matter and that the district has improperly disclosed the agreement in violation of a confidentiality provision. After reviewing the settlement agreement executed in August 2014, I agree with the parents that the settlement agreement is not relevant to this proceeding. The agreement indicates that it is limited to the 2014-15 school year and does not constitute pendency for the purposes of future disputes (Answer to Cross-Appeal, Exhibit A at p. 3).

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises

when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

The district contends that the parents did not raise the issue of the student's pendency placement in their due process complaint notice or during the hearing.[5] The parents allege that the IHO erred by not issuing a final order on pendency. The hearing record does not indicate that a request for a determination on pendency was ever addressed presented to or addressed by the IHO. Nevertheless, the district's position is incorrect. A student's right to pendency automatically arises as of the filing of the due process complaint notice and, therefore, is one particular issue that generally is not contained in a due process complaint. Additionally, considering the focus on maintaining the status-quo during the proceeding and the time sensitive nature of a pendency determination, an IHO may and should promptly address a parent's pendency claims, when raised (see Murphy, 297 F.3d at 199-200; see also M.R. v. Ridley Sch. Dist., 744 F.3d 112 [3d Cir. 2014]; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]).

During the hearing, the parties agreed as to most of the terms of the student's pendency placement and the student's after-school program was identified as an aspect of pendency that was in dispute (Tr. pp. 4, 45-46). During the course of the proceeding, the student attended an 8:1+2 special class at the out-of-district public school (see Joint Ex. a at p. 6). At the time of the filing of the due process complaint notice, the most recently implemented IEP for the student was dated June 12, 2015 (Dist. Ex. 8). According to the June 2015 IEP, the student was offered 12-month services in an 8:1+2 special class at an out-of-district public school recommended by the Mount Vernon CSE and agreed upon by the parents (id. at p. 1, 11-12). The student's recommended program included 8:1+2 adapted physical education, individual and small group (2:1) speech-language therapy, individual OT, a small group social skills group, and individual parent counseling and training (id.).[6] The June 2015 IEP called for the student to receive principally the same special education and related services for the duration of the 12-month school year (July and

[5] The due process complaint notice includes a request that the remain in his current out-of-district placement during the pendency of the hearing (Dist. Ex. 1 at p. 4).

[6] During the summer portion of the student's June 2015 IEP, the student-to-teacher ratio for the small group social skills group was 2:1 (Dist. Ex. 8 at p. 1). For the ten-month academic portion of the school year, the student-to-teacher ratio for the small group social skills group is not indicated (id.).

August 2015); however, the frequencies and student-to-teacher ratios differed slightly (id. at pp. 1, 12).

The hearing record also contains additional information regarding some modifications to the services actually delivered to the student by the out-of-district public school from those recommended in the June 2015 IEP. This evidence potentially implicates the operative placement test for pendency in addition to (or in leu of) the most recently implemented IEP test (Mackey, 386 F.3d at 163). As relevant to the operative placement test, the hearing record contains a recording and a written transcript of a June 15, 2017 CSE meeting at Mount Vernon, wherein the student's annual review for the 2017-18 school year was conducted (fourth grade) (Joint Ex. a at p. 6). The student's providers from the out-of-district public school participated in Mount Vernon's CSE meeting by telephone and described the special education services and related services the student received during the 2016-17 school year (third grade) (id.). At varying points during the June 2017 CSE meeting, the student's classroom ratio was described as an 8:1+2, an 8:1+4, and an 8:1+5 special class (Joint Ex. a at pp. 8, 148-49, 150, 153). According to the out-of-district assistant superintendent of schools, the student's classroom ultimately functioned as an 8:1+4 special class (id. at p. 153).[7] Thus, long after the impartial hearing was commenced, it became apparent during the July 2017 CSE meeting when the assistant superintendent described the services provided to the student in the out-of-district program that for "the last three years" (well before the filing of the due process complaint notice initiating this proceeding) the student had been receiving an 8:1+4 special class for four and one-half hours per day, and the related services of adapted physical education three times per six-day cycle for 30 minutes per session, individual speech-language therapy once per six-day cycle for 30 minutes, group (2:1) speech-language therapy two times per six-day cycle, and small group OT two times per six-day cycle (id. at pp. 8-9). The evidence shows that during third grade, the student began attending a mainstream physical education class at the out-of-district program with support that included some modifications for him (id. at pp. 131-32). The student received what was described as a "combination" adapted physical education class, with the student attending an adapted class two times per six-day cycle and a mainstream class once per six-day cycle (id.). The student also attended mainstream art and music classes with adult support, and participated in mainstream third grade math class three times per six-day cycle (id. at pp. 131, 134). The student's providers noted that the student always received adult support when participating in a mainstream class (id. at pp. 132, 146, 147).

