The University of the State of New York

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

No. 14-125

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

Appearances:
Mayerson and Associates, attorneys for petitioners, Gary S. Mayerson and Maria C. McGinley, Esqs., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the McCarton School (McCarton) for the 2013-14 school year. Respondent (the district) cross-appeals from the IHO's determination that it was required to fund the student's after-school services of six hours per week of applied behavior analysis (ABA) and two 45-minute sessions per week of occupational therapy (OT). The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of prior administrative appeals related to the 2009-10, 2010-11 and 2012-13 school years, and as a result, the parties' familiarity with the student's educational history and prior due process proceedings is assumed and will not be repeated here in detail (see Application of Dep't of Educ., Appeal No. 13-198; Application of Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-032).

At the time of the impartial hearing, the student was enrolled in the upper school at McCarton and had been attending McCarton since 2002 (Tr. pp. 29, 190-91, 326, 328; Dist. Ex. 5

at p. 1). On March 6, 2013, the student's mother entered into an enrollment contract with McCarton for the 2013-14 school year (Parent Ex. CC).[1]

On April 24, 2013, a CSE met for the student's annual review and to develop his IEP for the 2013-14 school year (Dist. Ex. 6). The April 2013 CSE recommended a 12-month placement for the student in a 6:1+1 special class in a specialized school for academic subjects with related services comprised of four 40-minute sessions of individual speech-language therapy per week, two 40-minute sessions of individual OT per week, two weekly 40-minute group sessions of OT, as well as one 60-minute group session of parent counseling and training per week (Dist. Ex. 6 at p. 20). In addition, the April 2013 CSE developed postsecondary goals, approximately 40 annual goals, and over 100 corresponding short-term objectives to address the student's areas of deficit (Dist. Ex. 6 at pp. 4-19). Further, the April 2013 CSE recommended approximately 20 environmental and human or material resources to further address the student's management and transition needs, as well as a coordinated set of transition activities (Dist. Ex. 6 at pp. 3-4, 21-22). The April 2013 CSE also recommended that the student receive a full-time 1:1 crisis management paraprofessional and developed a functional behavioral assessment (FBA) and behavior intervention plan (BIP) for him (Dist. Exs. 5 at p. 1; 6 at pp. 3, 20, 24; 7; 8). The April 2013 IEP also indicated that the student would participate in the New York State alternate assessments due to his severe cognitive and academic delays that precluded his participation in standardized assessments (Dist. Ex. 6 at p. 22). By prior written notice dated June 11, 2013, the April 2013 CSE summarized their recommendations to the parents and advised them of their due process rights (Dist. Ex. 19).

In a final notice of recommendation (FNR) to the parents dated June 14, 2013, the district summarized the April 2013 IEP and notified them of the particular public school site to which the student was assigned for the 2013-14 school year (Dist. Ex. 20). By letter to the district dated June 19, 2013, however, the parents rejected the April 2013 IEP and contended that they had not received an FNR from the district (Parent Ex. N at p. 1). As a result, the parents indicated that they planned to enroll the student in McCarton for the 2013-14 school year and would seek public funding for the costs of the student's tuition and costs related to his after-school services, as well as for transportation, and monthly individualized parent training as compensatory services (id.).

On August 1, 2013, the parent visited the assigned public school site (Tr. pp. 358-60; Parent Ex. P). By letter to the district dated August 1, 2013, the parents indicated that following their visit, they had determined that the assigned public school site was closed and inappropriate for the student, and outlined their reasons for rejection (Parent Ex. P).

A. Due Process Complaint Notice

By amended due process complaint notice dated August 1, 2013, the parents requested an impartial hearing (Parent Ex. B).[2] Additionally, the parents invoked their rights pursuant to

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

[2] The amended due process complaint notice superseded a due process complaint notice dated July 3, 2013 (Parent Ex. A) and indicates that its purpose was "to address the untimely [FNR] recently received by the parent" (Parent Ex. B at p. 1). All further references to the due process complaint notice are to the amended complaint.

pendency (stay put) in accordance with an unappealed 2008 IHO decision, which included, among other things, the costs of tuition at McCarton (id. at p. 2). The parents' due process complaint notice raised 132 claims, which essentially distill to the allegation that the district failed to offer the student a free appropriate public education (FAPE) during the 2013-14 school year (id. at pp. 2-14). The allegations, among other things, yield the following specific claims regarding how the district denied the student a FAPE: (1) the 6:1+1 special class with 1:1 paraprofessional services in the April 2013 IEP and assigned public school site were not reasonably calculated to provide the student with meaningful educational benefits; (2) the district failed to offer the student consistent 1:1 and dyad teaching throughout the school day; (3) the district failed to offer individualized parent counseling and training on the April 2013 IEP; (4) the district failed to develop an appropriate FBA of the student; (5) the district failed to develop an appropriate BIP for the student, despite his interfering behaviors; (6) the district failed to develop a transition plan for the student; (7) the district failed to offer the student any after-school services; (8) the district failed to meaningfully consider the assistive technology needs of the student; (9) the district failed to meaningfully consider methodology; (10) the district's offer of placement was untimely; and (11) the assigned public school site could not satisfy the student's related services mandates nor implement the April 2013 IEP (id.).

The parents also alleged that the student's unilateral placement comprised of McCarton and after-school ABA and OT services was appropriate to address his special education needs (id. at p. 15). They further maintained that they cooperated with the district in good faith, and therefore, no equitable considerations existed that would preclude or diminish an award of relief (id. at pp. 14-15). As a remedy, the parents sought tuition reimbursement for McCarton for the 2013-14 school year, and reimbursement for the costs of the student's after-school program (id. at pp. 15-16).

B. Impartial Hearing Officer Decision

On September 12, 2013, an impartial hearing convened and, after five non-consecutive days of proceedings, concluded on May 27, 2014 (Tr. pp. 10-391).[3] In a decision dated June 30, 2014, an IHO found that the district offered the student a FAPE and denied the parents' request for reimbursement of the tuition and costs associated with the student's enrollment at McCarton (IHO Decision at pp. 14-15). Nevertheless, the IHO directed the district to fund the student's after-school services of six hours per week of ABA and two 45-minute sessions per week of OT for the purpose of assisting the student with transitioning to a new educational environment (id.). The IHO also found that the parents had met their burden of establishing that McCarton was an

[3] The first day of hearings on September 12, 2013, was limited to the issue of pendency which, the parents claimed, was based on an unappealed IHO decision dated July 18, 2008, which ordered the district to reimburse the parents for tuition and related costs for the 12-month school year at McCarton, and after-school services comprised of ten hours per week of ABA instruction and two hours per week of OT (Tr. p. 4; Parent Ex. C). By interim order on pendency, the IHO found that the unappealed July 18, 2008 IHO decision constituted the student's pendency placement (Interim IHO Decision at p. 2) and ordered that the student's pendency placement consisted of those services requested during the pendency hearing, including two hours of 1:1 after-school OT per week (compare Interim IHO Decision at p. 2, with Tr. p. 4). The district did not object to the level of services recited at the hearing (Tr. p. 4). The July 2008 IHO Decision, however, indicates that the parent was awarded two 45-minute sessions of after-school OT (Parent Ex. C at p. 8).

appropriate unilateral placement for the student and that there was no equitable basis to preclude or limit an award of tuition reimbursement (id. at p. 15).

IV. Appeal for State-Level Review

The parents appeal, challenging the IHO's finding that the district offered the student a FAPE. The parents contend that the district did not conduct any assessments of the student in preparation for the April 2013 CSE meeting, and instead relied exclusively on reports from the staff and teachers at McCarton. The parents further allege that the district did not conduct an assistive technology evaluation, did not conduct a vocational assessment or include an appropriate transition plan, and did not provide for individualized parent training and counseling on the April 2013 IEP. The parents also argue that the district did not generate an appropriate FBA or BIP, did not develop its own goals, failed to "meaningfully consider methodology," failed to establish that the goals could be implemented in the recommended program, and did not provide for 1:1 instruction throughout the school day. In addition, and with respect to the school to which the student was assigned, the parents maintain that the district failed to offer a timely placement, and that the district failed to prove that the school (which was "closed" during the summer of 2013 and the parent could not visit) could implement the April 2013 IEP.

In an answer, the district responds to the parents' allegations with admissions and denials, and argues to uphold the IHO's decision which found that the district offered the student a FAPE for the 2013-14 school year. The district, however, cross-appeals from that part of the IHO's order which found they must fund the student's after-school ABA and OT services. The district argues that the IHO erred in awarding after-school services after determining that the district had offered the student a FAPE for the 2013-14 school year. In addition, the district contends that the uncontroverted purpose of the student's after-school services was to assist the student with generalizing skills to environments other than school.[4] In a reply and answer to the district's cross-appeal, the parents, among other things, admit and deny various allegations and argue that the IHO's award of after-school services should be upheld.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the

[4] The district does not appeal the IHO's finding that McCarton was an appropriate unilateral placement for the student or that equitable considerations favor the parents' request for relief (Answer p. 2 n.3).

procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. April 2013 CSE Process

1. Sufficiency of Evaluative Information

a. Use of Private School Assessments

In general, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately

assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The hearing record reflects that the April 2013 CSE considered a February 2013 McCarton "individual education plan/second quarter progress report" (McCarton progress report), a December 2012 McCarton speech and language report with goals (speech report), a January 2013 OT progress report with goals (OT report), and several McCarton positive behavior support plans dated from September 2012 to January 2013 (behavior support plans) (Tr. pp. 40, 43-44, 80-81; Dist. Exs. 14-18; see Dist. Exs. 5-6). The CSE also obtained input at the meeting from the student's mother, the student's McCarton speech therapist, occupational therapist, lead teacher, and ABA teacher (Tr. pp. 61, 76; Dist. Exs. 5 at p. 1; 6 at pp.1-3, 26).

Here the parents challenge the evaluative data relied on by the district in developing the April 2013 IEP by suggesting that the district improperly relied solely on information obtained from McCarton progress reports. However, contrary to the parents' claim, a district is not required to conduct its own evaluations in developing an IEP and recommending an appropriate program, but may rely on appropriate privately-obtained evaluations (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *9-*10 [S.D.N.Y. Feb. 16, 2011]). The district may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at *23 [S.D.N.Y. March 29, 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). This is especially true where, as here, the information obtained from the McCarton progress reports and the student's then-current providers at the April 2013 CSE meeting was comprehensive, sufficient to determine the student's needs, and was included in developing the present levels of functional performance, management needs, and annual goal sections of the April 2013 IEP (compare Dist. Exs. 13-18, with Dist. Ex. 6). For example, the February 2013 McCarton progress report indicated that the student received 1:1 support in a class with four peers to participate in some classroom instructional activities, while he received group instruction for science, health, cooking, and yoga (with faded 1:1 support) (Dist. Ex. 18 at p. 1). The progress report noted that the student showed improvement in his ability to attend in a group lesson, and to utilize visual strategies to learn unknown skills including referencing, measuring, and other new concepts (id.). The progress report also noted the student's needs with regard to reading and reading fluency (id. at p. 2), written communication skills (id. at pp. 2-3), expressive language (id. at p. 4), math (id. at p. 3), science (id. at pp. 3-4), safety skills (id. at pp. 5-6), attention and

participation during group instruction with fading 1:1 support (id. at p. 7), attention and self-monitoring of behavior during small group instruction (id. at pp. 6-7), reduction of maladaptive behaviors and increased attention through use of a self-monitoring token economy system (id. at p. 8), acquisition of appropriate community skills (id. at pp. 8-9), and activities of daily living (ADL) skills (id. at pp. 10-11).

Further, The December 2012 McCarton speech report included relevant information about the student, including that he demonstrated receptive, expressive, and pragmatic language delays; exhibited interfering off-task behaviors such as touching objects repeatedly, jumping, vocal stereotypy, leaving the classroom without warning, and unexplained grunting or crying; and that he needed to expand his vocabulary skills so as to facilitate interactions with peers (Dist. Ex. 15 at pp. 1-4). The December 2012 speech report also included goals and short-term objectives, the majority of which appeared in the April 2013 IEP (compare Dist. Ex. 15 at pp. 4-10, with Dist. Ex. 6 at pp. 10-15). Likewise, the January 2013 OT report noted that the student presented with decreased sensory processing, fine motor, visual perceptual, and motor planning skills; had difficulty sustaining attention; and presented with limited ability to perform ADL skills (Dist. Ex. 17 at p. 1). Moreover, the McCarton behavior support plan indicated that the student was verbal but difficult to understand, and understood simple, multi-step directives (Dist. Ex. 14 at pp. 1, 4, 9). Further, the behavior support plan indicated that the student required frequent breaks and varied tasks, retained learned skills without intensive maintenance practice, was resistant to change and required preparation, and learned best in contexts (id.). Inconsistent with the McCarton progress report and OT and speech reports, the student was described in the behavior support plan as "independent and initiates" self-care skills including toileting, eating, and dressing (compare Dist. Ex. 15, Dist. Ex. 17, and Dist. Ex. 18, with Dist. Ex. 14 at pp. 1, 4, 9).

Finally, a review of the April 2013 IEP, the minutes of the April 2013 CSE meeting, the February 2013 McCarton progress report, the January 2013 OT report, the December 2012 speech report, and the behavior support plans dated October 2010, September 2012, October 2012, and signed January 2013 indicate that the April 2013 CSE appropriately described the student based on the available reports, identified the student's needs, and developed adequate goals for the student that were sufficiently aligned with his needs (Dist. Exs. 5-6, 14-18). Accordingly, as the parents raise no issue with respect to the comprehensiveness of the McCarton reports,[5] I am unable to find that the district's reliance on these reports (which, as noted above, provide substantial information about the student) resulted in a denial of FAPE.

b. Assistive Technology Evaluation

The parents, however, do suggest that an assistive technology evaluation should have been conducted by the district. In this regard I note that while an assistive technology evaluation was not conducted by the district, the hearing record reflects that the student used assistive technology,

[5] Rather, the parents appear to rely on a January 2013 letter sent by the district seeking consent to unspecified assessments, which according to the letter were determined to be required, as proof that additional assessments were necessary. However, this alone does not establish that additional assessments were required. Rather, the relevant question is whether the April 2013 CSE had sufficient information before it to determine the educational needs of the student (see, e.g., D.B., 966 F. Supp. 2d at 330) which, as noted above, the McCarton reports provide. In addition, I note that the district school psychologist who attended the April 2013 CSE meeting testified that he believed that the CSE had sufficient information about the student, as well (Tr. p. 67).

and that this technology was contemplated by the April 2013 CSE and captured within the recommended annual goals, short-term objectives, and management needs of the April 2013 IEP (Dist. Ex. 6). In addition the April 2013 IEP included the use of assistive technology devices as tools for communicating, accessing schedules and leisure activities (id.). Specifically, the "use of and integration of technology" was cited as a management need to assist the student (id. at pp. 1, 3-4). Additionally, a short-term objective acknowledged the student's use of a computer and an iPad to increase fluency and the number of words typed per minute (id. at p. 5).

Notably, the parents do not contend on appeal that the student's assistive technology needs are not adequately addressed by the April 2013 IEP. Rather, the parents contend that an assistive technology evaluation should have been conducted because they explicitly requested one (Dist. Ex. 10 at p. 2). In this regard, I caution the district that a written parental request for evaluation must be properly addressed, and note that there is no indication that such was done in this case. The failure to conduct an assistive technology evaluation, however, was not discussed during the hearing and again, the parents do not allege on appeal that the district failed to address the student's needs relative to assistive technology (see Tr. pp. 1-391; Parent Ex. B at p. 8; Pet. ¶ 3).[6] Moreover, and as noted above, the April 2013 IEP reflected and incorporated the student's current use of assistive technology devices. Accordingly, and especially where the district has produced evidence that it provided the parents with notice of their due process rights (Dist. Ex. 19), I am unable to find that the failure to conduct an evaluation of the student's assistive technology, while a procedural violation, significantly impeded the parents' opportunity to participate in the decision-making process or otherwise rises to the level of a denial of a FAPE.

c. Vocational Assessment and Transition Plan

The parents further allege that the district failed to assess the student's vocational and transition needs.

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition

[6] Even in their due process complaint notice the parents did not allege that the student's assistive technology needs were not met. Rather, the parents alleged simply that the district did not give "meaningful consideration" to the need for assistive technology and that it did not properly "support" existing assistive technology (Parent Ex. B at p. 8).

from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]),[7] as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

While there is no indication in the record that the district conducted a vocational assessment of the student, the hearing record indicates that the April 2013 CSE had obtained sufficient information about the student's adaptive living skills needs and overall vocational abilities such that the lack of a formal vocational assessment in this instance did not compromise the appropriateness of the student's postsecondary goals or coordinated set of transition activities so as to result in a denial of a FAPE (Dist. Ex. 6 at pp. 4, 21-22). For example, the McCarton report included a "work-related skills" goal and noted that from a list of 10-plus activities, the student independently created his own six-item schedule; and further, he was partially successful transitioning between work tasks and utilizing a schedule when prompted (Dist. Ex. 18 at p. 12). According to the report, the student was working on completing independent task skills with increased fluency and productivity, problem solving skills, and following an iPad schedule (id.). The student was also working on increasing time spent on an expanded list of individual and group leisure and recreational skills and activities across environments during unstructured time (id. at pp. 12-14). Additionally the McCarton report included sexuality and sexual safety goals, which included independently using a public restroom and returning to his teacher, identifying what he could and could not do with people based on his relationship with them, and understanding appropriate locations in which, and people with whom one can be undressed (id. at pp. 14-15). With regard to transition skills, the McCarton report indicated that although the student could follow one-step instructions delivered to the entire class, he continued to require support to line up, wait for up to five minutes, and stay in one spot with support (id. at p. 16). The student had difficulty sustaining joint attention, which resulted in him being unable to maintain reciprocal interactions for playing games without 1:1 assistance and salient prompts (id.). With regard to self-advocacy and self-determination skills, the report indicated that the student needed to work on requesting more time with a desired item/activity when interrupted, as well as using "where" to locate a desired item, and politely requesting others to cease a non-preferred activity or remove an undesired object without inappropriately escaping the environment (id. at pp. 16-17).

In addition, the April 2013 IEP also set forth the student's transition needs and contained post-secondary goals to address those needs, which included navigating his environment, handling money, and integrating into the community (Dist. Ex. 6 at p. 4). Other transition goals developed for the student addressed such needs as improving his signature, food preparation, and selecting appropriate clothing (id. at pp. 15-17). Additionally, the April 2013 CSE recommended transition activities such as developing computer skills to improve the student's foundations in typing;

[7] These are supposed to be listed in the present levels of performance section of a student's IEP (see 8 NYCRR 200.4[d][2][ix][a]).

identifying his personal strengths; and exploring vocational options through an internship program (id. at pp. 21-22). Accordingly, contrary to the parents' assertion that the April 2013 transition plan was vague and insufficient, a review of the hearing record as detailed above shows that the annual and post-secondary goals contained in the April 2013 IEP, in conjunction with the transition plan, appropriately addressed the student's adaptive living and vocational needs (compare Dist. Ex. 18, with Dist. Ex. 6). Therefore, while the April 2013 CSE did not conduct its own assessment of the student's vocational and transition needs, it recommended a coordinated set of transition activities for instruction, related services, community experiences, employment and post-school adult living objectives, and activities of daily living such that, absent any evidence in the hearing record that the student required additional services (which the parents do not allege is the case in their petition), I am unable to find that the failure to conduct a vocational assessment alone, while again constituting a procedural violation, rises to the level of a denial of a FAPE.[8]

2. FBA and BIP

An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

It is undisputed that the student exhibits interfering behaviors. The parents allege that the district was required to develop its own FBA and that the BIP was inadequate. The record reflects that the FBA and BIP were discussed and collaboratively developed during the April 2013 CSE meeting. I agree with the IHO that the hearing record demonstrates that the FBA and BIP were developed using the information provided by the McCarton staff during the April 2013 CSE meeting, the student's mother, and the McCarton reports, which included a list of target behaviors and how they interfere with learning, the frequency triggers of target behaviors, and intervention plans (Tr. p. 349; Dist. Exs. 5; 6 at pp. 1-3; 14-18).

The FBA created during the April 2013 CSE meeting identified and defined the targeted behaviors including off-task behavior, tantrums, non-contextual vocalizations, and stereotypy; and further identified contextual factors such as frustration in communicating; and hypothesis as to

[8] While the parents reference the student's transitional and vocational needs as being set forth in "the voluminous record . . . in great detail" but not reflected in the April 2013 IEP, they specify no particular need which was not met. Inasmuch as the IHO found that this procedural violation did not constitute a denial of a FAPE, the parents should have identified, by citation to the hearing record, those needs they contend were not met (8 NYCRR 279.8[b]).

when the behaviors occur, such as physically orienting to either the task at the end or to the instructor (Dist. Ex. 7 at p. 1). The FBA included a baseline of the frequency, duration, and intensity of the student's behaviors, and noted that the behaviors occurred in the school setting, both inside and outside the classroom (id.). Also included in the FBA were several triggers and purposes for the identified behaviors, results of previously attempted interventions, positive reinforcers for the student, and expected behavior changes (id. at p. 2).

While the FBA, as noted above, included a baseline of the frequency, duration, and intensity of the student's behaviors, this information was not included in the April 2013 BIP (compare Dist. Ex. 8, with Dist. Ex. 7 at p. 1). However, the four behaviors targeted on the BIP were the same as those included in the FBA and the McCarton behavior support plans, to wit: off-task behavior, tantrums, non-contextual vocalizations, and stereotypy (compare Dist. Ex. 8, with Dist. Ex. 7 at p. 1, and Dist. Ex. 14 at pp. 1, 4, 9). Further, and although the BIP did not identify intervention strategies to alter the behaviors, the FBA and the April 2013 IEP included intervention strategies linked to the student's behaviors such as use of a self-monitoring checklist, use of a token economy, use of preferred activities for positive reinforcement and rewards, and use of a timer for self-monitoring (compare Dist. Ex. 8, with Dist. Ex. 6 at pp. 2-3, and Dist. Ex. 7 at p. 2). In addition, the CSE recommended the service of a full-time, 1:1 paraprofessional to assist the student in maintaining attention to task (Dist. Exs. 5 at p. 5; 6 at p. 20). The BIP also identified the individuals responsible for implementing the behavior plan as teachers, providers, and school staff; and, further, the BIP identified expected behavior changes such as, reduction in behaviors by 50 percent and increase time from five minute to eight minute intervals with a review scheduled with the parent at least every 10 weeks (Dist. Ex. 8). Additionally, the BIP included methods and criteria for outcome measurement such as ongoing teacher/provider observation, student self-monitoring, and checklists (id.). Although the BIP did not include all of the required elements, in conjunction with the FBA and IEP the student's behavior needs were addressed.

Although the CSE did not fully comply with State regulations in conducting the FBA and developing the BIP, when considered together with the supports provided by the student's IEP the district appropriately addressed the student's behaviors that impeded his learning (R.E., 694 F.3d at 190-91; see 20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; 8 NYCRR 200.4[d][3][i]). Accordingly, I decline to find that the district failed to offer the student a FAPE during the 2013-14 school year on this ground (see, e.g., F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6 [2d Cir 2014] [no denial of FAPE where IEP identifies behaviors and identifies ways to manage them]; R.E., 694 F.3d at 190-91 [failure to conduct an FBA a "serious procedural violation" but does not always rise to level of a denial of FAPE; care must be taken to ensure that IEP addresses problem behaviors]).

3. Cumulative Effect of Procedural Violations

Despite having found that none of the alleged procedural violations discussed above constituted a denial of a FAPE on their own, it is necessary to address the cumulative impact of these violations and determine whether they constitute a denial of a FAPE when taken together (R.E., 694 F.3d at 190-91). However, the IDEA still requires that for the cumulative effect of procedural violations to constitute a denial of a FAPE, they must have either impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 81 [2d Cir. 2014]). In

this instance, as I do not find that any of the alleged procedural violations led to any substantive harm suffered by the student, I am likewise unable to find that the cumulative impact of these violations, under the circumstances of this case, rise to the level of denial of a FAPE.

B. April 2013 IEP

As noted above, the April 2013 CSE recommended a 12-month placement for the student in a 6:1+1 special class in a specialized school for academic subjects with related services comprised of four 40-minute sessions of individual speech-language therapy per week, two 40-minute sessions of individual OT per week, two weekly 40-minute group sessions of OT, and one 60-minute group session of parent counseling and training per week (Dist. Exs. 6 at pp. 20, 23-24; 5 at p. 1).

1. Annual Goals

Turning to the annual goals in the April 2013 IEP, the parents assert on appeal that (1) the district failed to develop its own annual goals for the student, instead adopting goals developed by McCarton staff, and that (2) the district did not show that these goals—which were "designed to be implemented in [the student's] 1:1 ABA teaching program"—could have been implemented in the "recommended program and placement." For the reasons discussed below, I find that neither contention provides a basis for a finding of a denial of FAPE.

