



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-227

Application of the XXXXXXXXX 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, Lisa R. Khandhar, Esq., of counsel

The Law Offices of Steven L. Goldstein, attorneys for respondent, Steven L. Goldstein, Esq. and H. Jeffrey Marcus, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appealed from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to, among other relief, reimburse the parent for her son's tuition costs at the Rebecca School for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the U.S. District Court for the Southern District of New York (see D.N. v. New York City Dep't of Educ., 905 F.Supp.2d 582 [S.D.N.Y. 2012]). The factual background, including the student's educational history, was discussed in the prior decision relative to this appeal and, as such, need not be repeated again in detail, as the parties'

familiarity with the facts therein is presumed (Application of the Bd. of Educ., Appeal No. 11-086).

On January 12, 2010, the CSE convened for the student's annual review and to develop the student's IEP for the 2010-11 school year (Dist. Ex. 5 at pp. 1-2). Finding the student eligible for special education as a student with autism, the January 2010 CSE recommended a 12-month program consisting of, among other things, a 6:1+1 special class in a specialized school, a 1:1 crisis management paraprofessional, and the related services of individual occupational therapy (OT), individual speech-language therapy, individual physical therapy (PT), and individual counseling (id. at pp. 1, 15, 17).¹ The January 2010 CSE also recommended support for management needs, as well as annual goals and a behavioral intervention plan (BIP) (id. at pp. 3-14, 18).

In a "Notice of Recommended Deferred Placement" dated January 12, 2010, the district suggested that the parent consider deferring the student's placement in the recommended program until July 1, 2010, the start of the 12-month school year, as the January 2010 IEP was developed for the 2010-11 school year (Dist. Ex. 8 at p. 1). In a January 14, 2010 letter to the district, the parent acknowledged receipt of the Notice of Recommended Deferred Placement but stated that she could neither agree nor disagree with its recommendations for the student as she wanted more information to make a decision (Parent Ex. 1 at p. 1).

The parent signed an undated contract enrolling the student in the Rebecca School for the 2010-11 school year, which required a deposit due on April 15, 2010 (Parent Ex. S).²

By letter dated June 15, 2010, the district summarized the recommendations made by the January 2010 CSE and advised the parent of the particular public school site to which it had assigned the student to attend for the 2010-11 school year (Dist. Ex. 9). In a June 16, 2010 letter to the district, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year on both procedural and substantive grounds (Parent Ex. H at p. 1). The parents also notified the district of her intention to place the student at the Rebecca School for the 2010-11 school year, and to seek public funding for the costs of the student's tuition (id.). In a second letter to the district dated June 17, 2010, the parent confirmed receipt of the district's June 15, 2010 letter and requested assistance in setting up an appointment to view the assigned public school site, as well as information regarding the school and classroom (Parent Ex. G at p. 1). On June 22, 2010, the parent visited the assigned public school site identified in the June 15, 2010 letter, where she met with the assistant principal (Tr. pp. 727-28, 766, 772).

In an August 16, 2010 letter to the district, the parent again rejected the January 2010 IEP and reiterated her intent to enroll the student at the Rebecca School at the public expense (Parent Ex. F).

¹ The student's eligibility for special education and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

² The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (Tr. p. 519; see 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice

In a due process complaint notice dated September 13, 2010, the parent alleged that the district failed to offer the student a FAPE on procedural and substantive grounds (Parent Ex. A at pp. 4-11). Specifically, the parent alleged that: (1) the district refused to place the student in a nonpublic school; (2) the January 2010 CSE was not properly constituted; (3) the January 2010 IEP was based on insufficient and unreliable information; (4) the annual goals listed in the January 2010 IEP were not sufficient to meet the student's needs, or alternatively, could not be implemented in the recommended program; (5) the January 2010 CSE failed to conduct a functional behavioral assessment (FBA), resulting in an improper BIP for the student; (6) the January 2010 IEP did not include a plan for the student's transition from a private school to a public school; (7) promotional criteria identified in the January 2010 IEP were not appropriate; (8) the parent was denied an opportunity to meaningfully participate in the development of the student's January 2010 IEP; (9) the January 2010 CSE predetermined the student's program recommendation; (10) the assigned public school site would not have been appropriate for the student; and (11) the January 2010 CSE failed to include parent counseling and training, sensory accommodations, or appropriate transportation in the student's IEP (id. at pp. 5-14).³ The parent also asserted that the public school site to which the district assigned student was not appropriate (id. at p. 12).

The parent also asserted that the Rebecca School was appropriate for the student and that equitable considerations weighed in favor of the parent's request for relief (Parent Ex. A at p. 14). Lastly, the parent requested a determination of the student's pendency placement (id. at pp. 15-16). For relief, the parent sought the cost of student's tuition at the Rebecca School for the 2010-11 school year (id. at pp. 15-17).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 9, 2010 to address the student's pendency placement. In an interim decision dated November 19, 2010, the IHO determined that the student's pendency placement was the Rebecca School, effective September 13, 2010 (IHO Interim Decision at p. 2).