A specific area of dispute between the parties over pendency is the student's participation in an after-school social skills group. The transcript of the June 2017 CSE meeting reflects that the student participated in a social skills group once per week, a "lunch bunch" social skills group twice per week, and an after-school social skills group three times per week, which the out-of-

[7] The student's out-of-district special education teacher stated that the student-to-teacher ratio included in the report of the parents' evaluator after she visited the classroom was not correct (Joint Ex. at p. 64). The special education teacher stated that the classroom consisted of one special education teacher, one teaching assistant, and depending on the day, between four and six teacher aides (id. at pp. 64-65). The out-of-district assistant superintendent stated that the four teacher aides were not individual 1:1 aides, but assigned to the classroom to allow for students to leave the classroom with adult support without impacting the individual instruction provided to the remaining students in class (id. at pp. 149-50). The assistant superintendent also indicated that other students participated in "reverse mainstreaming"; however, there were never more than eight students in the classroom at any time (id.).

district public school staff considered an extended school day program (Joint Ex. a at pp. 35, 37-39, 41-42, 44, 47-48, 52-53). The hearing record reflects that the student's social skills programming was delivered on a weekly basis, rather than on a six-day cycle, specifically the student attended a social skills group once per week for 30 minutes (that was included as a recommended related service on the June 2015 IEP), a third grade mainstream small group social skills "lunch bunch" session with two typical peers once per week, a second grade mainstream small group social skills "lunch bunch" session with two typical peers once per week and an after-school specialized social skills group for self-contained special education students (10:1) three times per week (Dist. Ex. 14 at p. 1; Joint Ex. a at pp. 35, 37-39, 41-42, 44, 47-48, 51-53, 140).

Mount Vernon contends that the after-school social skills group is not a part of the student's pendency program. The after-school social skills program was described by the student's out-of-district providers as an extension of their school day, and a program that was available to all special education students who received services in self-contained classrooms (Joint Ex. a at p. 47).[8] The out-of-district providers indicated that it was their practice to recommend a student's participation in the after-school social skills group in the CSE meeting minutes and it was not considered a related service, but was a part of their program (id. at p. 42, 48-50, 52). It is unclear why the district objects to the afterschool social skills group being included in pendency, as it is clear from the hearing record that it is offered at no cost to the parents (id. at p. 48).[9] Further, the student attended the afterschool social skills group three times a week during the 2015-16 school year (Tr. pp. 665-66), and during the 2016-17 school year as described by the student's providers at the June 2017 CSE meeting (Joint Ex. a at pp. 41-50).

The district's argument that pendency should not include the after-school social skills group because it was not recommended by the June 2015 CSE is unavailing as it was included as a part of the program the student was attending at the time the due process complaint notice was filed. To alter the program and services the student receives after the commencement of due process, would destroy the purpose of the pendency provision: maintaining a stable and consistent educational environment for the student (M.G., 982 F. Supp. 2d at 247-48). Accordingly, for the purposes of pendency the after-school social skills group is a part of the student's educational placement.

3. Scope of Review

In addition to limiting the due process complaint notice to the district's ability to implement the June 2016 IEP, the IHO also did not address some claims raised in the due process complaint

[8] According to guidance from the New York State Education Department, students with disabilities may receive a recommendation for an extended school day and could document such a recommendation as a program modification under the heading of "Recommended Special Education Programs and Services" (see "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Requirements," at p. 38 Office of P-12 Mem. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/questions.htm).

[9] The hearing record includes an e-mail, dated September 26, 2016, from the parents' counsel to district counsel indicating that the district was refusing to pay for the afterschool social skills program (Parent Ex. P); however, there is no other indication in the hearing record that there was a separate cost for this part of the program and it does not appear to have impacted the provision of this service during the pendency of the proceeding.

notice, including the parents' allegations that the district's recommended placement did not have a proven record of success and was not the student's home school, and the parents' request for compensatory educational services. Neither party has advanced arguments in an appeal or cross-appeal that the IHO erred by failing to make any specific findings relative to these claims. The regulations governing practice before the Office of State Review are explicit, and require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f]). Furthermore the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). If a respondent wishes an SRO to address one or more claims that went unaddressed by an IHO, the practice regulations require the respondent to serve and file a cross-appeal with respect to such claims with references to the evidentiary record supporting such claims, to which the petitioner is entitled to file an answer to such a respondent's cross-appeal (8 NYCRR 279.5[b]) or the SRO is to deem them abandoned. As no cross-appeal challenging those unaddressed claims and unaddressed request for relief was included in the answer with cross-appeal filed by the respondent parents in this matter, the claims and request for relief above are deemed abandoned.

4. Scope of Review-Parent Participation

In their due process complaint notice, dated July 25, 2016, the parents alleged that their private evaluator was not permitted to observe the recommended placement and that this impeded their right to participate in the development of the student's program and placement (Dist. Ex. 1 at p. 3). The hearing record reflects that the IHO was appointed on August 1, 2016; however, the hearing was not convened until May 15, 2017 (IHO Decision at pp. 2-5). The hearing record also reflects that the parents changed attorneys between the filing of the due process complaint notice and the beginning of the hearing (id. at p. 4). The hearing record does not reflect that the parents sought Mount Vernon's agreement to add issues to the hearing or to amend their due process hearing request despite the change in representation or the IHO's denial of the parents' motion for clarification of the issues. Shortly before the start of the hearing and approximately nine months after the filing of the due process complaint notice, by email dated April 20, 2017, the parents requested that Mount Vernon allow a different educational consultant to observe the proposed classroom at Mount Vernon (Parent Ex. R). The district director of student services responded by telling the parent "this will not be permitted" (id.). The private evaluator originally identified in the due process complaint notice did not participate in the impartial hearing. In her decision dated October 13, 2017, the IHO determined that the district was not required to accommodate multiple requests by the parents to view the recommended placement (IHO Decision at p. 24).

In their answer with cross-appeal, the parents allege that the IHO erred in failing to find that the district impeded their right to participate in the development of the student's program and placement by "willfully obstruct[ing]" the parents' educational consultants from conducting

observations of the proposed classroom at Mount Vernon (Answer with Cross-Appeal at p. 9). The parents' due process complaint notice cannot possibly be read to include a request for a second educational consultant to observe the district public school months after the due process complaint notice was filed. Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or request permission to amend their due process complaint notice, the issue of a second educational consultant being denied access to the assigned school is not properly subject to review (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint"]; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 n.2 [S.D.N.Y. May 14, 2013] [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [S.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . ., is limited to matters either raised in the . . . impartial hearing request or agreed to" by the opposing party]). In addition, an independent review of the hearing record does not provide any indication that the district "opened the door" regarding a request to visit the assigned school by another consultant in April 2017 so as to expand the scope of the impartial hearing (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]). Therefore, my review of the parents' participation claim is limited to the evaluator identified in the due process complaint notice.

B. Prospective Challenges to Implementation of June 2016 IEP

As discussed above, the IHO determined that the scope of the hearing was limited to the district's capacity to implement the June 2016 IEP and the IHO's ruling has not been challenged. Nevertheless, the IHO's analysis did not follow the standard for addressing prospective challenges to a proposed school. The parents' eight-page statement submitted to the June 2016 CSE (and incorporated by reference in the parents' due process complaint notice) described the implementation of student's out of district program and placement and engaged in a comparison between the implementation of the out of district program and Mount Vernon's proposed program (Dist. Ex. 13). The IHO's decision followed the same pattern and, in doing so, failed to differentiate the district's capacity to implement the terms of the June 2016 IEP, as written, from the services delivered by the out-of-district placement in prior school years and during the pendency of the impartial hearing. The IHO's decision further failed to distinguish permissible from impermissible prospective challenges to the district's assigned school. As such a review of the current legal landscape is warranted.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[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 E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir.

2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[10] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

In rendering her determination on the parents' challenges to the district public school, the IHO addressed a number of issues that were actually impermissible challenges to the appropriateness of the June 2016 IEP because they were not sufficiently tethered to the IEP (see N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *6 [S.D.N.Y. Feb. 11, 2016] [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP; in other words, if the student ought to be placed in a school with particular characteristics, programs or services, then they should be set forth in the IEP and may not be raised as a challenge to the school placement"]). In

[10] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

this case, these included the IHO's findings: that the district did not "disabuse" the parents' concerns regarding mainstreaming; that the school could not provide a sensory program, or sensory supports, services and equipment, to meet the student's needs; that the school did not provide an appropriate amount of discrete trial instruction;[11] and that the district public school did not have an adaptive skills program. Because they were not written elements required under Mount Vernon's proposed June 2016 IEP, these claims are not permissible challenges to Mount Vernon's capacity to implement the IEP at its own public school site under M.O. (see Y.F., 2016 WL 4470948, at *2).

In their due process complaint notice, the parents also asserted claims linked to the June 2016 IEP concerning the district's lack of capacity to implement certain provisions of the student's IEP in Mount Vernon. These claims are addressed below and include the IHO's determinations that the district was not capable of implementing the annual goals addressing the student's daily living skills given Mount Vernon's lack of community outings; that Mount Vernon was incapable of providing 1:1 and 2:1 instruction; that the school did not have a mainstream social skills group; and that district staff did not have adequate training to implement an ABA program.

While the appropriateness of the June 2016 IEP is not at issue, a discussion of the student's skills and needs is relevant to and provides context for the determination of whether Mount Vernon was capable of implementing the student's IEP in the proposed classroom.

Although the hearing record does not include a recent full-scale IQ score for the student, intelligence testing conducted in December 2015 yielded inconsistent subtest scores, based in part on the student's significant echolalia (Dist. Ex. 9 at p. 2). The student performed below the first percentile on the verbal comprehension, working memory, and processing speed indices of the Wechsler Intelligence Scales for Children-Fifth Edition (WISC-V) (id.). On the visual spatial and fluid reasoning indices the student scored at the 7th and 21st percentiles, respectively (id.). Similarly, administration of the Woodcock-Johnson IV Tests of Achievement (Form B) yielded subtest scores with significant scatter (Dist. Ex. 7 at pp. 1-3). The student's standard score for total achievement was 81 (10th percentile) (id. at pp. 1, 4). The student's IEP indicated that he was able to decode words in text, but was unable to use contextual cues to derive meaning (Dist. Ex. 14 at p. 7). Reading comprehension was an area of weakness for the student and he struggled to recall information from short, three sentence passages and required prompting to return to the text to look for details (id.). The student was able to answer yes/no questions related to a text, but had not yet been able to answer "wh" questions to demonstrate understanding (id.). In math, the student could complete addition problems up to three digits, subtract one and two-digit numbers, and borrow when necessary (id.). The student was able to complete basic word problems with assistance but needed to be prompted to identify the terminology and associate it with the proper action (id.). With respect to writing, the student wrote daily journal entries with redirection and verbal prompting (id. at p. 8). He had increased the length of his writing from 1-2 sentences to 4-5 sentences and his use of punctuation was emerging (id.). The student's spelling skills were a relative strength for him (id. at p. 3).

