



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-118

**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, Tracy Siligmueller, Esq., of counsel

The Law Offices of Steven L. Goldstein, attorneys for respondents, H. Jeffrey Marcus, 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 the costs of the student's tuition at the Rebecca School for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was enrolled in a 6:1+2 classroom in the Rebecca School where he was receiving speech-language therapy, occupational therapy (OT), physical therapy (PT), and adapted physical education (APE) (Parent Ex. W at p. 1; Tr. pp. 39, 221-22, 226, 235, 239, 466).<sup>1</sup> The Commissioner of Education has not approved the Rebecca School as a school with which school 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 proceeding (Tr. pp. 27, 467; see 34 C.F.R. § 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

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<sup>1</sup> The student was also receiving twice weekly private counseling sessions at the time of the impartial hearing that were covered by insurance (Tr. p. 39).

## Background

When he was approximately two years old, due to language delays, the student received speech-language therapy and special instruction through the Early Intervention Program (EIP), until age three, at which point he transitioned to the Committee on Preschool Special Education (CPSE) (Dist. Ex. 6 at p. 1; Parent Ex. L at p. 1; Tr. pp. 467-68). The CPSE deemed the student eligible for special education and related services and in June 2006, recommended him for placement in a 10:1+2 self-contained classroom in a State-approved nonpublic preschool, where he also received speech-language therapy, OT, and counseling in addition to after-school special education itinerant teacher (SEIT) services and OT (Parent Ex. L at pp. 1-2; Tr. p. 469). In 2008, when the student was five years old, he was referred to the Committee on Special Education (CSE) and determined eligible for special education and related services as a student with autism (Tr. pp. 471-72, 488-89). The parents subsequently rejected the district's recommended program for the 2008-09 school year and in September 2008, they placed the student at the Rebecca School (Tr. pp. 235, 472-73).

Over a two-day period in February 2009, the parents obtained a psychoeducational update to assess the student's levels of cognitive and behavioral functioning and developmental progress (Parent Ex. L). Behavioral observations reflected that the student responded to "tickling" his palms to redirect his attention and that he required multiple repetitions and hand-held guidance to attend to test items (*id.* at p. 2). The evaluator also noted that the student made variable eye contact and was easily distracted by his surroundings (*id.* at p. 3). When told he would receive a desired reward following a task, the evaluator reported that the student was able to complete tasks (*id.*). The evaluator also reported that during both testing sessions, when the student became overwhelmed or over stimulated, he tightly squeezed her arm and testing was discontinued (*id.*).

Although the evaluator reported that the student was unable to engage in extensive formal testing due to significant difficulties with pragmatic language and reciprocal attention, administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) yielded a general language composite score of 75 at the 5th percentile and within the borderline range of functioning (Parent Ex. L at pp. 3-4).<sup>2</sup> The student's performance within the nonverbal domain, visual-spatial functioning, reflected his engagement in a puzzle assembly task which yielded a percentile rank of 37, within the average range; however, when an additional nonverbal task requiring abstract reasoning was presented, the student squeezed the examiner's arm and refused to engage (*id.* at p. 4). The student's academic progress was assessed using the school readiness composite of the Bracken Basic Concepts Scale, Expressive which revealed that the student's pre-academic skills were at the 16th percentile and mildly delayed for his age (*id.*). The evaluator further found that the student demonstrated mastery of colors, single digit numbers, shapes and letters; however, he demonstrated significant difficulty with letter

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<sup>2</sup> The psychoeducational update report reflected that the student's performance on the receptive vocabulary subtest was an underestimate of his receptive language abilities as the subtest was discontinued early due to the student's lack of reciprocal attention, resultant perseveration on an item, and inability to be redirected to the task (Parent Ex. L at p. 4). Additionally, the student was unable to complete other verbal IQ tasks as they required more complex language processing, expressive output, and reciprocal attention (*id.*).

sounds, comparisons, and multiple digit numbers and was extremely difficult to engage for these tasks (id.). According to the evaluator, she used hand-held guidance to help the student attend to items and demonstrate the basic pre-academic skills he had acquired (id.). The report further characterized the student's academic achievement as commensurate with his cognitive profile and indicated that fluctuating attention, significant language deficits, and lack of reciprocity negatively affected the student's ability to demonstrate his academic skills (id.). The evaluator assessed the student's adaptive daily living (ADL) skills and behavioral/emotional functioning via parent report using the Behavior Assessment System, Second Edition (ABAS-II) and the Behavior Assessment System for Children-Second Edition (BASC-2) (id.). The BASC-2 questionnaire indicated that the student's emotional functioning was generally within normal limits with areas of concern in atypicality (97th percentile), social skills (1st percentile), and functional communication (1st percentile) (id.). Additional areas of concern included attention problems (93rd percentile), withdrawal symptoms (92nd percentile), and adaptability (6th percentile), which the evaluator deemed to be consistent with the parent's endorsements on the ABAS-II and with behavioral observations made during formal testing and in school (id. at p. 5). The report reflected that while the student continued to evidence delays in areas of behavioral adjustment, language, and social development for his age, he was clearly showing relative progress in that he was less withdrawn and could perform more ADL skills than one year before (id.). The report recommended that the student continue to attend the Rebecca School (id.).