The impartial hearing reconvened on November 17, 2010 and concluded on April 28, 2011, after six days of proceedings (Tr. pp. 1-841). On June 10, 2011, the IHO issued a decision in which she determined that the district failed to offer the student a FAPE for the 2010-11 school year (IHO Decision at pp. 22). The IHO found that the district failed to offer the student a FAPE because the parent was denied the opportunity to meaningfully participate in the decision-making process at the January 2010 CSE meeting, in that the CSE convened with the "expressed intent" of placing the student in a 6:1+1 program and, in so doing, failed to give "due consideration" to the opinions of the parent and the CSE members from the Rebecca School regarding the inappropriateness of the ABA and TEACCH methodologies for the student (id. at

³ At the impartial hearing, the parent's counsel informed the IHO that transportation was not an issue (Tr. pp. 60-61). Therefore, the parent withdrew the issue from consideration and, as such, it will not be addressed herein.

pp. 21-22). Additionally, the IHO found that the assigned public school site would not have adequately addressed the student's sensory needs due to the absence of swings and appropriate sensory equipment (id. at p. 21). The IHO next found that the parent's unilateral placement at the Rebecca School was appropriate and that equitable considerations supported the parent's request for relief (id. at pp. 22). Consequently, the IHO ordered the district to pay the costs of the student's tuition at the Rebecca School for the 2010-11 school year (id. at p. 23).

IV. Appeal for State-Level Review

The district appealed the IHO's decision. In its petition, the district argued that the IHO erred in finding that the district failed to offer the student a FAPE. The district contended that the January 2010 CSE did not predetermine the program recommendation for the student, as it considered other placements before concluding that a 6:1+1 class was appropriate for the student. The district also asserted that the district afforded the parent a meaningful opportunity to participate in the January 2010 CSE meeting and that no specific concerns related to teaching methodologies were raised by the parent or the CSE members from the Rebecca School at the CSE meeting. The district also alleged that the IHO erred in finding that the assigned public school site would not have sufficiently addressed the student's sensory needs. The district also argued that the IHO erred in finding that the parent's unilateral placement was appropriate and that equitable considerations weighed in the parent's favor. Next, the district argued that the IHO erred in ordering tuition reimbursement and direct funding of the costs of the student's tuition at the Rebecca School because the school is a for-profit business entity. The district also asserted that the parent's allegations in the due process complaint notice that the IHO did not address should be dismissed. Specifically, the district alleged that the failure to conduct an FBA did not result in a denial of a FAPE, the January 2010 CSE developed an appropriate BIP, and the annual goals set forth in the January 2010 IEP were appropriate and measurable.

In her answer, the parent initially contended that the district's petition should be dismissed because the verification affixed to the petition did not state that the petition was verified pursuant to a resolution of the district's Board of Education authorizing the commencement of the appeal. The parent asserted that the IHO correctly determined that she was denied a meaningful opportunity to participate in the development of the student's January 2010 IEP and that the district predetermined the program recommendation for the student. The parent also asserted that the IHO correctly found that the district failed to adequately address the student's sensory needs. Further, the parent argued that: the evaluative materials considered by the January 2010 CSE did not support the CSE's recommendations for the student; the BIP developed by the January 2010 CSE was inadequate; the January 2010 CSE improperly refused to consider recommending a non-public school placement for the student; the January 2010 IEP failed to sufficiently address the student's need for adult support by recommendation of a 1:1 paraprofessional; the January 2010 IEP was defective because it failed to reflect appropriate present levels of academic performance, and failed to include parent counseling and training, appropriate annual goals and objectives, or transitional support services. With respect to the assigned public school site, the parent asserted that the district failed offer any evidence with regard to the appropriateness of a particular public school site as of September 2010 and that the abilities and needs of the other students in the assigned classroom were not similar to the student. Next, the parent contended that the district did not raise allegations concerning the

appropriateness of the Rebecca School or the for-profit status of the school in its responses to the parent's due process complaint notice and, therefore, any portions of the petition relating to those issues should be dismissed. Lastly, the parent contended that the unilateral placement at the Rebecca School was appropriate and that equitable consideration weighed in favor of the parent's requested relief.

In a reply to the parent's answer, the district contended that the petition was properly verified and that an SRO may properly consider the allegations in a petition that were not raised in a party's response to due process complaint notice.

On August 29, 2011, this SRO rendered a decision in an administrative appeal in this matter, which sustained the appeal and found that the district offered the student a FAPE for the 2010-11 school year (Application of the Bd. of Educ., Appeal No. 11-086). The decision held that the district had not predetermined the recommended placement, had not ignored the parent's opinions, and had not failed to offer a placement that would accommodate the student's sensory needs. In that decision I declined to review claims that went unaddressed by the IHO and were also not cross-appealed by the parent.

The parent appealed the August 29, 2011 decision, and on December 10, 2012, the United States District Court, Southern District of New York issued a Memorandum and Order, remanding the case back to the SRO (D.N., 905 F.Supp.2d at 589). Specifically, the Court held that those issues raised by the parent in the due process complaint, but not addressed by the IHO and not addressed by the SRO in the prior decision, must be addressed (id.). The court noted that the undecided claims "may provide an alternative basis for providing the [p]arent tuition reimbursement" (id. at 588).⁴

V. Applicable Standards

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

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

⁴ It has been noted that there is a split of authority on the issue of whether a cross-appeal is necessary for an SRO to rule on claims that were not addressed by and IHO (see Y.S. v. New York City Dep't. of Educ., 2013 WL 5722793, *7 [S.D.N.Y. 2013]), however, I have of course proceeded under the directive of the District Court's remand in this instance.

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4 [d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Bd. of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

My prior decision in this matter addressed the parent's claims that the district predetermined the student's recommendation, that the district deprived the parent a meaningful opportunity to participate in the development of the student's January 2010 IEP, and that the district failed to adequately accommodate the student's sensory needs (Application of the Bd. of Educ., Appeal No. 11-086). Accordingly, the remainder of this decision addresses the parent's remaining claims set forth in the due process complaint notice that were not reviewed by the IHO and were not addressed in the prior SRO decision (D.N., 905 F.Supp.2d at 589).