[11] To the extent that the meeting information section of the June 2016 IEP indicates the program at the district school is an ABA program (Dist. Ex. 14 at p. 2), and thus, the allegation that the school could not provide an ABA program may be properly raised, it is addressed below.

The student exhibited delays in receptive and expressive language and was judged to have a moderate receptive and expressive language disorder related to his primary disability of autism (Dist. Ex. 11 at pp. 2, 6-7). The student's strengths were his speech production, voice, basic syntax and verbal fluency; however, he exhibited weaknesses in all areas of spoken language (content, form, use) and written language (symbolism, mechanics, content, and organization) (id. at p. 2). The student was echolalic (Dist. Exs. 9 at p. 2; 12 at p. 1). He presented with significant difficulties in the social/emotional domain (Dist. Ex. 14 at p. 6). The student initiated greetings with peers when provided with nonverbal cues and appropriately responded to greetings with variable eye-contact (id.). The student enjoyed playing games, but would not consistently gain a peer's attention prior to asking them to play and had difficulty maintaining a game because he did not remind the friend when it was their turn (id.). With respect to fine motor and visual motor skills the student demonstrated poor attention to task, poor cutting and coloring accuracy, poor spacing and visual closure in writing, poor motor planning, delayed self-help skills, and delayed visual motor integration and perceptual skills (Dist. Ex. 12 at p. 1-3). The student's performance on the Adaptive Behavior Assessment System-Second Edition highlighted his struggles with communication and his ability to understand the feelings, wants, and needs of others (Dist. Ex. 9 at p. 5). In or around March 2016 the student's behavior started to regress and he demonstrated problems with self-regulation in the classroom (Dist. Ex. 14 at p. 5). Following long vacations, the student engaged in self-injurious behavior, such as hitting his hands and head (id. at p. 7). With respect to study skills, the student's IEP indicated that at times he required a token economy, but was able to request breaks when needed and used a timer to help transition back to work (id.).

The parents allege that Mount Vernon is not capable of implementing the student's 2016-17 recommended program, in part, because the June 2016 IEP largely consists of information provided by and goals written by the student's providers at the out-of-district program. The parents believe that the student's daily living goals cannot be met without visiting a store and the post office, but before one can reach such a conclusion, examination of the skills that are addressed by the annual goals at issue is in order.[12]

The student's June 2016 IEP included four annual goals addressing daily living skills (Dist. Ex. 14 at p. 12). These goals targeted the student's ability to read and comprehend warning and safety signs, exchange coins and bills to make purchases, "research, select, shop and purchase three items at a store every week," and complete three tasks related to using the post office (Dist. Ex. 14 at p. 12). The parents argued that three of these four annual goals could not be addressed within a school setting and required community outings, which were not available at the district assigned school (Dist. Exs. 1 at p. 3; 13 at p. 3).[13] The district argues that these goals do not require trips outside of the school setting, but rather could be achieved through a simulated setting within the

[12] The parents' argument is similar to arguments that adoption of certain language from non-public school progress reports is an implicit adoption of the methodology used by that school (see E.H. v. New York City Dept. of Educ., 611 Fed. Appx. 728, 732 [2d Cir. 2015]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *16 n. 8 [S.D.N.Y. Sept. 19, 2016]; T.C. v. New York City Dep't of Educ., 2016 WL 4449791, at *25 [S.D.N.Y. Aug. 24, 2016]; G.B. v. New York City Dep't of Educ., 145 F. Supp. 3d 230, 256 [S.D.N.Y. 2015]; F.B. v. New York City Dep't of Educ., 132 F. Supp. 3d 522, 550–51 [S.D.N.Y. 2015]).

[13] In their statement to the June 2016 CSE, the parents did not contend that the annual goal targeting exchanging coins and bills to make purchases could not be addressed within a school setting (Dist. Ex. 13 at p. 3).

school (Req. for Rev. at pp. 5-6). The IHO determined that two of these annual goals necessitated community outings (as they directed that the student would purchase three items at a store every week and use the post office) (IHO Decision p. 13). The IHO concluded that the other two annual goals implicitly required community outings in order to work on generalization of the skills across environments (id.).

Initially, addressing the IHO's finding that generalization of daily living skills across environments was fundamental to the implementation of the annual goals (IHO Decision at p. 13), the June 2016 IEP does not specifically target generalization of skills across environments, especially to environments beyond the school campus (Dist. Ex. 14 at p. 12). The description of the student's social development needs did indicate that the student needed to participate in mainstream social skills groups "to help generalize his social communication and peer interaction skills"; however, this related to the student's access to regular education peers in his social skills groups, which is discussed in more detail below (id. at pp. 8-9). While it is understandable that the student's ability to generalize skills to other environments outside of the public school's sphere of influence is of great importance to the parents and is no doubt a desirable objective for the student, it is not an objective explicitly set forth in the June 2016 IEP. As such, generalization of skills to other environments beyond the school is not required in order to implement the student's June 2016 IEP. Additionally, 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 environments 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]).

