The University of the State of New York

The State Education Department
State Review Officer
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No. 19-115

Application of the BOARD OF EDUCATION OF THE EAST RAMAPO CENTRAL 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:
Harris Beach PLLC, attorneys for petitioner, by Howard J. Goldsmith & Anne M. McGinnis, Esq.

The Law Office of Neal H. Rosenberg, attorneys for respondent, by Michael Mastrangelo, 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 failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for a portion of her son's tuition costs at the New Beginnings School (New Beginnings) for the 2018-19 school year. The parent cross-appeals from the IHO's determination which denied her request for either full reimbursement of tuition or full direct payment for tuition at New Beginnings for the 2018-19 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

According to facts alleged in the amended due process complaint notice initiating this proceeding, the student reportedly had been diagnosed with autism, and from the age of three to five years old was placed by the district in a 12:1+2 special class for students with autism (IHO Ex. D at p. 1). At the age of five years old, the student was placed in a district social communication program where, according to the parents, he made "little progress" for two years

(id.). Prior to second grade, the CSE recommended that the student receive the support of a one-to-one paraprofessional in his special class, however, he again reportedly made little progress (id. at p. 2). The parents filed a due process complaint, which resulted in a settlement compelling the district to fund a private parental placement for the student until June 2014 (id.). Prior to the 2014-15 school year the parents requested that the district place the student at a specific New York State approved nonpublic school (id.). The district agreed; however, the nonpublic school did not accept the student and, although the district sent out additional application packets, the student was not accepted into a nonpublic program (id.). Therefore, for the 2014-15 school year the student attended a BOCES 12:1+1 placement recommended by the district, but this placement was reportedly inappropriate, and the student once again made little progress (id. at p. 3). During the annual review process for the 2015-16 school year, the CSE recommended a different BOCES 12:1+1 program, however, the parent objected and challenged the recommendation through another due process complaint notice (id.). As a result of a resolution agreement dated April 27, 2015, the district funded the student's tuition at New Beginnings, an out-of-state private school selected by the parents for the 2015-16 school year (Parent Ex. A; IHO Ex. D at pp. 3-4).[1] The district again continued to fund the student's placement at New Beginnings for the 2016-17 school year as a result of a due process resolution agreement dated June 28, 2016 (Parent Exs. B; IHO Ex. D at p. 4).

The parents alleged that the district failed to offer the student an appropriate placement for the 2017-18 school year and elected to continue the student's enrollment in New Beginnings for the 2017-18 school year, once again filing a due process complaint in June 2017 with the district (IHO Ex. D at p. 4; Dist. Ex. 1 at p. 15). In a November 10, 2017 interim decision, an IHO ordered the district to provide pendency funding for the student's tuition at New Beginnings for the duration of an impartial hearing and subsequent appeals concerning the 2017-18 school year, and that is not at issue in the instant appeal (Dist. Ex. 1 at p. 14).

The parties entered into a resolution agreement with respect to the 2017-18 school year executed on December 6 and December 11, 2017 wherein the district agreed to continue funding the student's placement at New Beginnings for the 2017-18 school year, which the parties acknowledged was not approved by the Commissioner of Education (Dist. Ex. 2 at pp. 1-2; see IHO Ex. at p. 4). Provisions of the agreement also specified that the agreement covered a specific period and did not impact or effect the student's placement for any pendency issues that may arise and, further, the agreement indicated that the parent agreed to cooperate in good faith with respect to the CSE's efforts to secure a "New York State approved placement for the student for the 2018-19 school year" (Dist. Ex. 2 at pp. 1-2).

As described in greater detail below, three CSE meetings were conducted from winter through summer 2018 to develop an IEP for the student's 2018-19 school year. The CSE met initially on February 13, 2018, again on May 30, 2018, and finally on July 6, 2018 via telephone (Parent Exs. R; S; T; Dist. Exs. 8; 12).[2] The CSE recommended a placement in an 8:1+2 special

[1] The Commissioner of Education has not approved New Beginnings as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] Although IEPs were generated after both the May and July 2018 CSE meetings, and copies of each IEP in the hearing record demonstrates they contain the same recommended services, the vast majority of both the testimony

class with speech-language therapy, occupational therapy and parent counseling and training in the "Rockland BOCES" program (Tr. pp. 133-34; Dist. Exs. 7 at p. 2; 8 at p. 2; 11 at p. 2; 12 at p. 2). The parties also frequently refer to this placement as the Jesse Kaplan School or the Kaplan Community Development Center (Kaplan) (see Tr. p. 544; Dist. Ex. 34). By letter dated April 9, 2019, Kaplan accepted the student into its summer program beginning July 9, 2018 (Dist. Ex. 34).

By letter dated June 19, 2018, the parent notified the district of her intention to unilaterally place the student at New Beginnings at public expense during the 2018-19 school year (Dist. Ex. 9).

A. Due Process Complaint Notice

In a due process compliant notice sent to the district in late June or early July 2018 the parent argued, among other things, that the student's pendency placement should remain at New Beginnings (IHO Ex. A).[3]

The parent submitted an amended due process complaint notice dated September 14, 2018, in which the parent contended that the district failed to offer the student a FAPE during the 2018-19 school year, that the parent's unilateral placement at New Beginnings was appropriate and that equitable considerations favored tuition reimbursement for the cost of the student's attendance at New Beginnings during the 2018-19 school year (IHO Ex. D). The due process complaint notice alleged that the 8:1+2 special class recommended by the district was "too restrictive" because "the district had consistently recommended placement" in a 12:1+1 special class prior to recommending an 8:1+2 special class, and that the programming would not provide "the specific targeted instruction necessary to address [the student's] learning needs associated with his ASD diagnosis" (id. at p. 5).[4]

Further, the parent argued that the student would not be grouped with similarly functioning peers at Kaplan but rather with students who exhibited "significantly varying functional levels," academic abilities "far below" his, and "noted behavioral challenges"; as well as non-verbal and physically disabled students (id.). In addition, the parent asserted that the 2018-19 IEP failed to "adequately identify the student's specific learning needs" or establish annual goals related to those needs; that the goals were generic, did not address the student's deficits, contained "no baseline or method of measurement," and that there was no math goal (id. at p. 6). The parent also stated that the CSE failed to consider parent recommendations, the IEP failed to address the student's "need for specialized teaching strategies designed to address the needs of students with ASD as described

in the hearing record and the arguments presented refer to the May 2018 IEP, and for ease of identification citations to the student's IEP refer to the May 2018 IEP (see generally Dist. Exs. 8; 12).

[3] The June 28, 2017 date on the original due process complaint notice appears to be a typographical error. It was stamped as received by the district on July 9, 2018 (compare Tr. p. 21 with IHO Ex. A).

[4] The ratio of the student's special class at New Beginnings is described as a 12:1+1, 12:1+2, 12:1+3, and 12:1+4 variously throughout the hearing record (see, e.g. Tr. pp. 393, 430, 777-78, 831-32, 834; IHO Ex. D at p. 6; Parent Post-Hr'g Br. at pp. 15-16). One of the student's teachers at New Beginnings testified that the student attended a class with a total of 11 students, one special education teacher, one head assistant teacher and two aides; however one of the aides was designated for a specific student (Tr. pp. 777-79, 832).

by [the student's] clinicians and teachers," and that the IEP was developed without meaningful parental participation, as the district's recommendation was predetermined and based on availability of program options rather than the student's needs (id. at pp. 6-7). The parent claimed that the May 2018 CSE failed to discuss the student's 12-month or extended school year (ESY) services for July and she did not find out that ESY services were being offered until she received the IEP on June 13, 2018 (id. at p. 7). Finally, the parent also alleged the district erroneously stated that it was not required to offer transportation to non-public school student's during the summer and the "[p]arents were left with no transportation for July and August and were forced to pay for their own transportation to and from New Beginnings and for a 1:1 aide to supervise the student at home" (id. at p. 7).

The district submitted a seven-page written response to the parent's amended due process complaint notice, via letter dated September 25, 2018 (IHO Ex. E at pp. 1-7).

B. Impartial Hearing and Impartial Hearing Officer Decisions

An impartial hearing was convened and over three hearing dates beginning on October 3, 2018 and ending during the hearing on October 29, 2018, the parties and IHO addressed the issue of the student's pendency placement (see Tr. pp. 1-407). In an interim decision, dated January 4, 2019, the IHO determined that the student's pendency placement consisted of placement in a 12:1+4 special class with related services as indicated on the student's September 27, 2017 IEP (Interim IHO Decision at pp. 15-16; see Dist. Ex. 33; IHO Ex. G).

During the October 29, 2018 hearing date, the parties and IHO proceeded on to the merits of the parent's claims with respect to the district's proposed programming for the student for the 2018-19 school year as well as the parent's unilateral placement of the student at New Beginnings, and the impartial hearing was concluded on June 20, 2019 after a total of ten hearing dates (see Tr. pp. 408-1331). In a final decision dated October 11, 2019, the IHO determined that the district had failed to offer the student a FAPE during the 2018-19 school year, that the unilateral placement at New Beginnings was appropriate, and that equitable considerations merited a twenty percent reduction in the tuition reimbursement requested by the parent (IHO Decision at pp. 13-47).

Specifically, the IHO found that two procedural violations denied the student a FAPE. First, the IHO found that the failure to issue a prior written notice after the February 2018 CSE meeting was a procedural error that impeded the parent's participation in the CSE process because portions of the draft IEP were changed pursuant to the meeting and the parent did not receive a copy of the IEP until after subsequent CSE meetings (IHO Decision at pp. 17-20). Second, the IHO found that the CSE had impermissibly predetermined the student's program by failing to consider the full continuum of possible educational placements and present them to the parent early in the process (id. at pp. 21-22). The IHO concluded that "[t]here is no evidence in the record that the CSE considered any placement in district or in less restrictive settings, with any interaction with non-disabled peers" but acknowledged also that the parent "did not seek a general education placement," but did seek a less restrictive one (id. p. 21). The IHO concluded that the placement was predetermined because the district only sought placement in an approved non-public school (id. at pp. 21-24).

