



The University of the State of New York

The State Education Department
State Review Officer
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No. 11-134

**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 Siligmuller, Esq., of counsel

Kule-Korgood, Roff and Associates, PLLC, attorneys for respondents, Tamara Roff, 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 them for their son's tuition costs at a nonpublic school for the 2010-11 school year. The parents cross-appeal certain adverse determinations of the impartial hearing officer. The appeal must be sustained. The cross-appeal must be dismissed.

Background

In September 2007, the student moved into the district (Dist. Ex. 10 at p. 1). In November 2007, he was enrolled in a 6:1 class at the nonpublic school, combined with paraprofessional services, and related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and music therapy, and he has remained there since (Tr. pp. 340, 342; Dist. Ex. 10 at p. 1). The nonpublic school has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 386-87, 461; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see Dist. Ex. 5 at p. 1; Parent Ex. B; 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

A November 2, 2007 private psychological evaluation abbreviated summary report indicated that, at the age of ten, the student was referred for a psychological evaluation, in order to assist in educational and treatment planning (Dist. Ex. 6 at p. 1).¹ The evaluator characterized the student as "restricted yet cooperative" (*id.*). He further concluded that the student's speech-language, socialization, and communication impairments "clearly" impeded his ability to function at home and at school (*id.*). Based on the student's history and the findings of the November 2007 psychological evaluation, the evaluator determined that the student's presentation of symptoms was consistent with an "autistic spectrum" disorder diagnosis (*id.*). The evaluator recommended, among other things, placement in a special education school that specialized in working with "individuals with autistic spectrum disorders," where the student could also be provided with "a great deal" of 1:1 intervention to have his "significant" needs met (*id.* at p. 3).

On December 19, 2007, a district bilingual social worker prepared a social history of the student with his mother serving as informant (Dist. Ex. 10). At the time of the report, the student was enrolled in a 6:1 class at the nonpublic school with the support of a paraprofessional and related services comprised of speech-language therapy and OT (*id.* at p. 1). According to the parent, although the student enjoyed going to school and socializing with the other students, he "d[id not] want to do any academics," and tended to spit at and scratch the teacher (*id.* at pp. 1-2). The parent added that the student had "small temper tantrums," and would sit on the floor (*id.* at p. 2). At home, the parent stated that the student enjoyed playing with his cars and trains, looking at picture books, and tearing paper (*id.*). Although the parent characterized the student as a "very loving ... little gentleman," she also compared his behavior to that of a four-year-old child's (*id.*). The parent also noted that the student was not toilet trained; however, she described his general health as good (*id.*).

In a letter dated January 28, 2010, an administrator from HASC informed the parents that the student had been accepted into a HASC summer program for the period of July 2010 through August 2010 pending approval (Dist. Ex. 11; see 8 NYCRR 200.1[d], 200.7).² The hearing record reflects that the district had approved the summer program at HASC for the student every summer since he had moved into the district (Tr. pp. 46, 265-66; Dist. Ex. 11). HASC is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Pet. ¶ 12; see 8 NYCRR 200.1[d], 200.7).

In a May 1, 2010 speech and language annual review report, the student's speech-language pathologist from the nonpublic school stated that the student was evaluated to assess his communication status relative to his then-current individual education program (IEP) goals and objectives, and to determine service recommendations for the 2010-11 school year (Dist. Ex. 9 at p. 1). The speech-language pathologist reported that the student received three 45-minute sessions of speech-language therapy per week (*id.*). The speech-language pathologist noted that

¹ According to the report, "since the student had many prior evaluations, only a screening was performed" at the time of the November 2007 psychological evaluation (Dist. Ex. 6 at p. 2).

² Although not described in the hearing record, it appears from the context that "HASC" refers to Hebrew Academy for Special Children (see Application of a Student with a Disability, Appeal No. 09-034).

she based her findings on ongoing therapeutic treatment and observations in both the therapy room and classroom setting, as she deemed standardized tests inappropriate given the nature and severity of the student's deficits (id. at p. 2). Overall, the speech-language pathologist found improvement with regard to the student's receptive and expressive language skills (id.).

The speech-language pathologist also indicated that the student could identify a wide variety of common objects in pictures and by function (Dist. Ex. 9 at p. 1). The speech-language pathologist further noted that the student spontaneously commented on his own actions, actions taking place in his environment, and on the actions of others (id. at p. 2). In addition, she reported that the student often initiated conversation with adults and also communicated with others to tell them what to do (id.). According to the speech-language pathologist, the student could tell short narratives, and with minimal prompting, relate one to two events, and answer questions related to vocational outings (id. at p. 3). Although the speech-language pathologist reported that the student's word finding and attention difficulties affected his ability to remain on topic, she added that he had increasingly engaged in short conversational exchanges with adults, particularly when the subject was related to an immediate context (id.). Regarding vocational outings, the student demonstrated increased enthusiasm, confidence, and the ability to retain information from week to week about activities that the group completed, such as the steps involved in doing laundry at the laundromat (id.). According to the speech-language pathologist, the student improved his ability to verbalize his emotions, despite the need for prompting to express feelings of anger and frustration (id.).