To be sure, two of the student's annual goals included language suggesting that they would be worked on in a setting outside of the classroom environment (Dist. Ex. 14 at p. 12).[14] The wording for these goals identified that the student would: "research, select, shop and purchase 3 items at a store every week," and "use the post office and complete 3 different tasks related to using the post office" (id.).

Mount Vernon's director of student services explained that there were ways, other than school outings, for the student to gain community experience and that outings were not a necessary component of the student's daily program (Tr. pp. 140-41). The supervisor of special education testified that community outings, as they related to the student's daily living skills goals, were discussed at either the May or June 2016 CSE meeting (Tr. pp. 300-01). She acknowledged that while some students at Mount Vernon do participate in some outings, she was unaware (at the time

[14] While the parents assert that the annual goal directed at reading and comprehending warning and safety signs could not be worked on in a school environment, the parents do not point to and I did not find any language within the annual goal, or the June 2016 IEP, indicating that school staff could not work on that goal within the school. The director of student services and the ABA consultant explained that this skill could be worked on within the classroom (Tr. pp. 151, 422-23), although the ABA consultant testified that reading and comprehending are different skills and parent training would be necessary to ensure that comprehension was generalized into the community (Tr. pp, 423-24).

of the CSE meeting) of specific opportunities available to students within the assigned class during the 2016-17 school year, and that the federal post office was not within walking distance of the school (Tr. pp. 255-56, 300). However, the director of student services and the supervisor of special education also testified that the daily living goals could be addressed within the school setting, and the director of student services opined that the generalization of the skills would occur when the parent brought the student to the supermarket or post office (Tr. pp. 150-51, 256-57). Furthermore, they explained how Mount Vernon was capable of implementing the goals insofar as a "mock" post office and store could allow the student to acquire and demonstrate postal and money-related skills in the school setting (Tr. pp. 150, 278). The district's ABA consultant testified that some of the schools she worked with addressed the need for generalization by planning community trips; but noted that they did not wait for a community outing to try to generalize a skill (Tr. p. 441). She described how skills taught in a 1:1 setting could be generalized to a group environment within the classroom or to school environments outside the classroom such as the hallway, cafeteria, and playground (Tr. pp. 441, 481-82). However, she also testified that parent training may be necessary to ensure the skills were generalized in the community (Tr. p. 482). In addition, the ABA consultant described how the student's goals could be addressed in a "contrived" situation and noted that she did not go into many schools that had weekly access to the community, yet they were able to teach generalization for goals similar to those of the student (Tr. pp. 422-26). Specifically, the ABA consultant testified that the student could research purchases in the classroom by looking at flyers or going online and then select purchases at the school store and cafeteria; as well as learn to write letters, buy stamps, and mail letters within the school setting (Tr. pp. 425-26). However, the consultant also agreed that she would be unable to determine whether a student with autism could generalize a skill that he was taught in school to another setting outside of the school, without observing the student in that other setting (Tr. pp. 441-42).

Although the district public school may not have been able to implement the portions of the annual goals related to community outings, the district staff explained how the district public school would have been able to work on the annual goals in a contrived setting with the student (Tr. pp. 150-51, 256-57, 278, 425-26, 441, 481-82). Additionally, to the extent that the parent argues that the annual goals were developed by the out-of-district public school and had to be worked on in the same manner employed by the out-of-district public school, an IEP does not adopt a specific teaching methodology simply by adopting language used by the student's current school (see G.S. v. New York City Dep't of Educ., 2016 WL 5107039 *11 [S.D.N.Y. September 19, 2016] [the inclusion of DIR terms did not necessitate use of the DIR methodology because those terms had a "'relatively common meaning' that would not 'prevent a teacher or therapist from implementing the [IEP's] goals"'] [quoting T.C. v. New York City Dep't of Educ., 2016 WL 1261137 *14 [S.D.N.Y. March 30, 2016]). Finally, to the extent that the district public school could not arrange for community trips to the post office, or trips to the store (other than the school cafeteria), the district's inability to provide community outings was not such a material deviation from the student's IEP that it resulted in a denial of a FAPE (Y.F. v. New York City Dept. of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 2016 WL 4470948 [2d Cir. 2016]).

Turning next to the IHO's determination that the June 2016 IEP indicated that the student required 1:1 instruction at a level which Mount Vernon would be incapable of providing to the student, the hearing record does not support the IHO's finding. The June 2016 IEP does not explicitly state that the student required a specific amount of 1:1 or 2:1 instruction to derive educational benefit. However, the student was described in the present levels of educational

performance as benefitting from 1:1 or 2:1 instruction (Dist. Ex. 14 at pp. 7, 8, 9). Specifically, the June 2016 IEP reflected that the student "learn[ed] best in a 1:1 structured environment"; his ability to attend to task increased when working in a 1:1 or 2:1 setting; and he responded "very well" to 1:1 instruction (id.). The June 2016 IEP also indicated that the student actively participated in adaptive science, music, art, and physical education classes "with adult assistance" (id. at p. 8).