With regard to the parent's claims that the student would not be grouped with similarly functioning peers, the IHO discussed class profiles offered by the district as evidence that post-dated the student's IEP which showed that the four other students were verbal to an unknown extent, but the parent's claim was impermissibly speculative based on the class profiles, because the IEP is the centerpiece of the system and must be evaluated prospectively (IHO Decision at pp. 25-26). The IHO then determined that the ratio of an 8:1+2 special class recommended in the student's 2018-19 IEPs was not the least restrictive environment (LRE) and that the district did not maximize the student's exposure to nondisabled peers, because it never considered a placement less restrictive than the approved non-public school at Kaplan, and because the present levels of performance and annual goals in the student's IEPs suggested the student required peer interaction, the recommended program could not be implemented as written in an 8:1+2 classroom at Kaplan (IHO Decision at pp. 24-30). The IHO determined that the student was denied a FAPE due to the two procedural violations and the failure to comply with the LRE mandate (id. at p. 30).

Turning to the parent's unilateral placement at New Beginnings during the 2018-19 school year, the IHO found the Second Circuit possessed "dueling and inconsistent standards" in contrast to other circuit courts and eroded its standards in some areas (IHO Decision at pp. 33-34). Notwithstanding those points, the IHO examined New Beginnings with respect to, among other things, restrictiveness, state-approval, the provision of specially designed instruction and services, and the student's progress (IHO Decision at pp. 34-39). The IHO found that that while the parent's placement was not perfect, it was appropriate for the student, because it provided specially designed services that met the student's needs and the student had demonstrated some progress therein (IHO Decision at pp. 30-40). Lastly, the IHO addressed equitable considerations and found that because the parent had not fully cooperated with the intake process for several of the proposed approved non-public schools that the CSE was considering for placement, yet had agreed, pursuant to the December 2017 resolution agreement, to participate in all intake meetings, the equities warranted a twenty percent reduction in the tuition reimbursement requested (IHO Decision at pp. 40-47; see Dist. Ex. 2). Consequently, the IHO ordered the district to reimburse the parent for $59,417 for New Beginnings for the 2018-19 school year (id. at p. 47).

IV. Appeal for State-Level Review

The district appeals. Initially, the district asserts that the IHO erred in reaching the issue of prior written notice with respect to the February 2018 CSE meeting, because that claim was not raised in either of the parent's due process complaint notices. Additionally, the district contends that no prior written notice was required because the February 2018 CSE meeting was held pursuant to the resolution agreement between the parties for the purpose of planning the application process to approved non-public schools which would be appropriate for the student, and there were no changes made to the recommended program at the meeting.

With respect to the IHO's findings concerning parent participation and predetermination, the district asserts that the IHO erred in basing her finding on the CSE's failure to consider in-district placements because the parent did not raise a claim that the CSE failed to consider an in-district placement and the parent and the district had agreed in the December 2017 resolution agreement that an out-of-district placement was appropriate.

Challenging the IHO's finding that the recommended 8:1+2 placement at Kaplan was not the student's LRE and could not implement the IEP, the district contends that the IHO erred because Kaplan had correctly concluded that the student could be placed there, the placement was the student's LRE, the 8:1+2 program was similar in student-to-staff ratio to a 12:1+4 program, and the range of choices available to the CSE was limited due to the parent's lack of full cooperation with the intake process. Moreover, the district contends that appropriate functional grouping would be available for the student at Kaplan.

With respect to whether the parent's unilateral placement of the student at New Beginnings was appropriate, the district contends that the IHO erred in finding that it was because New Beginnings was too restrictive, as it was too far away from the student's home, was not approved by the State of New York, and the parent had not demonstrated that the student had made progress at the school.

The district also asserts that the IHO erred with respect to her findings on equitable considerations. The district contends that the IHO was correct that the parent had not fully cooperated with the intake process at all of the approved non-public schools, having attended two intakes, both of which accepted the student, but failing to attend at least two others. Further, the district asserts that because the parent never intended to accept a district placement, and violated the December 2017 resolution agreement, the IHO should have found against the parent on the equities and denied tuition reimbursement entirely. Lastly, the district argues that the parent has failed to show that the tuition owed to New Beginnings is a "true debt" and requests that the IHO's order of tuition reimbursement be reversed.

In an answer and cross-appeal, the parent initially asserts that the district's request for review should be dismissed because it does not contain a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, as the practice regulations require.

Next, the parent contends that the IHO properly determined that the failure to issue prior written notice after the February 2018 CSE meeting was a procedural error that denied the student a FAPE by significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, and that the district "opened the door" to this issue during the impartial hearing. The parent also asserts that the IHO properly found that the failure to consider less restrictive programs on the continuum denied the student a FAPE by significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, and that the IHO had jurisdiction to consider this issue because the parent had alleged an LRE violation.

The parent also asserts that the IHO correctly determined that the recommended 8:1+2 special class placement was not appropriate because it was overly restrictive, and therefore not the student's LRE, and that the IHO had a basis to find that the student could not be functionally grouped in the recommended program even without the class profiles in the hearing record.

The parent further contends that the IHO correctly determined that the unilateral placement at New Beginnings during the 2018-19 school year was appropriate for the student, and that the hearing record showed the student had made progress and achieved program goals. The parent

submits a February 2018 educational update attached to her memorandum of law as additional evidence.

Lastly, the parent asserts that the IHO should have found that equitable considerations fully favored the parent and supported reimbursement because the parent fully cooperated with the CSE process and was open to a district placement had an appropriate one been recommended. The parent asserts that in any event, intent is not relevant where there has been full cooperation with the CSE. In a cross-appeal, the parent contends that the IHO erred in failing to order full tuition reimbursement because the parent fully cooperated with the CSE and the December 2017 resolution agreement should not have been held to create a higher standard for the parent's cooperation with the CSE process.

In a reply to the parent's cross appeal, the district objects to the parent's submission of additional evidence to the hearing record. The district also answers the parent's cross-appeal, and asserts that the IHO did not err in finding that the parent had failed to fully cooperate in the intake process of at least two of the potential CSE placements.

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]).[5]

[5] 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

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. Compliance with Practice Regulations

I will first address the parent's contention that the district's request for review should be dismissed because it fails to provide a clear and concise statement of the issues presented. State regulations provide that each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3).

State regulation further provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Section 279.8 of the State regulations requires, in relevant part, that a request for review shall set forth:

(1) the specific relief sought in the underlying action or proceeding;

(2) 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 identifying the precise rulings, failures to rule, or refusals to rule presented for review; and

(3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

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chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

(8 NYCRR 279.8[c][1]-[3]). The regulation further states 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][4]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations As a general matter, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are . . . disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). However, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

In this case I disagree with the parent's assertions. The request for review identifies the precise rulings of the IHO in numbered paragraphs that the district asserts are error (see Req. for Rev. ¶¶ 22, 23-25, 38, 40-49, 50-57, 58-64, 74-76). The request for review makes regular and complete citations to the IHO's decision, the hearing record transcript, and the exhibits entered into the hearing record (see id. at ¶¶ 2, 4-12, 15-16, 23, 28-35, 37, 39, 41-52, 54-55, 58, 60, 62-70, 72). The request for review also clearly indicates what relief should be granted by an SRO (see id. at ¶¶ 76-78). In light of the above, I decline to dismiss the district's request for review because it adequately complies with the practice requirements of Part 279.

B. Additional Evidence

In a memorandum submitted in support of the parent's answer and cross-appeal, the parent attaches a district education update, dated February 8, 2018, which the parent unsuccessfully sought to submit to the IHO for consideration subsequent to the record close date but prior to the issuance of the IHO's decision. She requests that the additional evidence be considered on this appeal. The district argues that the additional evidence should not be considered on appeal because the document was available at the time of the hearing, it is not clear that the document is accurate and, in any event, because standardized test scores were only one factor among many the CSE considered during its decision making process, the education report is not necessary to render a decision in this matter.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if,

without such evidence, the SRO is unable to render a decision]). Disallowing the submission of evidence on appeal that could have been offered during the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable an IHO to make a correct and well-supported determination, and to prevent the party submitting the additional evidence from "sandbagging"—that is, withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]).

Here, the education report submitted on appeal by the parent was both available at the time of the impartial hearing and is not necessary to render a decision in this matter. The document is dated February 6, 2018 and, although she claims that she only "found" it after the hearing record closed, she appears to acknowledge that the document was in her possession and available to her at the time of the hearing (Parent's Memorandum of Law at p. 13, n.6). To the extent the parent asserts that the document should be considered in support of a "new issue" that "was not raised at hearing" – namely that an alleged discrepancy between certain standardized test scores reported on the student's IEPs and the scores included in the education report improperly influenced the State-approved school application process by allowing the district to present the student as lower functioning than he actually was (id. at pp. 12-14) – it is well settled that parties are precluded from raising new issues for the first time on appeal (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 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]"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]).

Although the parent also argues that the document is relevant to the district's claim on appeal that the IHO erred in her determination that the district denied a FAPE to the student by failing to produce any prior written notice directly after the February 2018 CSE meeting, this contention is also unavailing. As further described below, and also noted above, the parent never challenged the present levels of performance or description of the student's needs or abilities in her due process complaint notice and specifically did not dispute these aspects of the student's IEPs with reference to the alleged discrepant test scores she now alleges. Accordingly, to the extent the parent now claims that the education report supports the IHO's findings with respect to the district's failure to produce prior written notice after the February 2018 meeting, I find that the document is not necessary to determine whether or not the IHO erred in her determination that the district denied the student a FAPE on the basis of this procedural violation.

Finally, the parent also suggests that because the district, in part, relied upon the student's standardized test scores in its argument that New Beginnings was an inappropriate unilateral placement for the student, the education report she now seeks to submit is relevant to a determination of that issue. However, as described in detail below, because I am not reaching the issue of whether New Beginnings was appropriate, the education report's alleged relevance to that issue does not support its consideration on appeal. As a result of the foregoing, I decline to consider the parent's additional evidence.

C. CSE Meetings Related to the 2018-19 School Year

1. Prior Written Notice

The IHO found that the failure to issue prior written notice after the February 2018 CSE meeting was a procedural error that impeded the parent's participation in the CSE process because portions of the draft IEP were changed pursuant to the meeting and the parent did not receive a copy of the IEP until after subsequent CSE meetings (IHO Decision at pp. 17-20), a finding that the district challenges on several grounds.[6] For the reasons set forth below, I agree with the district and find that the IHO erred in determining that the district denied the student a FAPE based upon its failure to provide the parent with prior written notice subsequent to the February 2018 CSE meeting.

State and federal regulations require that a district provide parents of a student with a disability with a prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1). Pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

A CSE convened on February 13, 2018, for the purpose of conducting the student's annual review and as required by the parties December 2017 resolution agreement, which compelled the district and the parent to convene a CSE meeting by February 15, 2018 to "cooperate in an effort" to determine an appropriate placement for the student in a "New York State approved public or private school" (Tr. p. 114; Parent Exs. R; S; Dist. Ex. 2 at p. 1).

The February 2018 CSE had available to it a January 26, 2018 teacher annual review and progress report (Parent Ex. R at pp. 6-7, 11-12; see Dist. Exs. 21; 26), a January 26, 2018 report

[6] I disagree with the district's contention that the IHO was not permitted to reach the issue of prior written notice as it relates to parent participation in the CSE process. The evidence shows that the parent raised the issue of participation in the amended due process complaint notice (IHO Ex. D). However, during the impartial hearing, prior written notice was frequently discussed by counsel for the district during the impartial hearing, and the IHO made it clear that the district should enter any evidence of prior written notice it possessed into the hearing record (Tr. pp. 134, 146, 326-28, 453-54, 535, 1306-09; IHO Ex. D at pp. 6-7). Therefore, although the parent did not squarely raised the issue of prior written notice in the due process complaint notice (see IHO Ex. D), the hearing record indicates that the district nevertheless opened the door to the issue with respect to the February 2018 CSE meeting in its defense of the recommended program for the student during the 2018-19 school year (M.H., 685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). Under these circumstances, the district's defense that the issue is precluded must be rejected.

card (Parent Ex. G), a January 26, 2018 behavior consultation report (Parent Ex. R at p. 28; see Dist. Ex. 22), a January 26, 2018 transition report (see Parent Exs. I; R at pp. 21-22), a January 29, 2018 classroom observation (Parent Ex. R at p. 26; see Dist. Ex. 24), a February 5, 2018 transcript (see Parent Ex. L), a February 5, 2018 speech-language evaluation report and present levels (Parent Ex. R at pp. 13-14; see Dist. Exs. 19; 23), a February 5, 2018 annual review summary (Parent Ex. R at pp. 6-7, 11-12; see Dist. Ex. 21), a February 5, 2018 OT evaluation report and present levels (Tr. pp. 466-67; Parent Ex. R at pp. 15-16; see Dist. Exs. 20; 27), and a February 6, 2018 educational evaluation update (Tr. pp. 465-67, 472-74, 487-88; Parent Ex. R at pp. 8-10; see Dist. Ex. 18A). The hearing record indicates that this information was reviewed by the February 2018 CSE (Tr. pp. 114, 411-12, 414, 422-23, 934-35; Parent Exs. G; T at p. 1; Dist. Exs. 8 at pp. 2, 3-5). This evaluative information and the content of the recommended program will be further discussed below.[7]

According to the CSE chairperson who participated in the February 2018 CSE meeting, the purpose of the meeting was for the CSE to ascertain the student's present levels and needs and to locate an appropriate "state approved placement" for him (Tr. pp. 114-15). She noted that the parent and her advocate actively participated in the meeting and the district committee members (including staff who had evaluated the student), along with the team educating the student collegially discussed the student's academic, social/emotional, physical and management needs (Tr. p. 114). Similarly, the school psychologist who attended the February 2018 CSE meeting stated that the purpose of the meeting was to speak with all of the student's teachers and therapists from his then-current private school placement, review all of the reports that were presented and all of the documentation, and from those reports create goals for the student for the next school year (Tr. pp. 422-23). In addition, the school psychologist stated "a big part of the meeting" was to be able to sit together as a team and review New York State-approved programs and identify those that could possibly meet the student's needs (Tr. pp. 423, 429-30). The school psychologist reported that the February CSE identified eleven state-approved nonpublic schools that would potentially be appropriate for the student (Tr. p. 423).

According to the school psychologist, the student's IEP for the 2018-19 school year was primarily developed at the February 2018 CSE meeting (Tr. p. 542).[8] She indicated that the February 2018 CSE reviewed the student's present levels of performance, developed goals, and determined his related services needs (Tr. pp. 452-53, 507-08). The CSE chairperson noted that after the CSE went through the student's needs, together as a team they could identify which schools to send packets to for consideration (Tr. pp. 115-16, 179-81, 198-99, 256, 288-90).

[7] It is not clear if the following reports were available to the February CSE for review or if they were not available until the May 2018 CSE meeting: an April 12, 2016 social history report (see Dist. Ex. 17), an April 18, 2016 psychological assessment report (see Dist. Ex. 16), and a January 24, 2018 work sample (see Parent Ex. K; Dist. Ex. 8 at pp. 3-5).

[8] The CSE chairperson testified that the student's IEP was not developed at the February 2018 CSE meeting because "there was no placement" and in order to develop an IEP there had to be a recommended placement (Tr. p. 140). The district school psychologist testified that there was an IEP at the end of the February 2018 CSE meeting but that it was understood that the IEP was not finalized and the district knew it was going to have to find an appropriate program for the student (Tr. p. 437).

Consistent with the testimony of district witnesses, the parent reported that the purpose of the February 2018 CSE meeting was first to gather information from the student's providers at New Beginnings and hear how the student was doing in school, and then to talk about possible school placements (Tr. pp. 927, 1093-94; see Tr. pp. 932-42). The parent related that the February 2018 CSE discussed a list of possible schools at the meeting, and that specific conversations were held regarding some of the schools (Tr. p. 941-43). The parent testified that at the close of the February 2018 CSE meeting, the CSE decided to send "packets" out to 11 schools with the parent's written consent (Tr. pp. 1067; see Tr. pp. 982-84).

Audio recordings as well as a privately produced transcript of the February 2018 CSE meeting was admitted into the hearing record after much discussion between the parties and the IHO about its relevance, accuracy and admissibility (Parent Exs. R-U; see Tr. pp. 1037-55).[9] A review of the transcript supports the testimony above to the effect that the CSE members initially discussed the student's performance at New Beginnings, the results of district evaluations, and the need to update some of the student's annual goals (Parents Ex. R). The transcript also supports witness testimony that the CSE discussed sending intake packages to 11 approved non-public schools, that the parent signed a release to send the intake packets, that details about some of the programs were discussed, and that district members of the CSE noted that the process moving forward was to apply to the 11 schools, conduct intake processes, and then reconvene the CSE to finalize the recommended program, which would include recommending a specific approved school that had accepted the student (Parent Ex. S at pp. 2-17).

There is no dispute that the district did not issue prior written notice directly after the February 2018 CSE meeting, and that the actions taken by the February 2018 CSE were not included in a prior written notice until the prior written notice that was issued subsequent to the May 2018 CSE meeting (Req. for Rev. ¶¶36-45). Failing to do so constitutes a procedural error and the district is reminded of its obligation to document in a prior written notice to the parent the actions proposed or refused by the CSE and the reasons for the proposal or refusal. However, in this instance I disagree with the IHO's finding that this procedural error significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and thereby denied the student a FAPE, for the reasons set forth below.

Had the district drafted a prior written notice following the February 2018 CSE meeting, a proper notice would have included a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]). Thus, the parent would have been notified of the evaluations and reports that were considered during the meeting, and of the CSE's decision to apply to 11 approved non-public schools and begin the intake process at those placements that considered

[9] The audio file names submitted to the Office of State Review by the district with the hearing record (which are lettered differently than the listing in the IHO decision) are as follows Exs. R(1) - February 13, 2018 CSE Meeting Part 1; R(2) - February 13, 2018 CSE Meeting Part 2; S(1) - May 30, 2018 CSE Meeting; T(1) - BOCES Intake. Its not clear how the error occurred because the audio files and related transcriptions were reviewed at different times (see Tr. pp. 1053-54; 1208-11, 1215).

accepting the student. However, the hearing record supports finding that the parent was abundantly aware of the information the February 2018 CSE considered at the meeting and the actions, consented to by the parent, it determined to undertake with respect to further development of the student's recommended program. Moreover, it is clear from the hearing record that after the February 2018 CSE meeting, the district and the parent cooperated on their agreed upon plan to apply to the approved non-public schools identified at the February 2018 CSE meeting and to conduct intakes (Tr. pp. 1234-36, 298, 397-98, 401, 546, 947-50; see Dist. Exs. 4; 5; 6). The CSE met on two subsequent occasions in May and July 2018 to finalize the student's recommended program for the 2018-19 school year, and developed IEPs that recommended a specific approved non-public school the student had been accepted to (Dist. Exs. 8 at pp. 1; 12 at p. 1). Lastly, the CSE issued detailed and complete prior written notices after both of those subsequent CSE meetings (see Dist. Exs. 7; 11).

In light of the evidence described above, the hearing record supports a conclusion that the lack of prior written notice subsequent to the February 2018 CSE meeting did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student because the parent was aware of, and consented to, the actions the February 2018 CSE determined to undertake, and actively participated in subsequent CSE meetings to complete the development of the student's program, after which the parent received prior written notices in May and July 2018. The IHO's conclusion that the lack of a prior written notice from the February 2018 CSE meeting prevented the parent from having input is based solely on the IHO's reliance on the parents statements elicited during the impartial hearing that the present levels of performance in the IEP were inaccurate (IHO Decision at p. 20), but no IEP with allegedly inaccurate present levels of performance was produced as a result of the February 2018 CSE meeting and the alleged inaccuracy of the present levels of performance in the student's IEP was not among the parent's claims in this proceeding.[10] Consequently the procedural error of failing to provide a prior written notice from the February 2018 meeting did not, as the IHO reasoned, impede the parent's participation in the development of the student's programming, much less significantly impede the parent's participation as the IDEA requires in order to find a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]). Thus, the IHO's determination that the failure to issue prior written notice after the February 2018 CSE meeting constituted a denial of FAPE must be reversed.

2. Predetermination and Parent Participation

Turning next to the district's challenge to the IHO's finding that the CSE impermissibly predetermined the student's program because the CSE failed to consider the "full continuum" of possible educational placements and the parent's arguments that the district impeded her participation,[11] I disagree with the IHO's findings of a procedural violation in the form of

[10] As noted previously a prior written notice was produced by the district when the May 2018 IEP was produced. The parent attempts to argue in her memorandum of law, as she did in her post-hearing brief that the district's assessment of the student yielded inconsistent scores/ failed to accurately describe the student's abilities, but claims of inaccurate assessment of the student or a resultant IEP that failed to identify the student's needs are additional claims that were not among issues identified for hearing in the parent's due process complaint notice.

