



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 11-133

**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, Neha Dewan, Esq., of counsel

The Law Offices of Regina Skyer and Associates, attorneys for respondents, Jesse Cole Cutler, 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 Rebecca School for the 2010-11 school year. The parents cross-appeal the impartial hearing officer's decision to the extent that she did not reach certain issues set forth in their due process complaint notice. The appeal must be sustained. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending an 8:1+3 special education class at the Rebecca School and receiving occupational therapy (OT), speech-language therapy, counseling, and music therapy (Tr. pp. 210, 218; Dist. Exs. A; M at pp. 2, 8). The student was unilaterally placed by his parents at the Rebecca School in September 2006 (Tr. pp. 210, 379-80; Parent Ex. P at p. 2). The Rebecca School is a nonpublic school that has not been approved by the Commissioner of Education 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 programs and related services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

In October 2009, a teacher from the district observed the student during homeroom and a speech-language therapy session at the Rebecca School (Dist. Ex. 4). The district teacher reported that the student was enrolled in a class of eight students with one head teacher and four assistant teachers (id. at p. 1). She observed that during an elevator ride to the student's classroom, the assistant teacher tried to engage the student in conversation, but the student did not respond and acted as if the assistant teacher were annoying him (id.). As detailed by the district's teacher, the student had difficulty participating in the classroom's morning routine (id.). He did not respond for the first two minutes of a greeting song and later provided unrelated or tangential answers in response to teacher questioning (id. at pp. 1-2). When another student in the class was speaking, the student did not look at him and instead played with his mouth and made grimaces (id. at p. 2). The district teacher reported that during a writing activity, the student was able to correctly fill in the blank in a sentence written on a white board by accurately copying the word from another chart; write a word using a mixture of upper and lower case letters; and identify his favorite part of a specific fairy tale by writing his name in the correct box of a graphic organizer (id.).

Following the writing activity, the student proceeded to speech-language therapy (Dist. Ex. 4). According to the district teacher, the aim of the speech-language therapy lesson was for the student to verbalize directional phrases such as under, over, and beneath (id. at p. 2). The district teacher commented that several times the student referred to himself in the third person (id.). She noted that when provided with a model by the speech-language pathologist the student was able to repeat sentences correctly (id.).

In December 2009, the Rebecca School issued an interdisciplinary report of progress describing the student's program as well as his performance across academic, social/emotional, motor, and speech-language domains (Dist. Ex. 5). The progress report indicated that the student was enrolled in a classroom with seven other boys, one head teacher, and three teaching assistants (id. at p. 1). According to the progress report, the student's school day consisted of Floortime sessions, math, language arts, social studies, science, visual-spatial processing activities, sensory activities, and movement activities (id.). The progress report further indicated that the student received counseling, OT, speech-language therapy, music therapy, and art therapy as part of his individualized program (id.). According to the progress report, the student's regulation fluctuated throughout the school day; however, the student benefited from the support of a sensory diet and "knowing staff" (id.). The progress report indicated that the student was most engaged when playing with certain toys and board games; when listening to music; and when playing group games such as tag, scooter boards, and obstacle courses (id.). The student benefited from a visual schedule; clear expectations; highly affective interactions; verbal directions that allowed time for processing; a sensory diet; sensory breaks; and adults respecting his interests, acknowledging his feelings, and helping him to regulate in times of distress (id.). The progress report noted that with these supports, the student was able to transition from activities within the class and outside of the classroom with moderate ease (id.).

As part of the December 2009 progress report, the student's Rebecca School teacher commented on the student's performance with regard to functional emotional development

including shared attention and regulation, engagement and relating, two-way purposeful emotional interaction, shared social problem solving, creating symbols and ideas, and building logical bridges between ideas (Dist. Ex. 5 at pp. 1-4). In general, the teacher reported that with prompting and support, the student was able to sustain interaction with an adult "for long periods of time," more so when the interaction included a preferred topic (id. at pp. 1-2). In addition, the teacher indicated that the student was aware of the other students in the class and was able to sustain engagement with a peer with adult support for approximately 10 minutes if the activity was one the student chose (id.). According to the teacher, the student initiated communication related to motivating topics and when frustrated, could purposefully communicate with adult support (id. at p. 2).

With respect to academics, the teacher stated that the student was able to recognize sight words and could read most material "that comes his way" in the classroom (Dist. Ex. 5 at p. 4). She noted that the student had difficulty with multisyllabic words and sometimes used decoding strategies to read new words, but might need visual support to decode long words (id.). The teacher reported that the student was able to answer "wh" questions regarding a familiar story geared toward his comprehension level with 75% accuracy, but that he sometimes required choices to answer the questions correctly (id. at p. 5). The teacher stated that the student required support in reading fluency; however, she indicated that after the student had read a story many times his fluency greatly increased (id.). According to the teacher, for math the student participated in a group of no more than two students taught by one or two adults (id.). The teacher described the student as moderately engaged, noting that when the activities were hands on, creative, and presented with high affect during preferred activities, the student's interest increased (id.). According to the teacher, the student demonstrated some basic math competencies such as recognizing and adding numbers up to 20, identifying coins and their values, and telling time to the hour (id.). The student also understood the concepts of big/small, more/less, same/different, and heavier/lighter (id. at p. 6). The teacher reported that in addition to math instruction, the student participated in a daily 1:1 visual-spatial program designed to strengthen the processing capabilities needed for higher level academics (id. at p. 5).

With respect to social studies, the teacher reported that the student had an understanding of the commonalities between himself and those around him and was expanding his ability to recognize his own emotions, as well as those of others (Dist. Ex. 5 at p. 6). She indicated that through classroom jobs the student was learning responsibility and what it means to be a member of a community (id.). According to the teacher, science was presented in the classroom in a hands-on, project-based manner through weekly cooking groups and science projects (id.). With the support of choices the student was able to make predictions (id.).

The December 2009 progress report also included information regarding the student's motor, sensory, speech-language, and mental health needs (Dist. Ex. 5 at pp. 6-12). The student's occupational therapist reported that the student received individual OT four times per week in one of the two sensory gyms, the school environment, or in the classroom (id. at p. 6). She stated that the student required intense vestibular input and noted that a sensory diet that incorporated vestibular, visual, proprioceptive, and tactile input aided the student in maintaining a calm and alert state (id. at p. 7). With respect to motor planning and sequencing, the occupational therapist indicated that the student demonstrated the ability to initiate, sequence,

and successfully plan a familiar task (id.). With respect to visual spatial processing, the occupational therapist explained that the student was able to safely navigate the school environment; however, when he was distracted or emotionally dysregulated the student may require increased visual and verbal support to attend to spatial and social cues (id.). She noted that when the student's sensory system was overwhelmed he may hyper-focus visually on favorite objects (id.).

The student's speech-language pathologist reported that the student was provided with individual speech-language therapy five times per week (Dist. Ex. 5 at p. 7). She explained that the focus of therapy was on increasing the student's expressive, receptive, and pragmatic language skills with the primary focus on the latter (id.). The speech-language pathologist noted improvement in the student's ability to sustain communication using verbal language (id.). She commented that most of the student's interactions revolved around reality-based conversations and that the student was resistant to the therapist's attempts to introduce pretend play into speech-language therapy sessions (id. at pp. 7-8). According to the speech-language pathologist, social interaction remained a challenge for the student; however, his interactions with peers were improving (id. at p. 8). The speech-language pathologist stated that receptive language skills continued to be a relative strength for the student; however she noted that at times the student's auditory comprehension may be negatively impacted by delayed auditory processing (id.). She indicated that the student could follow two to three step related directions, but had difficulty when the directions were unrelated or contained temporal concepts (id.). She further indicated that the student was able to consistently answer "who," "what," and "where" questions, but had difficulty answering "when" and "why" questions (id.). With respect to expressive language, the speech-language pathologist reported that the student used six to eight word utterances in his spontaneous speech, but that he continued to have difficulty using expressive language for a variety of purposes (id.). She noted that the student had difficulty with gender specific and personal pronouns (id.).

The December 2009 Rebecca School progress report indicated that the student received twice weekly counseling, art therapy, and music therapy as mental health services aimed at improving his functional emotional development (Dist. Ex. 5 at pp. 8-10). The psychologist who provided the student's counseling reported that the student had made many gains in his ability to share attention and remain engaged across interactions with trusted adults and familiar peers (id. at p. 9). The psychologist noted that although the student struggled to remain regulated, he had demonstrated a marked increase in imitating and responding to instances of joint attention as well as marked gains in extending meaningful communication across topics and contexts (id.). The psychologist noted that overall she had noticed a decrease in the student's rigidity during interactions (id.). She opined that close relationships were paramount in the student's progress and treatment (id.). According to the psychologist, the student demonstrated an intense preoccupation with certain objects that heightened during times of anxiety or transition, and he could become fixated on how many minutes he could have a preferred object (id.). To address the student's fixation, the psychologist reported that she backtracked through the developmental levels with the student (id.). The psychologist reported that the student had demonstrated significant progress in his interactions with peers including initiating, responding, being playful, and following a peer's novel idea (id. at p. 10). However, she noted that the student still required significant support and facilitation in this area (id.).

The student's teachers and therapists concluded that since the beginning of school in September 2009, the student had made progress in his ability to think, relate, and communicate with the support of his individualized Rebecca School program (Dist. Ex. 5 at p. 12). They noted, however, that the student continued to demonstrate difficulty with regulating his sensory system and with flexibility, both of which interfered with his ability to engage, problem solve, make and connect ideas, think logically, and communicate his wants and needs (*id.*). To address the student's needs the Rebecca School staff developed goals and objectives related to improving the student's functional emotional development, academics, visual-spatial processing, pragmatic language, and receptive and expressive language (*id.* at pp. 13-16).

On February 2, 2010, the Committee on Special Education (CSE) met for the student's annual review (Dist. Ex. 3 at pp. 1, 2). Present for the meeting were a school psychologist who also served as the district representative, a special education teacher, an additional parent member, and the student's mother (Tr. pp. 74-75, 77-78; Dist. Ex. 3 at p. 2). The student's teacher from the Rebecca School also participated in the meeting by telephone (Tr. pp. 77-78; Dist. Ex. 3 at p. 2). The CSE reviewed the student's Rebecca School progress report and the district's classroom observation (Tr. p. 78, Dist. Exs. 4, 5). In addition, the school psychologist reviewed a draft Individualized Education Program (IEP), which she had created prior to the meeting, with CSE members and modified the draft as a result of CSE discussions (Tr. pp. 89-90). The February 2010 CSE recommended that the student be found eligible for special education services as a student with autism and that he be placed in 6:1+1 special class in a specialized school for the 2010-11 school year (Dist. Ex. 3 at p. 1). The CSE further recommended that the student receive the following related services on a weekly basis: one 30-minute session of individual counseling, one 30-minute session of counseling in a dyad, four 30-minute sessions of individual OT, four 30-minute sessions of individual speech-language therapy, and one 30-minute session of speech-language therapy in a dyad (*id.* at p. 15). The student was also recommended for adapted physical education (*id.* at p. 6). The CSE also found the student eligible for a 12-month school year (*id.* at p. 1). The resultant IEP stated that the student would participate in alternate assessment because global developmental delays precluded him from participation in the general education environment (*id.* at p. 13).

At the time of the CSE meeting, the parent was provided with a Notice of Recommended Deferred Placement (Tr. p. 388; Dist. Ex. 8 at p. 1). The notice indicated that although the student had a right to an immediate placement in the recommended program, the CSE believed it may be in the best interest of the student to defer placement until June 30, 2010 because the IEP was intended for the 2010-11 school year (Dist. Ex. 8 at p. 1).

On April 21, 2010, the parents signed a contract with the Rebecca School for the student's enrollment for the 2010-11 school year, which began on July 6, 2010 (Parent Ex. O).

By notice dated June 15, 2010, the district summarized the recommendations made by the February 2010 CSE and notified the parents of the school to which the district assigned the student (Dist. Ex. 6).

In a letter dated June 16, 2010, the parents advised the district that they were placing the student at the Rebecca School as of the first day of school for the 2010-11 academic year and intended to seek funding for this placement from the district (Parent Ex. H at p. 1). The parents indicated that the student had a diagnosis of autism and difficulty with sensory integration, which affected his attention, self-regulation, and modulation (id.). Additionally, the parents reported that the student had difficulty with multi-syllabic novel words, required help with reading fluency, and required support in mathematics (id.). The parents maintained that the program recommended for the student by the district was inappropriate to address the student's individual needs (id.). They asserted that the recommended program utilized a methodology that would not be able to appropriately address the goals contained in the student's IEP (id. at pp. 1-2). Additionally, the parents asserted that the student should not be excused from testing or evaluation (id. at p. 2). The parents stated that although they agreed with the CSE recommendation to place the student in a special class in a specialized school, the program recommendation was inappropriate to address the student's needs and further indicated that to date, the CSE had failed to notify the parents of the school to which it assigned the student for the 2010-11 school year (id.).

On June 24, 2010, the student's mother, accompanied with a social worker from the Rebecca School, visited the assigned school (Tr. pp. 390-95, 424-25; Dist. Ex. 10).

Due Process Complaint Notice and Response

The parents filed a due process complaint notice dated January 25, 2011 with the district requesting an impartial hearing to adjudicate their claim for payment of the student's tuition at the Rebecca School and for OT (Dist. Ex. 1). According to the parents, the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (id.). Among other assertions regarding the February 2010 CSE meeting, the parents asserted that the district erred by holding the CSE meeting in February, five months prior to the beginning of the academic year when the student's functioning levels would be known for the relevant academic year (id. at p. 2). They further contended that the February 2010 CSE meeting was held without the presence of a regular education teacher, that the parents were denied meaningful participation, and that the student's program was predetermined (id. at pp. 2, 4). According to the parents, the CSE "did not rely on necessary evaluations to properly gauge [the student's] current skill levels" and instead improperly relied on "[t]eacher observation" (id. at p. 3). The parents also asserted that the annual goals and short-term objectives contained in the February 2010 IEP were vague, generic, inadequate, and not measurable; and that the IEP failed to include a provision for parent counseling and training; did not indicate why adapted physical education was recommended for the student; and that the CSE would not consider a specific methodology for the student – DIR/Floortime (id. at pp. 3-4). With regard to the assigned school, the parents asserted that it was inappropriate because many of the other students in the assigned class had emotional disabilities and were lower functioning than the student; the student was not offered a suitable and functional peer group for instructional and social/emotional purposes; the assigned school could not provide the amount of OT to the student that was mandated on the IEP; and the student, who was recommended for a 12-month school year, could not attend the assigned school until September (id. at p. 5). As relief, the parents requested that the district reimburse them the student's tuition costs at the Rebecca School and for the costs of OT (id. at p. 6).

In a response to the due process complaint notice, the district asserted that its offered program and placement were reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. F at pp. 1-4).

Impartial Hearing Officer Decisions

The parties proceeded to an impartial hearing on February 14, 2011 for the purpose of determining the student's pendency (stay-put) placement (Tr. p. 1). On February 28, 2011, an impartial hearing officer issued an interim decision, wherein she determined that the parties agreed that the student's pendency placement continued to be the Rebecca School (Interim IHO Decision at p. 2).

The impartial hearing continued on May 9, 2011 after a new impartial hearing officer was appointed, and concluded on July 5, 2011, after three days of hearing on the merits (Tr. pp. 6, 151, 318).¹ In a decision dated September 14, 2011, the impartial hearing officer determined that the district had failed to offer the student a FAPE for the 2010-11 school year (IHO Decision at pp. 9-10).² With regard to the February 2010 CSE process, the impartial hearing officer determined that the CSE was duly constituted, that a regular education teacher was not a required member,³ and that the parents had an opportunity to participate in their son's IEP development (*id.* at p. 10). The impartial hearing officer further determined that the CSE's reliance on the Rebecca School evaluations was reasonable, and that the CSE reviewed recent and relevant information to determine the student's needs (*id.*). With regard to the recommended program, the impartial hearing officer determined that the CSE's recommended program was not appropriate (*id.* at pp. 9-10). In reaching this determination, the impartial hearing officer relied on the testimony of the parents' expert witness who opined that the district's program was not individualized to meet the student's needs, and that other students in the class with emotional and behavioral difficulties would lead to the student's regression (*id.* at pp. 10-11). Based on his testimony, the impartial hearing officer concluded that the district's placement was not appropriate because a district "must provide an IEP that is likely to produce progress, not regression" (*id.* at p. 11).

¹ The prior impartial hearing officer who issued the interim decision on pendency recused herself (Tr. p. 11). Unless otherwise noted in this decision, all references to "the impartial hearing officer" in this decision refer to the impartial hearing officer who rendered the September 14, 2011 decision. Neither party appealed the interim decision on pendency; therefore, that decision has become final and binding upon the parties (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

² I note that the impartial hearing officer's decision fails to comport with State Regulations. State regulations provide that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision. The impartial hearing officer is cautioned to comply with State regulations.

³ The regular education teacher's participation has not been raised on appeal.

With regard to the Rebecca School, the impartial hearing officer determined that it was an appropriate unilateral placement, noting that the student: had made meaningful progress; was socially more comfortable interacting with peers; could add and subtract multi-digit numbers; and his reading fluency and comprehension had improved (IHO Decision at p. 11). She further rejected the district's argument that the Rebecca School was inappropriate because the parents provided the student with after-school tutors and therapists (id.). Next, the impartial hearing officer determined that equitable considerations did not preclude or diminish an award of tuition reimbursement to the parents (id.). She also rejected the district's argument that the Rebecca School's for-profit status precluded an award of tuition reimbursement (id.). Accordingly, the impartial hearing officer ordered the district to reimburse the parents for the student's tuition costs at the Rebecca School for the 2010-11 school year (id. at p. 12).

Appeal for State-Level Review

The district appeals, asserting that the impartial hearing officer's decision should be annulled in its entirety because the decision failed to comport with legal standards and the impartial hearing officer failed to provide a legal basis for her determinations. The district further asserts that the impartial hearing officer erred in her determinations that the district failed to offer the student a FAPE for the 2010-11 school year, that the Rebecca School was appropriate, and that equitable considerations favored an award of tuition reimbursement.

The district notes that the impartial hearing officer correctly determined that the CSE was duly constituted and relied upon sufficient evaluative information. With regard to the CSE's recommended program, the district asserts that the recommended 6:1+1 placement was appropriate in that it was specifically designed for students with autism, would have provided a high student-to-teacher ratio, and would have provided numerous socialization opportunities. The district asserts that the impartial hearing officer erred by crediting the parents' witness and relying on his testimony in finding that the district did not offer the student a FAPE. With regard to the assigned school, the district contends that it provided socialization opportunities for the student; that the student would have received all of his related services and would have been functionally grouped; and that he would not have been placed in a class with students who had behavioral needs. The district also contends that the classroom teacher would have appropriately addressed the student's needs.

With regard to the impartial hearing officer's determination that the Rebecca School was an appropriate unilateral placement, the district contends that the student had no mainstreaming opportunities at the Rebecca School and that it did not provide adequate OT to the student as mandated on his IEP, necessitating that he receive OT services at home. The district also contends that the parents provided music and play therapy at home to supplement the services the student received at the Rebecca School. With respect to equitable considerations, the district asserts that the impartial hearing officer erred in her decision because, among other things, the parents did not truly consider the district's recommended placement as evidenced by the fact that they signed the enrollment contract with the Rebecca School prior to receiving the notice of the district's assigned school or visiting the assigned school, and the parents failed to provide the district with the requisite notice regarding the student's reenrollment at the Rebecca School.

In their answer to the district's appeal, the parents respond to the district's allegations with general admissions and denials, and contend that the impartial hearing officer properly concluded that the district failed to offer the student a FAPE for the 2010-11 school year. In a cross-appeal, the parents also assert that the impartial hearing officer failed to make determinations on many of the issues raised in their due process complaint notice. The parents assert that the impartial hearing officer failed to make determinations that, among other things: (1) the recommended program was not individualized for the student; (2) the goals were vague and inadequate; (3) the recommended OT services did not allow for group work; (4) the IEP failed to include "the only effective methodology" for the student, DIR/Floortime; (5) the IEP failed to include a provision for parent counseling and training; and (6) the district provided late notice of the student's assigned school. The parents also assert that the impartial hearing officer did not address various issues they raised in their due process complaint notice regarding the assigned school, including that the student would not have been functionally grouped in the assigned class. Next, the parents assert that the recommended 6:1+1 program was "the usual and default program recommendation for students with [a]utism" at district schools. The parents further assert that the CSE did not rely on sufficient evaluative data. The parents request that the district's petition be dismissed, the parents' cross-appeal be upheld, and that the district be ordered to reimburse them for tuition costs to the Rebecca School for the 2010-11 school year.

In its answer to the parents' cross-appeal, the district asserts, among other things, that the impartial hearing officer did not err in failing to discuss the student's functional grouping at the assigned school because the issue was speculative as the parents chose not to send the student to the district's school. In the alternative, the district argues that the student would have been functionally grouped in the assigned class. The district further alleges that parent counseling and training would have been available at the assigned school; therefore, the failure to include it on the IEP was a procedural violation that did not deprive the student of a FAPE. Moreover, the district asserts that it was not required to specify a particular methodology on the IEP and that the IEP included specific, adequate goals to address the student's needs. The district contends that the student would have received all of his OT mandates at the assigned school, or in the alternative, through RSAs –the issuance of which would not have denied the student a FAPE. The district requests that the parents' cross-appeal be dismissed in its entirety and the petition be sustained.

Applicable Standards

Two purposes of the Individuals with Disabilities 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 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 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

February 2010 CSE Process

Parental Participation/Predetermination

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). 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., 569 F. Supp. 2d at 382-83; 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 No. 10-070; see also 34 C.F.R. § 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see M.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

The hearing record shows that the student's mother participated in the February 2, 2010 CSE meeting, as did the student's teacher from the Rebecca School (Tr. pp. 383-84; Dist. Ex. 3 at p. 3, see Dist. Ex. 2). Furthermore, minutes from the CSE meeting reveal that, at the onset of the meeting, the student's mother was given the opportunity to express her concerns regarding the student and did so, specifically noting his need for sensory and OT intervention in order to remain focused in the classroom and commenting on the student's deficits in pragmatic language (Tr. pp. 84-85; Dist. Ex. 2 at p. 1). The student's mother recalled that she was told that to the extent possible the Rebecca School progress report, including goals and objectives, would be inserted in the student's IEP (Tr. p. 384). A draft IEP, prepared by the district's school psychologist, was reviewed with CSE members and CSE meeting minutes indicate that the district checked for agreement throughout the committee's discussion (Dist. Ex. 2; see Tr. pp. 89, 114). The student's mother testified that the CSE had copied the Rebecca School goals onto the IEP and that new goals, recommended by the Rebecca School teacher, were discussed (Tr. pp. 384-85). The district's special education teacher reported that the parent and the student's Rebecca School teacher participated in the development of the IEP goals (Tr. pp. 92-93; Dist. Ex. 2). She confirmed that the Rebecca School goals were modified based on the CSE discussions and the input of the student's Rebecca School teacher (Tr. pp. 384-85; Dist. Ex. 3 at pp. 7-8; see Tr. pp. 89-90). Based upon my review of the hearing record, I find that the CSE did not engage in predetermination and retained an open mind when formulating the student's IEP and that the student's parents were afforded an opportunity to participate in the IEP development process (T.P., 554 F.3d at 253; see M.R., 615 F. Supp. 2d 294).

Evaluative Data

The parents assert that the district lacked sufficient evaluations to create a program, and further that the evaluative data that the CSE did have was inappropriate, and that the district failed to reference any formal tests or standardized instruments, failed to incorporate the student's cognitive abilities into the 2010 IEP and failed to assess the student in listening comprehension and writing. Further they note that the present levels of performance in the February 2010 IEP include only 18 sentences of the 12 page Rebecca School report, omitting "crucial information" regarding the student's specific needs and behaviors. The information cited by the parents included a description of activities/materials included in the student's sensory diet and a description of reading strategies used with the student. The parents claim that the omitted information was crucial as the student would have changed classrooms, and maybe teachers between July and September 2010.

The district asserts that that the impartial hearing officer properly found that procedurally, the CSE relied on sufficient evaluative data, and that the CSE used a variety of assessment tools and strategies, including the Rebecca School reports and teacher input to derive the student's current functional levels, and furthermore, the February 2, 2010 CSE met as part of a reevaluation, which does not require updated evaluations or formal testing and only requires those evaluations that the CSE determines to be relevant.

A CSE is required to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers." (20 U.S.C. 1414[c][1][A]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, [S.D.N.Y. Nov. 9, 2011]). The implementing federal regulation and its comments specifically define the word "include" to mean that "the items named are not all of the possible items that are covered, whether like or unlike the ones named" (34 CFR § 300.20; 71 Fed. Reg. 46759 [August 14, 2006]).

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 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). However, when a student has not been attending the public school, it is appropriate for the CSE to rely on the private school's assessments, classroom observations, or teacher reports, particularly when the parents believe that these pieces of information provide sufficient information to the CSE at the time that the IEP is created (see S.F. 2011 WL at 5419847 at * 10). A district must also 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 and at least once every three years unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]-[2]; 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]).

In this case, it is not clear as to whether the student was required to have a triennial evaluation as no other IEPs were placed into the record; however, the February 2, 2010 IEP is annotated as an annual review (Dist. Ex. 3 at p. 2), and as the parents have not contested this, I

will accept that the IEP in question was in fact, an annual review. Therefore, absent any proof otherwise, the district was not required to conduct a full triennial evaluation on the student (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]).

With regard to the evaluations and assessments the CSE did rely on, the district's special education teacher who participated in the CSE explained that in developing the student's IEP for the 2010-11 school year, the CSE considered the [December 2009] interdisciplinary report of progress from the Rebecca School, the [November 2009] classroom observation of the student, and the student's IEP from the prior school year (Tr. pp. 78, 112; see Tr. pp. 81-96). She reported that in addition, the student's Rebecca School teacher participated in the CSE meeting by telephone (Tr. pp. 77-78). The interdisciplinary report from the Rebecca School described the student's functioning with respect to academics, emotional development, sensory processing, motor skills, and speech and language development, and portions of the report are reflected in the present levels of performance in the student's February 2, 2010 IEP (Dist. Ex. 5). Minutes from the CSE meeting indicate that the school psychologist developed a draft IEP that she reviewed with the team members and that the student's Rebecca School teacher was in agreement with the instructional levels contained in the IEP (Dist. Ex. 2 at p. 1). The minutes also indicate that the student's academic management needs were discussed at the CSE meeting, added to and agreed upon (id.). In addition, minutes reflect that the student's Rebecca School teacher agreed with the description of the student's social functioning and helped to develop the IEP goals and objectives (Tr. pp. 89-93, 384-85; Dist. Ex. 2).

The district's special education teacher reported that the school psychologist reviewed the materials from the Rebecca School prior to the CSE meeting and that she agreed with the psychologist that the materials were sufficient to proceed with developing an IEP (Tr. pp. 112-14). She noted that the psychologist was able to develop a draft IEP based on the information (Tr. p. 114). The district's special education teacher testified that if the CSE team had decided that it needed additional documentation or evaluations to gain an accurate picture of the student that it would have asked for standardized testing or asked the Rebecca School or parent for more information (Tr. p. 138). She noted that the parent could also ask that the CSE meeting be adjourned or rescheduled if they wanted to provide additional paperwork or evaluations (id.). The student's mother confirmed that neither the parents nor their attorney wrote to the district objecting to the reports and evaluations that were reviewed by the February 2, 2010 CSE (Tr. p. 412). She further confirmed that the parents did not request any additional testing from the district (id.). Based on the above, I find that the CSE had sufficient evaluative data with which to formulate the student's program. The next step in the inquiry is to determine if the CSE created an IEP that accurately reflected 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, 2008 WL 2736027, at *6), established annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provided for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

Visitation of the proposed classroom

Turning to the parents' allegation that they were unable to timely visit the assigned school, the IDEA and State regulations provide parents with the opportunity to offer input in the

development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP by, for instance, personally viewing and approving the classroom or classmates of their own choosing (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]; C.F. v. New York City Dept. of Educ., 2011 WL 5130101, at * 8 [S.D.N.Y. Oct. 28, 2011]; S.F., 2011 WL 5419847, at *12).⁴ A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H. v. Bd. of Educ., 2008 WL 3930028, at *11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). Although it is understandable that parents may wish to visit the particular school building or classroom to which their school district assigns their child in advance of enrolling the student in the proposed program, this is not always feasible. Furthermore, in some districts, the program, classroom composition, and teacher may not be the same several months later at the start of the new school year, thus potentially providing parents with a false idea of what the proposed program will look like.

Here, the hearing record demonstrates that on June 24, 2010, the student's mother visited the assigned school with the student's social worker from the Rebecca School and had the opportunity to meet with the parent coordinator who provided her with a tour of several classes including the class the student would have attended (Tr. pp. 157-59, 390-91, 424-25; Dist. Ex. 10; see Tr. p. 172). The student's mother testified that she had made up a list of questions prior to the visit and that for the most part her questions were answered (Tr. p. 392). Although the parent reported that she would have liked to visit the school a second time with the student's private neuropsychologist (Tr. pp. 390-91, 395-96). I decline to find a denial of a FAPE on the basis that the parents did not have an opportunity to visit the assigned school under "typical circumstances."

February 2, 2010 IEP

Present Levels of Performance

The hearing record shows that the student's present levels of performance, as described in his February 2010 IEP, are consistent with information before the CSE.⁵ As noted above, a draft

⁴ Nothing in this decision, however, is intended to discourage districts from offering parents the opportunity to view school or classroom placements as such opportunities can only foster the collaborative process between parents and districts. If parents visit a particular classroom and at that point have new concerns, the IDEA and the Education Law contemplate that the collaborative process will continue—that the parents will ask to return to the CSE and share those concerns with the objective of improving the student's IEP.

⁵ While permissible, there is no requirement that an IEP contain specific references to criterion referenced testing, achievement testing or diagnostic testing. Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). There is no support for the proposition that teacher estimates or teacher observations cannot, as the parents suggest, be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F. v. New York City Dept. of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

IEP written by the district's school psychologist was reviewed with CSE members and modified based on the team discussion with the input of the Rebecca School teacher (Tr. pp. 83-90; Dist. Ex. 2; see Dist. Ex. 3). Furthermore, the CSE meeting minutes indicate that the student's Rebecca School teacher agreed with the major parts of presented draft and suggested revisions that were incorporated in the proposed IEP (Dist. Ex. 2).

Annual Goals and Short-Term Objectives

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

The hearing record shows that student's February 2, 2010 IEP annual goals were developed with the input of the student's mother and Rebecca School teacher and were based in part on the interdisciplinary progress report provided by the Rebecca School (Tr. pp. 87-88; Dist. Ex. 2). A review of the IEP shows that the CSE developed annual goals and short-term objectives targeting the student's decoding skills, reading comprehension skills, functional math skills, handwriting, social/emotional awareness, engagement and communication with peers, body awareness, utilization of sensory information to remain engaged and related, visual-spatial processing, pragmatic language, and receptive and expressive language (Dist. Ex. 3 at pp. 7-12). The district's special education teacher who participated in the CSE testified that the student's goals were developed based on the report from the private school and the student's strengths and weaknesses as detailed in the IEP (Tr. p. 87). She indicated that the CSE looked at the IEP goals from the prior year and determined which goals the student had mastered and continued goals that had not been mastered (id.). As a result of the discussion at the CSE meeting, the IEP goals were modified and changed (Tr. pp. 89-90). The district's special education teacher testified that the handwriting on the IEP reflected the changes made by the school psychologist as a result of the CSE's discussion (id.).

A review of the IEP shows that the annual goals are not measurable; however, each is supported by several corresponding short-term objectives that include criteria for mastery. Therefore, I find that the related short-term objectives "contained sufficiently detailed information regarding 'the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress'" and remedied any deficiencies in the annual goals (Tarlowe, 2008 WL 2736027, at *9; see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 11-073;

Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). Although the parents assert that the February 2, 2010 IEP did not include annual goals for attention, distractibility, self-regulation, and modulation, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]). Accordingly, I find, as discussed below, that the IEP reflected and addressed the student's needs in those areas.

The December 2009 interdisciplinary progress report generated by the Rebecca School indicated that the student's regulation fluctuated throughout the school day and that he maintained regulation "through the support of a sensory diet and a knowing staff that [could] read his cues as to when he is becoming up-regulated" and could then employ co-regulation strategies (Dist. Ex. 5 at p. 1). The report indicated that the student benefited from a visual schedule, clear expectations, highly affective interactions, time for processing verbal directions, a sensory diet and sensory breaks, adults respecting his interests and acknowledging his feelings, and adults helping him to regulate in times of distress (*id.*). The February 2010 IEP included many of these supports as environmental modifications and human/material resources needed by the student (Dist. Ex. 3 at pp. 3, 4). The Rebecca School progress report indicated that the student's ability to verbalize his own emotions and those of others was an instrumental tool that helped him maintain his own regulation (Dist. Ex. 5 at p. 2). The February 2010 IEP included an annual goal and short-term objectives related to the student developing a deeper understanding of his own emotions and an increased comfort level with the emotions of others (Dist. Ex. 3 at p. 9). With respect to attending and distractibility, the Rebecca School progress report indicated that the student was most engaged when playing with certain toys and board games, listening to music, and participating in group games such as tag and obstacles courses (*id.* at p. 1). The February 2010 IEP included an annual goal and short term objectives related to improving the student's ability to remain engaged and related in purposeful interaction and shared problem solving for improved functional participation in school and home environments (Dist. Ex. 3 at p. 11). Based on the above, I find that the student's needs with respect to attention and self-regulation as reflected in the Rebecca School progress report were adequately address in the February 2010 IEP and that the parents claims are without merit.

A review of the hearing record shows that the parents correctly assert that the February 2101 IEP lacked goals for adapted physical education, despite the CSE recommendation for the service (Dist. Ex. 3 at pp. 1, 6). The district's special education teacher who participated in the CSE meeting testified that adapted physical education typically took place in the classroom with the classroom teacher and a physical education teacher who pushed into the class (Tr. p. 131). She explained that the ratio for adapted physical education was the same as the class ratio (*id.*; Dist. Ex. 3 at p. 6). The district's special education teacher testified that the CSE recommended adapted physical education based on the student's sensory issues and the CSE's belief that the student required a small classroom and adult supervision at all times (Tr. p. 131). She acknowledged that the IEP did not include any annual goals or short-term objectives that were specifically labeled as adapted physical education goals (*id.*). However, the hearing record does not show that the student would have been deprived of a FAPE due to the lack of annual goals and short-term objectives in adapted physical education. Rather, it reflects that the student's needs would have been met in this area as his sensory issues and need for a small classroom with

adult supervision and recommendations to address those needs were identified and discussed by the CSE and were reflected in the IEP (Dist. Ex. 3 at pp. 1, 3-4,6, 13; see Dist. Ex. 3 at p. 11).

Finally the parents assert that the student's IEP included annual goals for the home environment, but no home services. The February 2010 IEP included two goals and corresponding short-term objectives that referenced the home environment (Dist. Ex. 3 at p. 11). The first goal targeted the student's ability to use sensory information to remain engaged and related in purposeful interaction and shared problem solving for improved functional participation in school and home environments (id.). The second goal targeted the student's need to improve his visual-spatial processing necessary for greater success in play, academic, and home environments (id.). Although the parents are correct that the sensory goals in the IEP reference the home environment, the hearing record does not support their assertion that the inclusion of these goals in the student's IEP in and of themselves meant that the student required home-based services in order to receive a FAPE.

With respect to the evidence regarding the goals, I find that the district should have taken greater care in crafting the student's annual goals, especially with regard to the student's adapted physical education and unnecessary references to the home environment, but overall the annual goals, when combined with the short-term objectives, were sufficient and I cannot conclude that the student would have been precluded from the opportunity to receive educational benefits from the proposed IEP on this basis.

6:1+1 Special Class Placement

In their cross-appeal, the parents assert that the recommended 6:1+1 program was "the usual and default program recommendation for students with [a]utism" at district schools. The district asserts that the 6:1+1 placement recommendation was appropriate for the student.

State regulations mandate that "[t]he maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6 [h][4][ii][a]). The district's special education teacher who participated in the CSE meeting testified that a 6:1+1 class would have addressed the student's needs academically, socially, and emotionally (Tr. p. 99). She indicated that the recommendation was discussed with the entire CSE, including the parents and the Rebecca School teacher, and that the CSE members agreed it was appropriate (Tr. p. 100).

The hearing record indicates that at the time of the February 2010 CSE meeting, the student was demonstrating significant deficits in academics; expressive, receptive, and pragmatic language; sensory integration; and social/emotional development (see Tr. p. 125; Dist. Exs. 4; 5). The student also demonstrated problems with attention, distractibility, and regulation (Dist. Ex. 3 at p. 3). The student's instructional levels for academics based on teacher estimate were reflected as follows: decoding 2.0, reading comprehension 1.7, computation 1.8, and problem solving 1.6 (id.; see Dist. Ex. 2 at p. 1).

To address the student's academic, social/emotional, attending, and sensory needs, the February 2010 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school (Dist. 3 at p. 1). The February 2010 IEP reflected that the CSE considered a 12:1+1 and 8:1+1 program and rejected them because it believed the teacher-to-student ratio was "too high to appropriately meet [the student's] needs" (id. at p. 14). As discussed above, the CSE developed annual goals and short-term objectives that targeted the student's reading, math and handwriting skills, as well as goals and objectives that targeted his ability to understand emotions, engage in peer interactions, and engage in shared problem solving (id. at pp. 7-11). Also as discussed above, the CSE recommended numerous environmental modifications and human/material resources to address the student's management needs including a sensory diet and sensory breaks throughout the day, use of co-regulation strategies to help the student regulate his mood, use of a visual schedule and clear expectations, visual and verbal cues, redirection, chunking of materials, help with transitioning, and the presentation of materials in a high affect and motivating manner to sustain engagement (id. at pp. 3-4). To address the student's speech-language deficits, the CSE developed goals and objectives related to improving the student's pragmatic, receptive, and expressive language skills and also recommended that the student receive speech-language therapy (id. at pp. 12, 15). The CSE also recommended that the student receive OT and counseling (id. at p. 15).

The February 2010 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher (Dist. Ex. 3 at p. 4). As discussed above, the IEP included annual goals and short-term objectives related to the student understanding emotions, becoming comfortable with others emotions, increasing communication and spontaneous play with a peer, exploring changes in his body and relationships related to puberty, improving his ability to utilize sensory information to remain engaged and related in purposeful interactions, improving visual-spatial processing skills (id. at pp. 7-12). The IEP stated that the student's global developmental delays precluded him from participation in the general education environment at that time and indicated that the student would participate in alternate assessment (id. at p. 13). Based on the above, the hearing record supports a finding that the CSE's recommendation that the student attend a 6:1+1 placement in a specialized school would have addressed his needs as reflected in the evaluative information before the CSE at the time of the meeting. Accordingly, the hearing record does not support the parents' contention that the CSE's recommendation of a 6:1+1 placement for the student was a "default" program recommendation for students with autism, rather than a recommendation based on this student's individualized needs.⁶

⁶ While the parents assert that the individual OT services recommended by the February 2010 CSE did not allow for work in a dyad as prescribed in the IEP annual goals, I note that the parents do not specifically contend that the recommended OT services were inappropriate to meet the student's needs. Moreover, while the student's IEP does include some goals that require him to engage with a peer (see Dist. Ex. 3 at pp. 9, 10), I note that the goals are such that there is nothing that would preclude other service providers from implementing them and the hearing record does not reflect that the CSE's recommendation of individual OT services would not have conferred educational benefits upon the student. The hearing record also shows that information before the February 2010 CSE reflected that the student was receiving OT services at the Rebecca School on a 1:1 basis (Dist. Ex. 5 at p. 6).

Parent Counseling and Training

The parents assert that the IEP failed to include a provision for parent counseling and training. 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]).

In the instant matter, there is no dispute that the February 2010 IEP did not provide for parent counseling and training (Dist. Ex. 3).⁷ However, Courts have held that a failure to include parent counseling and training 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]).⁸ For the reasons set forth below, I find that the hearing record does not demonstrate that the lack of parent counseling and training on the February 2010 IEP rose to the level of a denial of a FAPE.

The special education teacher assigned to the CSE testified that the CSE did not "typically recommend parent training;" however, the CSE did tell parents that the program the CSE was recommending "encompass[d] parent training" (Tr. pp. 132-33). However, the hearing record contains no further information detailing the parent training that may have been available programmatically. I do note that the hearing record shows that at the time of the February 2010 CSE meeting, he had attended the Rebecca School since 2006 and the program

⁷ I note that State Review Officers have repeatedly addressed this district's failure to comply with this seemingly simple requirement and advised the district to provide for parent counseling and training in students' IEPs when required to do so by State regulation (see, e.g., Application of the Dep't of Educ., Appeal No. 11-134; Application of a Student with a Disability, Appeal No. 11-110; Application of the Dep't of Educ., Appeal No. 11-070; Application of the Dep't of Educ., Appeal No. 11-066; Application of a Student with a Disability, Appeal No. 11-032). To be clear—if the CSE believes the student should receive parent counseling and training, which is defined as a related service under federal law (34 C.F.R. § 300.34[a]), federal law requires the CSE to set forth such related services on the student's IEP (34 C.F.R. § 300.320[a][4]), notwithstanding any notion that may be espoused in this district that parent counseling and training may be "programmatically" in some placement recommendations for students.

⁸ With regard to the provision of FAPE, 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]).

director for the school testified that every family is assigned a social worker who provides counseling for family members (Tr. pp. 119, 380; Parent Ex. P at p. 2).

Based upon the circumstances of this case, I find that the district's failure to provide parent counseling and training on the February 2010 IEP did not comport with State regulations (8 NYCRR 200.4[d][2][v][b][5], 200.13[d]); however, given the parent counseling and training services the parents had received at the Rebecca School since 2006, and the fact that the recommendations in the IEP conferred educational benefits to the student, I conclude that the district's failure to incorporate parent counseling and training into the February 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 the past and had been extensively involved in their child's education, communicating regularly with her teachers and service providers]).

Methodology

The parents contend that the IEP failed to include "the only effective methodology" for the student, which was DIR/Floortime. Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

The district's special education teacher who participated in the February 2010 CSE meeting confirmed that the CSE did not recommend a specific methodology for the student in his IEP (Tr. p. 133). She testified that methodology was discussed at the CSE meeting in that the Rebecca School teacher mentioned DIR goals and "it was indicated by the team that no methodology is used" on the IEP, but that the counseling goals encompassed social and emotional goals (Tr. pp. 84-85, 133; see Tr. p. 133; Dist. Ex. 2 at p. 2). She further confirmed that DIR was not included on the IEP because it was a methodology (Tr. p. 133). She testified that CSE teams did not specify a certain methodology to be used with a student as the CSE did not know if other methodologies would also work with the student (Tr. p. 141).

She further reported that different methodologies were used in the district's specialized schools, and the CSE could not say for certain that the placement would only use a specific

methodology (*id.*). The district's special education teacher indicated that program staff may have other methodologies they want to use and that they feel will work with a student, and they might even use aspects of the DIR methodology (*id.*). The district's special education teacher testified that the CSE discussed that the DIR methodology worked for the student, even though it was not specified on the IEP (*id.*). The hearing record does not reflect that the student could only receive educational benefits through the exclusive use of the DIR/Floortime methodology. Therefore, based on the above, I decline to find that the absence of a particular methodology on the student's IEP constituted a denial of a FAPE.

Assigned School

With regard to the particular school to which the district assigned the student, the parents assert, among other things that in the assigned school could not have properly implemented the student's IEP. Specifically, they assert that the student would not have been functionally grouped in the class, and the assigned school could not have provided the student with all of his OT mandates, therefore, the district would have had to rely on RSAs.

To rise to the level of a denial of a FAPE, more than a de minimus failure to implement all elements of the IEP must be established, and instead it must be demonstrated that the school board or other authorities failed to implement substantial or significant provisions of the IEP (see Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing claims challenging the implementation of an IEP under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

In this case, a meaningful analysis of the parents' claims with regard to implementation of the recommended 6:1+1 special class at the assigned school would require me to determine what might have happened had the district been required to implement the student's February 2010 IEP, which is in part speculative because in June 2010 it became clear that the parent would not accept the placement recommended by the district in the IEP and that she intended to enroll the student at the Rebecca School. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless does not support the conclusion that the district would have deviated in its implementation of the IEP in a material way, thereby denying the student a FAPE. Even assuming for the sake of argument that the student had attended the district's program, I find that the hearing record

contains sufficient evidence that the district was capable of providing the student with the recommendations set forth in his February 2010 IEP and therefore, decline to find a denial of a FAPE based on a material failure to implement the student's IEP.

Functional Grouping

The hearing record reflects that the student would have been functionally grouped in the assigned class for the 2010-11 school year. The special education teacher of the assigned classroom testified that beginning in July 2010, there were five students in her 6:1+1 class, along with herself and two paraprofessionals (Tr. pp. 21, 49). The student's ranged in age from 11-14 years old and all of them were classified as students with autism (Tr. pp. 21, 25). The special education teacher reported that the student's reading levels ranged from prekindergarten to third or fourth grade and their math levels ranged from prekindergarten through the second to third grade levels (Tr. p. 21). The special education teacher testified that four of the students had similar needs and were grouped for instruction by those needs, while the fifth student worked with a paraprofessional or joined the group, depending on his needs in a given subject (Tr. p. 23). According to the special education teacher, the students were scheduled on a daily basis for 1:1 instruction with either the teacher or a paraprofessional in order to learn new skills that would be put into an independent work schedule (Tr. p. 24). The special education teacher of the assigned class reported that she had reviewed the student's IEP and that his academic and social/emotional needs were similar to those of other students in her class (Tr. pp. 33-35, 37).

Provision of OT Services

The parents assert that the district's assigned school would not have been able to provide the student with all of his mandated OT because the school lacked the needed occupational therapists. Specifically, the parents asserted in their due process complaint notice that they had been informed that the assigned school had only one occupational therapist to serve 150 students, that the student required OT four times per week, and that his therapy needed to be delivered on site and during the academic day (Dist. Ex. 1 at p. 5). For the reasons discussed below, I find the parents assertions to be without merit.

The hearing record supports a finding that the district was capable of providing the student with his mandated OT services. The special education teacher of the assigned class testified that the student would have been able to receive related services as indicated in his IEP (Tr. p. 24). She indicated that there were two occupational therapists at the assigned school (Tr. p. 59). The special education teacher further indicated that she was not aware that the school website indicated that 46 students at the school awaiting the provision of OT because all of her students were getting their mandated therapies (Tr. p. 64). The special education teacher assigned to the CSE stated that if the student were not able to receive his mandated therapies at school, that it was her understanding that the family would be issued an RSA (Tr. p. 132).

A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(<http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; see <http://www.emsc.nysed.gov/resources/contractsforinstruction/>).

Moreover, case law supports a finding that data indicating that a school has not always delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding (see M.S. v. New York City Dep't of Educ., 2010 WL 3377667, at *6-*7). Therefore, even if the district had needed to provide the student with an RSA for his OT services, this would not have denied the student a FAPE.

Conclusion

In sum, the evidence shows that the district offered an IEP to the student that, while not in perfect compliance with State regulations, was nevertheless reasonably calculated to enable the student to receive educational benefits, and thus offered a FAPE for the 2010-11 school year. Having found that the district offered the student a FAPE, I need not reach the issue of whether the unilateral placement of the student at the Rebecca School was appropriate for the student or whether equitable considerations support an award of tuition reimbursement and the necessary inquiry is at an end (Mrs. 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. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's September 14, 2011 decision finding that the district did not offer the student a FAPE for the 2010-11 school year is annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's September 14, 2011 decision which ordered the district to reimburse the parents for the student's tuition costs at the Rebecca School for the 2010-11 school year is annulled.

Dated: **Albany, New York**
 January 13, 2012



JUSTYN P. BATES
STATE REVIEW OFFICER