A. January 2010 IEP

1. CSE Composition

The parent alleged in her due process complaint notice that the January 2010 CSE was improperly composed, citing the lack of appropriate qualifications of the district special education teacher and district representative (Parent Ex. A at pp. 5-6). Although the matter was not cross-appealed, I also note that the parent did not otherwise pursue the issue of CSE composition in her answer. In any event, the evidence in the hearing record establishes that the CSE was properly constituted (see 20 U.S.C. § 1414[d]; 34 CFR 300.321; 8 NYCRR 200.3). The participants at the January 12, 2010 CSE meeting included: the parent; a district special education teacher, who also served as the district representative; a district school psychologist; the student's special education teacher at the Rebecca School; a social worker from the Rebecca School; an additional parent member; and a friend of the parent (Dist. Exs. 5 at p. 2; 6; see Tr. p. 105).

A district representative member of the CSE is described as a representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist, provided that such individual meets the above statutory qualifications (8 NYCRR 200.3[a][1][v]). Furthermore, the IDEA requires the attendance of a "special education teacher" or "special education provider" of the student (20 U.S.C. § 1414[d][1][B][iii]; 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). The Official Analysis of Comments to the federal regulations states that the special education teacher member of the CSE "should be the person who is, or will be, responsible for implementing the IEP" (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

The district school psychologist testified that the individual who served as the district special education teacher on the CSE was licensed as a special education teacher (Tr. p. 106); however, nothing in the hearing record indicates that she would be a teacher of the student or establishes her qualifications as the district representative.⁵ However, even if the qualifications of the district special education teacher/district representative amounted to a violation of the CSE membership procedures, the hearing record is devoid of any evidence that such a violation impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606, 646-47 [S.D.N.Y. 2011]). This is particularly so in light of the fact that the

⁵ The parent's due process complaint notice stated that the district special education teacher was "assigned to the CSE and, instead of teaching, merely conduct[ed] evaluations and prepare[d] IEPs" (Parent Ex. A at p. 6). While asserted to discredit her qualifications as a special education teacher, such allegations tend to support that the special education teacher possessed the knowledge necessary to serve as a district representative (see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; 8 NYCRR 200.3[a][1][v]).

teacher providing the student's special education services from the Rebecca School was present at and participated in the January 2010 CSE meeting (see Dist. Ex. 5 at p. 2; see also Application of the Bd. of Educ., Appeal No. 11-086, at pp. 8-9). As the Rebecca School teacher—who was directly acquainted with this student's particular needs—was able to fully participate in the January 2010 CSE meeting, the lack of a district special education teacher "of the student" was of little if any consequence in this instance and did not rise to the level of a denial of a FAPE (A.H., 2010 W L 3242234, at *2; see S.H. v. Eastchester Union Free Sch. Dist., 2011 W L 6108523, at *7 [S.D.N.Y. Dec. 8, 2011] [finding no denial of educational benefit where the CSE meeting was attended by those who "could contribute the information necessary for the CSE to address [the student]'s educational and therapeutic needs"]; Application of a Student with a Disability, Appeal No. 12-071; Application of the Bd. of Educ., Appeal No. 12-010; Application of the Bd. of Educ., Appeal No. 08-105). Moreover, given the attendance at the January 2010 CSE meeting and the participation of all members, there is no indication in the hearing record that the student required services available in the district of which the service providers were not aware.

2. Sufficiency of Evaluative Information and Present Levels of Performance

I turn next to the parent's assertion that CSE reviewed insufficient or unreliable evaluative data and that the present levels of academic performance set forth in the January 2010 IEP were deficient for failure to address the specifics of the student's abilities, levels of instruction or preferences (Parent Ex. A at pp. 7-8). 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 CFR 300.304[b][1]; see Letter to Clarke, 48 ID ELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. §1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. §1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), 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 CFR 300.304[c][3]; 8 NYCRR 200.4[b][6][ix]; see Application of the Bd. 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 request a reevaluation (34 CFR 300.303[a]; 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 agree otherwise (34 CFR 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]).

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 CFR 300.320[a][1]; 8

NYCRR 200.4[d][2][i]; see 8 NYC RR 200.1[ww][3][i]). 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 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *9 [S.D.N.Y. Aug. 19, 2013]).

In the present case, the January 2010 CSE considered the following documents in its review: the district's October 2009 classroom observation of the student at the Rebecca School, a psychological evaluation of the student conducted over three days in November and December 2009 by a Rebecca School psychologist, and the student's December 2009 interdisciplinary report of progress from the Rebecca School (Tr. pp. 106-07; Dist. Exs. 7; 10-12). According to the district school psychologist, the CSE also relied on the student's IEP from the previous year as a frame of reference to determine progress (Tr. p. 107; see Dist. Ex. 6). The district school psychologist testified that the January 2010 CSE was provided with the Rebecca School psychological evaluation at the start of the meeting (Tr. pp. 106, 192; see Dist. Ex. 11). Detailed discussion of the content of these documents is contained in the prior SRO decision in this case and therefore need not be repeated herein (Application of the Bd. of Educ., Appeal No. 11-086, at pp. 11-17).

The district did not conduct its own psychoeducational evaluation of the student (Tr. p. 170). The evidence shows that the district's school psychologist explained that the psychological evaluation from the Rebecca School indicated that the student was not able to undergo traditional formal testing, although it was attempted (Tr. p. 171). She also testified that the student's teacher would be able to give "a fairly accurate representation of where he was able to function" (id.)⁶ Thus, the Rebecca School progress report and the input from Rebecca School representatives at the CSE meeting was the most effective way for the CSE to determine the student's needs under the circumstances of this case. In any event, a district is not required to conduct its own evaluations in developing an IEP and recommending an appropriate program, but may rely on appropriate privately obtained evaluations (M.H. v. New York City Dep't of Educ., 2011 WL 609880 at *9-10 [S.D.N.Y. Feb. 16, 2011]). The district may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. March 29, 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]; see also Application of a Student with a Disability, Appeal No. 12-165).