[11] The district asserts that the IHO erred in basing her finding on the CSE's failure to consider in-district placements because the parent did not make that claim and the parent and the district had agreed that an out-of-

predetermination or significantly impeding the parent's input with regard to the type of placements considered.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K., 12 F. Supp. 3d at 358-59 [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at *8, *10; E.F., 2013 WL 4495676 at *17 [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural

district placement was needed, as demonstrated by the December 2017 resolution agreement. I disagree with the district's contention that the parent failed to raise an LRE claim. In the amended due process complaint notice, the parent asserted that the district had predetermined the student's placement and chosen an overly restrictive student-to-teacher ratio, arguing that the recommended 8:1+2 placement was "too restrictive" because the student could be educated in a 12:1+1 placement, and explicitly argued that the recommended placement was not the student's LRE (IHO Ex. D at pp. 4-6). While it does not put the district on notice that of a claim that the student should be placed with non-disabled peers in a regular public school, it was sufficient to put the district on notice that the CSE process, as well as the resulting type of special class, was at issue.

requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

"[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Generally, a district is not required to consider placing a student in a nonpublic school if it believes that the student can be satisfactorily educated in the public schools (W.S. v. Rye City Sch. Dist., 454 F.Supp. 2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in the IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]).

Initially, I note that the parties' arguments with respect to predetermination are somewhat entwined with the related question of whether or not the CSE identified an appropriate placement on the continuum for the student. Accordingly, as each issue warrants a separate analysis, I will first focus on whether the CSE had the requisite "open mind" with respect to the contents of the student's IEP and ensured that the parent was present at their child's IEP meeting and were afforded the opportunity to participate.

The February 2018 CSE convened a meeting as required by the parties' December 2017 resolution agreement, which compelled the district and the parent to convene a CSE meeting by February 15, 2018 to "cooperate in an effort" to determine an appropriate placement for the student in a "New York State approved public or private school" (Parent Exs. R; S; Dist. Ex. 2 at p. 1).

On appeal the parent puts forth a different restrictiveness argument than she presented during the CSE meeting or the impartial hearing. In both the parent's amended due process complaint and her post-hearing brief, the parent accused the district of improperly changing the special class student-to-staff ratio from a 12:1+2 to an 8:1+2, stating that it was more "restrictive" that what the student required (IHO Ex. D; Parent's Post Hr'g Brief at p. 15). The parent asserts that the placement recommended by the district for the 2018-19 school year was predetermined because the district did not consider an in-district placement and only considered BOCES and 853

schools: however, the hearing record shows that the district was open to suggestion regarding other possible placements for the CSE to explore. However, with regard to in-district programs, no such arguments were present and the parent merely stated in her brief to the IHO, that at the February 2018 CSE meeting "[A]s had been the case for several years prior, the CSE determined that the District would be unable to meet the Student's educational needs in an in-district program and recommended placement in an out-of-District program" (Parent's Post Hr'g Brief at p. 3). There was no argument from the parent previously that the district improperly failed to consider placing the student in one of the district's public high schools in some form of mainstreaming or inclusion program. Only now, for the first time on appeal, does the parent adopt the IHO's finding that the CSE should have procedurally considered placing the student in an in-district program ostensibly for inclusion or mainstreaming purposes in a district high school with nondisabled peers, which the IHO characterized as impermissible "predetermination." As more fully described below, both parties came to the CSE with pre formed opinions and envisioned that the student would not be appropriately placed in a mainstream setting, but the IHO's characterization of these opinions as predetermination was misguided, because the evidence shows that the CSE had not finalized the recommended programing before the CSE meetings occurred.

With regard to including the parents in the CSE process, the evidence in the hearing record shows that the CSE chairperson forwarded a list of State approved placements to the parent and her advocate prior to the February 2018 CSE meeting, and that she did not limit the placement search to those schools (Tr. pp. 115-16; Parent Ex. S at pp. 4, 13). Rather, during the February 2018 CSE meeting the CSE chairperson stated that she wanted to "cast a wide net" and advised the committee that she did not mind sending a referral to "any programs that you come up with that are New York State approved" (Parent Ex. S at p. 4).

The evidence shows that the CSE's attitude was the opposite of pressing toward predetermined outcome and that the CSE chairperson was instead actively seeking input from the members, which included the parent, and her lay advocate. For example, the CSE chairperson further advised the committee, "If there are any other programs that you can think of that are approved by the state I am absolutely interested in sending out a packet and exploring that too" (Parent Ex. S at p. 13; see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *21 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 F. App'x 56 [2d Cir. 2014] [discussing the permissibility of using draft IEPs or having pre-formed opinions so long as that is combined with a willingness to hear parental objections and suggestions]). She noted that based on information from the school (New Beginnings) and district evaluations the CSE had a good handle on the student's needs and, "Now the idea is to find the right fit of a nice and good school" (Parent Ex. S at p. 13). Moreover, the CSE chairperson did not limit the search for appropriate programming to a specific special class ratio. According to the transcript of the February 2018 CSE meeting, the CSE chairperson noted that the application to Rockland BOCES (Kaplan) would not indicate a program for the student at the school (Parent Ex. S at p. 13). She stated, ". . . I am not going to indicate [sic] program. I'm going to let them take a look at it, see where they sort by themselves." (Parent Ex. S at p. 13).

In addition, the IHO did not explain why she rejected evidence that the parent that tended to support that the parent was not willing to consider placing the student in a mainstream setting. The evidence shows that the parent had previously rejected a placement housed in a public school approximately one to two years earlier because she believed that it would be overwhelming for the student (Tr. pp. 94, 176-77, 222, 1099-1100; Parent Ex. T at p. 18, 19). The parent tended to refer

to programing in a public school as mainstreaming and opined that the student could not be placed in a mainstream environment (Tr. pp. 243-44). During the May 30, 2018 CSE meeting, the school psychologist explicitly brought up the reasoning that the parent had previously expressed concern about placing the student in a program located in a public school (Parent Ex. T at p. 18). The CSE chairperson also testified that when considering placements included in public school settings, she respected input given by the parent and her advocate that "[l]unch recess, change of classes, the bell ringing. . . would just be sensory overload for him" (Tr. 296). The parent also appeared to indicate during the May 2018 CSE meeting that she was interested in a special education school, stating "[s]o we're all looking at schools that are special ed and not in a general building" (Parent Ex. T at pp. 18-19). District witnesses testified that the recommended program was "center-based," like New Beginnings, meaning it was not housed in a large public high school (Tr. pp. 147, 159, 296, 303, 430, 435). The district personnel were required to keep an open mind and consider the parent's input and suggestions, and I find that the evidence shows that they did so, but keeping an open mind does not mean that when formulating potential options for consideration that district personnel are required to completely wipe the slate clean and simply ignore past and current input from the parent just to fend off a predetermination claim.

Rather than carry through on a predetermined placement, the evidence shows that the CSE chairperson stated that after hearing the private school staff discuss the student's present levels of performance, the February 2018 CSE selected 11 approved non-public schools to which a "referral package" would be sent (Tr. pp. 116-118, 288-90; Parent Ex. S; see Dist. Exs. 5, 38). In addition, the CSE determined that a reconvene would be necessary to discuss which placement was appropriate for the student (Parent Ex. S at p. 2). After the February 2018 CSE meeting the district sent application "packets" via email to the 11 identified schools (Tr. pp. 120-21; Dist. Ex. 4 at p. 1).

After receiving responses from some of the schools, the school psychologist visited potential placements in order to assess their appropriateness for the student and offer those contributions to the CSE (Tr. pp. 324, 432-33). The school psychologist reportedly had observed the student at his private school, had observed the recommended BOCES placement, and was present at the February and May 2018 CSE meetings (Tr. p. 324). The input from the school psychologist was reportedly relied upon in making the placement recommendation (id.).

The school psychologist stated that based on the information before the February 2018 CSE, the student would benefit from a "center-based" program which focused on "functional academics" such as the recommended placement (Tr. pp. 435-36). In addition, testimony indicated that the student could potentially go to a less restrictive placement in the future (Tr. pp. 436-37, 442-43, 519, 534-35, 553, 1247-49).

The parent visited some of the potential schools but did not complete two of the intakes, and the CSE chairperson subsequently contacted the parent to encourage her to complete the intakes (Tr. pp. 123-26, 129, 537-38, 1113-15; see Dist. Exs. 4 at p. 2; 5; 6). The parent described her attempts to schedule intakes and visits to potential programs (Tr. pp. 401, 947-66). In one instance the "parent refused" to complete the intake, as she determined the placement was too far (Dist. Exs. 5, 6). In the other instance the parent visited the school and determined that it was inappropriate for the student, and therefore she did not bring the student for a visit (Tr. pp. 123, 129, 1113-15).

When the CSE reconvened on May 30, 2018 to finalize the student's IEP and recommend a placement for the 2018-19 school year (Tr. pp. 132, 452-53; Dist. Exs. 7 at p. 2; 8 at p. 1), the evidence shows that the two approved nonpublic schools that had accepted the student were discussed as options, which also undermines the parent's predetermination and parental participation claims (Tr. pp. 141-42, 967). Representatives from both of the schools that had accepted the student attended the CSE meeting by telephone, spoke at length about their respective programs, and answered questions from CSE members, including the parent and her advocate (Tr. pp. 132-35, 141-46, 154-56; Parent Ex. T; Dist. Exs. 7 at p. 2; 8 at p.1).

After the IEP was completed, the CSE reconvened a third time on July 6, 2018 CSE for a program review and to give the parent an additional opportunity to ask questions of the assistant superintendent of the recommended BOCES program (Kaplan) (Tr. pp. 195, 615-20; Dist. Ex. 12). According to the meeting minutes the assistant superintendent for the recommended placement responded to all the parent's concerns (Dist. Ex. 12 at p. 1; see Tr. pp. 329-30, 615-30). The Kaplan assistant superintendent explained that the student's profile, adaptive behavior scores and goals were similar to the students currently in the proposed class (Tr. pp. 623-25; Dist. Ex. 12 at p. 1).

In this case the evidence weighs decidedly in favor of finding that the CSE kept an open mind in developing the student's IEP for the 2018-19 school year and considered the input of the parent and her advocate. At the time of the CSE meetings, there is no evidence that either party believed that the student should be placed in an in-district program, and the parent raised no claim to that effect at the impartial hearing stage. The IHO, while expressing what is always a legitimate question (i.e. is there any available programming in the district that the student may benefit from), should have posed that question directly to the parties and informed them that she was concerned that an in-district placement should have been considered instead of waiting until the final decision and impermissibly stretching the LRE concept well beyond the parties arguments and into a procedural violation that was not supported by the hearing record. To the extent that the parent's claim that her participation was impeded at the CSE meeting, the evidence shows that her input was sufficiently solicited by district personnel, and therefore must be rejected. To the extent that the IHO ruled on the parent's LRE claim as a substantive matter, I address that issue separately below.