Given that the June 2016 IEP does not require that the student receive a specific level of 1:1 or 2:1 instruction, evidence that the parent believed the proposed 8:1+2 special class cannot provide a sufficient amount of 1:1 or 2:1 instruction cannot portray a situation where the school was "factually incapable" of implementing the IEP (see G.S., 2016 WL 5107039, at *15 ["a parent's 'own testimony that [school] officials made comments to her indicating an inability to effectively serve [the student] do not come close to proving that the school was 'factually incapable' of implementing the IEP, and [could] thus [be] properly excluded from consideration"], quoting J.D. v. N.Y.C. Dep't of Educ., 2015 WL 7288647, at *16 [S.D.N.Y. Nov. 17, 2015]).

Additionally, although not necessary for a determination on this issue, the hearing record also supports finding that the student received both 1:1 and small group instruction at his then-current out-of-district school (Parent Ex. C at p. 1), and the student would have had some opportunity for 1:1 and small group instruction if the recommended program were implemented in Mount Vernon (see Tr. pp. 258, 334-35, 674). The district's special education supervisor who attended the May 2016 CSE meeting, testified that prior to the CSE meeting, she observed the student in his out-of-district classroom participating in group and independent classwork (Tr. p. 282). The supervisor also testified that the proposed 8:1+2 special class at Mount Vernon consisted of one teacher, two teaching assistants, and six students during the 2016-17 school year; and that the students had opportunities for 1:1 instruction (Tr. p. 258). The special education teacher from the assigned special class testified that she structured the assigned classroom so that students rotated between stations led by the two teaching assistants, thereby enabling her to pull students for 1:1 instruction (Tr. pp. 334-35). The parent testified that during her meeting with the special education teacher for the assigned class, she was told that the students received about one half-hour of 1:1 teaching per day (Tr. p. 674).[15]

With regard to LRE, the IHO's determinations that it was unclear whether the school could provide sufficient adult support for the student to benefit from access to nondisabled peers and that the district did not address the parents' concerns that the students at the Mount Vernon school did not eat lunch with nondisabled peers, did not mainstream for academics, are mainstreamed as a class, and did not participate in field trips with nondisabled peers are not supported by the hearing record. Initially, most of the issues raised regarding LRE were not tethered to the June 2016 IEP. The June 2016 IEP indicated that the student would have opportunities to engage with typically developing peers during non-academic programs such as music, media and art, assemblies, lunch,

[15] The IHO discounted the statement that the students in the class received approximately 30 minutes per day of 1:1 instruction at the time of the meeting with the parent because the class consisted of five students at that time (IHO Decision at p. 15; see Tr. pp. 349-50); however, if the 8:1+2 class were broken down into groups as described by the teacher, the maximum group sizes would be 3, 3, and 2 students, allowing for periods of 2:1 instruction. Additionally, as noted by the supervisor of special education, other students in the class are pulled for related services allowing for more opportunities for 1:1 instruction in the 8:1+2 class (Tr. p. 258).

and recess, but did not specifically indicate the level of adult support required during these activities (Tr. pp. 295, 297-98; Dist. Ex. 14 at p. 15). Accordingly, the only claim that refers to the district being unable to implement the provisions set forth in the June 2016 IEP is the parents' concern that the students at the district school did not eat lunch with nondisabled peers.

With respect to the parents' remaining claim regarding mainstreaming, the district's special education supervisor explained that the student would be mainstreamed according to the recommendations included in the student's IEP (Tr. p. 249). The supervisor testified that at the time of the hearing, some students received mainstream opportunities without adult support, while others were supported by a teaching assistant or by other students, and that the assigned school was able to individualize mainstreaming opportunities depending on the student's needs (Tr. p. 250). The supervisor also testified that general education students "work with" the special education students by having lunch and playing games together (Tr. p. 253). The special education teacher testified that the students in her 8:1+2 class attended general education music, art, and physical education classes with the teaching assistant (Tr. p. 340). The teacher testified that the general education teacher was aware of the special education students' needs and goals, and that the teacher and teaching assistant ensured that the needs and goals were addressed (Tr. pp. 340-41). Based on the above, although Mount Vernon did not approach providing the student with access to nondisabled peers in the same manner as the out-of-district public school, the evidence in the hearing record shows that Mount Vernon could have implemented the provisions for mainstreaming that were included in the June 2016 IEP with the support of the general education teachers and special education teaching assistants employed during the mainstreaming opportunities.