The minutes of the CSE meeting also reflect that the student's needs and abilities were discussed at the meeting, including that the student: used verbal approximations and was

⁶ The Rebecca School program director confirmed that standardized testing was more difficult for the student than many of the school's other students (Tr. p. 536).

emerging verbally; used a communication device; was working on self-regulation; was functioning at the pre-kindergarten level academically; and could recognize all letters (Dist. Ex. 6). The minutes reflect that the team discussed safety concerns for the student and that the Rebecca School special education teacher made comments concerning the student's lack of safety awareness that resulted in the team recommending a crisis management paraprofessional (id.). The minutes reflect that the January 2010 IEP was created and revised based upon review of the Rebecca School report and input from the Rebecca School representatives and the parent (id.).

Based on the foregoing, the information before the CSE was sufficient for the CSE to accurately identify the student's needs and those needs were accurately reflected and set forth in sufficient detail on the January 2010 IEP (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]). The information contained in the student's January 2010 IEP accurately reflected the CSE's understanding of the student's present levels of academic performance and special education needs in light of the evaluative information available to it at the time the IEP was formulated. For example, the student's present levels of performance in the IEP reflected elements of the December 2009 progress report submitted by the Rebecca School (compare Dist. Ex. 5 at pp. 3-5, with Dist. Ex. 10). Consistent with Rebecca progress report, the IEP accurately detailed the student's academic performance and learning characteristics, noting that he "present[ed] with significant developmental delays" and that his instructional level for reading and writing and math was in the pre-kindergarten range (Dist. Ex. 5 at p. 3; see Dist. Ex. 10 at pp. 3-5, 7-8). Also consistent with the Rebecca progress report, the IEP adequately detailed the student's social/emotional performance, noting the student's sensory regulation difficulties and that his behavior "seriously interfere[d] with instruction and require[d] additional adult support" (Dist. Ex. 5 at p. 4; see Dist. Exs. 10 at pp. 5-7; 11-12). Likewise, regarding the student's health and physical development, the IEP noted that the student exhibited low muscle tone and possible auditory sensitivities and recommended assistive technology to help him communicate, in addition to OT and PT (Dist. Ex. 5 at p. 5; see Dist. Ex. 10 at pp. 7-8).

In summary, the hearing record establishes that the CSE considered the evaluative information before it, which included detailed progress reports from the student's placement at the time of the January 2010 CSE meeting, as well as the parent's concerns, the student's academic abilities and needs, his required related services and support, and the effect of his behavior upon his learning. The student's present levels of performance in academics, social and emotional performance, health and physical development and management needs were reflective of the evaluative data and reports before the CSE and were sufficiently detailed on the IEP (see Dist. Ex. 5 at pp. 3-5). Based upon the foregoing, the evidence in the hearing record shows that the CSE had sufficient information concerning the student's present levels of performance in order to develop an IEP that accurately reflected the student's special education needs.

3. Transitional Support Services

The parent argued that the IEP failed to include transitional support services to help the student transition from a more restrictive placement at the Rebecca School to the less structured special education program recommended in the January 2010 IEP (Parent Ex. A at p. 10).

State regulation requires that, in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]).⁷ To the extent that it could be argued that there was any change at all in the restrictiveness of the settings between the Rebecca School and the public school program, which is highly questionable, since such change from a special class in a specialized private school to a special class in a specialized public school with no change in access to regular education peers in terms of restrictiveness is de minimus in this instance,⁸ which further diminished the need to recommend transitional support services on the student's January 2010 IEP (see 8 NYCRR 200.1[ddd]).⁹

Notwithstanding the above, the hearing record reflects that the May 2011 CSE did in fact address the parents' concern with the student's transition on the IEP (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *9 [S.D.N.Y. Mar. 19, 2013]). The proposed program for the student for the 2010-11 12-month school year, consisting of a 6:1+1 special class with the addition of a 1:1 crisis management paraprofessional for the student, was highly structured and provided support for the student's transitional needs (Dist. Ex. 5 at pp. 15-17). The IEP made specific accommodations for the student's regulatory needs and safety needs and to address his behaviors that interfered with instruction (id. at pp. 3-5, 18). The record reflects that the CSE heavily relied upon the detailed progress report from the Rebecca School and the input from the Rebecca School representatives at the CSE meeting to understand the depth of the student's needs and abilities and to draft appropriate annual goals and set forth appropriate supports and services (id. at pp. 3-14). While it would have been appropriate for transitional support services to be included on the January 2010 IEP as a supportive service, the IEP addressed the student's sensory needs, the parent's safety concerns, and the student's problem behaviors. Consequently, although the hearing record does not show that the January 2010 CSE was required to include

⁷ The Office of Special Education issued a guidance document, which describes transitional support services for teachers and how they relate to a student's IEP (see "Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Documents," at pp. 27-28, Office of Special Education. [Apr. 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

⁸ There is no suggestion that the State regulation regarding transition support services for teachers was intended for certified special education teachers of a highly intensive special class settings such as the 6:1+1 special class recommended in this case. Instead it is much more likely that an individual with such experience would be the provider of transitional support services to another teacher having either less familiarity or formal training in working with a student with autism (e.g., a regular education teacher).