In addition to the information reviewed at the CSE meetings, the May 2018 CSE was also influenced in its decision prior to the February 2018 CSE meeting by specific terms of the December 2017 resolution agreement which required that the parent and the school district agree to "cooperate and act in good faith" to "secure an appropriate New York State approved placement for the student for the 2018-19 school year" (Dist. Ex. 2 at p. 2). The May 2018 CSE requested the parent's preference between the two placements that accepted the student; which the parent did not provide (Tr. pp. 133-34, 154, 255-56, 1122-23; Parent Ex. T at pp. 15-17; Dist. Ex. 8 at pp. 1-2).

As the IHO noted, the parent has never claimed nor asked for an in-district placement to be considered for the student (IHO Decision at p. 23). The December 2017 resolution agreement reflects that the parent and the district were in general agreement that an approved placement should be identified for the student (Dist. Ex. 2). Furthermore, the district and the CSE had to be mindful of the guidance directed at the district by a State monitor and the Special Education

Quality Assurance office.[12] While it appears that the CSE did not explicitly discuss an in-district placement for the student during the CSE meetings, the CSE maintained an open mind with respect to the student's program and placement, and the parent clearly had a full opportunity to participate in the CSE process.

In light of the above, the failure to consider an in-district placement in this matter, under these facts, was a procedural error that did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits. Accordingly, I reverse the IHO's finding that the student was denied a FAPE on that basis.

D. 2018-19 IEP

The IHO made several findings with respect to the May 2018 IEP itself and Kaplan's ability to implement the IEP. For reasons different than those asserted by the parent, the IHO found that the recommended placement in an 8:1+2 special class at Kaplan denied the student a FAPE because the placement was not the student's LRE (IHO Decision at p. 26). The IHO found that the student's social abilities and needs as described in the IEP present levels of performance indicated that the student required peer interaction, including "interaction, to the maximum extent possible with non-disabled peers" (IHO Decision at p. 29). As a result, the IHO determined that the BOCES program at Kaplan was not capable of implementing the student's IEP and therefore denied the student a FAPE in the LRE (IHO Decision at pp. 26-30). However, the IHO also noted that the parent's objections to the programming proposed by the district had largely been focused on the class profiles of other student's at Kaplan, and the IHO rejected the parent's claims as impermissibly speculative (IHO Decision at pp. 24-26). The IHO also acknowledged provisions in the IEP in her decision, stating that the student "will not participate at all in general curriculum programs as he requires a smaller student teacher ratio" (IHO Decision at p. 29). I will first review the information relevant to the student's needs for contextual purposes. I will then turn to the LRE arguments and findings in this matter, lastly will address the findings related to the student's peers and Kaplan's ability to implement the student's IEP.

[12] The assistant superintendent for special student services testified that she had been "entrusted" to ensure that the district was following regulations and guidelines related to special education (Tr. pp. 33, 40). The assistant superintendent averred that a previous resolution agreement that the district had entered into with the parent was problematic because it was primarily focused on the district's fiscal concerns, rather than the student's needs and compliance with education law (Tr. pp. 38-40, 359-60). The assistant superintendent reported that the district had recently been investigated by a State monitor regarding certain practices that the district employed in placing special education students (Tr. pp. 352-65; see Dist. Ex. 41). She explained that the district had been issued a guidance letter from the "Special Education Quality Assurance office, SEQA" directing the district to "cease and desist" these practices, and the December 2017 resolution agreement was partially a product of that guidance (Tr. pp. 351-53, 358-60, 362-65; Dist. Exs. 2; 41 at p. 10; 42).

1. The Student's Needs

For purposes of context, it is necessary as a preliminary matter to consider the evaluative information available to the various CSEs regarding the student's needs and abilities and whether the resultant IEP provided the student with a FAPE in the least restrictive environment.

The April 2016 psychological evaluation was conducted as part of the student's triennial evaluation by the school psychologist who was also a board certified behavior analyst (BCBA)(Dist. Ex. 16 at p. 8). The psychologist's assessment of the student included a review of records, completion of a social history update, administration of standardized testing and completion of rating forms, a review of a teacher progress report and a review of student work samples (Dist. Ex. 16 at p. 2). The psychologist reported that during testing the student was "friendly, polite and cooperative," but noted that although the student made eye contact with the examiner it was often fleeting (id.). In addition, the psychologist noted that the student was distracted and required redirection and refocusing to engage in some of the tasks presented and that she employed a token economy with a choice of reinforcers to keep the student motivated during testing and to maximize the student's performance (id.). Administration of the Differential Ability Scales-Second Edition (DAS-2) yielded a general conceptual ability score that fell in the "[v]ery [l]ow" range (id. at pp. 3-4, 7). The student displayed "inter-test scatter" between index scores, which suggested that the student's acquired verbal knowledge, concepts and verbal reasoning, and complex visual-spatial reasoning were better developed than his ability to immediately problem solve, complete tasks requiring complex mental processing, and nonverbal reasoning (id. at pp. 4, 7). According to the psychologist, teacher completion of the Vineland Adaptive Behavior Scales–Second Edition (Vineland-II) yielded an adaptive behavior composite of 62 which fell in "[l]ow" range of adaptive functioning (id. at pp. 5, 7). In addition, completion of the Behavior Assessment Scale for Children-Second Edition (BASC-2) by the student's teacher indicated "some problem areas" including at-risk scores for hyperactivity, conduct problems, depression, learning problems, functional communication, leadership, social skills, and adaptability, and clinically significant scores for aggression, attention problems, and atypicality (id.at pp. 6-7). According to the psychologist, anecdotally the teacher reported that the student often argued when he was denied his own way, lost his temper easily and defied teachers, had a short attention span and was easily distracted from classwork, called out in class and interrupted others when they were speaking, and had trouble keeping up in class (id. at p 7).

In addition to formal testing, the school psychologist also conducted a classroom observation of the student on January 26, 2018 at his private school (Dist. Ex. 24; see Tr. pp. 313-14, 324, 412-13,). The psychologist explained that the purpose of the observation was to "get a sense" of the material the student was working on in his then-current classroom environment, how the student was functioning, not just academically, but also socially and behaviorally, and to speak to the student's teachers and collect requested documents (Tr. pp. 413-14). In the resultant observation report, the psychologist noted that the student appeared interested and attentive during a "functional math lesson" on how to write a check and responded well to verbal directions; however, the student also required prompting to complete some of the directives (Tr. pp. 415-16; Dist. Ex. 24 at p. 1). The psychologist indicated that the student did not require any behavioral interventions and interacted appropriately with the teacher but did not interact with his peers during the observation (Tr. pp. 417-18; Dist. Ex. 24 at pp. 1-2). The student was compliant during the activity and transitioned to his next class without incident (Tr. p. 418; Dist. Ex. 24 at p. 3).

The CSEs also had for consideration a February 6, 2018 educational evaluation report which described the results of testing using the Wide Range Achievement Test-Fourth Edition (WRAT-4) and an informal writing sample (Dist. Ex. 18A).[13] The district educational evaluator who conducted the assessment reported that the student was cooperative and attentive during the assessment and made intermittent eye contact (Dist. Ex. 18A at pp. 1, 2). In addition, she noted that the student correctly followed directions (id. at p. 1). With respect to word reading, the evaluator reported that the student read one and two-syllable familiar sight words; however, when presented with unfamiliar multisyllabic words the student would stare and state "I don't know" (id. at pp. 1, 2). In addition, the student was able to read fourth, fifth, and sixth grade-level passages correctly (orally) but could not answer corresponding literal or inferential comprehension questions at that level (id.). The evaluator indicated that the student required a significant amount of support to write simple a paragraph (id. at p. 1). He was able to spell 1-3 syllable familiar words but unable to spell words at the sixth or seventh grade level using spelling rules such as syllabication, double vowels, or regular and irregular endings (id. at p. 3). The evaluator reported that the student was able to express his thoughts with one expanded sentence and one sentence fragment (id.). She noted that the student's writing was difficult to decipher due to spatial errors and poor penmanship (id.). With respect to math, the evaluator reported that the student was able to add single (1-12) digits and subtract single and double digits without regrouping, however, he was unable to add or subtract double digits with regrouping, or multiply or divide basic facts (id.). The student was also unable to round numbers, add fractions with common denominators, simplify fractions or add mixed numbers (id. at p. 3). According to the evaluator, the student attained the following grade-based standard scores on the WRAT 4: word reading 81, spelling 80, and math computation 55 (id. at p. 1).[14] . On the WRAT: Expanded the student attained a reading standard score of 55 (id.). The evaluator opined that the student needed to increase his basic fund of sight words, practice reading comprehension skills, improve written expressive language, and practice math computation skills and solving real world problems using basic operations (id. at p. 3). [15].

In addition to district evaluations that identified the student's cognitive functioning and academic needs, the CSEs had access to reports written by the student's teacher at New Beginnings. An annual review report, written by the student's teacher in February 2018, provided information regarding the student's academic program and classroom functioning (Dist. Ex. 21). With regard to reading, the teacher reported that the student recently read a chapter book and used an iPad to define vocabulary words (Dist. Ex. 21 at p. 1). She noted that in class the student was able to answer comprehension questions related to the book (id.). The teacher indicated that the student's reading/language arts instruction focused in part on reviewing parts of speech (id.). With respect to math, the teacher reported that the student's math group focused on functional consumer math

[13] The February 2018 educational evaluation report (Dist. Ex. 18) was originally missing a page; District Exhibit 18A is the complete document (Tr. pp. 461-63).

[14] At the February 2018 CSE meeting, the educational evaluator reported that the student's scores as follows: word reading 85, spelling 94, and reading comprehension 78 (Parent Ex. R at p. 9).