In addition to providing that the student would have access to nondisabled peers during non-academic programs, the June 2016 IEP also indicated in the description of the student's social development needs that the student would "continue receiving support via a mainstream social skills group" and "join an additional mainstream social skills group" (Dist. Ex. 14 at pp. 8-9, 15). Regarding her visit to the assigned school, the parent testified that she posed questions to the teacher and she thought that the teacher said there were no typically developing peers in it (Tr. p. 671). Based on the parents' testimony, the IHO determined that the district school could not provide a mainstream social skills group; however, the hearing record does not support this finding. The director of student services explained that the social worker at the assigned school could implement a social skills group and also had "lunch bunch groups" available (Tr. p. 142). The district supervisor also testified that "general education students … work with our students and have lunch with them," and that the school has "the opportunity to have that … lunch buddy kind of system" (Tr. pp. 253-54). Considering that the school had access to nondisabled peers for the student to socialize with, this is not a situation where the district public school was "factually incapable" of implementing a mainstream social skills group (see Z.C., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]). Accordingly, the IHO's determination regarding Mount Vernon's inability to mainstream the student in accordance with the IEP and implement the social skills group is reversed.

Next, the district alleges that the IHO erred in finding the student required an ABA program in order to make progress and that district staff lacked the training and experience to implement the program. As noted by the IHO, during the June 2016 CSE meeting, the district program was described to the parents as an ABA program (Tr. p. 697; Dist. Ex. 14 at p. 2).

According to the notes from the June 2016 CSE meeting, the parent objected to the student's proposed classroom at Mount Vernon because the "ABA program [wa]s not sufficiently established" (Dist. Ex. 14 at p. 1). Mount Vernon's supervisor of special education and the special education teacher for the proposed classroom testified that after the May 5, 2016 CSE meeting, the parent visited the class to observe and ask the staff questions (Tr. pp. 235-36, 326). The supervisor testified that during her visit to the assigned school, the parent had specifically asked about the amount of "one to one or discreet trial" instruction provided in the assigned classroom (Tr. p. 257). Testimony by the assigned school staff reflected that during the parent's visit, they discussed the agency that consulted and trained the district teachers, the specific ABA methodology employed by the agency (verbal behavior), the principles of ABA, and "things that we do in our classroom as far as ABA" (Tr. pp. 234-35, 330).

The district's director of student services testified that Mount Vernon entered into a contract with a consultant in summer 2014 to assist in the development of an 8:1+2 special class for students with autism (Tr. pp. 118-19, 139, 159). The consultant provided training to all staff, and made monthly visits to the assigned classroom (Tr. pp. 139-40, 276). Mount Vernon staff confirmed that the classroom featured regularly scheduled, and as-needed, consultation and professional development provided by the ABA consultant (Tr. pp. 274-76, 325). The training was adjusted according to the needs of the staff and students, and could encompass discrete trials, token economies, and setting up an appropriate classroom for the students (Tr. p. 275). The classroom teacher stated that the autism consultant worked with her on teaching students "manding" and "intraverbal questioning";[16] as well as the practice of positive reinforcement, token economies, data collection, and behavior management (Tr. pp. 330, 333). In addition, the consultant provided consultation notes, which were then reviewed with the teaching assistants in the classroom (Tr. p. 332; see Parent Ex. M). Specifically, the consultation notes provided recommendations such as using fast paced instruction, use of frequent reinforcement, implementation of token economies, increasing "manding" repertoire, data collection and analysis, reducing problem behaviors, teaching replacement behaviors, fading prompts, Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), and Intensive Teaching Sessions (ITT) (Parent Ex. M).

Mount Vernon's consultant also testified that ABA incorporates, but is not limited to, components of discrete trial instruction (Tr. p. 427). The consultant explained that discrete trial instruction, as they were discussing it, should be done in a 1:1 format by teaching specific skills one at a time (Tr. p. 427-28). However, she also reported that she taught teachers to use the same errorless teaching, in which one presents a specific instruction and require a specific response, in a group setting (Tr. p. 428). The consultant testified that the primary principles of ABA were to break skills down, give specific instruction, and expect a specific response, followed by a specific consequence (Tr. p. 427). The consultant explained that a classroom utilizing ABA methodology may use discrete trial instruction if necessary, as well as natural environment instruction (Tr. pp. 428-430). Although the parents may have preferred that Mount Vernon's program include more discrete trial instruction or data collection in more areas, the Mount Vernon's description of its

[16] According to testimony provided by the private board certified behavior analyst, a "mand" is a request, and an "intraverbal" is a conversational unit (Tr. pp. 863-65).

program does not lead to the conclusion that an ABA program as represented to the parent at the CSE meeting would not be carried out.

Additionally, the hearing record does not support the IHO's conclusion that Mount Vernon's staff lacked adequate experience or training to implement the June 2016 IEP. The private board certified behavior analyst-doctoral (BCBA-D) testified that based on her review of the ABA "consultation notes," the assigned class would not have been able to implement the student's IEP because monthly consultations were not sufficient "to train staff who don't have previous experience implementing ABA instructional programming" (Tr. p. 837). However, as explained by the district supervisor of special education, who also had a Ph.D. in ABA and over three years of experience supervising classes working on ABA (Tr. pp. 211-12, 217-18), "you cannot specifically say the quality of instruction is completely tied to the amount of years that people have been trained in the practice" (Tr. pp. 288-90). She also testified regarding the training provided by the district consultant and testified that she did not have any concerns regarding the district staff's ability to implement the June 2016 IEP (Tr. pp. 274-76).

The 2016-17 school year was the Mount Vernon special education teacher's eighth year as a special education teacher in the district and her second year teaching in the ABA program (Tr. p. 320-21). The special education teacher testified that she attended "all of the training" given by the district autism consultant, which by her estimate occurred four times per year (Tr. p. 325).[17] She reported that she attended the training with the staff in her room and noted that she also received a monthly consultation in her classroom (id.). According to the district supervisor of special education, the training provided by the district consultant took different forms for different teachers, depending on the level they were at (Tr. pp. 274-75). She explained that the consultant specifically adjusted the program based on the needs of the class and the teacher and teaching assistant (Tr. p. 275). In addition to scheduled trainings, the teacher had access to the consultant through email and telephone calls and if a teacher was not sure what to do in a given situation the teacher could contact the consultant (id.). She testified that a lot of the training was "in situ," monthly in the classroom specific to the students in the class and that the consultant did pull-out training three times per year with all of the staff (Tr. p. 275-76). The district consultant testified that the special education teacher was receptive to her recommendations and implemented them "to the best of her ability," noting that she did not have any concerns with the teacher's ability to implement the program and that for the 2016-17 school year the teacher has "done a really nice job" (Tr. pp. 474-75).

Although the private BCBA-D believed that the consultation notes indicated staff were not able to implement the program independently and she would have recommended additional consultations (Tr. pp. 841-44), this opinion is contrary to the above described testimony of the teacher, director of special education, and district consultant. Accordingly, the hearing record does not support finding that the assigned school would have been incapable of implementing the IEP based on concerns over experience or training (see Ganje v. Depew Union Free Sch. Dist., 2012

[17] The parent testified that she asked the teacher about "the intensive summer training that they had described at the CSE meeting" and the teacher responded that she did not have that (Tr. p. 670). It appears the parent is referring to training that occurred in the summer of the 2014-15 school year (see Tr. pp. 163-65).

WL 5473491, at *18 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]).

C. Parent Participation

The parents cross-appeal the IHO's determination that their right to participate in the development of the student's program and placement was not violated when the district did not schedule an observation of the assigned school for the parents' private evaluator.

The United States Department of Education has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]); see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority]; E.A.M., 2012 WL 4571794, at *11 [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F., 2011 WL 5419847, at *12 [same]).[18] On the other hand, there is some district court authority indicating that a parent has a right to obtain information about an assigned public school site (F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding "implicit" in the reasoning of the Second Circuit's decision in M.O. the proposition that parents have the right to obtain information on which to form a judgment about an assigned school]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered, rather than, the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

In this instance, the district attempted to schedule a site visit with the parents and their private evaluator. The district director of student services and supervisor of special education testified that the district agreed to have the parents visit the assigned classroom and meet with the related service providers and teacher (Tr. pp. 124-25, 235). The district staff also testified that the parent asked to allow a private consultant to come observe, and although they "tried to work with the family," scheduling was very difficult due to end-of-year activities (Tr. pp. 126, 242-44). The parent and the district staff also reported that although the district had agreed to allow the private consultant to observe the assigned classroom, it did not occur due to "timing," and was never rescheduled (Tr. pp. 680, 725-26; Dist. Ex. 13 at p. 1).

The hearing record supports the IHO's determination that the parents' were not prevented from participating in the development of the student's educational program (see R.K. v. Clifton

[18] Nothing in this decision is intended to discourage districts from offering parents the opportunity to view school or classroom placements, as such opportunities can only foster the collaborative process between parents and districts envisioned by Congress as the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

Bd. of Educ., 587 Fed. Appx. 17, 22 [3d Cir. 2014] [district's refusal to allow the private expert access to proposed classroom did not deprive the parents of their right to participate in the decision-making process]). The district provided sufficient evidence that the parent was permitted to visit the assigned school site and ask questions of district staff (Tr. pp. 239, 242-43, 666-74). It was not unreasonable for the district to deny access to the private evaluator after scheduling attempts were made to accommodate the parents and the evaluator.

VII. Conclusion

As discussed above, the IHO erred in finding that the district was not capable of implementing the June 24, 2016 IEP. The IHO determined that the appropriateness of the June 24, 2016 IEP was not at issue, but erred by engaging in a comparison of the student's then-current out-of-district placement with the district's evidence of how it intended to implement the June 2016 IEP at the recommended assigned school. The parents demonstrated their preference for the out-of-district placement and no one disputed that the student received educational benefits from his instruction there. Nevertheless, the district also demonstrated that it was factually capable of implementing the June 2016 IEP, the appropriateness of which was not in dispute, at the recommended placement.

Having reviewed each of the parents' remaining challenges in their cross-appeal, and having determined the student's pendency placement, I find the district was capable of implementing the June 2016 IEP at the assigned school.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 13, 2017, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2016-17 school year; and,

IT IS FURTHER ORDERED that the IHO's decision dated October 13, 2017 is modified by reversing that portion which directed the district to fund the student's cost of attendance at an out-of-district public school for the 2016-17 school year; and

IT IS FURTHER ORDERED that the district shall ensure the student is provided with the services to which he is entitled pursuant to pendency as indicated above.

Dated: **Albany, New York**
January 17, 2018

STEVEN KROLAK
STATE REVIEW OFFICER