⁹ To the extent the parent argued that the CSE was required to develop a "transition plan" for the student to facilitate his transfer from a nonpublic school to a district public school, the IDEA does not specifically require a district to formulate a "transition plan" as part of a student's IEP when a student transfers from one school to another (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8-9 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y., Oct. 16, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d at 195).

transitional support pursuant to State regulations, the IEP as a whole was nevertheless designed with services that would address the student's transition from his private school to his public school and any failure to list transitional support services under the circumstances did not rise to the level of a denial of a FAPE (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).

4. Annual Goals and Promotion Criteria

Turning next to the annual goals, the parent asserted that the annual goals set forth in the January 2010 IEP were not appropriate, in that they failed to address student's needs and were vague and not measurable (Parent Ex. A at pp. 8-9). The parent further alleged that the annual goals could not be implemented in the program recommended in the January 2010 IEP because they could only be implemented in a program that utilized a developmental individual-difference relationship (DIR) based curriculum (id. at p. 9).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. §1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii][a]). 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 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternative assessments (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

The January 2010 IEP contained 16 annual goals and 41 associated short-term objectives that focused on the student's needs relating to pre-academic skills, reading, math, receptive and expressive language, articulation, pragmatic language skills, sensory abilities, motor planning, core strength, visual spatial processing, and communication skills (Dist. Ex. 5 at pp. 6-14). The goals and objectives were sufficiently specific and measurable to guide instruction and to evaluate the student's progress several times over the course of the school year (id.). The annual goals in the January 2010 IEP appropriately addressed the student's educational needs and considered his significant developmental delays, his need for sensory regulation, and his interfering behaviors (id. at pp. 3-14). The IEP reflects a program that offered the student the support and services needed to address his global delays in academics as well as his social, emotional and physical developmental needs (id.).

The district school psychologist testified that the annual goals were discussed at the January 2010 CSE meeting and that all participants were part of that discussion (Tr. pp. 126-28). Considering the student's present levels of performance in academics, the CSE first discussed

goals relating to pre-academic skills (Tr. p. 127; see Dist. Ex. 5 at p. 6). The hearing record indicates that some of the goals included in the January 2010 IEP were provided to the CSE by the Rebecca School (Tr. pp. 129-30, 812-14). The hearing record also shows that, during the CSE's discussion about the annual goals, the mother raised concerns regarding the difficulty and high accuracy level of the annual goals for the student (Tr. p. 127, 813-14). In response to the mother's concerns, the CSE team reduced the accuracy level required for the goals (Tr. pp. 127, 814). The goals for the student's areas of need separate from academics, including speech-language therapy, OT, PT, and counseling, were developed with input from the special education teacher and the social worker from the Rebecca School (Tr. pp. 128-37).

The parent alleges that the annual goals were vague; however, to the extent that is true, the inclusion of short term objectives in this case cured any lack of specificity in the annual goals (Dist. Ex. 5 at pp. 6-14; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013] [finding that, although the goals were vague, they were modified by more specific objectives that could be implemented]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013]; A.D., 2013 WL 1155570, at *10-*11; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *8 [S.D.N.Y. Sept. 22, 2011]). The parent's assertion that the goals failed to state a baseline of student's current level of functioning is equally unpersuasive because state regulations do not require "baseline" functioning levels to be included in annual goals (R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]).¹⁰

I note that the January 2010 IEP did not include the required description of the methods by which the student's progress toward the annual goals would be measured (20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3][i]; 8 NYCRR 200.4[d][2][iii][b]). The district school psychologist testified as to her belief that the goals were measurable and that the methods of measurement could be completed by the individual teacher or clinician (Tr. pp. 128, 181-82). These methods of measurement are not specified on the IEP itself, and as such this testimony cannot be relied upon to "rehabilitate a deficient IEP after the fact" (R.E., 694F.3d at 186). However, this is a procedural defect and there is no evidence in the hearing record to support a conclusion that the CSE's failure to specify the evaluation procedures to be employed in measuring the student's progress toward the annual goals rose to the level of a denial of a FAPE (see J.L. v. City Sch. Dist., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; J.A. v. New York City Dep't of Educ., 2012 WL 1075843, at *7-*8 [S.D.N.Y. Mar. 28, 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289 [S.D.N.Y. 2010]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F Supp 2d 283, 294-95 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

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The parent also asserted that, because they were specific to "DIR", the annual goals and short term objectives could not be implemented in the special education program recommended by the January 2010 CSE. Initially, a review of the IEP reveals that there is nothing that states that the goals are "DIR" goals (see generally Dist. Ex. 5 at pp. 6-14). Furthermore, testimony by the special education teacher at the assigned public school site explained that the annual goals

¹⁰ The annual goals must meet a simpler criteria than the "baseline" suggested by the parent—which is the goal must be "measurable."

contained in the IEP could be implemented utilizing different methodology (see Tr. pp. 262-62; see R.E., 694 F.3d at 186 [holding that testimony may be received that explains or justifies the services listed in the IEP]).

Turning next to the parent's allegations regarding the lack of promotional criteria in the January 2010 IEP, State regulations do not require that IEPs contain promotion criteria (see 8 NYCRR 200.4[d][2]; see also 34 CFR 300.320). Guidance from the Office of Special Education indicates that "[i]f the [CSE] determines that the criteria for the student to advance from grade to grade needs to be modified, the IEP would indicate this as a program modification. This information would most appropriately be indicated in the IEP in the 'Supplementary Aids and Services/Program Modifications/Accommodations' section of the IEP" ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Documents," at p. 51, Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). Furthermore, the district's school psychologist testified that the IEP promotion criteria were only applicable for students taking state tests and that the student was not eligible for state tests (Tr. pp. 155-56). Consistent with this testimony, the January 2010 IEP indicates that the student would participate in alternative assessments (Dist. Ex. 5 at p. 17).

Based on the above, the evidence in the hearing record reflects that the annual goals, short-term objectives, and promotion criteria in the January 2010 IEP appropriately addressed the student's areas of need and contained sufficient specificity for providers and teachers to evaluate the student's progress.

5. Parent Counseling and Training

The parent asserted that the IEP failed to include parent counseling and training, as required for programs for students classified with autism and asserts that this constitutes a denial of a FAPE (Parent Ex. A at p. 13).

State regulations require that an IEP indicate the extent to which parent counseling and 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 [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, some 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 a comprehensive parent training component that satisfied the requirements of the State regulation (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191; 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. 2010]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [State regulation] to provide parent t

counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see 8 NYCRR 200.13[d]; M.W., 725 F.3d at 142). The Second Circuit further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see K.L. v. New York City Dep't of Educ., 2013 WL 3814669 [2d Cir. July 24, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *10 [S.D.N.Y., Oct. 16, 2012]).

The meeting minutes from the January 2010 CSE meeting reflect that parent counseling and training was discussed at the meeting, although it was not reflected on the student's January 2010 IEP (Dist. Ex. 6). Other than the conclusory assertion that the failure to specify parent counseling and training on student's IEP rose to the level of a denial of FAPE, the parent did assert any detail in this regard.

Furthermore, the district provided the testimony of a special education teacher from the assigned public school site that parent training was in fact provided at the public school site and that notices were sent home to the parents regarding such training (Tr. pp. 238-40). This testimony suggests that parent counseling and training was "programmatic" at the assigned public school site. However, the Second Circuit has explained that under the "snapshot" rule, this evidence may not be considered because it constitutes "retrospective testimony" regarding services that the district failed to list in the IEP (R.E., 694 F.3d at 185-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of the parents' placement decision and that "retrospective testimony" regarding service is not listed in the IEP may not be considered, but rejecting a rigid "four-corners rule" that would prevent consideration of evidence explicating the written terms of the IEP]; see B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-77 [S.D.N.Y. 2012]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; F.L., 2012 WL 4891748, at *14; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *10 [W.D.N.Y. Sept. 26, 2012], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]).

Based upon the foregoing, although the January 2010 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (see M.W., 725 F.3d at 142; R.E., 694 F.3d at 191; F.L., 2012 WL 4891748, at *9-*10; C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

6. Special Factors - Interfering Behaviors

The parent asserted that the district failed to perform an FBA prior to developing the student's BIP and that the BIP developed was not sufficient to address the student's needs (Parent Ex. A at p. 10).

When developing an IEP, if a student's behavior impedes his or her learning or the learning of others, the CSE must "consider the use of positive behavioral interventions and

supports, and other strategies, to address that behavior" when developing, reviewing, and revising an IEP (20 U.S.C. § 1414[d][3][B][i]; see 34 CFR 300.324[a][2][i]; 8 NYCRR 200.4[d][3][i]). 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 (M.W., 725 F.3d at 140; K.L., 2013 WL 3814669; R.E., 694 F.3d at 190; A.H., 2010 WL 3242234, at *4; see F.L., 2012 WL 4891748, at *8; T.M. v. Cornwall Cent. Sch. Dist., 900 F. Supp. 2d 344, 353-54 [S.D.N.Y. 2012]; S.H., 2011 WL 6108523, at *8-*9; C.F., 2011 WL 5130101, at *9).

It is undisputed that the district did not conduct a formal FBA (Tr. p. 123). The district school psychologist testified that the January 2010 CSE was able to determine the student's behavioral triggers and, therefore, did not need to conduct an FBA and, further, that no participant at the CSE meeting made any objection to the BIP (Tr. pp. 123-24). The school psychologist testified that multiple behaviors interfered with the student's learning, including self-injurious behaviors, limited safety awareness, aggression when denied his needs and wants, as well as attention and sensory seeking behaviors (Tr. p. 121). She testified that the plan was to eliminate the student's self-injurious and aggressive behaviors, as well as reduce his tantrums and attention seeking behaviors, and increase his ability "to maintain a regulated state so that he [could] be more available for academics" (Tr. pp. 121-22). She noted that the strategies discussed included having a "sensory diet" for the student to maintain his regulated state and to improve the student's ability to communicate (Tr. p. 122). She noted that the team had an understanding of the root of the student's behaviors, which they believed to be due to the student's low frustration tolerance and the fact that he was nonverbal and unable to express his wants and needs (Tr. p. 123). The evaluative information reviewed by the January 2010 CSE also described the student behavioral needs (Dist. Exs. 10 at pp. 1-2, 6-8; 11 at pp. 2-3, 7, 9; 12 at pp. 1-3). That information was included in the January 2010 IEP (Dist. Ex. 5 at pp. 3-5).

Further, at the time of the January 2010 CSE meeting, the student was attending the Rebecca School, and conducting an FBA to determine how the student's behavior related to the student's school environment at the Rebecca School would have diminished value where, as here, the CSE was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [stating that it may be appropriate in some circumstances 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]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. Aug. 5, 2013]).

"The district school psychologist testified that the student's behaviors were not only addressed in the BIP at the end of the January 2010 IEP, but also throughout the IEP itself (Tr. pp. 123-24). She also testified that no one at the CSE meeting objected to the BIP (Tr. p. 124). The January 2010 IEP and the accompanying BIP recommended significant classroom supports and strategies to address the student's behaviors (see generally Dist. Ex. 5). The BIP itself described the student's behaviors that interfered with his learning, including hitting his head with his hand and biting, exhibiting a limited awareness of safety, exhibiting aggression when denied needs or wants, engaging in tantrums, and exhibiting attention or sensory seeking behaviors (id. at p. 18). The BIP specified the frequency of some of these behaviors (id.). The BIP then

articulated the behavior changes expected and the strategies and supports to be utilized in order to effect such changes (*id.*). In addition, the January 2010 IEP recommended a 1:1 crisis management paraprofessional for the student, as well as frequent sensory breaks, use of visuals, setting of consistent limits, continuous 1:1 support to address the student's aggression and "make him more aware of safety issues," an oral motor protocol, provision of a concrete place to put objects, and adult prompts (*id.* at pp. 3-4). The January 2010 CSE also recommended annual goals specifically targeted to address the student's behaviors (*id.* at pp. 13-14).

Based on the foregoing, the hearing record reveals that the information before the CSE and the discussion at the CSE meeting was sufficient to develop an appropriate BIP for the student (*see* Dist. Ex. 5 at p. 18). The hearing record reveals that January 2010 IEP sufficiently addressed the student's interfering behaviors, particularly through the inclusion of a full time 1:1 crisis management paraprofessional and therefore, any failure in this instance to conduct an FBA did not deny the student a FAPE (*see M.Z.*, 2013 WL 1314992, at *5, *8 [finding that even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"], quoting *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 [2d Cir. 2009]).

7. 6:1+1 Special Class with 1:1 Crisis Management Paraprofessional Services

The parent argued that the 6:1+1 special class was not appropriate for the student and that the provision of a 1:1 crisis paraprofessional for the student did not address the student's need for support.

State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6 [h][4][ii][a]). Consistent with the student's needs as reflected in the evaluations and reports before the CSE and applicable State regulations, the January 2010 CSE appropriately recommended a 6:1+1 special class in a specialized school with a 1:1 paraprofessional, together with related services, to address the student's needs for the 2010-11 school year. (Dist. Ex. 5 at pp. 1, 15, 17).

The district school psychologist testified that the CSE specifically addressed the student's need for adult support in the IEP (Tr. pp. 118-20). She specifically noted the student's need for "significant adult support throughout the school day" (Tr. p. 118). She testified that the January 2010 CSE recommended a 1:1 crisis management paraprofessional for the student, in addition to other strategies to help him increase his engagement, such as visual and verbal prompts, redirection, and use of motivating objects (Tr. pp. 117-18; Dist. Ex. 5 p. 3). The district school psychologist testified that no one at the CSE meeting objected to the recommendation for a 6:1+1 special class for the student (Tr. pp. 194-95).

The parent testified that her concern regarding the 6:1+1 special class placement was that it would not offer enough support (Tr. p. 763). On the contrary, in addition to recommending a small, highly structured school environment, along with a 1:1 crisis management paraprofessional, as detailed above, the CSE drafted annual goals and short-term objectives to

address the student's needs, including his need for adult support (see Dist. Ex. 5 at pp. 6-14). The evidence in the records supports a finding that the CSE's recommendation was appropriate to meet the student's documented need for a structured program with intensive adult support and the concerns of the Rebecca School representatives that the program was not sufficiently individualized or supportive for the student lacks support in the record. Moreover, the prior decision detailed the manner in which the January 2010 IEP met the student's sensory needs (Application of the Bd. of Educ., Appeal No 11-086, at pp. 18-19).

The parent also asserted that the January 2010 CSE improperly refused to consider recommending a non-public school program for the student (Parent Ex. A at p. 5). However, the district was not required to consider placing the student in a non-public school if it believed that the student could be satisfactorily educated in the public schools (W.S., 454 F.Supp.2d at 148-49). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; A.D., 2013 WL 1155570, at *7-*8; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F.Supp.2d at 430-31). Thus, although the parent might have preferred otherwise, given the availability of an appropriate program for the student in this instance, the district was not required to recommend a nonpublic school.

Based upon the foregoing, the hearing record supports a finding that the recommended 6:1+1 special class in a specialized school, along with related services and support from a 1:1 crisis management paraprofessional, was reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

D. Challenges to Assigned Public School Site

The parent asserted that the assigned public school site would not have been able to implement the student's January 2010 IEP (Parent Ex. A at pp. 12-13). Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate

basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 2012 WL 4891748, at *14-*16; Ganje, 2012 WL 5473491, at *15 [finding the parent's pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also K.L., 2013 WL 3814669, at *6; Reyes, 2012 WL 6136493, at *7; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R., 910 F.Supp.2d at 677-78 [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dep't of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, 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 the IEP (R.E., 694 F.3d at 186-88; 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 to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B., 2013 WL 5438605, at *17; E.F.,

2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is in to the nature of the program actually offered in the written plan").

In view of the forgoing, the parent cannot prevail on the claims that the district would have failed to implement the January 2010 IEP at the public school site because a retrospective analysis of how the district would have executed the student's January 2010 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the January 2010 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Exs. H; G). Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, as such, there is no basis for concluding that it failed to do so.

Assuming for the sake of argument that the student had attended the recommended program at the assigned public school site, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation. In the previous decision in this matter, it was determined that the assigned public school site was capable of addressing the student's sensory needs (Application of the Dep't of Educ., Appeal No. 11-086, at pp. 10-11). Furthermore, as more fully discussed below, the evidence shows that the 6:1+1 special class at the assigned district public school site was capable of providing the student with a suitable classroom environment for the entire 12-month school year and appropriate functional grouping, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see T.L. v. Dep't of Educ., 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502 [S.D. N.Y. 2011]; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. District of Columbia, 478 F. Supp. 2d 73 [D.D. C. 2007]; see also L.J. v. School Bd. of Broward County, 850 F. Supp. 2d 1315, 1319 [S.D. Fla. 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

1. Functional Grouping

The parent asserted that the district would not have provided appropriate functional grouping for the student according to his age, as well as his academic, social, emotional, and management needs (Parent Ex. A at p. 12).