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

As an initial matter I note that, under the IDEA and State and federal regulations discussed above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student generally turns, not upon their suitability within a particular classroom setting or student-teacher ratio, but rather whether said goals and objectives are consistent with and relate to the needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Here, the annual goals, together with the short-term objectives in the April 2013 IEP, were designed to meet the student's needs that resulted from his disability, contained sufficient specificity to guide instruction and help the student make educational progress, and met the student's other educational needs resulting from his disability. Specifically, the April 2013 IEP contained 40 annual goals, and consistent with the CSE's determination that the student would participate in an alternate assessment, approximately 100 short-term objectives, which addressed the student's needs in the areas of reading comprehension, reading fluency, writing fluency, spelling, expressive language, receptive language, pragmatic language, math, activities of daily living, safety, socialization, attention, behavior, vocation,

transitions, self-advocacy, fine-motor, muscle strengthening, food preparation, stretching, and flexibility (Dist. Ex. 6 at pp. 4-19). Further, the annual goals and short-term objectives contained in the April 2013 IEP included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress (Dist. Ex. 6 at pp. 4-19; see 8 NYCRR 200.4[d][2][iii][b]). Specifically, the annual goals and short-term objectives in the April 2013 IEP provided criteria for measurement to determine if a goal had been achieved (e.g., four out of five occasions, 90 percent accuracy, nine out of ten opportunities, 100 percent accuracy), the method of how progress would be measured (e.g., check lists, teacher/provider observation, performance assessment task, class activities), and a schedule of when progress toward the goals would be measured (e.g., one time per week, one time per quarter) (id. at pp. 14-19). Accordingly, I am unable to find that the goals contained in the April 2013 IEP do not address the student's unique needs and/or are insufficient simply because they may have been developed by staff at McCarton. This is especially true where, as here, the parents do not raise any specific objections to the substance of these annual goals on appeal (see Pet. at ¶¶ 18-19).

However, and as noted above, the parents do imply in their petition that the annual goals contained in the April 2013 IEP are insufficient because they can only be implemented with the use of 1:1 ABA.[9] However, the goals and short-term objectives included in the McCarton reports and the April 2013 IEP do not identify a specific methodology to be utilized to implement the goals (Dist. Exs. 6 at pp. 4-19, 14-18). For example, goals which were developed by the student's then-current providers and incorporated into the April 2013 IEP to address reading, reading fluency, and the need to follow multi-step directions did not indicate any methodology for implementation (compare Dist. Ex. 6 at pp. 4-5, 10, with Dist. Exs. 15 at p. 4; 18 at p. 2). In addition, the district school psychologist testified that the goals were not designed to be used with any specific methodology (Tr. p. 68). Accordingly, the parents' suggestion that the annual goals included in the April 2013 IEP can only be implemented through the use of instruction provided in a 1:1 student-to-teacher ratio with an ABA methodology is unsupported by the hearing record.[10]

[9] It is notable that the parents do not directly allege that the goals in the April 2013 IEP could not be implemented, but rather assert simply that the district "failed to show how the goals and services on [the student's] IEP could actually be implemented in the 6:1:1 program that the [district] recommended for [the student]" (Pet. at ¶ 18 [emphasis in original]). To the extent that this allegation is related to the parents' argument that a district, in general, is required to prove that an IEP developed for a student can be implemented in the public school building or classroom to which he or she is assigned, this argument is addressed in further detail below.

[10] With respect to the use of ABA (or the issue of methodology in general), I note that a CSE is not generally required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the discretion of the teacher (Rowley, 458 U.S. at 208; M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; see K.L. v New York City Dep't of Educ., 2012 WL 4017822, at *12 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013] [noting that it is "well established that once an IEP satisfies the requirements of the [IDEA], questions of educational methodology may be left to the state to resolve"]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1176 [S.D.N.Y.1992]). While exceptions exist for situations where a particular methodology is required in order for a student to receive an educational benefit (see, e.g., R.E., 694 F.3d at 194 [suggesting that where evidence shows that a particular methodology is required for a student, the IEP should provide for such]), I am unable to find that the record as a whole presents such a situation here. For example, while there are indications in the hearing record that ABA might be appropriate for the student (see, e.g., Tr. p. 243), this does not necessarily indicate a need for it. Further, and while the head of school at McCarton at one point opined that the student needed ABA (Tr. p. 303), when questioned about how ABA was

2. 1:1 Instruction

The parents contend that there is no provision in the April 2013 IEP for "1:1 teaching." In this regard the parents contend that the student requires 1:1 "instruction" due to his high rates of behavior, his significant attention deficits, and his need for continual redirection and prompting. In addition, the parents contend that the student needs 1:1 "instruction" to learn new skills and to work on his goals, and that the district did not have any evaluative information indicating that the student no longer required such "instruction." The district argues that the student's needs can be met with 1:1 support to assist with prompting the student to remain on task and to assist in managing the student's interfering behaviors. The IHO found that full-time 1:1 support by a paraprofessional in a 6:1+1 special education classroom was sufficient to offer the student a FAPE. I agree and find that the recommended program and related services are appropriate.

Initially I note that the April 2013 CSE considered and ultimately adopted many of the recommendations in the comprehensive written and oral reports provided by the student's then-current McCarton providers. The April 2013 IEP reflects the student's unique educational needs, set forth goals and strategies to address those needs, and included a 1:1 paraprofessional (see Dist. Exs. 5-6; 13-18). According to the minutes from the April 2013 CSE meeting, the parent and then-current teacher agreed that a 1:1 paraprofessional would be appropriate to address the large amount of prompting and support required by the student to maintain his attention to task (Dist. Ex. 5 at p. 5). The district psychologist testified that the 1:1 paraprofessional would be under the direction of the special education teacher (Tr. p. 107). The April 2013 IEP also included use of a token economy system, positive encouragement and reinforcement, 1:1 support, use of step sheets, use of a self-monitoring checklist, redirection, modeling, and support with transitions as environmental and human or material resources to address the student's management needs (Dist. Ex. 6 at p. 3). As the record indicates that the student's interfering behaviors were managed with prompting and redirection, I see no reason to disturb the IHO's finding that a 1:1 paraprofessional can appropriately address this need (see, e.g., F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85-86 [2d Cir. July 24, 2013]).

In addition, while the hearing record contains testimony from individuals indicating that the student requires 1:1 "instruction," it is not clear from the hearing record that the activities constituting such "instruction" cannot be provided by a paraprofessional. For example, the student's then-current occupational therapist testified that the student required 1:1 support for

---

used with the student she indicated that, "if done correctly," ABA was no different than "good teaching" (Tr. p. 331). Additionally, while the head of school opined that the student required instruction provided with an ABA methodology, her basis for so stating was that the student needed to receive prompting, and fading of prompts, in a consistent manner, so that he could become increasingly independent (Tr. p. 304). However, there is nothing inherent to prompting or the fading of prompts that requires the use of an exclusively ABA style of instruction, and the April 2013 IEP specifically identified the student's need for prompts but noted that the student was becoming "less prompt-dependent" and that focus was paid to increasing his independence (Dist. Ex. 6 at pp. 2-3). Furthermore, several of the annual goals and short-term objectives included in the IEP explicitly contemplated the use of a lower level of prompting throughout the course of the school year (see, e.g., id. at pp. 15-19). Accordingly, and especially since parents do not even assert that the student could not make progress through use of any methodology other than ABA (instead they allege simply that the CSE failed to "meaningfully consider methodology") I see no reason to require that a specific methodology be specified on the student's IEP in this instance.

purposes of redirection, to "ensure safety," and to help the student practice the skills that he is being exposed to, the latter two things being what she considered "instruction" (Tr. pp 143-44, 163, 165-66, 176). Likewise, the students' then-current speech-language therapist testified that the student benefitted "from reinforcements, from a consistent behavioral plan" which were included in the April 2013 IEP by way of the annual goals and management needs, as supplemented by the FBA and BIP (Tr. p. 211; see Dist. Exs. 6 at pp. 3-23; 7-8). The speech therapist also testified that "[w]ithout 1:1 instruction he becomes very self-engaged" (Tr. p. 227), and indicated that the 1:1 "instruction" the student required consisted of "a lot of refocusing" and prompting (id. at p. 201).

Further, the home based team supervisor testified that 1:1 instruction was appropriate to keep the student on task and focused, "including a reinforcement system, as well as breaking the steps down" (Tr. p. 243). However, the role of a 1:1 service provider, as reflected in the McCarton behavior support plans, included providing visual supports or demonstrations, repetitive practice to acquire new skills, multiple exemplars to learn new concepts, frequent breaks, varied tasks, and preparation to change (Dist. Ex. 14 at pp. 1, 4, 9). Similarly, the McCarton behavior support plans indicate that student required 1:1 support to provide prompting to use a self-monitoring token economy system to address his needs including off-task behaviors, delayed echolalia, non-contextual vocalizations, stereotypic hand movements, and tantrumming (id. at pp. 4-5). In this regard I note that, according to the student's occupational and speech-language therapists at McCarton, "instructors" measured the amount of prompting needed, how much assistance the student required in completing each part of his routine; provided redirection, refocusing, and carryover of skills; and collected data (Tr. pp. 149, 165, 200-01). In addition, while the head of school at McCarton testified the student needs a 1:1 "instructor" (Tr. p. 309), her testimony indicates that this "instructor" is to help prompt the student and help maintain his attention (id.). In addition, the head of school also indicated that the student had a "teacher" with him to implement his behavior plan and reinforce him after every three minutes that he remained attentive (Tr. p. 262). These services, provided under the supervision of a certified special education teacher and which do not involve the provision of direct instructional services, are similar to those which supplementary school personnel are permitted to provide pursuant to State regulation (8 NYCRR 80-5.6).

State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Accordingly, as the hearing record supports a finding that the student's need for 1:1 assistance related primarily to his interfering behaviors and difficulty remaining on task, the student's needs for 1:1 support could adequately be met in a 6:1+1 special class together with the additional provision of a 1:1 paraprofessional and the management needs specified on the April 2013 IEP (see F.L., 553 Fed. App'x at 8-9; see also K.L., 530 Fed. App'x at 85-86; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *18-*20 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10-*11 [S.D.N.Y. Mar. 31, 2014]).

3. Parent Counseling and Training

The parents raise concerns regarding the parent counseling and training recommended in the April 2013 IEP. Notably, the parents do not allege that the district failed to recommend parent counseling and training in the April 2013 IEP as the IEP, in fact, recommends such as a related service. Rather, the parents claim an entitlement to individualized parent counseling and training,

but cite to no authority explicitly creating such a right, nor do they assert any particular reason why they require such services. Accordingly, I find that the district met its obligation to provide parent counseling and training in accordance with State regulations (8 NYCRR 200.4[d][2][v][b][5]; 200.13[d]) and decline to find a denial of FAPE on this basis.

4. After-School Services

Finally, the parents contend that the student requires after-school services in order to generalize the skills learned at school and to benefit from his education. The IHO determined that the district was required to provide six hours of 1:1 ABA services per week and two 45-minute sessions of OT per week in order to assist the student with transitioning to a public school, and the district appeals this decision. I find that the IHO erred in this regard.

Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). Here, the student's private school and home-based team providers all testified that the purpose of the after-school services was for the student to generalize skills to environments other than school. Specifically, the McCarton coordinator of home-based services and the McCarton head of school both testified that the focus of the home-based sessions was generalization of skills from school to home (Tr. pp. 237, 302). Additionally, the coordinator of home-based services from McCarton testified that without the home ABA program, the student would be able to make academic gains (Tr. p. 247). The head of school at McCarton further testified that without the home-based services, the student would still be able to make progress in school (Tr. p. 334). Accordingly, I am unable to find that the student required after-school services in order to receive an educational benefit.

Further, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir.2003]; Walczak, 142 F.3d at 132). Thus, while I can understand that the parents may believe these services were desirable for their son, it does not follow that the district must be made responsible for all of them. The IDEA 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]). I therefore conclude that the IHO erred in awarding after school services (see Luke P., 540 F.3d at 1152-53; L.B. v. Nebo Sch. Dist., 379 F.3d at 979 n.18).

C. Assigned School Claims

In addition to the claims discussed above related to the April 2013 IEP, the parents make allegations in their petition regarding the school to which the district assigned the student. Specifically, the parents contend that the district's "chosen placement" was not timely since they were not sent an FNR until June 26, 2013, that the school was not open during the summer portion of the 2013-14 school year (so the parent could not visit it), and that the district did not prove that

the school itself could implement the April 2013 IEP as written. For the reasons discussed below, however, I am unable to find that any of these claims provide an appropriate basis for an award of tuition reimbursement.

As an initial matter, and with respect to the parent's contention that they did not receive a timely FNR, to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191–92 [district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

Here, the hearing record reflects that the district developed an IEP for the student for the 2013-14 school year and that the parents received a copy of this IEP prior to the beginning of the 2013-13 school year (Parent Ex. N at p. 1). Moreover, and with respect to the FNR, while it is not entirely clear from the hearing record when this document (which is dated June 14, 2013 and the parents claim was mailed on June 26, 2013) was received by the parents, I am unable to find that the alleged non-receipt of this document had any bearing on the parent's decision to reject the program offered to the student, which was done almost immediately after receiving the April 2012 IEP itself (id.). Accordingly, even if the FNR (which is not required by the IDEA) were untimely, I would be unable to find that this, by itself, prejudiced the parent or caused a deprivation of educational benefit (or denial of a FAPE) to the student.

Further, the Second Circuit Court of Appeals has held that where an IEP is rejected by a parent before a district has had an opportunity to implement it, the sufficiency of a district's offered program must generally be determined on the basis of the IEP itself. In R.E., for example, the

Court was confronted with a situation where the parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (id.). This claim, however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents" and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id.).

Likewise, in K.L. v. New York City Dep't of Educ., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x 81, 87 [2d Cir. 2013]). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (id., quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. v. New York City Dep't of Educ. (553 Fed. App'x 2 [2d Cir. 2014]), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (id. at *6). Citing to R.E., the Court reiterated that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" (id. at *6, citing R.E., 694 F.3d at 195), and held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice" (id., citing R.E., 694 F.3d at 187 n.3).

In light of the above, two general principals are clear: (1) the sufficiency of a special education program offered to a student must generally be based on the IEP which is offered to the student, and (2) speculation that a school district will not adequately adhere to that IEP does not, alone, constitute an appropriate basis for unilateral placement. To the extent that the parents claim that they were unable to visit the assigned school, therefore, I am unable to find that this constitutes a basis for the relief they seek in that the sufficiency of the special education program offered to the student must be judged based on the IEP itself. This is especially true since, as noted above, districts are required to provide services in conformity with a student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). Likewise, I am also unable to find, as the parents suggest, that the district was required to prove that its "proposed placement" was substantively appropriate to meet the student's needs since imposing such a requirement would both (a) require that one look past the April 2013 IEP in assessing the sufficiency of the program offered to the student, and (b) require one to speculate—due to a lack of evidence—that the district would not adequately adhere to the April 2013 IEP (see, e.g., M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014] [noting that "it would be inconsistent with R.E. to require . . . evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP"], citing R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]). In this regard, while I realize that some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs (or that issues pertaining to a school site relate to the provision of a FAPE), the weight of the relevant authority, consistent with the Second Circuit precedent discussed above, supports the approach taken here (see B.K., 2014 WL 1330891, at *20-*22; M.L., 2014 WL 1301957, at *12;

M.O., 2014 WL 1257924, at *2; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 588-90 [S.D.N.Y. 2013]; J.L., 2013 WL 625064, at *10; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] ["Absent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP."]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

VII. Conclusion

The hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2013-14 school year. The hearing record does not support the IHO's determination that the district must provide after-school services for the purpose of transitioning the student to public school. Accordingly, I annul that portion of the IHO's decision that ordered the district to provide six hours per week of 1:1 ABA services and two 45-minute sessions of OT per week; and affirm the IHO's decision in all other respects.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated June 30, 2014, is modified by reversing those portions which ordered the district to provide the student with after-school services.

Dated: **Albany, New York**
October 23, 2014

HOWARD BEYER
STATE REVIEW OFFICER