On June 8, 2009, the district obtained a PT evaluation of the student from a private evaluator to assess his PT needs (Dist. Ex. 6). According to the evaluation report, the student exhibited decreased muscle tone and demonstrated difficulty in motor planning and maintaining graded control during activities that required multiple steps, stability, balance, and coordination (id. at p. 1). The evaluator further noted that when the student was challenged on dynamic surfaces, his postural control decreased (id.). In addition, she reported that the student's righting reactions and protective reactions were decreased in all directions (id.). By parent report, the evaluator stated that the student was sensitive to loud noises, but not to light (id.). Administration of the Peabody Scales for Gross Motor Development, Second Edition (PDMS-2) revealed that the student demonstrated a 50 percent delay in his gross motor skills, although as the student was not able to execute commands required in the testing, the percentage of delay was reported to be an approximation of his gross motor skills (id. at pp. 2, 6). The evaluator noted that the student exhibited fair eye contact and poor task focus, and she also described the student's body awareness and safety awareness as "fair" (id.). The report also indicated that the student exhibited functional range of motion of both lower extremities, decreased overall muscle strength, and decreased endurance; however, the student was able to transition within and between all planes with caution, with movements lacking refinement and fluidity (id. at p. 3). Recommendations included continued PT to increase the student's overall muscular strength and to enhance his gross motor skills (id.). The evaluator also suggested that the student's therapy should emphasize body and safety awareness in navigating his home and school environment, motor planning, and balance and coordination for physical and social inclusion with the student's peers (id.).

On November 4, 2009, a district special education teacher conducted a classroom observation of the student in his class at the Rebecca School (Dist. Ex. 7). The special education teacher observed the student transition from the library to his classroom (id. at p. 1). The teacher

directed the student to wash his hands upon entering the classroom, and although he initially walked to the white board and hugged his teacher, the student was redirected to wash his hands (id.). The student covered his ears, when another child began to scream, but eventually, he began to slowly eat his pretzels (id. at p. 2). An assistant teacher instructed the student that he could have ten pretzels, and with 1:1 correspondence with the assistant teacher's help, the student counted the pretzels (id.). When offered a choice in lessons, the student chose tapping, proceeded to cover his ears, put away his placemat, and asked for something to drink (id.). The student got a drink and after he returned, he immediately dragged his chair over to the area where the tapping lesson took place (id.). The special education teacher noted that the student gave appropriate responses (id.). Next, the student moved to the exercise mat, and another student "grabbed" him and caused him to shudder; however, he calmed down within 30 seconds (id.). An interview with the student's classroom teacher revealed that the student enjoyed an audience when he was upset (id.). The student's teacher added that the student exhibited difficulty describing objects and with food (id.). According to the student's teacher, the student enjoyed hugging, so he could get deep pressure in his muscles (id.). The teacher also reported that the student knew his letters, most sounds, and approximately 20 sight words (id.).

A December 2009 interdisciplinary progress report from the Rebecca School revealed that the student was enrolled in a class of eight students and received OT, PT, speech-language therapy, art therapy, music therapy and APE (Parent Ex. N at p. 1). The report characterized the student as "charming, happy, [and] good-humored" (id.). According to the report, at school, the student was drawn toward the trampoline, puzzles, books, and blocks, and also enjoyed many sensory activities (id.). The report further reflected that the student was able to stay regulated throughout a variety of activities and environments and exhibited a growing ability to stay regulated when challenged with strong emotional feelings (id.). His teacher further noted that the student continued to make progress in his ability to maintain shared attention when dysregulated and when he observed peers who were dysregulated (id.). The report also revealed that the student would initiate circles of communication with adults when they were in close proximity to him (id. at p. 2). Although the student was unable to direct his communication toward a particular person, the progress report indicated that the student consistently opened and closed circles of communication to express his wants and needs (id.). However, the student exhibited difficulty closing circles during non-preferred activities (id.). Regarding shared social problem solving, the report noted that the student had developed some strengths in this area, as the student was able to independently problem solve and motor plan through a variety of obstacles to gain a desired object or activity for up to 30 minutes (id.). In addition, the student was also beginning to act out familiar stories and plots from books and TV shows (id.). Lastly, while the student could answer concrete "w" questions in highly emotionally motivating situations, he demonstrated an inconsistent ability to respond to "why" questions (id. at p. 3).

According to the progress report, the student also demonstrated skills with respect to word recognition, comprehension, and fluency and was highly motivated by reading (Parent Ex. N at pp. 3-4). Regarding math, the student was able to use 1:1 correspondence for quantities up to ten and also demonstrated number sense related to the concept of "larger" and related to subtraction using manipulatives (id. at p. 4). The progress report also revealed that the student exhibited some independent living skills, including the ability to wash his hands independently and clean up spills and toys with no more than one prompt (id.).

The student's occupational therapist reported that the focus of therapy was on sensory integration, fine motor coordination, and upper extremity and core strengthening (Parent Ex. N at p. 4). The occupational therapist indicated that the student continued to present with an overresponsive sensory profile; however, she also noted that the student was making progress modulating his response to sensory input (id. at p. 5). She further reported that although the student previously covered his ears in response to loud input and was untrusting of his environment, at the time of the report, he rarely covered his ears, which allowed him to answer questions, and more readily follow directions (id.). According to the progress report, the student also participated in a weekly feeding group to address his limited food preferences and to allow him to explore different foods with his senses and the student had shown "steady progress" since the start of the sessions (id.). Although the therapist reported that the student could become dysregulated while in a busy environment, especially during a period of frustration, he was making "slight" progress toward visually understanding his space and using this information to effectively engage and participate in the classroom environment (id. at p. 6). The student's physical therapist reported that he had improved his confidence and ability to partake in more challenging gross motor activities and that he continued to improve his repertoire of movements (id.). The student's speech-language pathologist noted that while the student continued to exhibit difficulty maintaining a continuous flow of communication and was rigid in his play schemes, he had improved in forming relationships and attachments, while increasing intimacy and displaying shared and lengthened engagement with multiple partners in different environments (id. at p. 7). The progress report also reflected that the student followed one to two-step directives within context, but intermittently required gestural support with an increase in steps, due to difficulty with auditory processing (id.). The student's therapist described him as a "verbal child" who typically utilized one to six-word utterances with intermittent self-stimulatory scripts or vocalizations to communicate (id. at p. 8). Lastly, the report included a recommendation to continue the student's program at that time and set forth specific goals related to the programming areas addressed in the progress note (id. at pp. 10-14).

On February 5, 2010, the CSE convened to develop the student's individualized education program (IEP) for the 2010-11 school year (Tr. p. 17; Dist. Exs. 2; 3). Meeting attendees included the parents, a district school psychologist, a district special education teacher, who also served as district representative, and an additional parent member (Tr. pp. 17, 19-20; Dist. Exs. 2; 3 at p. 2). The student's classroom teacher also participated in the February 2010 CSE meeting by telephone (Tr. p. 19; Dist. Exs. 2; 3 at p. 2). According to the resultant IEP, the February 2010 CSE recommended placement of the student in a 6:1+1 special class in a specialized school with APE and related services consisting of 1:1 speech-language therapy five times per week, twice weekly 1:1 counseling, 1:1 OT five times per week, and twice weekly 1:1 PT (Tr. pp. 27-28; Dist. Exs. 2 at p. 2; 3 at pp. 1, 15; 4). The February 2010 CSE also determined that the student was eligible for a 12-month program in order to prevent significant regression of skills (Tr. p. 28; Dist. Exs. 2 at p. 2; 3 at pp. 2, 16). Annual goals and short-term objectives were developed with respect to reading; math; receptive, expressive and pragmatic language; shared attention and engagement; sensory processing and regulation; fine and gross motor development (motor planning, sequencing, visual-spatial skills, strength, coordination and postural control); and oral motor skills (Dist. Ex. 3 at pp. 7-14). The February 2010 CSE also considered placing the student in a 12:1+1 special class and an 8:1+1 special class; however, the

CSE deemed both placements insufficient to meet the student's needs (Tr. p. 44; Dist. Ex. 3 at p. 16). In a notice of recommended deferred placement also dated February 5, 2010, the district advised the parents that it was in the student's best interest to defer placement in the proposed program until June 30, 2010 and provided the contact information of an individual with whom they could contact to arrange a visit of a sample 6:1+1 classroom (Dist. Ex. 4). The parents were also advised of their rights to request an impartial hearing if they did not agree with the CSE's recommendation (id.).

By letter to the district dated February 18, 2010, the parents advised that although they agreed with the recommendation for a 12-month school year, they could not agree to the CSE's other recommendations without additional information (Parent Ex. H at p. 1). Among other things, the parents requested information regarding potential schools to which the district might assign the student and class profiles (id.). The parents also requested assistance to arrange a visit to an assigned school where the student's IEP might be implemented (id.).

In a letter to the CSE dated June 16, 2010, the parents advised that they believed that due to procedural errors, including the CSE's failure to consider appropriate evaluations, the district denied the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. G at p. 1).<sup>3</sup> The parents further indicated that the February 2010 IEP was not substantively appropriate to meet the student's needs (id.). The parents advised that in July 2010, they planned to place the student at the Rebecca School and would seek funding and/or reimbursement for the student's tuition for the 2010-11 school year through an impartial hearing (id.).

On June 18, 2010, the parents executed an enrollment contract with the Rebecca School for the student to attend the Rebecca School for the 2010-11 school year (Parent Ex. Q).

By letter to the CSE dated June 22, 2010, the student's father acknowledged receipt of the district's final notice of recommendation (FNR) that provided the name and address of the school to which the district assigned the student for the 2010-11 school year (Parent Ex. F). The parent requested help to arrange a visit to the assigned school, as well as additional information regarding the assigned school, including but not limited to information concerning its size, physical layout, and class profiles (id. at p. 1). The student's father also requested information regarding the type of related services available at the assigned school and the types of remedial interventions, teaching methodologies and behavioral modifications and interventions used at the assigned school (id.).

On July 9, 2010, the parents visited the assigned school (Tr. p. 479; Parent Ex. K). In a letter dated July 20, 2010, the student's father advised the CSE that he did not deem the assigned school appropriate to address the student's educational needs (Parent Ex. E). Among the parent's concerns were the functional grouping of the students in the proposed class and whether the student's related services mandate would be met (id. at p. 1). The parent maintained that the student was denied a FAPE during the 2010-11 school year and he reiterated his intention to

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<sup>3</sup> The letter is dated June 16, 2009, which appears to be a typographical error given that it referenced the 2010-11 school year and stated that the parents intended to place the student at the Rebecca School in July 2010 (Parent Ex. G).

place the student in the Rebecca School and seek reimbursement and/or funding for the student's tuition (id. at pp. 1-2).

By letter to the CSE dated August 16, 2010, the parents' attorney advised that the February 2010 IEP was both procedurally and substantively deficient, which resulted in a denial of a FAPE to the student for the 2010-11 school year (Parent Ex. D at pp. 1-2). The parents' attorney further advised that by due process complaint notice, to be sent under separate cover, the parents planned to commence an impartial hearing to seek reimbursement and/or funding for the student's tuition at the Rebecca School (id. at p. 2).

### **Due Process Complaint Notice**

By due process complaint notice dated October 21, 2010, the parents commenced an impartial hearing, arguing that the district denied the student a FAPE for the following reasons: (1) the district improperly refused to consider the student's placement in a more restrictive program; (2) the February 2010 CSE was improperly constituted because the district representative and special education teacher were unqualified to fulfill their roles on the CSE; (3) the district denied the student's classroom teacher the right to meaningfully participate in the CSE and did not provide her with access to all of the materials being reviewed and considered by the CSE; (4) the CSE's recommendations were predetermined; (5) the February 2010 IEP did not contain an adequate and updated statement of the student's present levels of educational performance; (6) the February 2010 IEP did not contain a listing of the evaluative data upon which the CSE relied in forming its recommendations; (7) the goals were insufficient, inappropriate, and would not allow the student to make meaningful progress across all domains; (8) the annual goals were not individually tailored to address the student's significant educational deficits; (9) the goals lacked adequately objective criteria to measure the student's progress; (10) a number of the goals could not have been implemented in the recommended program; (11) the February 2010 IEP should have included transitional support services to allow the student to move from the Rebecca School to the district program; (12) the district failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP); (13) the assigned school was inappropriate; (14) the February 2010 IEP did not provide for individualized parent counseling and training; and (15) the parents were denied meaningful parent participation (Parent Ex. A at pp. 3-10). The parents further alleged that the Rebecca School was an appropriate placement and that equitable considerations favored their request for relief (id. at pp. 10-11). As relief, among other things, the parents requested an order directing the district to reimburse them for the monies submitted toward the student's tuition at the Rebecca School for 2010-11 school year in addition to direct funding of the balance of the student's tuition to the Rebecca School (id. at pp. 11-12).

On October 27, 2010, the district responded to the parent's due process complaint notice (Parent Ex. B).

### **Impartial Hearing Officer Decision**

On March 11, 2011, the parties proceeded to an impartial hearing that concluded after four days of testimony (Tr. pp. 1-512). On August 16, 2011, the impartial hearing officer

rendered his decision in which he ordered that the district reimburse the parents for the student's tuition at the Rebecca School for the 2010-11 school year (IHO Decision at pp. 9-10). Initially, the impartial hearing officer rejected the district's claim that the parents' case must be dismissed because they failed to exhaust their administrative remedies (*id.* at p. 4). The impartial hearing officer then found that the district denied the student a FAPE for the following reasons: (1) the CSE failed to have sufficient data upon which to base the February 2010 IEP, nor did the IEP set forth what documentation upon which the CSE relied in making its determinations; (2) the February 2010 CSE should have developed an FBA and a BIP; and (3) the February 2010 IEP failed to provide for parent counseling and training (*id.* at pp. 5-6).

The impartial hearing officer further found that the Rebecca School was appropriate to meet the student's unique needs (IHO Decision at pp. 8-9). Specifically, the impartial hearing officer concluded that the Rebecca School constituted a therapeutic environment designed to address the student's sensory and social deficits (*id.* at p. 8). Additionally, the impartial hearing officer determined that the student had made progress with respect to decreasing the frequency of his dysregulation as well as his interfering behaviors at school (*id.* at p. 9). He also found that the student had made progress in the speech-language and social skills domains (*id.*). Lastly, the impartial hearing officer noted an increase in the student's sight word vocabulary during his enrollment in the Rebecca School (*id.*). Regarding equitable considerations, the impartial hearing officer found that they weighed in favor of the parents' request for relief, because the hearing record reflected the parents' cooperation with the district and that they would have considered a district school (*id.*).

### **Appeal for State-level Review**

The district appeals and maintains that it offered the student a FAPE during the 2010-11 school year. Specific to this claim, the district raises the following points: (1) the district had sufficient evaluative data and information regarding the student's functioning levels on which to develop the February 2010 IEP; (2) the absence of an FBA and a BIP did not result in the denial of a FAPE; and (3) although the February 2010 IEP did not contain a provision for parent counseling and training, this did not rise to the level of a denial of a FAPE. The district also addressed the remaining issues in the due process complaint notice that the impartial hearing officer did not reach in making his conclusion that the student did not receive a FAPE and maintains that they are without merit. For example, the district asserts that the February 2010 CSE was properly composed and everyone who attended the meeting, including the parents, had an opportunity to participate. Moreover, the district contends that its program recommendation for the student was not predetermined. The district also claims that the goals contained in the February 2010 IEP addressed the student's educational needs and were designed to provide him with an educational benefit. Lastly, the district maintains that it was not legally obligated to incorporate transitional support services on the student's IEP.

Regarding the parents' claims that pertained to the assigned school, the district initially notes that they are speculative because the parents rejected the district's program. Regardless, the district asserts that the student would have been functionally grouped with other students at the assigned school and the student would have received his related services mandate. Next, the district argues that the Rebecca School was not appropriate because in part, the hearing record is

unclear regarding the amount of related services that he received at the Rebecca School. Moreover, the district submits that the student has not progressed at the Rebecca School. Additionally, given that the student does not have access to typically developing peers at the Rebecca School, the district alleges that it does not constitute the student's least restrictive environment (LRE). Lastly, the district argues that equitable considerations bar the parents' request for relief because they never seriously intended to send the student to public school.

The parents submitted an answer and request that the petition be dismissed in its entirety. As a threshold claim, the parents allege that in its response to the due process complaint notice, the district failed to raise any challenges regarding the appropriateness of the Rebecca School and whether equitable concerns support the parents' request for relief; therefore, it is precluded from asserting such allegations on appeal. The parents maintain that the student was denied a FAPE for the following reasons, which include, among other things: (1) the February 2010 IEP was not based on current evaluations; (2) the February 2010 CSE did not conduct an FBA and develop a BIP; (3) the present levels of performance contained in the February 2010 IEP were not based upon current evaluative data; (4) the goals in the February 2010 IEP were not measurable and cannot be implemented; (5) the February 2010 IEP did not provide for parent counseling and training; (6) the student would not have received his related services mandate at the assigned school; (7) the February 2010 IEP did not address the student's sensory needs; (8) the February 2010 IEP did not provide the student with transitional support services; and (9) the district did not provide the student with a classroom placement in the assigned school.

Next, the parents argue that the Rebecca School was appropriate because it constituted a therapeutic environment that addressed the student's sensory and social deficits. The parents further submit that the student has made progress while at the Rebecca School. Finally, the parents argue that the equities support their request for relief, because, in part, they properly and promptly notified the district of their concerns regarding the February 2010 IEP and assigned school, and their intention to place the student at the Rebecca School and seek reimbursement. Furthermore, they maintain that they cooperated with the district at all times.

The district submitted a reply, and asserted that its response to the due process complaint notice was appropriate. Furthermore, as the responding party below, the district maintains that its response was not required to include claims that it planned to assert on appeal.

### **Applicable Standards**

Two purposes of the Individuals with Disabilities Education Act (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 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 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**

Before reaching the merits of the instant case, I will address the parties' dispute regarding whether the district waived any claims relating to the appropriateness of the Rebecca School and the equities because it failed to assert them in its response to the due process complaint notice. Here, the district submitted a response to the due process complaint notice that comported with federal and State regulations, and there is no indication in the hearing record that its failure to include an affirmative defense below resulted in a denial of a FAPE to the student (34 C.F.R. § 300.508[e]; 8 NYCRR 200.5[i][4]; see also Application of a Student with a Disability, Appeal No. 08-151). Moreover, State regulation does not require the insertion of affirmative defenses in the response to the due process complaint notice, nor does it suggest that unasserted defenses will be waived (R.B. v. Dep't of Educ., 2011 WL 4375694, at \*5 [S.D.N.Y. Sept. 16, 2011]). Accordingly, the district is not precluded from challenging the appropriateness of the Rebecca School or whether the equities bar the parents' claims for relief.

Additionally, the parents do not cross-appeal from the impartial hearing officer's decision, which did not address the following allegations that were raised in the due process complaint notice: (1) the district improperly refused to consider placement in a more restrictive program; (2) the February 2010 CSE was improperly constituted because the district representative and special education teacher were unqualified to fulfill their roles on the CSE; (3) the district denied the student's classroom teacher the right to meaningfully participate in the

CSE and did not provide her with access to all of the materials being reviewed and considered by the CSE; (4) the CSE's recommendations were predetermined; (5) the goals were insufficient, inappropriate and would not allow the student to make meaningful progress across all domains; (6) the annual goals were not individually tailored to address the student's significant educational deficits; (7) the goals lacked adequately objective criteria to measure the student's progress; (8) a number of the goals could not have been implemented in the recommended program; (9) the February 2010 IEP should have included transitional support services to allow the student to move from the Rebecca School to the district program; (10) the parents were denied meaningful parent participation; and (11) the assigned school was not appropriate (Parent Ex. A at pp. 3-10).

State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer (8 NYCRR 279.4[b]). Although the parents assert in their answer reasons to support their claim that the student was denied a FAPE, a review of the parents' verified answer indicates that the parents did not cross-appeal from the impartial hearing officer's August 2011 decision (*see* Answer). Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the aggrieved party either asserts an appeal or the nonaggrieved interposes a cross-appeal.<sup>4</sup> Accordingly, regarding the first prong of the Burlington/Carter test, the only remaining issues to be considered on appeal in this case concern (1) the adequacy of the evaluative data before the February 2010 CSE; (2) whether the February 2010 CSE should have developed an FBA and a BIP; and (3) whether the failure to include parent counseling and training in the February 2010 IEP denied the student a FAPE.

### **Adequacy of Evaluative Data Before the February 2010 CSE**

I will first review the parties' dispute regarding the sufficiency of the evaluative data upon which the February 2010 IEP was based. An 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 C.F.R. § 300.304[b][1][ii]; *see* Letter to Clarke, 48 IDELR 77 [OSEP

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<sup>4</sup> An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see* Application of a Student Suspected of Having a Disability, Appeal No. 09-063; Application of the Dep't of Educ., Appeal No. 09-051; *see also* Parochial Bus Sys. Inc. v. Board of Educ., 60 N.Y.2d 539, 545 [1983]).

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 C.F.R. § 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 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and 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 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). 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 C.F.R. § 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 (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). 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]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]).

Although the hearing record is equivocal regarding whether the February 2010 CSE reviewed and/or relied upon the February 2009 psychoeducational update, as explained below, this does not support a conclusion that the evaluative information upon which the February 2010 IEP was based was inadequate (IHO Decision at p. 5; Tr. pp. 74, 76-77).<sup>5</sup> The district psychologist for the CSE indicated that the CSE reviewed the student's 2009-10 IEP, a November 2009 classroom observation of the student which was completed by the special education teacher/district representative at the February 2010 CSE meeting, a June 2009 PT evaluation completed by the district, and a December 2009 interdisciplinary progress report from the Rebecca School that listed the student's current goals across all domains and described the student's functioning based on input from his classroom teacher, occupational therapist, physical therapist, speech-language pathologist, as well as his music and art therapists (Tr. pp. 11, 23-24, 28-29; Dist. Exs. 6 at pp. 1-6; 7 at pp. 1-2; Parent Ex. N at pp. 1-10, 11-14).<sup>6</sup>

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<sup>5</sup> The district psychologist testified that she must have reviewed the February 2009 psychoeducational report; however, she did not bring it to the CSE meeting (Tr. pp. 76-77).

<sup>6</sup> The district psychologist testified that the CSE reviewed the student's file including the June 2009 PT evaluation; however, the February 2010 CSE meeting minutes reflect that at the time of the meeting, the CSE did not have this evaluation report (Dist. Ex. 2 at p. 2). The meeting minutes further indicated that the CSE would add PT goals to the IEP once they obtained the PT evaluation (id.). The February 2010 IEP contained PT as well as goals that addressed the student's strength, endurance, coordination, postural control, motor planning, sequencing, shared attention for ball play activities, and ability to execute age appropriate gross motor functional skills for physical and social interaction with peers (Dist. Ex. 3 at pp. 11-12, 14, 17).

Here, the hearing record reflects that the February 2010 CSE utilized information from the aforementioned reports to develop the student's IEP. Prior to the CSE meeting, the district school psychologist prepared a draft IEP, which included information from the Rebecca School progress report, which she then read verbatim with the parents and the teacher at the CSE meeting to ensure that the information was current and accurate (Tr. pp. 26-27; Dist. Ex. 3 at pp. 3-4; M.H. v. New York City Dept. of Educ., 2011 WL 609880, at \*10 [S.D.N.Y. Feb. 16, 2011]). She further indicated that the CSE summarized "what's going on with the [student]" and revised the IEP accordingly (Tr. p. 27). A review of the present levels of academic and social/emotional performance sections of the IEP reflects that these descriptions of the student were gleaned from the December 2009 Rebecca School progress report (compare Dist. Ex. 3 at pp. 3-4, with Parent Ex. N at pp. 1, 3-4). Moreover, the hearing record reflects that in addition to the parents' input regarding the student's continued needs in health and physical development, the February 2010 CSE used the June 2009 PT evaluation to describe the student's gross motor functioning and to generate some of the PT goals that were included in the February 2010 IEP (Tr. pp. 42-43; Dist. Exs. 3 at pp. 6, 14; 6 at p. 3).

In addition to the aforementioned documents, the February 2010 CSE also sought the student's Rebecca School teacher's input to develop his IEP. The district psychologist testified that the CSE reviewed each goal with the teacher and discussed the need for any changes or modifications (Tr. pp. 36, 80). According to the school psychologist, the student's 2009-10 IEP was also reviewed to ensure carry over of any goals that the student had not yet mastered to the February 2010 IEP (Tr. p. 29). The teacher also provided information regarding the student's grade levels for the teacher estimates reflected in the IEP as well as information regarding his sensory needs that was added to the academic and social/emotional management needs during the meeting (Tr. pp. 28-29, 37-39, 79-80; Dist Exs. 2 at p. 1; 3 at pp. 3-4). The student's teacher further advised that the student's behavior did not seriously interfere with instruction and that he required a 12-month program and such recommendations were built into the resultant IEP (Tr. pp. 40, 46-47, 79-80; Dist. Ex. 3 at pp. 1, 4).

Based upon the foregoing, I find that the district had sufficient information relative to the student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs (see 34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dept. of Educ., Appeal No. 11-025; Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).<sup>7</sup>

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<sup>7</sup> In addition, notwithstanding the impartial hearing officer's finding that the February 2010 IEP was deficient in part, because it failed to indicate the specific documents and/or evaluations on which the CSE relied to develop student's February 2010 IEP, State regulations do not require as such (see 8 NYCRR 200.4[d][2]). Beginning with the 2011-12 school year, information regarding the evaluations that the CSE relied upon should be readily available on the prior written notice form prescribed by the Commissioner of Education and required under State regulations, but it is not required to be set forth on the student's IEP (see 8 NYCRR 200.5[a][3][iv]; <http://www.p12.nysed.gov/specialed/formsnotices/PWN/memo-jan10.htm>).

## Special Factors in an IEP and Interfering Behaviors

Next, I turn to the district's contention that the impartial hearing officer erred in finding a denial of a FAPE because the district did not conduct an FBA and develop a BIP. 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. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at \*8; W.S., 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 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.)<sup>8</sup> 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

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<sup>8</sup> 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 [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]).

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]).<sup>9</sup> 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 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

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<sup>9</sup> 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]).

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 February 2010 IEP included reports from the student's Rebecca School teacher that indicated that he might become dysregulated, cover his ears, scream or attempt to squeeze or scratch at a trusted adult or an upset child when the student was in proximity to a loud peer, especially one who was crying or upset (Dist. Ex. 3 at p. 4). I note that the function of the student's behavior had already been identified as being related to his sensory processing deficits; specifically, the student's sensitivity and response to loud noise, and as such, an FBA was not warranted (*see id.*). The program director from the Rebecca School also indicated that they addressed the student's behavior from a sensory system perspective, and that as a result, the behavior had significantly decreased in frequency and duration (Tr. pp. 244-45). Moreover, the hearing record further suggests that the severity of the student's behavior did not require a BIP. The February 2010 IEP included reports from the student's teacher that his periods of dysregulation typically lasted less than one minute in duration and that the student had made improvements in this area (Dist. Ex. 3 at p. 4). In addition, the student's teacher noted that at the time of the February 2010 CSE meeting, the student rarely covered his ears (*id.*). The school psychologist also testified that the student's behavior was discussed with the parents and his teacher at the February 2010 CSE meeting and despite parent reports that the student's behavior was "backsliding," his teacher indicated that his behavior at school did not seriously interfere with the instructional process to the extent that it could not be addressed by the special education teacher (Tr. pp. 39-40, 87; Dist. Ex. 2 at p. 1). Lastly, the February 2010 IEP included social/emotional management strategies to assist the student in maintaining appropriate regulation such as immediate access to sensory materials such as a pressure vest, sensory breaks, therapeutic listening and access to a quiet space to retreat to when overwhelmed (Dist. Ex. 3 at p. 4). Accordingly, the hearing record reveals that the student's behavior did not seriously interfere with instruction and could be addressed by the special education classroom teacher, and therefore, the district was not required to conduct an FBA or develop a BIP.<sup>10</sup>

### **Parent Counseling and Training**

Finally, I turn to the district's assertion that the impartial hearing officer erred in concluding that the omission of parent counseling and training in the February 2010 IEP contributed to a denial of a FAPE to the student. State regulations require that an IEP indicate

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<sup>10</sup> Although the parents' claims regarding the implementation of the student's IEP in the assigned school are speculative because the parents rejected the district's offer and the student did not attend the assigned school, the teacher in the proposed class indicated that she could address the student's behavior and that she had two students whose behavior was similar to that described in the student's present level of social/emotional performance in his February 2010 IEP (Tr. pp. 124, 126-27, 145; Application of the Dep't. of Educ., Appeal No. 11-054). The teacher further testified that to address these behaviors in her classroom, she had certain quiet areas where students could go when needed if the noise level became too loud or depending on the situation, the other student could be taken out of the room (Tr. pp. 126-28). Although the teacher testified that she did not have a pressure vest in her classroom, she described a variety of sensory tools available in the classroom, including a trampoline, sensory balls, and a swing and she noted that if necessary, the class was allowed to use the OT room that served another school housed within the building (Tr. pp. 124, 128, 153-54; Parent Ex. I at p. 4). The teacher in the proposed class also testified that she was able to implement the social/emotional management needs reflected in the student's February 2010 IEP (Tr. pp. 127-28).

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]; see 34 C.F.R. § 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*10 [S.D.N.Y. Oct. 28, 2011]; 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. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at \*9 [E.D.N.Y. Mar. 2011]; adopted at 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; 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]).<sup>11</sup>

Although the provision of parent counseling and training is not listed on the February 2010 IEP, the hearing record reflects that the assigned school would have provided this service. The parent coordinator at the assigned school indicated that she facilitated approximately ten to twelve workshops per year with a parent coordinator from another school and that additional workshops were hosted by several outside agencies that provide services for individuals with developmental disabilities (Tr. pp. 163, 166-67). According to the parent coordinator, the content of the workshops and trainings was determined at the beginning of the school year based on the parents' interests (Tr. p. 167). The parent coordinator testified that during the 2010-11 school year, workshops included topics such as social stories, creating realistic schedules at home using visual schedules, and understanding the new IEP format (Tr. pp. 168-69). She further testified that some of the workshops were presented by the school's speech department with some input from herself, that the workshops and trainings were provided for all of the school sites and that "[a]ny workshop or training that [wa]s provided [wa]s offered to any parent who ha[d] a child in [their] organization" (Tr. p. 169). The parent coordinator also noted that parents were notified of the workshops through flyers and newsletters which were sent home via student backpacks, as well as via "school messenger," an automated messaging system that calls the home to remind parents of the workshops and their dates (id.). Under the circumstances presented herein, given that parent counseling and training was available at the assigned school, I decline to find that the district's failure to incorporate it into the February 2010 IEP resulted in a denial of a FAPE to the student (see C.F., 2011 WL 5130101, at \*10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

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<sup>11</sup> To the extent that P.K. or R.K. 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]).

## Conclusion

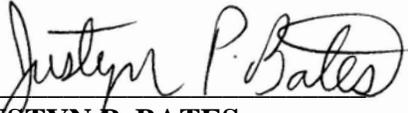
Having determined that the district did not fail to offer the student a FAPE for the 2010-11 school year based on the evaluative data before the February 2010 CSE, the lack of an FBA or BIP, and the lack of parent counseling and training in the IEP, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a 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 herein.

### THE APPEAL IS SUSTAINED

**IT IS ORDERED** that the portion of the impartial hearing officer's decision dated August 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 tuition reimbursement for the student's attendance at the Rebecca School is hereby annulled.

**Dated:** Albany, New York  
November 25, 2011

  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**