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Bd. of Educ., Appeal No. 08-095; Application of the Bd. of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]).

The parent testified that she was concerned after visiting the assigned public school site and learning that the student would be placed with second and third graders (Tr. p. 767). She feared that the student would be below the functional levels of the other student's in the classroom, but she acknowledged that she did not know if the reference to second and third graders referred to their academic level (Tr. p. 817). As described above, this claim is unavailing because the student did not attend the public school site, (see R.B., 2013 WL 5438605, at *17; F.L., 2012 WL 4891748, at *14), and as described below, the available evidence would not support the parent's claim in any event.

The hearing record establishes that the students in the student's recommended class would have been grouped similarly based upon their individual needs and academic abilities. The student was nine years old at the time of the January 2010 CSE meeting and his academic functioning level was in the prekindergarten range (Dist. Ex. 5 at p. 3). The district special education teacher from the assigned public school site testified that the student would have been appropriately placed in her class because the age range was seven to nine years old and the students' instructional levels in academic areas ranged from prekindergarten to first grade (Tr. pp. 223-24, 246-49). Based upon the evidence in the record, and assuming for the sake of argument that the student had attended the public school site, the district would have been able to suitably group the student for instructional purposes within the 6:1+1 special class (see M.P.G., 2010 WL 3398256, at *10-*11 [noting that the student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T., 716 F.

Supp. 2d at 290-92 [holding the district did not fail to offer a FAPE where the age range within a student's proposed class exceeded 36 months because the student could have been functionally grouped with other similarly-age students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R., 615 F. Supp. 2d at 294).

2. Change in the Assigned Public School Site

The parent also asserted that the student would not have been assigned to the same public school site for the summer 2010, as compared to rest of the 12-month school year, and that the change in school sites "would have been unduly stressful and anxiety provoking to [the student] and would have caused him to regress due to his transitional difficulties" (Parent Ex. A at pp. 12-13).

Even if the evidence in the hearing record established that the district would have assigned the student to two different public school sites during the course of the 12-month school year, a future change in a school building does not amount to an actionable claim that the student has been denied a FAPE (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *16 [S.D.N.Y. Aug. 23, 2012], aff'd 2013 WL 3814669).

3. Parental Participation in Selection of the Assigned School

In my previous decision, the parent's participation in the development of the student's January 2010 IEP was addressed (Application of the Bd. of Educ., Appeal No. 11-086, at pp. 8-10). The parent also asserted that she was denied the opportunity to participate in the selection of the assigned public school site (Parent Ex. A at pp. 12-13).

In general, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116[a][1], 300.327, 300.501[c]). However, as set forth above, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White, 343 F.3d at 379).

In T.Y., the student's IEP did not "name the school [the student] would attend," but rather, the parents received notice "in the mail that recommended a specific school placement" (584 F.3d at 416). The parents visited the recommended site, but thereafter rejected it; the district recommended a second site, which the parents "called" but did not visit, and thereafter unilaterally placed the student in a nonpublic school (id.). Pointing to the IDEA and its implementing regulations, the parents argued in T.Y. that "procedural safeguards make clear that parents are to be afforded meaningful participation in the decision-making process as to the location and placement of their child's school and classroom" (id. at 419). However, the Court in T.Y. relied upon precedent establishing that the "the term 'educational placement'" did not refer to the specific school, and expressly rejected the parents' argument (id. at 419-20; see also R.E., 694 F.3d at 191). Moreover, the Second Circuit in R.E. found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and that "[t]he [district] may select the specific school without the advice of the parents so long as it

conforms to the program offered in the IEP "P" (694 F.3d at 191-92; see also F.L., 2012 W L 4891748, at *12); K.L., 2012 W L 4017822, at *13; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. 2011]; S.F., 2011 W L 5419847, at *12, *14; C.F., 2011 WL 5130101, at *8-*9; A.L., 812 F. Supp. 2d at 504).

For the same reasons, the parents' argument must also be rejected because the parent's right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school building or classroom (T.Y., 584 F.3d at 416, 419-20; J.L., 2013 W L 625064, at *10). Therefore, based upon the foregoing, the parent could not prevail on a claim that the student was denied a FAPE because she was deprived of the opportunity to participate in the selection of the student's specific public school site or classroom because neither the IDEA nor its implementing regulations provides her this right (C.F., 2011 WL 5130101, at *9).

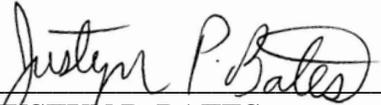
VII. Conclusion

In summary, the as I found previously, IHO's determinations that the district failed to offer the student a FAPE for the 2010-11 school year were not supported by the hearing record and none of the claims asserted by the parent in her due process complaint notice that went unaddressed by the IHO provide an alternative basis for providing the parent tuition reimbursement. It is therefore unnecessary to reach the issue of whether the student's unilateral placement at the Rebecca School was an appropriate placement or whether equitable considerations support an award of tuition reimbursement, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 W L 5130101, at *12; D.D-S., 2011 WL 3919040, at *13).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated June 10, 2011 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and directed the district to either pay or reimburse the parent for the student's tuition costs at the Rebecca School for the 2010-11 school year.

Dated: Albany, New York
December 12, 2013


JUSTYN P. BATES
STATE REVIEW OFFICER