Behaviorally, the speech-language pathologist indicated that the student engaged in spitting, scratching, and pinching behaviors when frustrated by a task (Dist. Ex. 9 at p. 2). The speech-language pathologist further described the student as highly distractible, and added that he required a great deal of redirection and reinforcement in order to complete an activity (id.). According to the speech-language pathologist, staff implementation of behavior plans decreased instances of the student's inappropriate behaviors (id.). In addition, the speech-language pathologist reported that the utilization of social stories with the student that demonstrated the use of socially appropriate behaviors with adults and peers assisted him in regulating and modifying his actions (id.). Lastly, the speech-language pathologist's recommendations included the provision of five 45-minute sessions of speech-language therapy, over a 12-month period (id. at p. 3).

On May 6, 2010, a district special education teacher conducted a classroom observation of the student in a class of three students at the nonpublic school (Dist. Ex. 4). During the observation, the student participated in an applied behavioral analysis (ABA) session with a teacher's assistant (id. at p. 1). The district special education teacher found that the student was respectful toward the teacher's assistant and complied with his directions (id.).

In a May 6, 2010 OT progress report, the student's occupational therapist indicated that the student presented with significant delays across his gross, fine, and visual-perceptual-motor domains (Dist. Ex. 8 at p. 1). The occupational therapist further noted that she gauged the student's behavior during treatment sessions to determine his strengths and weaknesses, as well as to refine his OT goals (id.). According to the occupational therapist, the student displayed strengths in regard to self-regulation and interests in the world, forming relationships, attachments and engagement, two-way purposeful communication, behavioral organization,

problem-solving, internalization, and behavioral elaboration (id. at pp. 1-2). The occupational therapist stated that the student had become more relaxed and began to allow himself to enjoy physical challenges (id. at p. 3). She also described her use of sensory integrative techniques, that helped the student remain regulated and interested, and facilitated his ability to demonstrate initiative to communicate with purpose and to be available for learning (id.). Recommendations included the provision of twice weekly 45-minute sessions of 1:1 OT in addition to twice weekly 45-minute sessions of OT in a group setting (id.). Annual goals and short-term objectives addressed the student's ability to remain self-regulated while being involved in sequences of interaction, ability to remain self-regulated while improving body awareness, and improvement in functional hand usage bilaterally (id. at pp. 4-6).

A May 14, 2010 educational progress report written by the student's classroom teacher indicated that she incorporated multiple philosophies including ABA, a Developmental Individual Relationship (DIR) based model, and sensory integration in the classroom (Dist. Ex. 7 at p. 1). According to the report, the student attended a class with four other children comprised of a 1:1 student-to-staff ratio (id.). The teacher characterized the student as empathetic and added that he was eager to help and took pride in having responsibilities throughout the day (id.). Consistent with the May 2010 speech-language progress report, the educational progress report revealed that the student displayed spitting, scratching, pinching, and kicking (id.). According to the classroom teacher, the student demonstrated these behaviors to escape from challenging work, for attention, and due to frustration (id.). The student's teacher explained that the student used the aforementioned behaviors as an outlet, when he could not express himself (id.). The teacher further stated that "with some redirection and constant opportunities for success (i.e. token economy to acquire desired items) [the student] [wa]s able to decrease such behaviors" (id.). She also cautioned that when working with the student, it was important for him to know he could not escape from demands, and that the adult would maintain consistent control (id.). The student's teacher also noted that he had a tendency to want to do things on his own, such as leaving the room without asking to do so, and was often unresponsive when an adult told him to stop (id.).

Cognitively, the student's teacher reported that he was generally able to follow the classroom routine, although he might display protesting, inappropriate behaviors, and defiance when a direction was presented in both an individual and group context (Dist. Ex. 7 at p. 2). The teacher noted that the student could respond to his name by making eye contact with the person calling his name (id. at p. 2). Regarding activities of daily living (ADL) skills, the teacher explained that the nonpublic school provided the student with a consistent, predictable structure that helped him become more independent and increased his ability to follow directions (id. at p. 3). She added that on a daily basis, the student worked on strengthening his ability to follow routines and perform self-help skills (id.). According to his teacher, the student's independence emerged in his ability to brush his teeth, wash his hands, and follow a morning routine (id.). Although the student could independently self-feed using a fork and spoon, the teacher noted that he needed reminders to do so appropriately (id.). Lastly, although the student was almost completely independent with toileting, his teacher indicated that he needed reminders regarding self-hygiene (id.). Recommendations included the continued provision of 1:1 instruction and treatment at the nonpublic school in order to increase the student's ability to reach his developmental goals (id.).

Also on May 14, 2010 the Committee on Special Education (CSE) convened for the student's annual review and to develop his IEP for the 2010-11 school year (Dist. Exs. 5; 13). The following individuals attended the May 2010 meeting: a district representative who also acted as a special education teacher, a district regular education teacher, a district school psychologist, the parent, and an additional parent member (see Tr. pp. 26, 343; Dist. Exs. 5 at pp. 1-2; 13). In addition, the principal and the student's classroom teacher from the nonpublic school participated by telephone (Dist. Exs. 5 at p. 2; 13). According to the May 2010 meeting minutes, the CSE reviewed materials, and explained testing results and the recommended placement to the parent (Dist. Ex. 13). The meeting minutes further reflected the parent's desire for the student to become more verbal (id.). The parent also brought paperwork to the May 2010 CSE for the student to attend a HASC summer program for summer 2010 (id.). The May 2010 IEP reflected the CSE's conclusion that the student exhibited significant cognitive and language delays that precluded his participation in the general education environment (Dist. Ex. 5 at p. 15). For the 2010-11 school year, the May 2010 CSE continued the student's eligibility for special education programs and services as a student with autism and recommended that he attend a 6:1+1 special class in a specialized school with related services comprised of twice weekly 1:1 OT, twice weekly OT in a small group, three sessions per week of 1:1 speech-language therapy, and twice weekly sessions of speech-language therapy in a small group (Tr. pp. 45, 47-48; Dist. Exs. 5 at pp. 1-2, 17; 13).³ The May 2010 CSE also deemed the student eligible for 12-month programming (Tr. pp. 45-46; Dist. Ex. 5 at pp. 2, 15).

In a letter dated June 25, 2010, the district summarized the recommendations of the May 2010 CSE and notified the parents of the school to which the student was assigned for the 2010-11 school year (Dist. Ex. 3).

By letter to the district dated August 18, 2010, the parents advised that they had yet to receive notice of the assigned school for the student (Parent Ex. E). In addition, they rejected the May 2010 IEP, because they deemed it inappropriate and did not believe that it sufficiently addressed the student's needs (Tr. p. 347; Parent Ex. E). Specifically, the parents believed that the May 2010 IEP did not sufficiently describe the student's needs and did not contain enough goals (Parent Ex. E). The parents further advised that they intended to enroll the student in the nonpublic school for the upcoming school year and request an impartial hearing to seek the costs of the student's tuition (id.).

On or about September 14, 2010, the parent visited the assigned school (Tr. p. 349; Parent Ex. D). By letter dated September 28, 2010, the parents advised the district that the assigned school was not appropriate for the student (Parent Ex. D). In part, the parents described the school environment as "too overwhelming" and indicated that the student would have difficulty navigating the stairs frequently during the day (id. at p. 1). Additionally, the parents advised that the student's social and emotional needs differed from those of the students in the recommended class (id.). The parents also reiterated their rejection of the May 2010 IEP, adding that it did not address the student's behavioral needs, nor did the assigned school have sufficient support to meet them (id.). Lastly, the parents expressed concern that the assigned school would not be able to meet the student's related services mandates (id.). In closing, the parents informed

³ The May 2010 CSE recommended the student attend the parent's requested HASC summer program for "July and August 2010 only" (Dist. Exs. 5 at p. 1).

the district that they planned to continue the student's enrollment at the nonpublic school and seek payment of the student's tuition through an impartial hearing (id.).

Due Process Complaint Notice

By due process complaint notice dated February 16, 2011, the parents contended, among other things, that the district denied the student a free appropriate public education (FAPE) during the 2010-11 school year (Dist. Ex. 1 at p. 1). The parents argued that the district failed to reevaluate the student, and consequently, developed an inappropriate and insufficient IEP (id.). The parents also raised the following allegations with regard to the May 2010 IEP: (1) the IEP's description of the student's present levels of performance was not sufficient and failed to provide an adequate baseline from which to determine the student's progress; (2) the May 2010 IEP contained little information regarding the student's academic and living skills, which resulted in the development of insufficient goals, particularly with regard to academics, independent living skills and socialization; (3) the district failed to memorialize the provision of parent training and counseling in the IEP, in violation of State regulations; and (4) despite developing a behavioral intervention plan (BIP) for the student, the district failed to conduct a functional behavioral assessment (FBA) to determine the cause of the student's behaviors (id. at pp. 1-2). In addition, the parents contended that the assigned school was not appropriate for the student (id. at p. 2). As relief, the parents requested tuition reimbursement for the nonpublic school for the 2010-11 school year (id.).

On February 24, 2011, the district responded to the parents' due process complaint notice (Dist. Ex. 2).

Impartial Hearing Officer Decision

On June 2, 2011, the parties proceeded to an impartial hearing, which concluded on July 25, 2011, after four days of testimony (IHO Decision at p. 2; Tr. pp. 1-494). On September 15, 2011, the impartial hearing officer rendered a decision in which she awarded tuition reimbursement for the 10-month program at the nonpublic school to the parents (IHO Decision at p. 11). In her decision, she noted testimony from parent witnesses that indicated that the student's present levels of academic performance and learning characteristics as depicted in the May 2010 IEP accurately described the student (id. at p. 6). The impartial hearing officer further found that the goals were discussed at the May 2010 meeting and noted that the parent did not object to them at that time, and that the nonpublic school's principal deemed the goals appropriate (id.). She further rejected the parents' claim that the May 2010 IEP was deficient because it did not provide for parent training and counseling, noting that some parent training was provided by the assigned school (id.).

However, the impartial hearing officer held that the district failed to offer the student a FAPE based on the following findings: (1) the recommended 6:1+1 placement without any additional 1:1 support was not reasonably calculated to enable the student to make meaningful educational gains; (2) the documentation upon which the May 2010 CSE relied did not provide a basis for a conclusion that the recommended program was appropriate for the student; (3) although the May 2010 CSE concluded that the student's behaviors interfered with his learning, the CSE failed to conduct an FBA to determine the extent of his behaviors and their

circumstances (IHO Decision at pp. 7-8). The impartial hearing officer cited to testimony regarding the student's need for 1:1 support and noted that it was part of the student's summer 2010 program (id. at p. 8). Accordingly, the impartial hearing officer inferred that the student required 1:1 support (id.).

The impartial hearing officer proceeded to find that the nonpublic school was appropriate, despite the district's assertion that the student required 12-month programming, and that the nonpublic school only provided the student with a 10-month program (IHO Decision at p. 9). The impartial hearing officer determined that by the time that the parents received notice of the assigned school, the student only required a 10-month program to cover the remainder of the 2010-11 school year (id. at p. 10). Lastly, the impartial hearing officer found that equitable considerations supported the parents' request for relief (id.).

Appeal for State-level Review

The district appeals and requests that the impartial hearing officer's award of tuition reimbursement be vacated. With respect to its claim that it offered the student a FAPE during the 2010-11 school year, the district raises the following allegations, among other things: (1) the district was not obligated to conduct the student's triennial evaluation; (2) the May 2010 CSE had sufficient information upon which to base its program recommendation; (3) the goals were appropriate; (4) the lack of an FBA did not deprive the student of a FAPE; (5) the recommended 6:1+1 classroom would have provided the student with sufficient support and addressed his behavioral needs; and (6) the assigned school was an appropriate setting for the student. Next, the district argues that the nonpublic school was not appropriate for the student because it is only a 10-month program and it is undisputed that the student required 12-month programming. Moreover, the district alleges that the nonpublic school did not provide the student with his related services mandate. Lastly, although the district does not contend that equitable considerations preclude the parents' request for relief, the district maintains that any relief to which they may be entitled should be limited to the amount of tuition that they have paid to the nonpublic school.

The parents submitted an answer and request that the impartial hearing officer's decision be upheld. The parents argue, in pertinent part, that the impartial hearing officer correctly determined that the evidence did not show that the proposed 6:1+1 program, without any additional 1:1 support, was reasonably calculated to enable the student to make meaningful educational progress. Specifically, they submit that the student requires 1:1 instruction in order to learn a new task. Additionally, the parents maintain that the assigned school was not appropriate for the student. The parents further allege that the impartial hearing officer properly found that the district failed to conduct an FBA. In addition, the parents assert that the district failed to conduct sufficient evaluations of the student, which were necessary to formulate an appropriate IEP. The parents also claim that the May 2010 IEP did not contain any information regarding the student's academic needs or goals.

Next, they allege that the nonpublic school was appropriate to meet the student's educational needs. Despite the district's claim that the nonpublic school was not appropriate, because it could not fulfill the student's related services mandate, the parents allege that the district failed to raise this argument below, and therefore, the issue was not preserved for appeal.

The parents also contend that the district's claim that any award of relief should be limited to the amount of tuition that they have already paid is also not subject to review because the district's argument is being raised for the first time on appeal.

The parents also cross-appeal the impartial hearing officer's decision to the extent that they argue that the impartial hearing officer failed to find that the IEP was inappropriate. The parents submit that the May 2010 IEP lacked information concerning the student's academic needs or performance. Moreover, the parents contend that the May 2010 IEP did not contain academic goals to address vocational and independent living skills, nor did it contain a description of the student's sensory diet. In addition, the parents allege that the May 2010 IEP was deficient because it did not provide for parent training and counseling in accordance with State regulations.

The district submitted a reply and answer to the cross-appeal. The district requests a dismissal of the cross-appeal in its entirety. The district maintains that the May 2010 IEP was appropriate. Regarding the parents' claim that the district has failed to preserve two arguments on appeal, the district submits that, as the responding party in an action, it is not bound by the requirement that all claims raised on appeal must be raised below.

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 note that the parents assert in their cross-appeal that the impartial hearing officer failed to find that the May 2010 IEP was deficient, in part, because it lacked a detailed description of the student's sensory diet (see Dist. Ex. 1). It is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, *8 [S.D.N.Y. Mar. 10, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]; Application of the Bd. of Educ., Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-038). Moreover, under the IDEA, a complaining party is not entitled to proceed to an impartial hearing unless the challenged due process complaint notice meets minimal pleading requirements to be legally sufficient, including a description of the nature of the problem of the student "relating to the proposed or refused initiation or change, including facts relating to the problem" (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]).

Here, the parents' due process complaint notice may not be reasonably read to assert a claim that the May 2010 IEP was inappropriate because it lacked a detailed description of the student's sensory diet or how to implement it (Dist. Ex. 1). Nor does the hearing record contain an agreement by the district to expand the scope of the impartial hearing to include this issue. Consequently I find the impartial hearing officer should not have reached the issue of the student's sensory diet.

Next, I will address the parties' dispute regarding whether the district waived any claims relating to the appropriateness of the nonpublic school because it failed to assert them below. 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 nonpublic school.

May 2010 IEP

Sufficiency of the Evaluative Data and Present Levels of Performance

I will first consider the parties' claims that pertain to the adequacy of the May 2010 IEP. As set forth in greater detail below, the hearing record reflects that the May 2010 CSE relied on a variety of sources of information, including input from the student's teacher and the nonpublic school reports in order to create an accurate portrait of the student's needs and to develop appropriate educational program recommendations for him.

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 S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; 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;). 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]).

According to the hearing record, the May 2010 CSE considered the following documentation: the October 2007 psychological evaluation abbreviated summary report, the December 2007 social history update report, the May 2010 speech-language annual review report, the May 2010 classroom observation report, the May 2010 OT progress report, and the May 2010 educational progress report (Tr. pp. 29-30; Dist. Exs. 4 at pp. 1-2; 6 at pp. 1-4; 7 at pp. 1-3; 8 at pp. 1-6; 9 at pp. 1-3; 10 at pp. 1-2). The hearing record further reveals that the May 2010 CSE also elicited information from the student's teacher and principal in order to develop the IEP (Dist. Ex. 13).

Although the parents argue that the May 2010 IEP was insufficient because it did not adequately describe or address the student's special education needs, a review of the academic performance and learning characteristics provisions of the IEP reflects that these descriptions of the student were gleaned from the nonpublic school reports and teacher input (compare Dist. Ex. 5, with Dist. Ex. 7, and Dist. Ex. 9 at pp. 1-2; Dist. Ex. 13). The May 2010 IEP indicated that academically, the student enjoyed interacting with his teachers and friends and could use his words to communicate appropriately, although at times he had difficulty retrieving the appropriate object labels and forming complete sentences (compare Dist. Ex. 5 at p. 3, with Dist. Ex. 7 at p. 1). The May 2010 IEP further noted that the student often used gestures to express himself in place of using words (id.). In addition, despite his communication difficulties, the May 2010 IEP reflected that the student could make his wants and needs known to those around him (id.). According to the May 2010 IEP, the student noticed the emotions of his peers and expressed his desire to help them when they were angry or upset (id.). Additionally, the May 2010 IEP reflected that the student initiated interactions with teachers and peers on a regular basis in various settings throughout the day (id.). Moreover, also in accordance with the May 2010 educational progress report, the May 2010 IEP noted that despite his delays in his receptive and expressive language, the student made slow, but consistent progress in his acquisition of identifying common objects across various categories (compare Dist. Ex. 5 at p. 3, with Dist. Ex. 7 at p. 2). Lastly, a review of the May 2010 CSE meeting minutes reflected the student's teacher's involvement in the creation of the IEP (Dist. Ex. 13). Specifically, according to the meeting minutes, the teacher reported that the student had improved with redirection and she described his work on identifying objects (id.). The meeting minutes also revealed that the teacher estimated that the student was at a pre-kindergarten level (Pre-K) for reading and math, and her observation that although he could not read, the student was "very, very verbal" (id.).

In regard to the student's speech-language needs, the May 2010 IEP stated that the student presented with severe global delays including receptive and expressive language deficits, decreased speech intelligibility, and pragmatic/social skill deficits (compare Dist. Ex. 5 at p. 4, with Dist. Ex. 9 at p. 1). According to the May 2010 IEP, the student followed multi-step directions across environments with minimal verbal repetitions, and could anticipate steps in a daily routine and associate certain objects with specific routines (id.). The May 2010 IEP also described the student's ability to identify a wide variety of common objects, both in pictures and by function and his comprehension of basic yes/no and "wh" questions (id.). Consistent with the May 2010 speech and language annual review report, the May 2010 IEP portrayed the student as a verbal communicator whose verbal output was inconsistent and might vary depending upon his level of motivation (id.). The May 2010 IEP further noted that the student typically communicated using two to three-word utterances, although he had demonstrated the ability to expand the length and complexity of his utterances (id.). In addition, the May 2010 IEP

indicated that although the student's word finding deficits affected his ability to fully express himself, it further stated that the student could communicate for a wide variety of communicative functions (compare Dist. Ex. 5 at p. 4, with Dist. Ex. 9 at p. 2). Furthermore, the May 2010 IEP included the speech-language pathologist's observations that the student's speech was characterized by variable volume and decreased intelligibility in the absence of a referent, but that the student could increase his intelligibility when asked to repeat himself (id.). In accordance with his speech-language pathologist's report, the May 2010 IEP revealed that the student often spoke at an increased rate that further affected his overall intelligibility, but when asked to speak more clearly, he could slow down his rate of speech and increase the accuracy of his articulation (id.). In regard to the student's social/emotional performance, the May 2010 IEP characterized the student as "lovable," "sociable," and as someone who enjoyed interacting with teachers, classmates, and friends (compare Dist. Ex. 5 at p. 5, with Dist. Ex. 7 at p. 1). In regard to the student's health and physical development, the May 2010 IEP included a parent report, showing that notwithstanding the student's significant medical history, his general health was good at the time of the May 2010 CSE (Dist. Ex. 5 at p. 6).

Consistent with the student's present levels of performance, the May 2010 CSE identified the student's social/emotional management needs, and incorporated observations from his teacher such as his need to be "restrained" from biting, scratching, pinching and kicking, and the need for close supervision to prevent him from leaving the classroom without permission (Dist. Ex. 5 at p. 5; see Dist. Ex. 7 at p. 1). In addition, the May 2010 CSE recommended that the student receive adapted physical education (APE) in a 6:1+1 setting (Dist. Ex. 5 at p. 6).

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 Dep't 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).

Annual Goals and Short-Term Objectives

Turning to the parties' dispute about the annual goals contained in the May 2010 IEP, I note that an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum, and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 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]).

According to the district special education teacher, the goals contained the May 2010 IEP were developed based on information provided by the student's teachers (Tr. p. 42; see Tr. p. 363). He further testified that during the May 2010 meeting, no one voiced any objections to the

suggested goals (Tr. p. 45). Aligned with the student's needs per the aforementioned progress reports, the May 2010 IEP included annual goals and short-term objectives specific to receptive, expressive, and pragmatic/social language, attention to task, self-help and life skills, participation in games and group activities, self-regulation, and bilateral hand usage (Tr. pp. 43-45; Dist. Ex. 5 at pp. 8-14). A review of the annual goals and short-term objectives reveals that except for specific and measurable annual goals and short-term objectives related to APE, the other annual goals were vague and not measurable; however, their associated short-term objectives were aligned to the annual goals, clarified them, were specific, and all but a few were measurable (see Dist. Ex. 5 at pp. 8- 14).⁴ Thus, these 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 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). Moreover, based upon the hearing record, I find that the student's annual goals and short-term objectives contained in the May 2010 IEP adequately addressed the student's significant areas of deficit as identified in the evaluative data considered by May 2010 CSE, and therefore, I decline to find a denial of a FAPE for the 2010-11 school year on the basis of inappropriate goals.

Special Factors and Interfering Behaviors

Next I turn to the district's contention that the lack of an FBA did not result in a denial of a FAPE to the student. 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. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; 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

⁴ The hearing record reflects that the May 2010 CSE incorporated the goals and short-term objectives provided by the nonpublic school (see Tr. pp. 43-45, 98-99, 139-44).

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.*)⁵. State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (*A.H.*, 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or Pre-school Committee on Special Education (CPSE) "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to"

⁵ 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]).

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]).⁶ 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 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, although the hearing record does not include a separate document entitled a "functional behavior assessment," the BIP contained information about the student's behaviors that interfered with learning that typically would be part of an FBA and a BIP. The May 2010 nonpublic school's educational progress report and the speech-language annual review described the student's behaviors including, spitting, scratching, pinching, and kicking when he was frustrated or upset, or when he wanted to escape from challenging work (Dist. Exs. 7 at p. 1; 9 at p. 2). The nonpublic school's principal testified that the nonpublic school developed a BIP, submitted it to the May 2010 CSE, and that the statements made on the BIP were accurate (Tr. pp. 434, 437). According to the district special education teacher, the CSE collected information regarding the student's behavior from his teacher, reviewed the nonpublic school's BIP, and made modifications (Tr. pp. 49-50). Consistent with the information about the student's behavior per the aforementioned reports, the BIP attached to the May 2010 IEP revealed that the student exhibited a variety of behaviors, including spitting, scratching, pinching, and kicking (Dist. Ex. 5 at p. 18). The BIP indicated the hypothesis as previously discussed and noted in the nonpublic school's educational progress report, that the student demonstrated these behaviors for reasons including escape from challenging work, attention, and frustration (Dist. Exs. 5 at p. 18; 7 at p. 1). In addition, the BIP described other behaviors reported by the student's classroom teacher (compare Dist. Ex. 5 at p. 18, with Dist. Ex. 7 at p. 1). According to the BIP, based on input from the nonpublic school, the student's behaviors that interfered with his learning were expected to decrease as he strengthened his ability to use his words and hands in an appropriate manner (Dist. Ex. 5 at p. 18). Proposed strategies to change the student's interfering behaviors included

⁶ 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]).

continued work on the use of appropriate communication, especially to express himself when he was frustrated or upset (*id.*). In addition, the BIP noted that the student required redirection in order to decrease interfering behaviors whereby he used his hands and words appropriately (*id.*). The BIP also called for the student to work on asking permission before leaving the room (*id.*). Lastly, the BIP noted that the student responded well to a reward system where he acquired desired objects if he behaved appropriately (*id.*). Additional supports were also incorporated into the BIP to help the student change the behaviors that interfered with his learning, such as the assistance of related service providers, classroom paraprofessional, and a small class setting (*id.*). Moreover, consistent with the strategies noted in the BIP, review of the speech-language annual goals in the May 2010 IEP revealed a short-term objective that incorporated the student's use of complex patterns of reciprocal communication with socially appropriate behaviors and an expected decrease in the student's inappropriate behaviors of pinching, spitting, and scratching (Dist. Ex. 5 at p. 12).⁷ Moreover, in addition to the BIP, the May 2010 IEP also identified the following health/physical management needs that addressed the student's behaviors: (1) the provision of supervision for safety in/out of class, up/down stairs, negotiation within and between environments (control of maladaptive behaviors); (2) assistance and supervision with daily hygiene needs (toileting, grooming, control of maladaptive behaviors); and (3) assistance during mealtime (pacing food/fluid intake, control of maladaptive behaviors) (*id.* at p. 7). Accordingly, in this case, where the district formulated a BIP based on information from the student's teacher, and developed management needs designed to target the student's interfering behaviors, the absence of an FBA did not result in any substantive harm to the student nor did it rise to the level of a denial of a FAPE (C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

Parent Counseling and Training

Next, I turn to the parents' assertion in their cross-appeal that the impartial hearing officer erred in determining that the omission of parent counseling and training in the May 2010 IEP did not result in a denial of a FAPE to the student. 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]; 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

⁷ I also note the special education teacher of the recommended 6:1+1 special class indicated that the autism coach that came to her classroom one time per week for the first half of the school year observed her interactions with students, and worked on developing FBAs and implementing BIPs for students as necessary (Tr. p. 194). In addition, the teacher explained how the classroom behavior plan was implemented with the assistance of visuals throughout the day, whereby the students in the recommended 6:1+1 class had opportunities to earn preferred activities (Tr. pp. 188-89; see Parent Ex. O at pp. 1-2).

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]).⁸

Although the provision of parent counseling and training was not incorporated into the May 2010 IEP, the hearing record reflects that the impartial hearing officer correctly found that it was provided programmatically (IHO Decision at p. 6; Tr. pp. 49, 193-94). Specifically, the hearing record demonstrates that the parent coordinator at the assigned school coordinated parent workshops, based on parent requests (Tr. p. 194). According to the teacher of the proposed classroom, one workshop took place each month at the assigned school (Tr. pp. 246-47). The teacher also testified that notices of upcoming workshops were sent home with students (Tr. p. 202; Parent Ex. N). According to the hearing record, such workshops addressed topics, such as "Resources for Children with Special Needs," and "visual arts" (Parent Ex. N at pp. 10, 13). Under the circumstances presented herein, given the availability of parent counseling and training at the assigned school, I decline to find that the district's failure to incorporate it into the May 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). In view of the forgoing, I find that the parents have not prevailed on their claims that inadequacies in the May 2010 IEP denied the student a FAPE.

Assigned School

With regard to the parents' claims regarding the particular school to which the district assigned the student, 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 (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; 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., 2008 WL 3930028, at *11, aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). 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 Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011], but see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8 [S.D.N.Y. Oct.

⁸ 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]).

28, 2011]). Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

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 May 2010 IEP, which is in part speculative because it became clear on August 18, 2010 that the parents would not accept the services recommended by the district in the IEP and that they intended to enroll the student in the nonpublic school (Parent Ex. E). 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 from the IEP in a material way in the 6:1+1 special class and related services at the assigned school and thereby deny the student a FAPE.

According to the nonpublic school's principal, the student exhibits "learned helplessness" (Tr. p. 403). She explained that when certain tasks are presented to the student, he "breaks down very, very, very, easily" and may display crying, spitting, and biting (Tr. pp. 403-04). The principal indicated that the student required structure to help him learn "basics" (Tr. p. 404). For example, she described a situation from the previous year, when the student gave the ABA instructor "a really hard time," but he successfully demonstrated what he knew in a semi-structured situation (id.). The principal attributed that later success to the structure of the 1:1 ABA session (Tr. pp. 404-05). In addition, the principal testified that the nonpublic school encourages students to work independently and that independence is the school's "final goal" (Tr. p. 427).

Here, a review of the May 2010 IEP reflects that the CSE's recommendation addressed the student's needs (Tr. pp. 186-87, 190-93; Dist. Ex. 5 at pp. 1, 17). Although the May 2010 IEP did not include instructional level estimates for the student, the special education teacher of the proposed 6:1+1 class testified that upon review of the description of the student's present levels of performance, she estimated his instructional levels to be within kindergarten range (Tr. p. 211).⁹ The special education teacher also indicated that the student's needs and goals were similar to other students in the 6:1+1 class, and that other students in the class received speech-language and OT as related services (Tr. pp. 174, 181-84, 190-93).

⁹ The special education teacher's testimony was consistent with the nonpublic school's principal's testimony and the CSE meeting minutes that estimated the student's levels ranged from pre-kindergarten to kindergarten (compare Tr. p. 211 with, Tr. p. 414 with, Dist. Ex. 13).

In addition, the special education teacher from the assigned school indicated that the school was prepared to implement all of the goals and management strategies included in the May 2010 IEP, while targeting an increase in the student's independence levels (Tr. pp. 183-87, 190-92, 226-28). According to the special education teacher, she provided differentiated instruction for each student in the class based on assessments she conducted several times per year for each student and their ability levels (Tr. pp. 170, 178).¹⁰ In addition, the special education teacher indicated that the assigned school was able to offer the student 1:1 instruction during the school day (Tr. pp. 168-69). According to the special education teacher, the level of individual instruction provided to students in the 6:1+1 class varied depending on the needs of the particular student (Tr. p. 226). She further explained that depending upon their level of need, some students received more individual instruction; however, some students received less individual instruction, because they were working on increasing their levels of independence (*id.*). Furthermore, the special education teacher described her use of graphic organizers, which she employed to increase independence among students (Tr. pp. 178-79). The special education teacher also utilized a class visual schedule and could have provided the student with his own visual schedule (Tr. p. 179). Next, the special education teacher described how she fostered communication skills in her students, through tools such as "the mood meter," and use of the calendar (Tr. p. 173). The hearing record also describes how she emphasized social interaction between students throughout the day across tasks (*id.*). Moreover, the assigned school was capable of addressing the student's related services needs because it provided speech-language therapy and OT (Tr. pp. 173, 192-93).¹¹

Lastly, the hearing record indicates that the assigned school could address the student's behavioral needs. Here, the assigned school had the support of an autism coach, who assisted in the development of FBAs and BIPs (Tr. p. 194). The special education teacher also described her use of a classroom behavior plan (Tr. pp. 188-89). Moreover, the special education teacher opined that she could implement the student's behavior plan, and described how she would do so (Tr. pp. 189-90). Similarly, the special education teacher also described how she could address the student's health and physical management needs (Tr. pp. 186-88). For example, regarding the student's need for close supervision to prevent him from leaving the classroom without permission, the teacher indicated that she could address that need through adjustment in the physical structure of the classroom regarding desk arrangement and the location of the door, as well as staff placement in the classroom (Tr. pp. 185-86; Dist. Ex. 5 at pp. 5, 7). The teacher also noted that the student's need for supervision and safety in and out of the classroom and negotiating between environments (including traveling up/down stairs) would be provided, because students were supervised at all times and the student in the instant case "would never be alone in the school" or outside the school (Tr. pp. 186, 193). Based on the foregoing set of circumstances, there is no showing in the hearing record that the district would have deviated

¹⁰ Testimony by the special education teacher indicated she conducted the Assessment of Basic Language and Learning Skills (ABBLs) three times per year and the "Brigance" two times per school year in their entirety (Tr. p. 170).

¹¹ At the beginning of the 2010-11 school year, students in the recommended class received speech-language therapy in school and/or were offered Related Services Authorizations (RSAs) (Tr. pp. 206-07). Testimony by the special education teacher of the recommended class indicated that subsequent to the beginning of the 2010-11 school year, the district hired another speech-language pathologist to provide speech-language therapy in school (Tr. pp. 174, 206-07, 203-05).

from substantial or significant provisions of the student's IEP in a material way and thereby precluded him from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P., 2010 WL 1049297, at *2).

Conclusion

Having determined that the district did not fail to offer the student a FAPE for the 2010-11 school year based on the sufficiency of the evaluative data on which the May 2010 CSE based its program recommendations, the adequacy of the IEP's description of the student's present levels of performance, the sufficiency of the goals, the lack of an FBA and the lack of parent counseling and training in the IEP, it is not necessary to reach the issue of whether the nonpublic 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 reach them in light of my determination

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated September 15, 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 nonpublic school is hereby annulled

Dated: Albany, New York
December 29, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER