



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-070

**Application of the [REDACTED]
[REDACTED] for review of a determination of a hearing
officer relating to the provision of educational services to a
student with a disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, G. Christopher Harriss, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Luria Academy of Brooklyn (Luria) and for privately obtained related services for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending Luria (Tr. p. 1057; Parent Ex. C at p. 6), which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

The hearing record reflects that the student first manifested developmental delays at age two, exhibiting anxiety, aggression, and limited communication skills; eventually, he received diagnoses of a pervasive developmental disorder (PDD), an attention deficit hyperactivity disorder (ADHD), a speech and language disorder (marked by pragmatic language deficits), and

fine and gross motor deficits (Tr. pp. 980-82; Dist. Exs. 3 at pp. 4-5; 7 at p. 3; 11 at p. 1; 34 at p. 2; Parent Ex. L at pp. 1-2).¹

According to the student's mother, the Committee on Preschool Special Education (CPSE) classified the student as a preschool student with a disability, and for the 2007-08 school year, the student began attending preschool in an integrated class with related services consisting of occupational therapy (OT), speech-language therapy, and counseling/play therapy (Tr. pp. 991-93; see Parent Ex. L at p. 1). The parents withdrew their son from this placement, citing regression, and placed him in a private preschool class of eight students, a paraprofessional, and a private speech-language pathologist trained in the "DIR/Floortime" approach² who functioned as a DIR/Floortime therapist, while continuing with the OT and speech-language related services provided by the district (Tr. pp. 854-56, 993-95; see Parent Ex. L at p. 1).

On February 14, 2008, the CPSE convened and for the remainder of the 2007-08 school year and summer 2008, recommended a special education program with 10 hours per week of special education itinerant teacher (SEIT) services in a 1:1 setting, and pull-out related services consisting of OT and speech-language therapy, both for 3 sessions per week for 30 minutes per session in a 1:1 setting (Parent Ex. B at pp. 1-2, 13-14). The hearing record indicates that during the 2008-09 school year, the student attended a private school and continued to receive private SEIT services, and OT and speech-language therapy (Tr. pp. 995-97, 1059).

The student attended Luria during the 2009-10 school year with a full-time 1:1 private paraprofessional, and also received 10 hours per week of in-school instruction using the DIR/Floortime approach provided by the private DIR/Floortime therapist (Tr. pp. 801-02, 822-23, 854-56, 862-64, 886-88; Dist. Ex. 10 at p. 1).

By e-mail dated January 30, 2010, the student's mother advised Luria that she was "very interested" in the student attending the school for the 2010-11 school year, and "would like to secure a spot for him" (Dist. Ex. 33). Four days later, on February 3, 2010, the student's mother executed a tuition contract with Luria reserving a place for the student for the 2010-11 school year (Dist. Ex. 34).

On June 10, 2010, the Committee on Special Education (CSE) convened for the student's annual review and to develop his individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 3). The CSE determined that the student was eligible to receive special education

¹ The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

² The student's private DIR/Floortime therapist explained that the DIR/Floortime approach was "based on research that's been done on how children typically develop social emotional skills, and learn to communicate and interact with people," adding that the approach was "based on a timeline of how children normally develop these skills" that revealed "where the gaps are for a child with PDD, and we fill in those gaps in a developmental sequence" (Tr. pp. 860-61).

and related services as a student with autism, and recommended a 10-month special education program consisting of a 12:1 integrated co-teaching class (ICT)³ class, a 1:1 behavior management paraprofessional, related services, and environmental modifications (id. at pp. 1, 3-4, 17). The student's weekly related services recommendations consisted of one session of counseling in a group of three, three individual sessions of OT, two individual sessions of physical therapy (PT), two individual sessions of speech-language therapy, and one session of speech-language therapy in a group of two (id.). The resultant IEP indicated that all of the related service sessions were to be 30 minutes in length and provided in a separate location (id.). The CSE recommended that the student receive environmental modifications including use of verbal praise and encouragement, repetition, and rewording of directions and questions (id. at pp. 1-4, 15, 17). The June 2010 CSE also developed a behavioral intervention plan (BIP) for the student (id. at p. 19).

On June 18, 2010, the parents advised the district that they had not yet received notification from the district of the school to which the district was assigning the student for the 2010-11 school year (Parent Ex. F). The parents further advised the district of their intention to reenroll the student at Luria for the 12-month school year, unless the district provided the student with an appropriate educational program, and provide additional services of 10 hours per week of DIR/Floortime therapy and a 1:1 paraprofessional for 30 hours per week (id.). The parents indicated that they would seek reimbursement from the district for the costs of the student's program (id.).

On July 1, 2010, the district summarized the recommendations made by the June 2010 CSE and notified the parents of the school to which the district assigned the student (Dist. Ex. 4).

By letter to the district dated July 12, 2010, the parents indicated that they had met with the principal of the assigned school on July 8, 2010 to discuss the assigned school and the student's program (Parent Ex. R). The parents determined that the assigned school was inappropriate for the student, contending, among other things, that the number of students in the assigned classroom would be "over stimulating" for the student; the physical setup of the assigned classroom lacked a "quiet corner or spot for him to [regulate] his sensory system" when he felt overwhelmed; the classroom teacher lacked proper training in instructing students with autism; and the "lecture style" of instruction used in the classroom was inappropriate for the student (id. at p. 1). The parents again advised the district of their intention to reenroll their son at Luria for the 2010-11 12-month school year absent an appropriate program from the district and to seek reimbursement for the DIR/Floortime therapist and paraprofessional services (id.).

³ "Integrated co-teaching services," as referred to in State regulations, means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). In April 2008, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued a guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" that further describes ICT services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html>).

Amended Due Process Complaint Notice

By amended due process complaint notice dated September 29, 2010, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year and requested an impartial hearing to adjudicate claims for pendency and reimbursement (Parent Ex. C).⁴ The parents asserted 45 procedural and substantive allegations in their amended due process complaint notice regarding the June 2010 CSE meeting and resultant IEP (see id. at pp. 2-6).

Impartial Hearing Officer Decision

On August 19, 2010, the parties proceeded to an impartial hearing, which concluded on March 25, 2011, after 12 nonconsecutive days of proceedings.⁵ On October 12, 2010, the impartial hearing officer issued an amended interim order on pendency, in which she determined that the student was to receive 10 hours per week of school-based SEIT services, and three 30-minute sessions per week of both 1:1 OT and speech-language therapy, pursuant to the February 2008 IEP, until the conclusion of the impartial hearing (Interim IHO Decision at pp. 2-3).

On May 16, 2011, the impartial hearing officer issued a decision, finding that the district failed to offer the student a FAPE for the 2010-11 school year on procedural and substantive grounds, that the parents' unilateral placement of the student at Luria and provision of additional services were appropriate, and that the equities favored an award of tuition reimbursement and the costs of the additional services (IHO Decision at pp. 24-30). The impartial hearing officer determined that the parents were denied the opportunity to meaningfully participate in the formulation of their son's IEP because (1) the IEP goals were not discussed during the June 2010 CSE meeting, (2) the student's mother and his regular education teacher from Luria were not provided with copies of the assessments relied upon by the CSE, (3) the CSE failed to consider the student's mother and his Luria teacher's recommendation that the student required a small class size setting, and (4) the district's recommended program was predetermined (id. at pp. 26-27). The impartial hearing officer also concluded that the district failed to substantively offer the student a FAPE for the 2010-11 school year, finding that: (1) the June 2010 CSE's decision to offer the student a 10-month program rather than a 12-month program was not supported by the evaluative material the CSE had regarding the student; (2) the hearing record did not support the CSE's failure to offer the student adapted physical education in the IEP; (3) the June 2010 IEP lacked appropriate annual goals to address the student's language processing, pragmatic language

⁴ The parents filed their original due process complaint notice on July 8, 2010, which contained 35 allegations of procedural and substantive deficiencies relative to the June 2010 CSE meeting and resultant IEP (Parent Ex. A). These allegations were reiterated and supplemented in the amended due process complaint notice (compare Parent Ex. A at pp. 2-5, with Parent Ex. C at pp. 2-6).

⁵ I remind the impartial hearing officer that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]) and further, that each party shall have up to one day to present its case and that additional hearing dates, if required, should be scheduled on consecutive days, when practicable (8 NYCRR 200.5[j][3][xiii]).

problems, ADHD, and inability to generalize; (4) the district presented "no documentary evidence" supporting the appropriateness of the recommended ICT program, especially in light of the student's demonstrated language and social and pragmatic delays; (5) the June 2010 IEP did not provide for parent training and counseling services; (6) the district failed to conduct a functional behavioral analysis (FBA); and (7) the BIP was developed without parent or teacher involvement and was inappropriate (IHO Decision at pp. 27-29).

The impartial hearing officer then found that the parents met their burden of proving that the student's placement at Luria and the additional services provided by the private paraprofessional and the private DIR/Floortime therapist were appropriate to meet the student's special education needs from July 1, 2010 through June 30, 2011, insofar as the DIR/Floortime methodology addressed the student's "sensory integration disorder" and his diagnosis of a PDD, and made him more available for learning and socialization (IHO Decision at pp. 28-29). She further found that testimony from both the private paraprofessional and the private DIR/Floortime therapist established that due to his attendance at Luria and the receipt of the additional services, the student demonstrated progress with his communication, pragmatic skills, socialization, and behavioral difficulties (*id.*).

Lastly, the impartial hearing officer concluded that equitable considerations supported the parents' reimbursement claims because the hearing record demonstrated that they provided adequate notice to the district, the student's mother testified that she would have considered a public school placement if the district had offered an appropriate program, and the parents fully cooperated with the district (IHO Decision at pp. 29-30).

The impartial hearing officer ordered: (1) full tuition reimbursement for the student's 2010-11 school year at Luria;⁶ (2) reimbursement of the student's private paraprofessional for services rendered from October 2010 to April 8, 2011; (3) reimbursement for the student's private DIR/Floortime therapist for services rendered from July 2010 to April 2011; (4) funding from the date of the decision through July 1, 2011 for 10 hours per week of private DIR/Floortime therapy services, and 30 hours per week of services from the student's private paraprofessional; and (5) transportation to and from Luria (IHO Decision at p. 30).

Appeal for State-Level Review

The district appeals from the impartial hearing officer's decision, arguing that it offered the student a FAPE during the 2010-11 school year. The district asserts, among other things, that the impartial hearing officer incorrectly determined that the student required a 12-month program, that the student's mother had not fully participated in the June 2010 CSE meeting, that

⁶ Although acknowledging that the student received some religious instruction at Luria which would not be reimbursable under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) (IDEA), and despite evidence contained in the hearing record detailing the percentage of time during the typical school day and school week that the student received religious instruction at Luria (*see* Tr. pp. 848-50, 911-13; IHO Ex. XI), the impartial hearing officer nevertheless declined to reduce the award of full tuition reimbursement, stating "I am unable to determine the exact time, if any, that [the student] received religious instruction" (IHO Decision at p. 31).

the IEP were predetermined, that the absence of parent training and counseling from the IEP constituted a denial of a FAPE, that the BIP was not appropriate, and that the IEP did not contain appropriate goals. The district further contends that the impartial hearing officer erred in determining that the lack of adapted physical education in the IEP deprived the student of a FAPE because that issue was not raised in the parents' amended due process complaint notice. According to the district, the parents failed to meet their burden of proving that Luria and the private services obtained by the parents were appropriate for the student. The district contends that equitable considerations favor the district and preclude the award of relief to the parents. The district seeks annulment of the impartial hearing officer's decision.

The parents answer, countering that the impartial hearing officer properly found that the district denied the student a FAPE for the 2010-11 school year; that Luria served as the inclusion component of the student's total educational program, and to that extent, constituted an appropriate placement for the student for the 2010-11 school year; and that the hearing record supported the determination that equitable considerations favored the parents' claims for reimbursement.

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 v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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 C.F.R. §§ 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; 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 accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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]). 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; Gagliardo, 489 F.3d 105 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 C.F.R. § 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Scope of Review

First I will address the district's contention that the impartial hearing officer erred in addressing two issues that were not raised in the parents' amended due process complaint notice, specifically, that the IEP lacked a recommendation for adapted physical education and that an ICT class was too large for the student (see IHO Decision at pp. 26-27). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

In this case, a review of the parents' amended due process complaint notice reveals that they specifically alleged 45 substantive and procedural allegations regarding the student's June 2010 IEP (Parent Ex. C). The amended due process complaint notice does not contain any allegations regarding the lack of adapted physical education or that an ICT class was too large for the student (id.). A review of the hearing record shows that the parents did not argue during the impartial hearing that the IEP lacked a recommendation for adapted physical education; therefore, the impartial hearing officer should not have addressed this issue and I will annul the impartial hearing officer's determination regarding the lack of adapted physical education in the student's June 2010 IEP. However, a review of the hearing record indicates that the issue of the appropriateness of the size of the ICT class was in fact raised during the impartial hearing without objection by the district (see Tr. pp. 536-42, 593-94, 713-14, 1014-15; see also Parent Ex. R at p. 1). Accordingly, this issue is properly before me and I will consider the parties' dispute regarding the appropriateness of the recommended ICT placement.

June 2010 CSE Process

Next, I will address the district's contentions that the impartial hearing officer erred in determining that the student's IEP was predetermined and that the parents were precluded from meaningfully participating in the formulation of their son's IEP because the June 2010 CSE did not discuss the IEP goals during the meeting and did not provide either the student's mother or his regular education teacher from Luria with copies of the assessments relied upon by the CSE in developing the recommended program.

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 C.F.R. § 300.322; 8 NYCRR 200.5[d]). In deciding whether parents were afforded an opportunity to participate in the development of their child's IEP, courts have considered the extent of the participation (see Cerra, 427 F.3d at 193 [finding meaningful parental participation when the student's mother attended numerous CSE meetings and a CSE meeting transcript reflected that she "participated actively" in the development of her daughter's IEP and was "frequently consulted for input about the CSE's proposed plan"]; Perricelli, 2007 WL 465211, at *14-15 [finding no denial of a meaningful opportunity to participate when the student's mother was in "frequent contact" with teachers and school officials, "active[ly] participat[ed]" at her daughter's CSE meetings, and questioned the CSE about documents that she did not understand]; Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d. 366, 378-79 [S.D.N.Y. 2006] [finding that the school district's failure at the time of the CSE meeting to have completed an annual report concerning the student's progress toward goals and objectives did not deprive the parents of meaningful participation where the parents attended the CSE meeting and admitted that they were informed of the information to be contained in the report]; see also Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006] [finding no denial of a meaningful opportunity to participate when the parents were involved in the development of the IEP, had a "special education representative," and visited the school recommended by the school district]; A.E. v. Westport Bd. of Educ., 2006 WL 3455096 [D. Conn. Nov. 29, 2006]).

Here, the hearing record indicates that the participants at the June 10, 2010 CSE meeting included the district's school psychologist who also functioned as the district representative, a district special education teacher, the student's regular education teacher from Luria (participating telephonically), the student's mother, and an additional parent member (Dist. Exs. 2 at p. 2; 3). Initially, I find that there is no indication in the hearing record that the parents objected to any CSE member's telephonic participation at the time of the CSE meeting and note that State regulations provide that a parent and the CSE may agree to use alternative means of meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]; see 34 C.F.R. § 300.328).

Regarding the impartial hearing officer's finding that the goals were not discussed at the CSE meeting and that the student's mother and his teacher from Luria were therefore, denied the

opportunity to meaningfully participate in the decision-making process, the hearing record is unclear as to whether the goals were discussed at the June 2010 CSE meeting (see, e.g., Tr. pp. 379, 414-31, 442, 602-03, 651, 986-90). Even assuming that the hearing record established that the CSE did not discuss the annual goals, the lack of discussion about the goals during the June 2010 CSE meeting did not, by itself, deny the student a FAPE. The hearing record demonstrates that both the student's mother and his regular education teacher from Luria actively participated in the review process. The school psychologist testified that the student's regular education teacher from Luria "was on the phone throughout the review, and she told us exactly how [the student was] functioning in every single area within the classroom environment," which was corroborated by the student's mother's testimony (Tr. pp. 439-42, 1098-99). The student's mother acknowledged that she explained to the CSE her opinion that the student needed DIR/Floortime therapy as part of his educational program, that she "explained to them how important it was for [the student] to have a specialized program of people who know how to deal specifically with high-functioning children with autism," and that she related to the June 2010 CSE the positive effect that the environment at Luria had on the student (Tr. pp. 990-91, 1086-88). She also acknowledged that she was afforded an opportunity at the June 2010 CSE meeting to voice the same concerns about the recommended program that were enumerated in her July 12, 2010 letter to the district, and confirmed that no one at the CSE meeting precluded her from stating her concerns during the meeting (Tr. pp. 1016, 1088; see Parent Ex. R at p. 1).

The impartial hearing officer also asserted that the hearing record established that "the [parent] and the [student's regular education] teacher from [Luria] were not provided with copies of the CSE assessments," which denied the student's mother and his teacher from Luria an opportunity to meaningfully participate in the decision-making process (IHO Decision at p. 26). The school psychologist testified that copies of all the documents considered by the CSE were placed on a table in the meeting room, and that each CSE member in attendance was afforded an opportunity to look through the documents during the course of the June 2010 CSE meeting (Tr. pp. 447-48). Several of the reports considered were passed between, and reviewed by, each of the CSE participants in attendance, and the reports were reviewed telephonically with the student's regular education teacher from Luria during the meeting (Tr. pp. 447-48, 453-55). Furthermore, there is insufficient evidence in the hearing record to conclude that the student's mother lacked the opportunity to review any of the documents upon which the CSE based its recommendations. Thus, the hearing record demonstrates that both the student's mother and his regular education teacher from Luria were afforded the opportunity to meaningfully participate in the review process, ask questions to which the other CSE members responded, and express their opinions as to the appropriateness of the recommended program for the student. Accordingly, I find that the impartial hearing officer erred in determining that the parents were denied the opportunity to meaningfully participate in the development of their son's IEP.

Turning to the parties' dispute regarding whether the June 2010 CSE engaged in impermissible predetermination in formulating the student's IEP, I note that 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 (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton

County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Although the impartial hearing officer determined that the CSE predetermined the student's recommended program, she did not cite to any evidence in the hearing record or legal authority to support her finding. Moreover, there is insufficient evidence in the hearing record to conclude that the CSE did not maintain an open mind at the June 2010 meeting. As previously discussed, the hearing record indicates that the student's mother had the opportunity to meaningfully participate in the development of the June 2010 IEP and the student's teacher from Luria participated in the CSE meeting and voiced her understanding of the student's classroom performance (Tr. pp. 439-42, 1098-99). The hearing record also reveals that the June 2010 CSE discussed other program options for the student and rejected them, based on his needs (Tr. pp. 435-37; Dist. Ex. 3 at p. 16). The impartial hearing officer's statement that the CSE did not consider the student's placement at Luria is not evidence of predetermination. Based on the foregoing, I find that the evidence in the hearing record does not support a finding that the district predetermined the student's program for the 2010-11 school year, but shows that the student's mother meaningfully participated and contributed to the development of the student's IEP during the June 2010 CSE meeting.

The June 2010 IEP and Recommended Placement

Annual Goals

Turning to the impartial hearing officer's substantive determinations, the district contends that the impartial hearing officer's finding that the June 2010 IEP was inappropriate because it did not contain appropriate annual goals to address the student's language processing, pragmatic language problems, ADHD, and inability to generalize, was not supported by the hearing record. As further discussed below, I find that the annual goals contained in the June 2010 IEP were sufficiently linked to the student's educational needs as described in the present levels of performance, which reflected the evaluative information available to the June 2010 CSE during the meeting (compare Dist. Ex. 3 at pp. 3-6, with Dist. Exs. 5-12).

The hearing record establishes that the evaluative information available to the June 2010 CSE included a June 2009 psychological evaluation report, a May 2010 district funded psychoeducational evaluation report, a March 2009 private neurodevelopmental evaluation

report, a May 2010 classroom observation report, a June 2010 private DIR/Floortime therapy report, a September 2009 district funded PT evaluation report, and the student's May 2010 progress report regarding his 2009-10 school year at Luria (Tr. pp. 385-86, 397-400, 403-07, 480-81, 631-32; see Dist. Exs. 5-12).

The June 2009 psychological evaluation included administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student, which yielded a verbal comprehension index score of 110 (high average), a perceptual reasoning index score of 102 (average), a working memory index score of 91 (average), a processing speed index score of 88 (low average), and a full scale IQ of 100 (average) (Dist. Ex. 5 at pp. 2-3).⁷ The evaluator reported that the student's verbal and nonverbal skills were "consistently developed," but observed that he exhibited relative weaknesses in the areas of working memory and processing speed (id. at p. 7).

The May 2010 district funded psychoeducational evaluation report included administration of selected subtests from the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), which yielded the following standard scores (percentile): letter word identification, 75 (10); passage comprehension, 61 (2); calculation, 86 (27); applied problems, 92 (38); and spelling, 69 (7) (Dist. Ex. 6 at p. 2). The May 2010 psychoeducational evaluation report indicated that the student's reading and spelling skills fell within the K.5-K.8 range, while his math skills fell within the 1.3-1.5 grade range (id. at pp. 2-3). IEP conference summary notes contained in the hearing record prepared by the special education teacher who participated in the June 2010 CSE meeting reflected that the June 2010 CSE discussed the student's academic and behavior management needs and concluded that he demonstrated needs in all academic areas, and that his reading and mathematics skills were at a kindergarten level (Tr. pp. 438-39, 495, 496; Dist. Ex. 2 at p. 1). The June 2010 CSE also noted that the student experienced difficulty with vowel sounds, and that during reading activities, he concentrated on decoding rather than comprehension (Dist. Ex. 2 at p. 2). The CSE described the student's reading comprehension skills as "delayed," noted that he did not "make use of contextual clues," described the student's sight word vocabulary as "inconsistent," identified listening comprehension as an area of relative strength, and commented that the student demonstrated the ability to compare and contrast information (id.). In math, the IEP conference summary notes revealed that the student could identify numbers 1-10, write numbers 1-30, demonstrate 1:1 correspondence for numbers 1-20, and complete single digit addition problems using manipulatives; however, he experienced difficulty applying skills to word problems (id.).

According to the June 2009 psychological evaluation report, the student communicated through short sentences, using more complex sentences with encouragement (Dist. Ex. 5 at p. 3). In the June 2010 progress report, the private DIR/Floortime therapist noted that although the student had many ideas to share, he experienced difficulty linking those ideas together in a meaningful way and in sequencing ideas, and occasionally required visual support (Dist. Ex. 10

⁷ A winter 2009 administration of the Kaufman Brief Intelligence Test to the student yielded verbal and nonverbal domain scores in the average range of cognitive functioning (Dist. Ex. 7 at p. 2).

at pp. 1-2). Multiple reports noted that the student exhibited difficulties with auditory processing and comprehension, but benefited from repetition and rephrasing of directions (Dist. Exs. 5 at p. 3; 6 at p. 2; 7 at p. 3). In winter 2009, the student received a diagnosis of a language-based learning disability (Dist. Ex. 7 at p. 3).

Multiple evaluation reports reflected that the student exhibited pragmatic language and social skills deficits (Dist. Exs. 7 at pp. 2, 4; 9; 10). In June 2010, the student's private DIR/Floortime therapist reported improvement in the student's ability to interpret body language and social cues regarding the feelings of others; cited his progress in his ability to interact with peers; and noted that he had demonstrated the ability to participate in "a continuous flow of back and forth interactions," having established some friendships with peers at school (Dist. Ex. 10 at p. 2). She further observed that the student was beginning to modulate his behavior accordingly, but qualified that the student still required adult facilitation to stay socially engaged in play if it became "more complex" or did not go according to his plan (Dist. Exs. 10 at p. 2; 11 at p. 4).

Motorically, evaluation reports indicated that the student presented with low muscle tone in his trunk, decreased strength in his upper extremities and hands, gross motor incoordination, motor planning deficits, and poor graphomotor skills (Dist. Exs. 7 at pp. 2-3; 11 at pp. 3-4). The parents and the evaluating physical therapist noted the student's need for sensory input (Dist. Ex. 11 at p. 4; see Dist. Ex. 5 at p. 4). A September 2009 PT evaluation report suggested that the student's poor gait control, balance, motor control, and endurance affected his abilities to negotiate a school environment and participate in school-based and peer activities (Dist. Ex. 11 at p. 4).

Behaviorally, the June 2010 DIR/Floortime therapy progress report reflected that the student demonstrated difficulties with frustration tolerance, becoming "dysregulated," and displaying tantrum behaviors; the private DIR/Floortime therapist opined that this behavior had a behavioral, rather than sensory origin and she assessed the tantrum behavior "to be within [the student's] control," observing that the student responded well to the imposition of consistent consequences for his tantrums, which had "significantly lessened" the behavior (Dist. Ex. 10 at p. 1). Several evaluation reports confirmed that the student exhibited frequent impulsive, distractible, and inattentive behaviors, and in winter 2009, he received a diagnosis of an ADHD (Dist. Exs. 5 at pp. 1, 4, 6; 7 at p. 3; 11 at pp. 3-4). The March 2009 neurodevelopmental evaluation report indicated that the student demonstrated difficulty focusing on activities unless he was interested in the subject matter, and according to the May 2010 psychoeducational report, prior to the beginning of one test administration, the student exhibited anxiety characterized by pacing back and forth; however, he eventually transitioned easily and began the assessment (Dist. Exs. 6 at pp. 1-2; 7 at p. 2). Two other evaluation reports documented concerns regarding the student's lack of safety awareness and "self-control," concluding that he was unable to read situations, solve problems independently, or determine the consequences of his actions (Dist. Exs. 5 at pp. 6-7; 11 at pp. 2, 4).⁸ The IEP conference summary notes documented the student's

⁸ According to results of a June 2009 administration of the Vineland Adaptive Behavior Scales, 2nd Edition (VABS II) completed by the student's mother, the student exhibited "moderately low" communication skills and "low" daily living, socialization, and motor skills (Dist. Ex. 5 at p. 5).

tendencies to become easily frustrated and distracted, and indicated that he exhibited tantrum behavior at times and required frequent breaks (Dist. Ex. 2 at p. 1). Although the student did not exhibit aggressive behaviors toward peers or adults, he reportedly became frustrated at times with objects (*id.* at p. 2). The IEP conference summary notes further revealed that the student was more attentive to familiar material, that he enjoyed talking and sharing information during class discussions, that Luria staff were attempting to improve the student's independence regarding class work and activities, and that his peer interaction skills, particularly in the areas of sharing and conversation, had improved during the 2009-10 school year (*id.*).

During a May 2010 classroom observation of the student at Luria, the district's school psychologist observed the student's behavioral "meltdown," but also witnessed him in the classroom listening to instruction, seated with peers in a circle, sustaining his attention, and responding to a teacher's comment (Dist. Ex. 8). During lunch time, she observed him seated at a table with peers and engaging in appropriate conversation and interactions (*id.*). The school psychologist characterized the student as "[f]ull[y] engaged" and noted that he demonstrated an ability to transition, established "fleeting" eye contact, attempted activities, and expressed the skills he possessed, but he also experienced difficulty with pragmatic language skills and "perseverated" on the number seven (Dist. Ex. 9).

A review of the June 2010 IEP shows that the present levels of performance generally reflected the evaluative information available to the CSE described above (compare Dist. Ex. 3 at pp. 3-6, with Dist. Exs. 6; 7; 10; 11).⁹ Present levels of performance included in the June 2010 IEP referenced the results of the June 2009 WISC-IV administration (Dist. Ex. 3 at p. 3). Regarding the student's reading skills, the IEP indicated that he was able to identify all letters and sounds in isolation, and knew approximately 20 sight words (*id.*). Results of the May 2010 WJ-III reading decoding subtest and spelling subtest administrations reflected in the IEP indicated K.8 and K.6 instructional levels, respectively (*id.*).¹⁰ The IEP indicated that the student had mastered number order and correspondence in mathematics, and that he was working on completing single digit addition problems (*id.*). The IEP contained the results of the May 2010 WJ-III calculation and applied problem subtest administration, which yielded instructional levels of 1.3 and 1.5, respectively (*id.*).

The June 2010 IEP social/emotional present levels of performance indicated that during the 2009-10 school year, the student had demonstrated progress in the area of peer interaction skills; initially, he exhibited "difficulty staying engaged socially and often self-absorbed during peer interactions," but at the time of the CSE meeting, the student was "able to participate in the

⁹ I note that the impartial hearing officer did not make a finding regarding the adequacy of the June 2010 IEP present levels of performance, and neither party has raised present levels of performance as an issue on appeal.

¹⁰ The June 2010 IEP indicated a 2.5 rather than a K.5 reading comprehension instructional level, which appears to be a typographical error (Dist. Ex. 3 at p. 3). The IEP correctly reflected WJ-III grade equivalencies for the other subtests administered during the May 2010 evaluation (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 6 at pp. 2-3). Additionally, information included in the IEP conference summary reflected the CSE's discussion and knowledge of the student's reading comprehension deficits (Dist. Ex. 2 at p. 2).

continuous flow of back and forth interactions, and ha[d] made some friendships with his peers" (Dist. Ex. 3 at p. 4). The IEP further stated that the student demonstrated difficulty in the area of self-regulation, and that he was easily frustrated and exhibited a difficult time "calming down" (id.).

Regarding the student's health and physical development, the June 2010 IEP indicated that the student was in good general health, and that he had received diagnoses of an ADHD and a PDD (Dist. Ex. 3 at p. 5). The IEP also stated that at home, the student was administered medication for his behavior (id.). According to information contained in the IEP, the student demonstrated poor balance, coordination, muscle tone, and strength, which prevented him from participating in age appropriate activities (id. at p. 6). Although the CSE determined that the student did not require environmental modifications, the IEP indicated that the student's gross motor deficits affected his ability to participate in school-based activities, negotiate the school environment, and interact with peers (id.).

The June 2010 IEP contained goals in the areas of math; reading; social/emotional; gross and fine motor; sensory processing; and expressive, receptive, and pragmatic language skills (Dist. Ex. 3 at pp. 7-14). The impartial hearing officer determined that the June 2010 IEP lacked appropriate goals to address the student's language processing and pragmatic language deficits, "his ADHD," and "his inability to generalize skills" (IHO Decision at p. 26). Regarding the adequacy of the student's language processing goals, the June 2010 IEP recommended goals designed to improve the student's ability to respond to "wh" questions related to a story read aloud; improve his production of syntactically correct sentences; improve his ability to express complex ideas and abstract concepts; and improve his use of age appropriate pronouns and descriptive concepts to describe objects and people (Dist. Ex. 3 at pp. 11-12). The June 2010 IEP also included a goal to improve the student's pragmatic skills in order to reduce his instances of becoming "self-absorbed," and to improve his conversation and topic maintenance abilities, eye contact, and body language skills (id. at p. 12). In conjunction with goals designed to improve the student's ability to accept redirection for inappropriate behaviors and attend to activities without "fidgeting," the IEP provided supports discussed in detail below to further address his attention needs, which included full-time 1:1 behavior management paraprofessional services, a BIP, and repetition and rewording of directions and questions (id. at pp. 3, 9, 17, 19).

Regarding the impartial hearing officer's finding that the IEP lacked goals for generalization, I note that the due process complaint notice did not specifically raise the lack of this type of goal as an issue, nor was the student's ability to generalize skills discussed during the impartial hearing (see Tr. pp. 1-1376; Parent Ex. C). Although there were no goals in the June 2010 IEP directly referencing generalization skills, the district's recommended program offered opportunities for the student to interact with school personnel including a regular education teacher, a special education teacher, a paraprofessional, a speech-language pathologist, a school psychologist, a physical therapist and an occupational therapist, within the general education and separate location settings where there existed opportunities for generalization of skills to occur (Tr. pp. 176-78; Dist. Ex. 3 at pp. 1, 15, 17). Therefore, in this instance, the lack of IEP goals in the area of generalization of skills did not rise to the level of a denial of a FAPE.

In summary, I conclude that the evidence contained in the hearing record establishes that the annual goals contained in the June 2010 IEP were aligned to the student's needs as described in the evaluative data available to the June 2010 CSE at the time of the meeting (see Tr. pp. 638-51; Dist. Exs. 3 at pp. 11-12; 5 at p. 3; 6 at p. 2; 7 at p. 3; 10).

12:1 ICT Class

Next I turn to the parties' dispute regarding the appropriateness of the recommended ICT placement. Upon review of the hearing record, I find that in consideration of the of the supports and related services recommended in the student's IEP, the June 2010 CSE's recommendation of a 12:1 ICT class was appropriate for the student and was reasonably calculated to enable the student to receive educational benefits in the LRE.

The June 2010 CSE recommended that the student be placed in a 12:1 ICT classroom and receive the services of a full-time 1:1 behavior management paraprofessional (Dist. Ex. 3 at pp. 1, 17). The school psychologist, who conducted the student's May 2010 classroom observation and who participated at the June 2010 CSE meeting, explained that ICT classrooms were composed of a regular education teacher and a special education teacher, with a maximum of 12 of the students in the class having IEPs (Tr. pp. 377-78, 410). The district's special education teacher testified that at the start of the 2010-11 school year, the student's recommended class in the assigned school had a total of 23 students, 8 of whom had IEPs (Tr. pp. 176-78).

The school psychologist opined that the student would have benefitted from an ICT program because one of the two teachers in the classroom would have provided special education support, and, although the student exhibited needs stemming from his autism spectrum disorder, he was "high functioning" and it was "really important" for the student to be exposed to typically developing students in a general education curriculum (Tr. pp. 433-34, 437). She further testified that the June 2010 CSE's recommendation of a full-time 1:1 paraprofessional was designed to address the student's attention difficulty and behavior needs (Tr. pp. 416-17). According to the June 2010 IEP, the CSE concluded that in conjunction with the support of a regular education teacher, a special education teacher, and a 1:1 behavior management paraprofessional, the student would benefit from the use of a multisensory approach during the presentation of directions, explanations, and instructional content, and from the daily review of skills and concepts previously introduced, the repetition and rewording of directions and questions, and the use of verbal praise and encouragement as motivational tools (Dist. Ex. 3 at p. 3). The school psychologist added that the CSE based its academic management recommendations upon information about the student that was received during the June 2010 CSE meeting (Tr. pp. 414-16; see Dist. Ex. 3 at p. 3).

Relative to the student's social/emotional needs, the school psychologist advised that, based in part upon her May 2010 classroom observation of the student, the June 2010 CSE recommended pull-out counseling services once per week for 30 minutes per session in a group of three and the services of a 1:1 behavior management paraprofessional to address the student's "emotional letdowns, breakdowns" and to "be with him throughout the day, specifically, due to his ... emotional issues, and to help him with staying focused, on-task" (Tr. pp. 416-17; Dist. Ex.

3 at pp. 1, 15, 17; see Dist. Exs. 8; 9). She also confirmed that the June 2010 CSE discussed the student's health and physical development, and acknowledged that the CSE concluded that he did not require environmental modifications at that time; however, the CSE continued recommendations for OT and PT for the student as part of his educational program for the 2010-11 school year (Tr. pp. 421-22; Dist. Ex. 3 at pp. 5, 15, 17).

BIP

The district appeals the impartial hearing officer's determination that its recommended program for the 2010-11 school year was inappropriate because it did not conduct an FBA of the student, the student's BIP "was developed without parent or teacher involvement," and the BIP was "not appropriate" (IHO Decision at p. 28).

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H., 2009 WL 3326627; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380 ; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that the "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-

disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). 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]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or Pre-school Committee on Special Education (CPSE) "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]" (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹¹ Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he

¹¹ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the hearing record confirms the parents' claim that the district did not conduct an FBA of the student prior to the June 2010 CSE meeting (Tr. pp. 528-29; Parent Ex. C at p. 5).¹² However, as noted above, the district's failure to conduct an FBA prior to developing a BIP did not, by itself, automatically render the BIP deficient (A.H., 2010 WL 3242234, at *4). While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

Regarding the impartial hearing officer's finding that the BIP was developed without parent or teacher input, the hearing record is unclear as to whether the BIP was discussed at the June 2010 CSE meeting (see, e.g., Tr. pp. 416, 431-33, 605-07, 651, 989-90). Even if the hearing record established that the CSE did not discuss the student's BIP, the lack of discussion at the CSE meeting did not, by itself, deny the student of a FAPE. As previously stated, the BIP identified the student's behaviors that interfered with learning and strategies to remediate those behaviors, based on evaluative information available to the CSE and discussions with both his mother and then-current teacher (see Tr. pp. 439-42, 1098-99; Dist. Exs. 5-12). Additionally, the student's mother testified that at the time of the June 2010 CSE meeting, she did not request a BIP, as her son was "not presenting with severe behavioral issues" (Tr. pp. 989-90). Under the circumstances of this case, the hearing record does not support a finding that the failure of the CSE to discuss the BIP at the meeting rose to the level of a denial of a FAPE.

Due to reports of the student's behavioral difficulties, the CSE developed a BIP, identifying the student's behaviors that interfered with learning as "emotional melt-downs," "poor self-regulation," and "poor attention;" the same behaviors described in the evaluative information considered by the June 2010 CSE (Tr. pp. 531-32; Dist. Ex. 3 at p. 19; see Dist. Exs. 5 at pp. 1, 4, 6; 7 at p. 3; 10; 11 at pp. 3-4). Expected behavior changes included expectations that the student would "remain attentive and focused" and would "control frustrations better" (Dist. Ex. 3 at p. 19). The BIP included three strategies to address the problem behavior: (1) a reward system, under which the student could earn privileges; (2) praise and encouragement; and (3) positive modeling (id.). Additionally, the BIP provided for collaboration between the

¹² There is no indication in the hearing record that either an FBA was conducted or a BIP was developed during the student's 2009-10 or 2010-11 school years at Luria or by his private service providers.

student's teacher, paraprofessional, and parents in order to "implement and reinforce the desired behaviors" (*id.*). According to the school psychologist, the BIP was based upon how the teacher reported that the student functioned in the classroom and the information contained in the reports before the CSE (Tr. pp. 416, 431-32). The school psychologist acknowledged that, as drafted, the BIP constituted a "broad plan, and again, this can only be implemented by somebody who is with the child on a daily basis;" however, she added that the CSE was expecting the teacher, the paraprofessional, and the parent to "come up with a more specific plan" (Tr. p. 532; see Cabouli, 2006 WL 3102463, at *3).

The June 2010 CSE determined that the student's behavior seriously interfered with instruction, and it addressed these behavioral concerns by recommending positive reinforcement, additional adult support in the form of a full-time 1:1 paraprofessional, counseling services, and the BIP described above (Tr. p. 417; Dist. Ex. 3 at pp. 4, 15, 17, 19). The school psychologist testified that CSEs typically recommended, as it did in this instance, paraprofessional services for those students who need additional emotional support (Tr. p. 417). She testified that the CSE's recommendation for one 30-minute session of group counseling services per week would also have addressed the student's social and behavioral needs (Tr. p. 416; see Dist. Ex. 3 at pp. 1, 17, 19). She further stated that the student's social and behavioral recommendations were developed using a "team approach," and were based upon her observation of the student, assessment results, and discussion with the student's teachers (Tr. pp. 417-18; see Dist. Ex. 3 at pp. 1, 15, 17, 19).

Although without further analysis the impartial hearing officer determined that the student's BIP was "inappropriate," in light of the evidence above, I find that the BIP developed by the CSE to address the student's difficulty sustaining attention and self-regulation was consistent with the information available to the CSE. I further find that the positive behavioral intervention services and supports were consistent with the requirements of 34 C.F.R. § 300.324(a)(2)(i) and subject to change as needed in the student's proposed new environment (see Tr. pp. 531-32; see also 8 NYCRR 200.4[d][3]). Furthermore, the hearing record does not support the impartial hearing officer's determination that the lack of an FBA rose to the level of denying the student a FAPE where the IEP addressed behavioral needs and the student had not yet enrolled at the proposed district placement (see 8 NYCRR 200.22[a], 200.1[r]; E.H., 2008 WL 3930028, at *11 [delay in implementing an otherwise proper IEP or its component parts denies a student a FAPE only where the student is being educated under the IEP, or would be but for the delay]; see also Tarlowe, 2008 WL 2736027; Cabouli, 2006 WL 3102463).

Parent Training and Counseling

The district alleges that the impartial hearing officer erroneously determined that the June 2010 IEP was inappropriate because it did not offer parent training and counseling services as part of the student's recommended program for the 2010-11 school year (IHO Decision at p. 27). State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR

200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]). However, Courts have held that a failure to include parent training and counseling on an IEP does not constitute a denial of FAPE where a school provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. March 25, 2010], or where the district was not unwilling to provide such services at a later date (see M.M., 583 F. Supp. 2d at 509 [S.D.N.Y. 2008]; but c.f., R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).¹³

In the instant matter, the provision of parent training and counseling was not included in the June 2010 IEP (Dist. Ex. 3). However, I note that the student's BIP provided that "[t]he [student's] teacher, para[professional] and parent will collaborate to implement and reinforce the desired behaviors" (id. at p. 19). The special education teacher of the assigned school testified that the school offered parent workshops and parent coordinator services, and if the parents required additional services to address their child's behavioral needs, they could request in-school counseling (Tr. pp. 706-07). Furthermore, the hearing record reflects that the private DIR/Floortime therapist had been working with the student and the parents for approximately four years, providing them with information on how to implement the student's Floortime sessions at home, and strategies to improve the student's self-regulation (Tr. pp. 867-68, 887, 1030-31). The student's mother testified that she was receiving training at the "DIR/Floortime Institute" and was certified in New York State as a special education teacher (Tr. pp. 1046-47; Parent Ex. H). She further testified that although "every parent should" receive parent training and counseling because it was "always good to have support," she believed that she "kn[ew] a lot" (Tr. pp. 1030-31). The student's mother also detailed specific examples of intervention techniques taught to her that she implemented at home while working with the student (Tr. pp. 1029-31).

Based upon the circumstances of this case, I find that the district's failure to provide parent training and counseling on the June 2010 IEP did not comport with State regulations (see 8 NYCRR 200.4[d][2][v][b][5], 200.13[d]). However, given the amount of parent training and counseling services the student's mother had already received through both the private DIR/Floortime therapist and her own initiative, and the fact the hearing record reflects that parent training and counseling would have been available at the assigned school, I conclude that under the circumstances of this case, the district's failure to incorporate parent training and counseling into the June 2010 IEP did not result in a denial of a FAPE (see M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp.2d at 509 [district's failure to provide parent counseling and training did not deny the student a FAPE where parents had received extensive parent training in

¹³ To the extent that RK may be read to hold that the failure to adhere to the procedure of listing parent counseling and training on an IEP constitutes a per se, automatic denial of a FAPE, I note that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y., Oct. 30, 2008]).

the past and had been extensively involved in their child's education, communicating regularly with her teachers and service providers]).

Extended School Year Services

The district argues that the impartial hearing officer erred in determining that it denied the student a FAPE, in part, because the hearing record did not support the CSE's determination that the student no longer required extended school year (ESY) services for the 2010-11 school year (IHO Decision at p. 26). The district asserts that the hearing record did not demonstrate that the student required a 12-month program in order to receive meaningful educational benefits from the recommended program.

Pursuant to State regulations, students "shall be considered for [ESY/] 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]; see Application of the Bd. of Educ., Appeal No. 11-058; Application of a Student with a Disability, Appeal No. 09-088; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-073; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 C.F.R. § 300.106 [defining ESY]).¹⁴

The impartial hearing officer found that the June 2010 CSE did not "justify the elimination of a 12-month program" and that the record was "devoid of evidence supporting the appropriateness of a reduction in services from a 12-month program [to] a 10-month program" (IHO Decision at p. 26). The hearing record does not contain the student's 2009-10 IEP;

¹⁴ The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.p12.nysed.gov/specialed/publications/policy/esy/qa2006.htm>).

therefore, it is unclear whether the CSE recommended ESY services for summer 2009, and consequently, whether the CSE's decision not to recommend ESY services for summer 2010 actually constituted a "reduction" in services." However, even if the hearing record contained evidence indicating that the student had received ESY services during the 2009-10 school year, there is insufficient evidence to suggest that the student would have experienced substantial regression during summer 2010 without ESY services (see Dist. Exs. 5-12), and the impartial hearing officer did not cite to any evidentiary basis for her determination that the lack of 12-month services denied the student a FAPE. The fact that the student may have received ESY services during the preceding school year would not, by itself, automatically render the student eligible to receive them again during the following school year, absent evidence of the likelihood of substantial regression of skills during the summer months (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *12 [E.D.N.Y. Jan. 4, 2010]). Given the absence of evidence demonstrating that the student would have experienced substantial regression during summer 2010 without ESY services, I find that the impartial hearing officer's determination that the district's decision not to offer 12-month services denied the student a FAPE is not supported by the hearing record.

Transportation Services

The district also contends that the impartial hearing officer erroneously awarded transportation services to the student (see IHO Decision at p. 30). The parents asserted in their amended due process complaint notice that the student was entitled to transportation services for the 2010-11 school year pursuant his February 2008 preschool IEP which constituted the student's pendency (Parent Ex. C at p. 7). However, contrary to the parent's assertion, the February 2008 preschool IEP does not recommend the provision of special education transportation (Parent Ex. B at p. 1). Although the parents sought an award of transportation services for the 2010-11 school year, the amended due process complaint notice did not specifically allege that the district failed to provide transportation services as part of the June 2010 IEP (see Parent Ex. C at pp. 6-7). Even if the parents properly alleged a claim for transportation services in the amended due process complaint notice, the hearing record contains insufficient evidence to suggest that the student required such services, or that the parents ever contacted the district prior to the filing of the amended due process complaint notice to request such services (see Tr. pp. 442-43, 617, 652, 656-57). Accordingly, I do not find the impartial hearing officer's award of transportation services in this case to be supported by the hearing record, particularly here where I have otherwise determined that the district offered the student a FAPE.

Conclusion

In summary, any procedural errors asserted were either not supported by the hearing record or did not rise to the level of a denial of a FAPE. There is no showing that any procedural error impeded the parents from meaningfully participating in the formulation of their son's IEP (see Cerra, 427 F.3d at 193). I further find that the June 2010 CSE's recommendation of a 12:1 ICT class with related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school

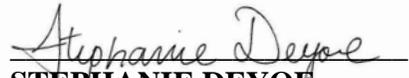
year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record demonstrates that the June 2010 IEP identified the student's multiple needs, developed annual goals and short-term objectives to address those needs, and recommended a program in the LRE (see 20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]). Having reached this determination, it is not necessary to address the appropriateness of the student's unilateral placement at Luria or the privately obtained related services, and I need not consider whether equitable considerations support the parents' request; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated May 16, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to provide transportation services as well as tuition reimbursement for the student's attendance at Luria and for privately obtained related services is hereby annulled.

Dated: Albany, New York
August 17, 2011


STEPHANIE DEYOE
STATE REVIEW OFFICER