[15] The transcript of the February 2018 CSE meeting suggests that the student's mother, advocate, and teacher disagreed with the results of the district's standardized testing and suggested that the student's math and comprehension skills were at a higher level (Parent Ex. R at pp 8-12). However, the private school staff did not present any objective measure of the student academic functioning.

including calculating salary (id.). In addition, the student was working on money skills, making change, and telling time (id.). According to the teacher, the plan for the student's future instruction was to focus on the banking process and how to analyze a paycheck (id.). The teacher reported that in chemistry the student was studying states of matter, mixtures and solutions, atoms and molecules and physical and chemical changes (id. at p. 2). In social studies the student was learning about topics in American history (id.). In the student's life and career class, the teacher reported that the student was working toward improving his ability to problem solve and apply the skills to real life problems (id.). The student was able to work on money management, personal budgeting and engaged in job sampling (id.). The teacher reported that the student enjoyed socializing with his peers and was working toward demonstrating appropriate interactions with adults and peers in school and in the community (id.). She indicated that the student frequently asked questions that were off-topic and repeated himself (Dist. Ex. 21 at p. 3). Throughout her report, the teacher noted that the student was easily distracted, had difficulty or was unmotivated to complete tasks independently, was at times noncompliant, and benefitted from reminders to stay on task, visual aids, and interactive lessons, as well as verbal encouragement and positive reinforcement (id.). In addition to the annual review report, the student's teacher at New Beginnings also completed an updated progress report in which she indicated that the student's "instructional functional grade level" for reading was a fourth-grade level, for math was a second to third grade level, and for writing was second to third grade level (Dist. Ex. 26 at p. 1). The student's special education teacher participated in the February 2018 CSE meeting and reported that the student was doing "very well in class," his "behaviors ha[d] decreased" and he "occasionally" needed "a little extra guidance" during group work (Parent Ex. R at p. 6; see Tr. p. 780). According to the special education teacher, the student was "very, very social" with other students, he was a "good role model," and looked "forward to going to work" every day (Tr. pp. 780-81; Parent Ex. R at pp. 7, 13).

With respect to the student's behavior, a January 2018 behavior consultation report completed by New Beginnings indicated that during the 2017-18 school year the student excelled in both the classroom and work settings (Dist. Ex. 22 at p. 1). According to the behavior report, within the school setting staff had identified "non-compliance" as a specific behavior targeted for reduction in order to increase the student's time spent on task (id.). The target behavior was defined as episodes of refusing to follow directions, at times paired with disrespectful language, destruction of materials, and stereotypy (id.). The private school determined that the function of the student's noncompliant behavior was (in decreasing order) "attention/preferred item," "sensory," and "automatic"(id.). The behavior report indicated that through the use of differential reinforcement of other behavior (DRO) and fixed, then variable, reinforcement schedules the student's frequency of noncompliant behavior decreased (id).

The CSEs also had information from both the district and New Beginnings regarding the student's speech and language needs. The district speech-language pathologist, who completed a February 2018 speech-language evaluation, described the student as attentive, focused, and compliant (Dist. Ex. 19 at p. 1). She observed that the student engaged in jaw/tooth grinding, self-talk, fidgeting with his fingers, dysfluent speech, and robotic speech during testing (Dist. Ex. 19 at p. 1; see Parent Ex. R at p. 14). According to the speech-language pathologist, the student looked down during testing and although he answered questions, he did not initiate conversation with her (Dist. Ex. 19 at p. 1). The speech-language pathologist reported that the student presented with significant receptive, expressive, and pragmatic language delays (id. at p. 5). More

specifically, the therapist noted that the student scored in the "very poor" range on the Test of Pragmatic Language -Second Edition and had difficulty understanding common scenarios that were presented as well as understanding abstract language, inferential questions, and problem solving (Dist. Ex. 19 at p. 2). On the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) the student attained an expressive language score of 71, receptive language score of 57, and a core language score of 62 (id. at p. 3). The speech-language pathologist recommended that the student's speech-language goals target pragmatic language skills with an emphasis on understanding figurative language, identifying and solving problems related to activities of daily living, answering inferential questions, understanding body language and personal space, initiating and maintaining a conversational exchange, and the appropriate use of eye contact (id. at p. 5). The student's speech-language pathologist from New Beginnings assessed the student's progress toward his annual goals that were established at New Beginnings for the 2017-18 school year and reported that the student had achieved an objective related to understanding safety signs (Dist. Ex. 23 at p. 1). She noted that the student's ability to ask appropriate questions in a community setting was emerging (id.). With respect to problem solving, the speech-language pathologist indicated that the student was able to identify a problem, explain why it was a problem, and generate a logical solution with minimal cues (id.). In terms of pragmatic language, she noted that the student had been asking questions and making comments when a highly motivating topic of conversation was being discussed, but when a less motivating topic was introduced, his focus and attention to the conversation fluctuated (id.). The speech-language pathologist also noted that the student had been working on practicing phone calls to community locations and benefitted from the use of a prepared script (id.at p. 2). The New Beginnings speech-language therapist stated that the student would continue to work on some of his pragmatic, social language, and problem-solving goals, as well as additional "functional goals" for when he was "out in the community" (Parent Ex. R at pp. 1, 13-14). She indicated that the standard scores obtained by the district were typical of those the private school staff observed (id.at pp. 16-17).

Turning to the student's motor development, the district conducted an OT evaluation of the student in February 2018 (Dist. Ex. 20). In terms of the student's sensory status and more specifically his visual skills, the evaluating therapist reported that the student tended to look straight ahead rather than make eye contact (id. at p.1). The therapist noted that the student was able to disassociate his eyes from his head in order to track a moving pencil through midline; however, had difficulty tracking an object moving up through vertical and diagonal planes (id.). With respect to graphomotor skills, the student was able to write most letters and numbers legibly but did not consistently leave enough space between words (id.at pp. 2, 4). The therapist reported that the student was able to manipulate paper and scissors to cut out shapes and able to use in-hand manipulation skills to properly orient and place a peg, albeit slowly (id. at p. 4). In terms of activities of daily living, the evaluating therapist reported that the student indicated he did not know which coins to give a cashier to buy a seventy-five-cent piece of pizza (id.at p. 3). In addition, after discussing how to make a pizza, the student indicated he did not know what items he would put on his shopping list if he wanted to make one (id.at p. 3). According to the evaluating therapist, the student scored in the very low range on a standardized measure of visual motor, visual spatial, and fine motor coordination skills (id. at p. 3). The therapist explained that the student scored low on his fine motor coordination mainly due to his slow pace compared to his same age peers (Parent Ex. R at p. 16; see Dist. Ex. 20 at pp. 2, 4). Based on the student's performance, the evaluating therapist stated that the student appeared to be functioning at the same level as when she previously evaluated him in April 2016 (Dist. Ex. 20 at p. 4).

The private school occupational therapist was present for the February 2018 CSE meeting and reported that the student tended to rush which caused his handwriting to be sloppy, with poor line orientation and directionality (Parent Ex. R at pp. 3, 15). However, the occupational therapist stated that he was "mostly concerned about" the student's functional skills such as writing a check, completing a job application, and taking legible notes in class that he could read back to himself (id. at p. 15). The occupational therapist also stated that he wanted to focus on keyboarding as a priority for the student and noted that the student's math skills were lacking (id. at p. 15). Although the private school occupational therapist agreed with the district occupational therapist's assessment of the student's ADL skills, the parent appeared to suggest that the student's money skills were better developed and the student was aware of the ingredients necessary to make a pizza (Parent Ex. R at pp. 15-19).

Lastly, with respect to information regarding the student's needs, the CSEs had access to a transition plan developed by New Beginnings that indicated the student participated in a weekly "infusion" class where he explored career options and that he also participated in the school's work program in which he worked at a hotel and in on-campus settings (Parent Ex. I at p. 1; see Parent Ex. R at pp. 21-22). The transition plan further indicated that the student participated in community-based instruction (CBI) where he practiced applying independent functional skills in the community (Parent Ex. I at p. 1). The transition plan included long-term goals that aimed to provide the student with an education in appropriate social and life skills, prepare the student to be a self-sufficient adult, and assist the student with establishing and maintaining long-term employment (id. at pp. 2-4).

With regard to the resultant May 2018 IEP, the present levels of performance were derived from the results of the evaluations conducted by the district as well as information provided by the student's private school teachers and therapists (Compare Dist. Ex. 8 at pp. 4-9 with Parent Exs. R; Dist. Exs. 16; 18; 19; 20; 21; 22).[16] For the 2018-19 school year, the CSE recommended that the student attend an 8:1+2 special class at the Rockland BOCES (Kaplan) and receive related services of one 30-minute session per week of individual OT, one 30-minute session per week of group (3:1) OT, and one 30-minute session per week of group (3:1) speech-language therapy (Dist. Ex. 8 at pp. 1, 14). The CSE also recommended that the parent be provided with one 60-minute

[16] As noted above, I will not delve into additional matters that were not challenged by the parent in her amended due process complaint which were only later questioned by the parent in the midst of testimony during the impartial hearing; the adequacy of the evaluation of the student and the accuracy of the present levels of performance in his IEP were not raised by the parent at the outset of the impartial hearing. It is unfair to the district to start adding new disputed issues to the proceedings in the middle of the impartial hearing, especially on issues that it bears the burden of production and persuasion. Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d] [noting that the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing or the other party otherwise agrees]).

session per quarter of individual parent counseling and training (id.at p. 14). The recommended IEP afforded the student the following supplementary aids and services: refocusing and redirection to assist the student with attending, special seating arrangements to account for the student's visual and fine motor needs, use of a graphic organizer to assist the student with the writing process, checks for understanding and the use of a calculator (id. at p. 15). The IEP also provided the student with access to a word processor and allowed for one 30-minute behavioral intervention consultation per month with the student's team (id.). The IEP indicated that the student was eligible for 12-month services and would be alternately assessed (id.at pp. 15-16, 17). The IEP included annual goals and short-term objectives that targeted the student's speaking and listening skills, social/emotional/behavioral development, motor skills, daily living skills, academic skills, participation in a vocational program appropriate to his interests and skills, and career/transition needs (id. at pp. 10-14). The IEP also included post-secondary goals and detailed recommended transition activities (id.at pp. 9, 16-17).

2. LRE

I will next address the district's challenge that IHO erred in finding that the May 2018 IEP was not the student's LRE and the parent's assertion that the IHO correctly determined that the IEPs did not place the student in the LRE. The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test];Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

> (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[17]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

As illustrated by the legal standards referenced above, the question of whether a student's placement is in the appropriate LRE focuses first and foremost on a student's access to nondisabled peers. Accordingly, despite the IHO's reference to "LRE" in analyzing the appropriateness of the student's placement at Kaplan, and her own stated view that the student's needs required "interaction, to the maximum extent possible with non-disabled peers" (IHO Decision at p. 29). However, as discussed to a degree above, the May 2018 IEP present levels of performance, contrary to the IHO's finding, say no such thing and the IEP otherwise explicitly states that "[the

[17] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington,546 F.3d at 120 n.4).

student] will not participate in general education programs and requires special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards" (Dist. Ex. 8 at p. 17). Furthermore, as I stated above, when addressing the IHO's findings of a procedural violation in conducting the CSE meeting, both parties came to the CSE process with the opinion that the student should not be placed in a general education building alongside non-disabled peers and that the disagreement presented by the parties to the IHO on the appropriateness of the recommended placement was primarily not one of the IDEA's LRE requirement that student's be placed with nondisabled peers, because both the district's recommended placement and the parent's unilateral placement at New Beginnings offer programming in a small special class setting rather than alongside nondisabled peers and therefore a removal from the general education environment.

Again, while the parent's amended due process complaint notice used the term "too restrictive" (IHO Ex. D at p. 4), the factual dispute centered on the parties' opinions and dispute regarding whether the student should be placed in a 8:1+2 special class at Kaplan as proposed by the district or a 12:1+4 special class as preferred by the parent at New Beginnings, and these particular placement characteristics are unrelated to the IDEA's LRE requirement (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015][stating that "[t]he requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement"; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [finding that the IHO's application of LRE requirement to a ratio dispute was improper, stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). Instead the IEP was responsive to the parent's concern that the student should not be placed in a regular school environment that would be over whelming for the student or a "general building," and the evidence described above with regard to the student's needs does not in any way suggest that the student would be more poorly served by an IEP that calls for small special class having 8 peers as opposed to 11 or 12 peers in a special class like the one the student received at New Beginnings. The small special class ratio aligns with the student's needs as identified in the evaluative information before the CSE that is described above, and the district was not required to precisely mimic the ratio that the student had been receiving at New Beginnings in order to be appropriately tailored to the student's needs and likely to result in educational benefit to the student. The remainder of parent's concerns with respect to the 8:1+2 class at Kaplan as proposed in the IEP is best addressed in the context of the district's remaining challenges to the IHO's decision as discussed below.

3. IEP Implementation

I will next address that branch of the IHO's reasoning that the district failed to offer the student a FAPE because the 8:1+2 special class at Kaplan was not capable of implementing the student's IEP insofar as it did not provide the student with access to peers, including nondisabled peers, which the student required as a result of his "high degree of social interaction" and "high level of goals, which require[d], at a minimum, some peer interaction" (IHO Decision at p. 29). Although the IHO was correct that the parent's objections to Kaplan in particular focused on evidence such as the class profiles and the peers with whom the student would have been grouped, and the IHO rejected that argument (IHO Decision at pp. 25-27), a review of the parent's September

14, 2018 due process complaint notice also shows that the parent did not raise any claims with respect to Kaplan's implementation of or capacity to implement the student's IEP for the 2018-19 school year. Instead, the IHO raised and decided this matter sua sponte, without disclosing her intention to do so to the district, and this capable-of-implementation aspect of her decision should be reversed on that ground alone.[18] Further clouding matter, the parent has not challenge the IHO's adverse finding regarding the impermissible, speculative nature of her claim regarding the type of peers in the proposed placement (IHO Decision at p. 26), and instead has limited her cross appeal of the IHO's decision solely to her challenge to the IHO's reduction of reimbursement on equitable grounds. Rather than peruse the claims and factual underpinnings of her FAPE claims as she laid them out in the due process complaint, the parent has essentially adopted the IHO's reasons for finding a denial of a FAPE, but to the degree that the IHO's decision contains serious flaws such as deciding matters not properly raised or unsupported by the evidence, the strategy then backfires under the circumstances of this case. Out of an abundance of caution, I will offer an analysis of why the IHO's decision is not supported by the evidence. Despite the parent's speculative claim that the assigned school would be unable to provide functional grouping for the student, the hearing record shows the recommended placement was capable of implementing the student's IEP for the 2018-19 school year.

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., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). The Second Circuit has also stated that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's speculative concerns that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 611 Fed. App'x at 731).

[18] Not surprisingly the district's post-hearing brief to the IHO tracks the issues presented by the parent in her due process complaint, and therefore focuses on arguments asserting why the IEP is appropriate for the student rather than defending Kaplan's capacity to implement the IEP, merely making a single general remark that Kaplan was prepared to implement the IEP (Dist. Post Hr'g Brief at p. 11).

However, 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 assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; 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]). In particular, the Second Circuit has stated 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 student's] IEP" (M.O., 793 F.3d at 246; see L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *24 [S.D.N.Y. Sept. 27, 2016] [rejecting the parent's particular grouping claims as to what might have occurred as impermissibly speculative]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015] [noting that the "the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *6-*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at *12-*13 [S.D.N.Y. July 6, 2015] [noting the preference of the courts for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*13 [S.D.N.Y. June 16, 2014]).

In view of the foregoing, the IHO erred in finding that the parent should prevail on her claims regarding the lack of capacity of the district's proposed placement to implement the student's IEP. While it is understandable that the parent would desire the best possible environment for her child, the evidence in the hearing record provides support only for what the parent believed might occur at the assigned school, rather than evidence that the Kaplan was incapable of implementing the student's IEP. Accordingly, the parent's claims based on her observations regarding the environment at Kaplan generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP]; see Y.F., 2015 WL 4622500, at *7 [holding that a quality review report of some aspects of a public school was irrelevant with regard to whether the school could implement a student's IEP]). In particular, parental concerns regarding school or class size, such as the parent's general concerns regarding the 8:1+2 student-to-staff ratio, when not contrary to a requirement in a student's IEP, have been deemed not to constitute permissible challenges to the ability of an assigned school to implement the student's IEP (M.O., 793 F.3d at 245; Y.F., 2015 WL 4622500, at *6).

According to the CSE chairperson, the Kaplan principal, who participated in the student's intake and in the May 2018 CSE meeting, expressed that the student was "a very appropriate candidate" for the recommended program and he was "one hundred percent confident" that the program would meet the student's needs (Tr. p. 145). The CSE chairperson further reported that the Kaplan principal indicated the student would be a good fit for the class and did not feel the student would stand out in any way, meaning the student would not be too high functioning or too low functioning for the recommended class (Tr. pp. 309, 320-21). The CSE chairperson testified that, similar to the student's then-current private school placement, the recommended program

would provide the student with all of his related services, an adaptive daily living component, and a vocational training component (Tr. p. 147-48).

In support of the district's case that both the May 2018 IEP and the student's placement at Kaplan were appropriate, the principal of Kaplan testified that when he received the referral packet from the district, he reviewed the student's present levels of performance with regard to his needs and strengths (Tr. pp. 547, 549). The principal explained that he considered the student's significant language deficits, adaptive behavior scores, functional communication, transition needs and vocational skills, social needs, and the skills he "still needed to acquire" to help determine if the student would be appropriate for a BOCES program (Tr. pp. 549-51). The principal noted that the students in the class that was projected for the student were social and able to engage and interact with others (Tr. pp. 550-551). He stated that a lot of the interaction was facilitated or initiated by an adult, something he had noticed in the student's IEP as well as some of his goals (Tr. p. 551). The principal noted that similar to the student's OT report, the focus of the student's program was "aligned with the way we present related services" (Tr. p. 552). Specifically, the principal stated that the student's goals to improve prevocational skills, self-care, and independence were also the focus of the recommended BOCES program and specifically driven through occupational therapy (Tr. p. 552).

The principal testified that during the parent's intake visit at Kaplan he discussed how the program might meet the student's needs including the blend of applied behavior analysis and TEACCH strategies employed by the school, the use of "embedded schedules," how the school broke down tasks, and how it "taught towards independence" (Tr. p. 567). He described the "different [teaching] protocols" used in the placement that were "based on research" (Tr. p. 568). The principal stated that he believed the parent was "impressed by the techniques and strategies" that were being implemented (Tr. p. 569). He recalled that he finished the intake with a tour of the building where he talked with the parent about the vocational room and how skills were assessed and the "mock apartment" and how the school worked on independent living (Tr. p. 570).

The principal opined that the 8:1+2 special class at Kaplan was "extremely appropriate" for the student (Tr. p. 571-72). He described how Kaplan prepared to make sure it had the capacity to support a student who was accepted into its program (Tr. p. 576). He explained that when a new student began attending, the school would review information provided at intake with regard to what motivated the student, and initially start with a "thick schedule of reinforcement," and then "systematically introduce instruction" (Tr. pp. 576-77). The principal opined that Kaplan could provide the student with a FAPE and indicated that the program would be able to provide the student with OT and speech and address the student's management needs through the use of a "work activity schedule,", ABA program, and "building wide tiered interventions" for skill acquisition and appropriate behaviors (Tr. p. 581). He further opined that the placement would allow the student to make progress towards his goals (Tr. p. 581). With respect to the vocational component of the recommended program, the Kaplan principal testified that staff would probe the student to see what skills or interests he had and the vocational teacher would find a job site for the student if there was not an appropriate one currently available (Tr. p. 606; Dist. Ex. 8 at pp. 7-9; 16-17). According to the principal, the student would participate in a job site between one to three half days per week and be accompanied by a job coach (Tr. p. 606-07). The vocational program featured opportunities to work in hotels, restaurants, offices, clothing stores, grocery stores and with a local sports team (Tr. p. 607). The principal testified that during the May 2018

CSE meeting, he talked about the "curriculum initiatives" at the school, how the school would address the student's academic needs, and the vocational teacher who assisted in placing the students (Tr. p. 585; see Parent Ex. T at pp. 5-6).

At the May 2018 CSE meeting, the Kaplan principal reported that there was "a little cohort" in the recommended class whose abilities were level with the student's (Parent Ex. T at p. 6). He stated that he did not know if the student would be the highest functioning student in the class but indicated that "he would definitely be in the higher grouping" (Parent Ex. T at p. 6). The principal testified that he provided a proposed class profile to the district as requested soon after the May 2018 CSE meeting (Tr. pp. 588-89; Dist. Ex. 14).[19] He stated that the verbal abilities of the students in the proposed classroom were mixed, with some nonverbal students as well as verbal students who exhibited strengths in their social skills (Tr. p. 591). Based on the class profile, the principal indicated that the overall skills of the student in this case fell in the middle, and that the student would have additional opportunities to strengthen his language skills through interaction with adults (Tr. pp. 592-93, 1228). Although the parent expressed concerns about the behavior of the students in the recommended class (Tr. pp. 397, 1089-90), the principal stated that no students exhibited "continuous daily instances of problem behavior" (Tr. pp. 594-95). The principal noted that the parent did not bring to his attention her concern that the students in the recommended class were too low performing for the student (Tr. p. 601). However, he stated that he was not concerned by the parent's assertion as he had spent time reviewing the IEPs of the other students and Kaplan differentiated for every student, although the goals (skill sets) were similar (Tr. pp. 601-02).

The parent testified that when she observed the recommended 8:1+2 special class she saw students who used "short utterances and prompted speech" and needed help to respond to the simple questions she was asking (Tr. pp. 959-60). In addition, the parent reported that she asked the teacher about the daily schedule and it did not make sense to her when the teacher indicated that the students took an hour and a half to get ready for swimming because they needed help with their ADL skills, specifically undressing and putting on a bathing suit (Tr. pp. 961-62). The parent questioned, why if the students had been working on ADLs using ABA since the beginning of the school year they still had difficulty getting dressed (Tr. p. 963). The parent stated that during a tour of the vocational component of the placement, she observed students watching cartoons as rewards and students with poor language skills (Tr. pp. 964-965). The parent testified that the Kaplan principal did not tell her that the recommended school was socially appropriate for the school and further testified that the principal advised her that "only thirty percent" of the students at the school would be able to socialize and communicate with the student at his level (Tr. pp. 1118-19, 1165; see Parent Ex. v at p. 29-30). The parent stated that although vocational options were discussed at the May 2018 CSE meeting, the BOCES assistant superintendent was not specific enough regarding which hotels BOCES used for vocational placements (Tr. pp. 239-40; see Tr. pp. 329-30, 1129-31).

[19] The IHO concluded the class profiles were not relevant because they were generated after the IEP was developed; however, if a district chooses to produce them, class profiles if they "explain or justify what is listed in the written IEP" and to the extent that they do not "support a modification that is materially different from the IEP" are permissible and relevant because the Second Circuit rejected a ridged "four corners" rule limited solely to the IEP document itself (R.E., 694 F.3d 167, 185; see, Cerra, 427 F.3d 186, 194).

The parents do not pursue their claim that the IEP was deficient as a due to the lack of a math goal, a claim that the IHO did not specifically address. Consequently, the goal claim has been abandoned by the parent (8 NYCRR 279.8[c][4]). However to the extent, the IHO reference the "high level of goals which require at a minimum, some peer interaction" in her decision about Kaplan's ability to implement the student's IEP (IHO Decision at p. 29), I have reviewed the student's goals. The goals were contained in the student's May 2018 IEP but there was no evidence to suggest that Kaplan was incapable of implementing the student's goals (Dist. Ex. 8 at pp. 10-14). The CSE chairperson testified that the goals were written based upon the input and recommendations from the teachers and therapists at the student's private school (Tr. pp. 148-49; see Tr. p. 452). The CSE chairperson stated that the CSE "not only considered" the goals developed by the private school, but also used "a number of those goals" as well as developing additional goals (Tr. pp. 148-49). The May 2018 IEP featured 19 annual goals and 21 short term objectives for the student that covered the areas of speaking and listening; social/emotional/behavioral skills; motor skills; daily living skills; career,/vocational/ transition skills; reading; and writing (Dist. Ex. 8 at pp. 10-14). Specifically, to address the student's needs in the area of social and pragmatic language, the IEP included goals and objectives that targeted the student's ability to demonstrate appropriate turn-taking, maintain eye contact, engage in active listening, communicate ideas coherently, and evaluate a speaker's point of view (id. at p. 10). To address the student's social, emotional and behavioral needs, the IEP included goals and objectives related to identifying and verbalizing the roles of others in his environment; complying with teacher and school-wide directives and rules; and using positive strategies to resolve social conflicts (id. at pp. 10-11). To address his needs in the area of motor skills, the IEP included a goals and objective that targeted the student's ability to copy material from a distant source to complete a worksheet (id. at p. 12). The IEP included additional motor goals related to improving the student's visual memory skills and ability to complete classroom assignments using a word processor (id. at pp. 11-12). The student's daily living skills were addressed with goals for using money to make purchases, completing tasks related to banking, and maintaining an appointment book (id. at p. 12). To address his needs related to vocational skills the IEP goals included researching preferred occupations, meeting the requirements of a vocational program, and appropriately communicating with supervisors and peers when working at a job site (id. at p. 13). To address the student's needs related to reading the IEP included goals and objectives that required the student to identify support for an inference, conclusion, or summary, and identify figurative language (id.). Finally, the IEP included goals and objectives designed to improve the students writing skills by learning to plan, revise, and edit to create a narrative text (id. at p at p. 14).

The district provided the parent with a class profile of the recommended placement on May 30, 2018, just after the May 2018 CSE meeting, and as set forth above the CSE met via telephone in July 2018 (Tr. pp. 1085, 1088; Dist. Ex. 14). The profile described the eight students who were in the recommended class at the time it was prepared in in May 2018 (Dist. Ex. 14). The disability classifications included intellectual disability, multiple disabilities, and autism (id. at p. 1). In terms of social skills, the profile described the nine students, respectively, as able to "verbally communicate without prompts"; requiring "verbal and gestural prompts when interacting with both peers and staff": "able to initiate interactions with others, but also "a selective and/or reluctant speaker"; "verbally communicates without prompts," "able to express wants and needs using one-word answers, short phrases and simple sentences," and "able to engage in short conversations" with reminders to remain on topic; "can be friendly, personable, social and funny"; "communicates wants and needs through spoken words and the use of an augmentative communication device"

and "initiates conversation with adults"; "initiates interaction with staff and peers"; "verbal student", "demonstrates an ability to express wants and needs given the words 'I want'"; and student enjoys being around others but "does not often interact unless prompted to do so"(Dist. Ex. 14 at pp. 1-2). Five students were described as "friendly" (Dist. Ex. 14 at p. 2). The profile described the management needs of the students including one who needed direct supervision due to aggressive behaviors and one student who may demonstrate inappropriate behaviors when anxious (id. at pp. 4-5). The profile described four students who required supervision when outside of school due to safety; most of the students benefitted from a multisensory approach and responded well to positive reinforcement (id. at pp. 4-6). The profile indicated that in the area of academics the students ranged from kindergarten level math and reading skills to seventh grade spelling skills (id. at pp. 7-8). The Kaplan/BOCES principal testified that while some of the students in the recommended placement were nonverbal, they used voice-output devices to communicate (Tr. p. 1233). The principal opined that this would not have a negative impact on the student because it was "just another way" to communicate (Tr. p. 1234). The evidence in the hearing record therefore supports a finding that the student's IEP, including the elements related to social needs and functional grouping, could have been implemented in the recommended placement. In her due process complaint notice the parent argued that the May 2018 IEP could not be implemented at the recommended placement because the student would not be grouped with peers who were functioning at similar levels; rather with students who were functioning below his level, require one-on-one supervision, and "exhibit behavioral challenges" (IHO Ex. D at p. 5). The parent testified that the student required "very good role models" in order to gain social skills and allow him to "the most" functioning as possible" (Tr. p. 261). The parent also stated that when the student had previously been in a class with "lower functioning" students and students with "social emotional problems" he tended to imitate their behaviors, which precluded placement with these types of students (id.). In addition, the parent argued that the social/emotional levels, management needs, curriculum modifications and program adaptations of the matriculated students in the recommended placement were "vastly different" and "below" the student in this case (IHO Ex. D at p. 6). However, the hearing record shows that the May 2018 IEP recommended a program and placement appropriate to meet the student's needs that was capable of implementation at Kaplan, including the IEP's goals. Moreover, contrary to the parent's claims in her due process complaint notice, and the IHO's findings that the functional grouping in the proposed classroom precluded implementation of the student's IEP at Kaplan, evidence in the hearing record demonstrates that the students in the proposed class were social, and the nonverbal students used alternative communication methods effectively; therefore, the student's class members would be capable of engaging and communicating with the student at a level commensurate with the objectives of his IEP program and goals (see Dist. Ex. 14).

Accordingly, as the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site based on the parent's contentions would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 793 F.3d at 245-46; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3). Nonetheless, the evidence was submitted by the district at the hearing in the form of a class profile As described above, the class profiles further bolster the district's evidence that Kaplan had the capacity to implement the student's IEP, including by providing appropriate support for the

student's social interaction and communication needs, and do not lend any credence to the parent's claim that Kaplan was unable to provide the functional grouping necessary to meet the student's needs and adhere to the IEP's recommendations.

As I noted previously, the IHO raised a logical question about the potential of placing the student in a setting that has greater access to nondisabled peers, and I find it would have been reasonable to raise that concern with the parties and give them the opportunity to submit evidence and argument on that particular issue, or, alternatively provide the parties some non binding observations as they continue to plan for the student's programming in the future. However, by substituting her own concerns about the student's lack of access to nondisabled peers in place of the parent's actual claims as set forth in the due process complaint notice, while simultaneously utilizing some of the parent's claims and evidence concerning the class ratio and functional grouping, the IHO improperly conflated and muddled the claims raised by the parent with traditional LRE considerations about placing the student in a class setting with nondisabled peers, which was not a disputed issue at the outset of this proceeding. As a result, the IHO erred in determining that the district failed to offer the student a FAPE.

VII. Conclusion

Thus, while the May 2018 CSE may not have had a full discussion of the continuum of placements available in the district when recommending a program and placement for the student, the May 2018 CSE's recommendation of the BOCES 8:1+2 special class at Kaplan was nonetheless appropriate to meet the student's needs in the LRE, and the proposed school site was capable of implementing the student's IEP for the 2018-19 school year. Moreover, although the IHO, without further discussion or analysis, notes that the student's present levels of performance indicate that he requires interaction "to the maximum extent possible with non-disabled peers," (IHO Decision at p. 29), there is no other evidence in the hearing record that supports this particular conclusion and none of the parent's initial claims concerned the student's access to non-disabled peers. While the IHO's LRE concerns would certainly be relevant in a typical IEP development process where the CSE is obligated to discuss and consider LRE factors, here, where the parties have already resolved certain issues by agreeing that the student should be in a special class setting (albeit with differing opinions as to the ratio), the IHO erred by finding that the placement could not implement the substance of the IEP because "the IEP itself does not even consider the least restrictive environment" (id.). Accordingly, the IHO's decision must be reversed.

Having found that the IHO erred in determining that the district failed to offer a FAPE, there is then no predicate for the IHO's order of tuition reimbursement and the inquiry is at an end. I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 11, 2019, is hereby modified by reversing that portion that found that the district failed to offer the student a FAPE during the 2018-

19 school year and directed the district to reimburse the parent for the cost of the student's attendance at New Beginnings during that school year.

Dated: **Albany, New York**
January 9, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER