



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-057

**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:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner,  
Francesca J. Perkins, Esq., of counsel

The Law Firm of Tamara Roff, P.C., attorneys for respondents, Tamara Roff, 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) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year. The parents cross-appeal from the IHO's decision and the IHO's failure to address certain issues raised in the due process complaint notice. The appeal must be sustained. The cross-appeal must be dismissed.

### **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, 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]-[i]).

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**

During the 2011-12 school year, the student attended the Rebecca School in a classroom with eight students, one teacher, and three assistant teachers, and received the following related services: two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a "cooking group consisting of three peers, [the speech-language therapist] and two teaching assistants," two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of OT in a small group,

and two 30-minute sessions per week of individual mental health services in the form of music therapy (see Dist. Ex. 5 at pp. 1, 4-6).<sup>1</sup>

On May 24, 2012 the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 6 at pp. 1, 14-15). Finding that the student remained eligible for special education and related services as a student with autism, the May 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school (id. at pp. 1, 9, 11, 13).<sup>2</sup> The May 2012 CSE also recommended the following related services: four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual physical therapy (PT), four 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a small group, and one 30-minute session per week of individual counseling (id. at pp. 9-10). Additionally, the May 2012 CSE recommended the services of a full-time, 1:1 crisis management paraprofessional (id. at p. 10). The May 2012 CSE created annual goals with corresponding short-term objectives, recommended strategies to address the student's management needs, completed a functional behavioral assessment (FBA), and developed a behavioral intervention plan (BIP) for the student (id. at pp. 2-9; see Dist. Exs. 6 at p. 2; 7 at pp. 1-2; 8 at p. 1).<sup>3</sup>

By final notice of recommendation (FNR) dated June 7, 2012, the district summarized the special education and related services recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 10).

In a letter dated June 18, 2012, the parents notified the district that they visited the assigned public school site and determined it was not appropriate to meet the student's needs (see Parent Ex. E at p. 1). The parents expressed concerns about the functional grouping of the students, the curriculum, the lack of "measures" taken to ensure the interaction of female students, the assigned public school site's ability to provide the student with the "sensory supports, instruction, and materials" to meet her needs, the physical environment of the classrooms, the inadequate supervision of students in the hallways, the number of students using the cafeteria at the same time, the ability of the assigned public school site to provide the student with all of the related services recommendations in the May 2012 IEP, and the space in which the student would receive related services with other students (id. at pp. 1-2). In addition, because a specific classroom assignment was not identified for the student, the parents requested more information, such as a "class profile and program recommendation" for the student's classes during July and September 2012 (id. at p. 2). Having received the May 2012 IEP, the parents

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<sup>1</sup> The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). In February 2012, the student's classroom at the Rebecca School increased in size from a total of eight students to a total of nine students; an additional adult also staffed the classroom (see Parent Ex. C at p. 1).

<sup>2</sup> The student's eligibility for special education programs 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]).

<sup>3</sup> At the impartial hearing, the parents testified that the May 2012 CSE meeting lasted approximately 45 to 60 minutes (see Jan. 23, 2013 Tr. pp. 512-13).

noted that the IEP failed to "fully describe or address" the student's needs, particularly her sensory needs; despite a discussion at the meeting, the May 2012 IEP failed to include music as an "academic management need;" the May 2012 CSE did not discuss the FBA; the BIP was not sufficient to meet the student's behavioral needs; and the 6:1+1 special class placement would not provide "enough support" to meet the student's "academic, social, and behavioral needs" (id.). Therefore, the parents notified the district of their intention to place the student at the Rebecca School for the 2012-13 school year, and requested that the district arrange transportation (id.).

On June 20, 2012, the parents executed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year from July 2012 through June 2013 (see Parent Ex. F at pp. 1-4).

### **A. Due Process Complaint Notice**

By due process complaint notice dated July 2, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at p. 1). More specifically, the parents alleged that the May 2012 CSE failed to conduct adequate evaluations of the student, including an OT evaluation and an updated speech-language evaluation (id. at pp. 1-2). In addition, the parents asserted that the "psychological update" did not "comprehensively assess" the student in all areas of need (id. at p. 2). Next, the parents alleged the May 2012 CSE failed to conduct an "adequate, data-based" FBA to "pinpoint the cause of the behaviors, or develop an adequate [BIP] to address them" (id.). With regard to the FBA, the parents asserted that the May 2012 CSE did not discuss it with the parents (id.). The parents alleged that the CSE failed to develop the student's IEP on an "annual basis," and did not provide adequate notice of the May 2012 CSE and prior written notice (id. at pp. 1, 3).

With regard to the annual goals, the parents alleged that the May 2012 CSE failed to discuss the student's progress on the "current IEP goals," thereby "precluding the parents' full participation at the meeting" (Parent Ex. A at p. 3). The parents also alleged that the annual goals in the May 2012 IEP were not sufficient, were not appropriate, and were vague, and the IEP failed to include annual goals in "all areas of need" for the student, including activities of daily living (ADL) skills (id.).

Next, the parents alleged that the present levels of performance in the May 2012 IEP failed to provide an "adequate baseline from which to guide Rebecca[s] teachers and parents, and from which to determine progress" (Parent Ex. A at p. 3). In addition, the parents asserted that the May 2012 IEP contained "conflicting information" about the student's "current level of academic functioning" and the student's instructional levels (id.). The parents also alleged that the May 2012 IEP did not include "sufficient guidance" regarding the sensory input and supports the student required (id.).

With respect to the recommended 6:1+1 special class placement with a 1:1 crisis management paraprofessional, the parents argued it was not appropriate because the student's behavioral and special education needs required a "great deal more support" and the 1:1 paraprofessional was overly restrictive and did not adequately address the student's delays (see

Parent Ex. A at p. 3). Next, the parents alleged that the May 2012 IEP did not "accurately reflect the discussions" at the May 2012 CSE meeting, which indicated that the student no longer required PT services and that the May 2012 IEP should include "music as a management tool" (id.). In addition, the parents asserted that May 2012 CSE failed to recommend music therapy, and the recommended counseling services were not appropriate (id.). Finally, the parents alleged that the May 2012 CSE failed to recommend parent counseling and training in the IEP (id.).

Turning to the assigned public school site, the parents alleged that the FNR was not sufficient as it failed to specify a "particular class" for the student (Parent Ex. A at p. 3). In addition, the parents repeated the concerns expressed in the June 2012 letter to the district (compare Parent Ex. A at p. 4, with Parent Ex. E at pp. 1-2). The parents also expressed concerns with the fact that the student would be in a different class in the summer than in the fall, the lack of "an appropriate behavioral plan or consistent sensory diet," and the assigned public school site's "entrance" (Parent Ex. A at p. 4). As relief, the parents requested reimbursement for the costs of the student's tuition at the Rebecca School for the 2012-13 school year (id.).

## **B. Impartial Hearing Officer Decision**

On July 16, 2012, the parties proceeded to an impartial hearing, which concluded on January 23, 2013 after seven days of proceedings (see July 16, 2012 Tr. pp. 1-11; Sept. 10, 2012 Tr. pp. 12-72; Sept. 20, 2012 Tr. pp. 73-96; No. v. 8, 2012 Tr. pp. 97-313; Nov. 19, 2012 Tr. pp. 97-312; Jan. 14, 2013 Tr. pp. 313-424; Jan. 23, 2013 Tr. pp. 425-571).<sup>4</sup> By decision dated March 6, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, and thus, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year (see IHO Decision at pp. 6-11).

Initially, the IHO made several findings of fact (see IHO Decision at pp. 5-6). With respect to conclusions of law, the IHO found that there were no "procedural inadequacies that would rise to the level of a denial of FAPE" (IHO Decision at pp. 7-9). In addition, the IHO noted that the parents raised "serious questions" with regard to the annual goals in the May 2012 IEP, which appeared to be "lifted from Rebecca School goals" (id.). Moreover, the IHO opined that the May 2012 IEP was "somewhat out of date" and "substitute[ed] counseling for music therapy for a student whose communication appear[ed] to be primarily through music" (id.). The IHO also noted that the May 2012 IEP failed to include a recommendation for parent counseling and training (id. at pp. 9-10). In addition, the IHO noted that based upon the "parents' visits and expert testimony," the parents raised "serious questions" regarding whether the assigned public school site could implement the May 2012 IEP, and the district did not "present any evidence substantiating that the [assigned public school site] offered would have likely been able to meet

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<sup>4</sup> On August 1, 2012, the IHO issued an interim order on pendency, which directed the district to continue to fund the student's attendance at the Rebecca School as the student's pendency (stay-put) placement during these proceedings (IHO Interim Order at pp. 2-3). In addition, the IHO also issued an Interim Order, dated September 24, 2012, and a Second Interim Order on Subpoena, dated October 15, 2012; since neither party appealed the interim order on pendency or any portions of the two subsequent interim orders, these decisions have become final and binding upon the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

the student's needs, as per the IEP" (IHO Decision at p. 10). As a result, the IHO concluded that the district failed to establish that the "program and placement" offered the student a FAPE (id.).

With regard to the unilateral placement, the IHO found that the Rebecca School, "with its small classes, individualized instruction, provision of related services, and use of curriculum and methods that appear[ed] to focus on meeting the unique educational needs of [the student]," satisfied the parents' burden (IHO Decision at p. 10). With respect to equitable considerations, the IHO found that the parents cooperated with the district and there was no evidence that would bar or diminish the parents' requested relief (id.).

#### **IV. Appeal for State-Level Review**

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year. Initially, the district contends that contrary to the parents' assertions, the CSE timely developed the May 2012 IEP—which would be implemented from July 2012 through June 2013—and moreover, the parents had "actual notice" of the May 2012 CSE meeting. In addition, the district asserts that the May 2012 CSE relied upon sufficient evaluative information to develop the May 2012 IEP. The district also asserts that the annual goals in the May 2012 IEP addressed the student's needs, and the annual goals could be implemented as written and in the recommended placement. The district also asserts that the present levels of performance in the May 2012 IEP properly identified the student's academic functioning. Next, the district argues that the 6:1+1 special class placement with a 1:1 crisis management paraprofessional was appropriate. In addition, the district argues that the May 2012 CSE was not required to recommend a particular methodology in the IEP. Finally, the district alleges that the FBA and BIP adequately addressed the student's sensory and behavioral issues, and the failure to recommend parent counseling and training in the May 2012 IEP did not support a finding that the district failed to offer the student a FAPE.

Next, the district asserts that contrary to the parents' assertions, it was not required to identify or list a particular classroom on the FNR, and any discussion of the classroom composition and related services at the assigned public school site was speculative as the student never enrolled in the assigned public school site. With regard to direct funding of the student's tuition, the district argues that the parents failed to establish that they lacked the financial resources to pay for the student's tuition at the Rebecca School, and thus, the parents were not entitled to direct funding of the student's tuition costs.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision in its entirety. In particular, the parents assert that the IHO properly determined the following: the annual goals in the May 2012 IEP were not appropriate because many had been achieved at the time the May 2012 IEP was developed; the May 2012 CSE improperly substituted counseling annual goals for the student's music therapy annual goals; the FBA was created after the May 2012 CSE meeting and failed to describe the student's behaviors, such as climbing on furniture; the May 2012 IEP failed to include parent counseling and training; the district failed to present evidence regarding the assigned public school site; and equitable considerations weighed in favor of the parents' requested relief. As a cross-appeal, the parents continue to argue the merits of certain issues in the due process complaint notice that the IHO did not address, including that the present levels of performance in the May 2012 IEP did not

accurately or appropriately describe the student's needs; whether the services of a full-time, 1:1 crisis management paraprofessional was overly restrictive; and whether the May 2012 CSE failed to conduct a speech-language evaluation, an OT evaluation, and a PT evaluation of the student.<sup>5</sup>

In an answer to the parents' cross-appeal, the district responds to the parents' allegations and generally argues that the unaddressed issues must be dismissed.

## 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 Sch. Dist. 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 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. Mamaronck 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

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<sup>5</sup> In this case, the parents did not allege in the due process complaint notice that the district failed to offer the student a FAPE for the 2012-13 school year because the May 2012 CSE was not properly composed (see Parent Ex. A at pp. 1-4). Therefore, to the extent that the parents now assert for the first time on appeal that the district failed to offer the student a FAPE because the May 2012 CSE failed to include a speech-language therapist or an occupational therapist, these allegations will not be considered (N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).

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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 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, 293 Fed. App'x 20, 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, 486 Fed. App'x 954, 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 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]; 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**

### **A. May 2012 CSE Process**

#### **1. Evaluative Information**

Turning first to the cross-appeal, the parents argue that the May 2012 CSE failed to appropriately evaluate the student, and in particular, failed to conduct a speech-language evaluation, an OT evaluation, and a PT evaluation of the student. The district argues that the May 2012 CSE had sufficient evaluative information to develop the student's IEP and regardless of whether the parents received a copy of the December 2011 psychoeducational evaluation of the student prior to the May 2012 CSE meeting, the CSE made additional copies available at the meeting. In addition, the district asserts that no one at the May 2012 CSE meeting disputed the accuracy of the December 2011 psychoeducational evaluation of the student. A review of the evidence in the hearing record does not support the parents' contentions.

Generally, 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 CFR 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 and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). In addition, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v.

New York City Dep't of Educ., 2013 WL 5178300, at \* 18-\*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 2013 WL 592664, at \*8 [S.D.N.Y. Feb. 14, 2013]).

Here, the evidence in the hearing record reflects that the May 2012 CSE considered and relied upon the following evaluative information in developing the May 2012 IEP: a December 2011 psychoeducational evaluation, a December 2011 Rebecca School interdisciplinary report of progress (December 2011 Rebecca School progress report), and a January 2012 classroom observation (see Nov. 8, 2012 Tr. pp. 129-30, 238-39; Dist. Exs. 3-5; see also Dist. Ex. 9 at p. 1). In addition to the foregoing, the district school psychologist who attended the May 2012 CSE meeting testified that the CSE also considered information provided to the CSE by the student's then-current teacher at the Rebecca School (Rebecca School teacher) and the Rebecca School social worker because they presented "current and accurate descriptors of [the student's] performance" (Nov. 8, 2012 Tr. pp. 120, 127-30, 238-39; see Dist. Exs. 5 at pp. 1-4; 6 at p. 16).

The December 2011 psychoeducational evaluation report described the student's cognitive functioning and academic achievement as measured by the Differential Ability Scales-Second Edition (DAS-II) and Woodcock-Johnson Test of Cognitive Ability-Third Edition (WJ-III); the student's adaptive behavior as measured by the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II); and the student's visual motor skills as measured by the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI) (Dist. Ex. 4 at pp. 1-4).<sup>6</sup> An administration of the DAS-II yielded a "GCA" standard score of 31, which placed the student in the "[v]ery [l]ow range of cognitive functioning" (Dist. Ex. 4 at pp. 2-3). The evaluating psychologist reported that the student displayed very low functioning in both verbal reasoning and in the nonverbal domain (id. at p. 2). With respect to academics, results of the WJ-III indicated the student's performance fell significantly below that expected for her age in all areas tested with a relative strength in letter-word recognition (reading decoding), where she scored at the 2.4 grade level (id. at pp. 2-4). The psychologist reported that the student could read two, but not three word phrases, and lacked reading comprehension skills as measured by the ability to relate words to the pictures they described (id. at p. 2). According to the psychologist, the student could count three units with good consistency, but she could not add or subtract (id.). In addition, the psychologist reported that the student could not consistently write letters or copy shapes (id.). However, on the VMI the student could imitate a scribble, but she could not consistently imitate a horizontal or vertical line, and the student perseverated on writing her first name when presented with visual stimuli (id.). As reported by her parents on the Vineland-II, the student's adaptive behavior skills fell within the deficient range (id.). Overall, the December 2011 psychoeducational evaluation report highlighted the student's deficits in attention and language processing, and noted that the student exhibited perseveration, echolalia, and hyperactive features, such as impulsivity, difficulty staying in her seat, and laughing to herself (id. at pp. 1-3).

The December 2011 Rebecca School progress report included information provided by the student's Rebecca School teacher and related service providers related to the student's

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<sup>6</sup> Although the evaluating psychologist indicated that he assessed the student using the Woodcock-Johnson Tests of Cognitive Abilities, the evaluation report cites to grade equivalent scores for subtests from the Woodcock-Johnson Tests of Achievement (see Dist. Ex. 4 at pp. 1, 4).

functional emotional development, academic ability; sensory processing; receptive, expressive and pragmatic language; and oral motor skills (see Dist. Ex. 5 at pp. 1-14). The report focused on the student's progress between May and December 2011 (id. at p. 1). As detailed more fully below, the December 2011 Rebecca School progress report included narrative information regarding the student's participation in therapy sessions, and also included a review of the student's progress on her current goals in both OT and speech-language therapy (id. at pp. 4-5, 9-13). In addition, the December 2011 Rebecca School progress report included new short-term objectives related to the student's speech-language therapy goals (id. at pp. 11-12).

Generally, the December 2011 Rebecca School progress report indicated that the student was working on functional emotional developmental levels one through four, as follows: level one, regulation and shared attention; level two, engagement and relating; level three, two-way purposeful emotional interactions; and level four, shared social problem solving (see Dist. Ex. 5 at p. 1). With respect to regulation and shared attention, the student demonstrated progress in her ability to stay regulated throughout the day, including during challenging moments, such as being presented with a limit or change in schedule (id.). At that time, the student's ability to maintain regulation was affected by things outside of her control—such as a crying classmate—and the student would seek out a place to hide—such as a dark corner—until the crying stopped or the student left the classroom (id.; see Dist. Ex. 5 at p. 11). According to the report, the student typically communicated using one to three word utterances, and familiar, memory based phrases, which the student used appropriately (see Dist. Ex. 5 at p. 1). At that time, the student was beginning to close a circle of communication opened by a peer on a more consistent basis (id.). In addition, the student was beginning to initiate playful interactions with adults more frequently throughout the day (id.). Additionally, the student continued with an ability to engage in 30 to 35 continuous circles of communication using familiar, memory based phrases, and also continued to engage in "physical anticipation interactions"—such as a game of chase—for approximately 15 circles of communication (id. at p. 2). The student also remained engaged for approximately five circles of communication in a conversation with an adult, although at times she required choices in order to answer questions (id.). Moreover, since May 2011 the student demonstrated pretend play abilities by incorporating classroom objects into her familiar, memory based phrases and by using classroom items to act out familiar fairytales (id.). The student also demonstrated an understanding of her own emotions and those of others, as well as an increase in her ability to answer concrete "who" and "what" questions (id.; see Dist. Ex. 5 at p. 12).

With respect to academics, the December 2011 Rebecca School progress report described the student as a fluent reader, who could read sight words and full sentences and also decode unfamiliar words by sounding them out (see Dist. Ex. 5 at pp. 2-3). In mathematics, the student could rote count to 50, demonstrate one-to-one correspondence up to 20, and identify numbers 1 through 100 (id. at p. 3). However, without choices, the student struggled to guess the number of objects in a presented set (id.). At that time, the student demonstrated an understanding of big and small; same and different (but not related to size); and more, but not less (id.). The student could also consistently identify a penny and a quarter, and she was working on understanding the concept of time (id.). Since May 2011, the student improved her participation in structured group activities, and during morning meeting, the student answered a variety of questions about the calendar, morning message, and the book of the week (id. at p. 4). Also, the student could identify "walk" or "do n't walk" signs in the community and adhered to them with verbal prompting from an adult (id.). Finally, with regard to daily skills, the student could pack and

unpack her backpack and put her things away in the appropriate places with verbal support from an adult (id.). In addition, the December 2011 Rebecca School progress report described the student as mostly self-sufficient at meal times, but she required maximum adult support to sit at the table and eat when presented with new foods (id.).

In the December 2011 Rebecca School progress report, the student's occupational therapist reported that the student received two 30-minute sessions per week of individual OT and one 30-minute session per week of OT in a small group (see Dist. Ex. 5 at p. 4).<sup>7</sup> The occupational therapist described the student's participation in therapy sessions with respect to her interaction with the therapist, noting a great improvement in the student's ability to engage with her and maintain a continuous flow of 20 to 25 circles of communication while receiving vestibular input (id.). In addition, the student improved her ability to accept verbal and tactile redirection without becoming dysregulated (id. at p. 5). When the student became upset, the occupational therapist reported that providing the student with "increased time to process and calm [herself], with clear limit setting and warm affect" supported the student's ability to reengage with adults and peers (id.). According to the occupational therapist, the student's OT sessions concentrated on activities that encouraged upper extremity, lower extremity, and core strength through the use of sensorimotor equipment and input, obstacle courses, and heavy work (id.). At that time, the occupational therapist worked with classroom staff to implement the "Handwriting without Tears" program, which taught the student the proper position to hold a pencil and which used sensory strategies to prepare the hands for writing (id. at p. 10). Through the provision of pre-writing sensory supports, the student improved her ability to hold a pencil with appropriate force (id.). According to the report, the student's OT sessions would continue to focus on improving the student's sensory processing abilities, fine and gross motor skills, visual perceptual and visual-motor skills, bilateral integration skills, and attention and focus, particularly in the presence of peers in two-way purposeful interactions (id. at p. 5).

In the December 2011 Rebecca School progress report, the student's speech-language pathologist reported that the student received two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a small group (see Dist. Ex. 5 at p. 5). The group session consisted of a cooking group, in which the student interacted with classmates in a semi-structured activity with a common goal and included work on following one-step and two-step directions with temporal concepts and on identifying specific vocabulary (id.). At that time, the student communicated primarily through the use of verbal language, and typically produced three to four word utterances to make requests during a motivating activity (id.; see Dist. Ex. 5 at p. 12). According to the speech-language pathologist, the student understood physical attributes such as color, size, and shape, but she had difficulty incorporating them into her verbal language in order to increase the length of her utterances (see Dist. Ex. 5 at p. 12). The speech-language pathologist reported that the majority of the student's interactions consisted of memorized phrases used in an appropriate context (id.). At that time, the student also inconsistently followed one-step directives, but she could carry out routine directions with one or two verbal cues (id.). In addition, the student continued to demonstrate steady progress with regard to her engagement and pragmatic language skills (id. at p. 11). However, the student exhibited difficulty sustaining reality-based interactions, and

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<sup>7</sup> According to the December 2011 Rebecca School progress report, the student also participated in "additional 30-minute groups" led by the reporting occupational therapist "each week" (Dist. Ex. 5 at p. 4).

instead, she initiated the majority of her interactions using scripted language (id.). The speech-language pathologist also noted that due to the student's preference for activities—such as singing and riding a scooter—she made little progress toward increasing her play repertoire to include characters or props (id.). According to the speech-language pathologist, the student's speech-language therapy would continue to focus on improving her pragmatic, receptive, and expressive language skills, as well as her oral motor skills (id. at p. 5).

The December 2011 Rebecca School progress report also indicated that the student received two 30-minute sessions per week of mental health services in the form of music therapy (see Dist. Ex. 5 at p. 5). The student's music therapy sessions focused on developing and broadening her functional emotional developmental levels through interactive, music-making experiences designed to cultivate relatedness, engagement, continuous flow of interaction, social problem solving, as well as the exploration and expression of emotion (id.). During therapy sessions, the student immediately initiated musical interaction with the therapist upon entering the office (id.). The student frequently presented parts of well-known songs on the piano and asked the therapist to play the rest of the piece (id.). When the therapist played the requested piece, the student demonstrated positive affect and vocalized or played the drum in a manner that reflected the melody or tempo of the pieces being played (id.). According to the music therapist, during these times the student made direct eye contact and occasionally stated the names of composers whose songs she was about to play (id. at p. 6).

As noted in the December 2011 Rebecca School progress report, the student was keenly aware of musical elements and structures and demonstrated perfect pitch (see Dist. Ex. 5 at p. 6). However, the student tended to change her musical ideas rapidly and had difficulty staying engaged in presented musical ideas (id.). At times, the music therapist intentionally stopped playing music in the middle of a phrase, which helped the student with her ability to respond and sustain her engagement and interaction (id.). During therapy sessions, the student consistently initiated an expressive change in tempo or dynamics, as well as imitated or reflected a musical idea presented by the therapist (id. at p. 13). In addition the student closed circles of communication initiated by the therapist (id.).

Finally, in January 2012, the district school psychologist who attended the May 2012 CSE meeting conducted a classroom observation of the student during "Morning Meeting" at the Rebecca School (Dist. Ex. 3). According to the report, the student leaned on the aide who sat next to her, and the aide helped the student "stay seated in the chair" (id.). The teacher led the students through a "calendar activity and days of the week song," and the student approached the calendar and "pointed to the days in turn" and when finished, she returned to her seat (id.). Next, the teacher read a book, and the aide sitting next to the student encouraged her to "pay attention to the teacher" (id.). After completing the story, the aide asked the student to "put her chair back" and the student repositioned the chair next to the table (id.). At that time, the student went to the side of the classroom and lay on a bean-bag chair with a classmate next to her (id.). In summary, the January 2012 classroom observation report indicated that the student "appeared" to require prompting and redirection to attend and focus (id.).

At the impartial hearing, the district school psychologist who attended the May 2012 CSE meeting testified that the CSE reviewed, discussed, and relied upon the December 2011 psychoeducational evaluation, the December 2011 Rebecca School progress report, and the

January 2012 classroom observation report to develop the May 2012 IEP (see Nov. 8, 2012 Tr. pp. 125-35). He further testified that the December 2011 Rebecca School progress report "served as a large piece of information about [the student] and in terms of what her skills were, what areas that she should continue working on and needed to further develop" (Nov. 8, 2012 Tr. pp. 133-35, 238-39). In addition, the district school psychologist testified that the May 2012 CSE also obtained information about how the student functioned in school, the specific services the student received—such as speech-language therapy, OT, and mental health services—and the specific goals the student was working on, as well as her progress on those goals from the December 2011 Rebecca School progress report (see Nov. 8, 2012 Tr. pp. 134-35, 257-58).

With respect to the December 2011 psychoeducational evaluation, the district school psychologist testified that it was conducted as part of the student's mandated three-year reevaluation and no one at the May 2012 CSE meeting disputed the accuracy of the evaluation (see Nov. 8, 2012 Tr. pp. 120, 160, 162). The evidence in the hearing record reveals that in two separate letters dated September 26, 2011, the district notified the parents of the student's upcoming three-year reevaluation, and indicated that the reevaluation "may include" a psychoeducational evaluation, a classroom observation, and "other appropriate assessments and evaluations" in order to determine the student's special education needs (Dist. Exs. 1-2).<sup>8</sup> In addition, the May 2012 CSE had "multiple copies of all the documents" available, and the district school psychologist did not recall the parents mentioning that they did not previously receive a copy of the December 2011 psychoeducational evaluation report (Nov. 8, 2012 Tr. p. 256).

During cross-examination, the district school psychologist testified that he did not recall when the student was last evaluated in the areas of speech-language, OT, or PT (see Nov. 8, 2012 Tr. pp. 178-79, 194-95). However, given the amount of information about the student's related services' needs in the December 2011 Rebecca School progress report—and in particular, speech-language therapy and OT—even if the May 2012 CSE's failure to conduct updated evaluations of the student in these two areas constituted a procedural violation, the evidence in the hearing record not provide any basis upon which to conclude that this procedural violation resulted in a failure to offer the student a FAPE for the 2012-13 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). First, it is unclear what further information the May 2012 CSE would derive from additional evaluations of the student in these areas in light of the information obtained from the December 2011 Rebecca School progress report (see generally Dist. Ex. 5 at pp. 1-14). And second, the hearing record contains no evidence that the parents requested reevaluations of the student in the areas of speech-language therapy, OT, or PT at any time during, or after, the district sought and received the parents' consent to reevaluate the student in September 2011 or that the parents made any such request at the May 2012 CSE meeting (see generally July 16, 2012 Tr. pp. 1-11; Sept. 10, 2012 Tr. pp. 12-72; Sept. 20, 2012 Tr. pp. 73-96; Nov. 8, 2012 Tr. pp. 97-313; Nov. 19, 2012 Tr. pp. 97-312; Jan. 14, 2013 Tr. pp. 313-424; Jan. 23, 2013 Tr. pp. 425-571; Dist. Exs. 1-10; Parent Exs. A-K; IHO Exs. I-VIII). Moreover, while the December 2011 Rebecca School progress report did not include information related to the student's gross motor functioning or PT needs, the May 2012 CSE continued to recommend PT services for the student because PT had

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<sup>8</sup> The parents signed the district's request for consent to reevaluate the student on October 13, 2011 (see Dist. Ex. 2 at p. 1).

previously been recommended for the student and the May 2012 CSE did not have any information before it upon which to discontinue PT services (see Nov. 8, 2012 Tr. pp. 193-95; compare Dist. Ex. 5 at pp. 1-14, with Dist. Ex. 6 at p. 10).

Based on the above, the evidence in the hearing record demonstrates that the May 2012 CSE had sufficient evaluative information upon which to develop the student's 2012-13 IEP, and contrary to the parents' contentions, the May 2012 CSE was not required to conduct updated speech-language or OT evaluations of the student in order to develop the student's IEP.

## **B. May 2012 IEP**

### **1. Present Levels of Performance**

Next, the parents assert in the cross-appeal that the present levels of performance in the May 2012 IEP did not accurately or appropriately describe the student's needs, and in particular, failed to adequately describe the student's ADL skills, intellectual functioning, and expected rate of progress. The parents also assert that the present levels of performance failed to include baselines for the annual goals in the IEP. The district argues that the present levels of performance accurately reflected the evaluative information and the information provided by the parents and the student's Rebecca School teacher at the time of the May 2012 CSE meeting. In addition, the district asserts that consistent with regulations, the May 2012 IEP reported the student's present levels of academic achievement and functional performance. Here, while a review of the evidence in the hearing record generally supports the parents' assertions, the weight of the evidence in the hearing record—as explained more fully below—does not support a finding in this case that any deficiencies in the present levels of performance in the May 2012 IEP constituted a failure to offer the student a FAPE.

Among the other 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 NYCRR 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]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]). When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (see S.F., 2011 WL 5419847, at \*10 [indicating that based upon 20 U.S.C. § 1414(c)(1)(A), a CSE is required in part to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii)

observations by teachers and related services providers"]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013] [upholding a district's reliance upon information obtained from the student's nonpublic school personnel, including sufficiently comprehensive progress reports, in formulating the IEP]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at \*23 [S.D.N.Y. March 29, 2013]).

According to the May 2012 CSE meeting minutes, CSE reviewed the December 2011 psychoeducational evaluation of the student, and the Rebecca School teacher confirmed that the December 2011 Rebecca School progress report accurately reflected the student's needs at that time (see Dist. Ex. 9 at pp. 1-2). The meeting minutes also reveal that the May 2012 CSE discussed the student's academic skills, noting her strengths in sight word vocabulary, music, her sense of humor, and ability to use "less scripted language" (id. at p. 2). In addition, the meeting minutes demonstrate that the May 2012 CSE discussed the student's challenges, which included "communication [and] comprehension," difficulty "communicating her feelings," sensitivity to "peers who [were] crying" (and seeking a "dark corner" in response), and the student's need for "constant access to sensory input" (id.). The May 2012 CSE meeting minutes further noted that the student became dysregulated when overwhelmed (and responded by getting "really quiet"), the student had improved her ability to be more "accepting of limits," and that the student did not exhibit "aggressive behaviors" (id.). With respect to academic skills, the CSE meeting minutes indicated that the student was working on her ability to "remain engaged," she required "individual work for comprehension," teachers would "sing questions" to the student because she "communicate[d] much more through music," the student could do "incidental things with math," and that the student "really enjoy[ed] sound" (id.).

The May 2012 CSE meeting minutes also included information regarding the student's peer interaction skills, noting the student's improved ability to respond when "peers want[ed] to interact with her," the student's interest in peers, and her ability to follow directions from a teacher (while noting that at home, the student consistently demonstrated this skill) (id.). According to the CSE meeting minutes, the parents reported on the student's daily living skills (id. at pp. 2-3). At that time, the parents indicated that the student needed "help" with brushing her teeth and combing her hair (id. at p. 2). In addition, although the student attempted to dress herself, the student could not "zip, button, or snap" by herself (id.). The May 2012 CSE meeting minutes further revealed that at school, the student could "pack [and] unpack," and while she could eat independently, the student needed "help" with "juice boxes" (id. at p. 3). The parents also reported that they would "mix vegetables [with] spaghetti sauce," and the student's "gag reflex" had improved (id.).

With respect to the student's health, the May 2012 CSE meeting minutes noted that she liked to "climb" but was unaware of "street safety" (Dist. Ex. 9 at p. 3). However, the student did not "run out of [the] classroom," and she was sensitive to "visual [and] tactile input" (id.).

Next, the May 2012 CSE meeting minutes reflected more specific information discussed regarding the student's academic skills (see Dist. Ex. 9 at p. 3). At that time, the student "gravitate[d] towards a book for a couple of . . . weeks," and she enjoyed looking at the book "by herself [and] with an adult as well" (id.). The student could repeat a "comprehension ('wh') question" and follow "familiar meaningful multi-step directions" (id.). In mathematics, the May 2012 CSE meeting minutes indicated that the student was working on identifying coins and

developing a "concept of time" (id.). The student "loved counting," and she demonstrated "1:1 correspondence" (id.). At that time, the student was also working on "basic addition skills with manipulatives," and she could use a "number line with adult support" (id.). The student had also increased her ability to "attend to morning meetings to 20 minutes" (id.).

Turning to the student's present levels of academic achievement, functional performance and learning characteristics in the May 2012 IEP, the May 2012 CSE indicated that the student exhibited "very limited skills in academics, as well as daily living skills and socialization" (Dist. Ex. 6 at p. 1). In addition, the May 2012 IEP noted the student's "very short attention span with hyperactivity" and that she demonstrated "constant echolalia and perseveration" (id.). The present levels of performance described the student as "alert" and "curious," and noted that she had a "sweet disposition" (id.). In addition, the present levels of performance noted that the student enjoyed "learning situations," "sound," and that "[m]usic engaged the student" across a "variety of environments" and helped her to regulate and to express herself (id.). As a result, the May 2012 IEP indicated that music should be "integrated throughout the school day" (id.). In the section related to parents' concerns, the May 2012 IEP noted that the student functioned "below the kindergarten level in all areas except reading decoding," she had a short attention span, and she exhibited "disorganized behavior" (id.).

In terms of social development, the present levels of performance in the May 2012 IEP described the student's limited self-awareness and her ability to interact with others (see Dist. Ex. 6 at p. 1). In the section related to parents' concerns, the present levels of performance noted that the student needed to make "more consistent eye contact and interact appropriately with peers and adults" (id.).

With respect to the student's physical development, the present levels of performance in the May 2012 IEP indicated that she had "no health or motoric problems" and was "very active and enjoy[ed] physical activity" (Dist. Ex. 6 at pp. 1-2). In the section related to parents' concerns, the present levels of performance noted, however, that the student needed to "reduce hyperactivity and impulsivity" (id. at p. 2). To address the student's management needs, the May 2012 IEP indicated that the student required "very close classroom management," and she had "very poor self-preservation and safety skills" (id.). In addition, the May 2012 IEP indicated that the student required a "very small class with trained teachers to address her special needs" (id.).

Finally, the May 2012 IEP indicated that the student required strategies, including positive behavioral interventions, to address behaviors that impeded her learning and further indicated that the student required a BIP (see Dist. Ex. 6 at p. 2). The May 2012 IEP also indicated that the student liked to climb and lacked safety awareness, she was very sensitive to peers who were crying and would seek out dark corners in the room, and the student was very sensory seeking and required sensory support to engage in academic tasks (id.).

At the impartial hearing, the district school psychologist testified that the May 2012 CSE developed the present levels of performance and individual needs section of the IEP based upon a review of the student's scores on specific academic achievement tests from the December 2011 psychoeducational evaluation and based upon the May 2012 CSE's discussion—and in particular, the discussion with the Rebecca School teacher regarding the student's performance in

the classroom and the discussion with the parents regarding how they saw the student at home (see Nov. 8, 2012 Tr. pp. 133-39; see also Dist. Ex. 9 at pp. 1-4).

The district school psychologist testified that according to the December 2011 psychoeducational evaluation, the student's academic skills fell "below a low kindergarten level;" however, he also testified that the student functioned "somewhat higher in terms of reading decoding on one of the subtests" (Nov. 8, 2012 Tr. pp. 131-32). In addition, he testified that the academic levels reported in the December 2011 psychoeducational evaluation report were consistent with the skill levels reported by the Rebecca School teacher (Nov. 8, 2012 Tr. p. 179). However, the district school psychologist also testified that the December 2011 Rebecca School progress report and the Rebecca School teacher indicated the "specific level of skill or types of skills that [the student] was manifesting," and that based upon the student's skills, the district special education teacher derived an estimate of the student's functioning (Nov. 8, 2012 Tr. pp. 181-82). The district psychologist testified that based upon the district special education teacher's experience, she interpreted the student's academic skills as "commensurate" with a kindergarten level (Nov. 8, 2012 Tr. pp. 182-85).

As noted previously, the December 2011 Rebecca School progress report indicated that the student was "a fluent reader" who could read full sentences, she could decode unfamiliar words by sounding them out, she could read sight words, and she could answer "wh" questions related to familiar stories read repetitively in class when provided with choices (Dist. Ex. 5 at p. 3). In mathematics, the December 2011 Rebecca School progress report indicated that the student could rote count to 50, she demonstrated 1:1 correspondence up to 20, and she could identify numbers 1 through 100 (id.). In addition, the student could identify two coins and was working on beginning time concepts (id.). Therefore, based upon the evidence in the hearing record, the student demonstrated skills that ranged from a prekindergarten level to a kindergarten level, and further, that the student received instruction at both levels (see generally Dist. Ex. 5).<sup>9</sup> Consistent with the December 2011 psychoeducational evaluation report and the December 2011 Rebecca School progress report, the May 2012 IEP reflected that the student functioned below the kindergarten level in all academic areas except reading decoding (compare Dist. Ex. 6 at p. 1, with Dist. Ex. 4 at p. 3, and Dist. Ex. 5 at pp. 2-3).

However, notwithstanding the district school psychologist's testimony, evidence of what appeared to be a thorough discussion of the student's needs at the May 2012 CSE as reflected in the May 2012 CSE meeting minutes, and as noted above, that the CSE had sufficient evaluative information about the student's needs in order to develop the May 2012 IEP, the present levels of performance and individual learning needs section of the May 2012 IEP included very basic and general statements describing the student's needs (compare Dist. Ex. 6 at pp. 1-2, with Dist. Ex. 9 at pp. 1-4). And while the information in the present levels of performance and individual needs section of the May 2012 IEP is accurate, the parents correctly assert that the present levels of performance provide very limited descriptions of the student's ADL skills, intellectual functioning, and expected rate of progress, and the present levels of performance did not

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<sup>9</sup> Given that the student demonstrated both prekindergarten level and kindergarten level skills, the district correctly notes in its petition that—contrary to the parents' assertion in the due process complaint notice—the May 2012 IEP did not include conflicting information about the student's academic functioning (compare Parent Ex. A at p. 3, with Nov. 8, 2012 Tr. pp. 179-85, and Dist. Ex. 4 at p. 3, and Dist. Ex. 5 at pp. 2-3, and Dist. Ex. 6 at p. 1).

establish a "baseline" for the annual goals in the IEP (see Dist. Ex. 6 at pp. 1-2). State guidance indicates that the present levels of performance in an individual needs section of an IEP acts as the "foundation on which the [CSE] builds to identify goals and services to address the student's individual needs" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 21-25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). Although the same State guidance does not dictate how much information must be included in the statement of present levels of performance in an IEP, generally, the present levels of performance should enable a person to answer questions, such as the following: "What are the student's unique needs that result from his or her disability?" and "What is it that the student can and cannot do at this time?" (*id.* at pp. 23-24). Reviewing the present levels of performance and individual needs section of the May 2012 IEP essentially leaves these questions unanswered (see generally Dist. Ex. 6 at pp. 1-2).

However, based upon a review of the evidence and upon review of the entire May 2012 IEP, the hearing record does not otherwise indicate that the limited information in the present levels of performance in the May 2012 IEP altered the overall accuracy of the IEP which—when read as a whole—contained sufficient information to provide the student with educational benefits (*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]). Moreover, even assuming that the alleged deficiencies in the present levels of performance constituted a procedural violation, the hearing record does not support a finding that the deficiencies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefit upon which to conclude that the district did not offer the student a FAPE for the 2012-13 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii] *M.H. v. New York City Dep't of Educ.*, 2011 WL 609880, at \*11 [S.D.N.Y. Feb. 16, 2011]). In this particular instance, the annual goals and short-term objectives include more specific information about the student's present levels of performance and sufficiently describe the student's baseline skills in order to guide instruction (see Dist. Ex. 6 at pp. 3-9). For example, in the annual goal to improve the student's receptive language skills related to comprehension of language in a variety of settings, the corresponding short-term objectives indicated that the student would "follow novel 1-step directives across multiple communicative environments in 8 out of 10 opportunities;" the student would "sequence 2 steps of an everyday or highly preferred activity when provided with visual and verbal support in 8 out of 10 opportunities;" and the student would "appropriately respond to abstract 'where' questions, given moderate verbal cueing, in 8 out of 10 opportunities" (*id.* at p. 7). In addition, the May 2012 IEP included annual goals that targeted the student's ADL skills, including feeding skills, safety awareness when walking and crossing the street at traffic lights and independence, quality of movement, and efficient organization of self for effective participation in school and home activities through improved motor planning, visual-spatial and perceptual skills (*id.* at pp. 5-6, 8). Therefore, while the May 2012 CSE's decision to include this information in the annual goals—as opposed to the present levels of performance—does not conform to State guidance on the development of IEPs, it does not rise to the level of a denial of a FAPE because to find otherwise would "exalt form over substance" (*M.H.*, 2011 WL 609880, at \* 11).

## 2. Annual Goals

The district argues that contrary to the IHO's decision, the annual goals in the May 2012 IEP adequately addressed the student's needs. The district contends that the May 2012 CSE's decision to carry over language from some of the annual goals in the December 2011 Rebecca School report into some of the annual goals in the May 2012 IEP did not invalidate the annual goals or preclude implementation of the annual goals in the recommended placement. The parents argues that the IHO properly concluded that the annual goals in the May 2012 IEP were not appropriate because the student had achieved a number of the annual goals at the time the May 2012 CSE developed the IEP and because the district improperly substituted the student's annual goals in "music therapy" for annual goals in counseling. A review of the evidence in the hearing record supports the district's assertions, and thus, the IHO's findings must be reversed.

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]). 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 instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 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]).

At the impartial hearing the parents testified that the May 2012 CSE reviewed the student's December 2011 Rebecca School progress report page by page with the Rebecca School teacher—including the student's then-current annual goals—at the May 2012 CSE meeting (see Jan. 23, 2013 Tr. pp. 520-21). Similarly, the district school psychologist testified that the May 2012 CSE reviewed each of the student's then-current annual goals in the December 2011 Rebecca School progress report "one by one" in order to get an idea about what the student had been working on, the student's progress on the annual goals, and what annual goals remained appropriate for the student (see Nov. 8, 2012 Tr. pp. 146, 152-53). In addition, the district school psychologist testified that he made handwritten notations in the annual goals section of the December 2011 Rebecca School progress report during the May 2012 CSE meeting, which reflected input from the Rebecca School teacher regarding whether the student met the annual goal, whether the annual goal needed to be continued and addressed going forward, or whether the annual goal should be modified (see Nov. 8, 2012 Tr. at pp. 139-46).<sup>10</sup>

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<sup>10</sup> Contrary to the parents' argument, a review of the annual goals and short-term objectives in the May 2012 IEP revealed that consistent with the district school psychologist's notations—and with only one exception regarding safety awareness—the annual goals carried over into the May 2012 IEP had not been met at the time the May 2012 CSE developed the IEP (compare Dist. Ex. 5 at pp. 7-13, with Dist. Ex. 6 at pp. 3-9).

In this case, the May 2012 IEP included approximately 15 annual goals with approximately 32 corresponding short-term objectives to address the student's identified needs in the areas of academics; sensory processing; regulation; attention and engagement; social interaction; social/emotional skills; communication skills, including oral motor skills and expressive, receptive, and pragmatic language skills; ADL skills; motor planning; and visual spatial and perceptual skills (see Dist. Ex. 6 at pp. 3-9).<sup>11</sup> A review of the annual goals reveals that each annual goal included an evaluative criteria embedded within the short-term objectives (i.e., 1 out of 4 opportunities, 6 to 8 times per day), an evaluation schedule (i.e., one time per report period), and a procedure to evaluate the goals (i.e., class activities, teacher or provider observations) (*id.*).

With respect to the language carried over from some of the annual goals in the December 2011 Rebecca School progress report—which the IHO referred to in the decision as "jargon" from the Developmental Individual Relationships (DIR) methodology used at the Rebecca School—into the annual goals in the May 2012 IEP, under the IDEA and State and federal regulations noted above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather upon whether the annual goals and short-term objectives are consistent with, and relate to the identified needs and abilities of the student (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]; see also IHO Decision at p. 5; Nov. 8, 2012 Tr. pp. 175-77). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at

<http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> [noting, among other things, that the "recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment"]). Therefore, while "circles of communication" may represent a term typically affiliated with the DIR methodology used at the Rebecca School, the Rebecca School's program director (Rebecca School director) testified that the term "circle of communication" referred to the "two parts of a communicative exchange," with one person asking a question (i.e., "opening a circle") and the

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<sup>11</sup> State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (see *id.*). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal;" benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (*id.*). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (*id.*).

other person answering the question (i.e., "closing a circle") (Nov. 8, 2012 Tr. pp. 302-03). Thus, when given its relatively common meaning—and applying that same principle to terms generally used throughout special education, such as "dysregulation," "regulation," and "flow of interaction"—such terms do not render the annual goals or short-term objectives inappropriate or otherwise prevent a teacher or therapist from implementing the annual goals in the May 2012 IEP in the recommended placement (see Dist. Ex. 6 at pp. 3-9).<sup>12</sup>

Finally, the evidence in the hearing record does not support the parents' contention that the IHO properly found that the May 2012 CSE improperly substituted the student's annual goals related to "music therapy" for the annual goals related to counseling. In support of this finding, the IHO opined that it made "no sense" to transfer the music therapy annual goals to counseling for a student with autism "who [did] not express herself through language or play; but [did] express herself with particular skill and talent through music" (IHO Decision at p. 5). And while no one disputes the student's "particular skill and talent" in the area of music, the evidence in the hearing record also does not support the IHO's conclusion.

At the impartial hearing, the Rebecca School director testified that the student received "counseling" services at the Rebecca School in the form of music therapy (Nov. 8, 2012 Tr. pp. 303-04). At the Rebecca School, the "mental health department" staff assessed the students to determine "which counseling would be best suited" for them, including "talk therapy, play therapy, [or] music therapy" and for this student in particular, "music therapy [was] the most successful counseling service" (Nov. 8, 2012 Tr. p. 303).

According to the December 2011 Rebecca School progress report, the student's mental health services—or music therapy—focused on developing her "relatedness, engagement, continuous flow of interaction, social problem solving, as well as the exploration and expression of emotion" (Dist. Ex. 5 at p. 5). In addition, this service provided the student with "opportunities . . . to support and encourage creative thinking, initiation of ideas, and development of abstraction" (id.). The student's "[f]uture sessions" would focus on developing "flexibility and reciprocity" and "deepening her ability to maintain a continuous flow of musical interactions across a wide range of emotions," and the December 2011 Rebecca School progress report included two annual goals with short-term objectives targeting these areas within a musical experience (id. at pp. 6, 13).<sup>13</sup> A review of the May 2012 IEP reveals that the annual goals—as well as the short-term objectives—related to the recommended counseling services targeted these very same areas of need: namely, her need to "deepen her ability to maintain a continuous flow across a wide range of emotions," and her need to "expand her ability to follow through on creative ideas with emphasis on flexibility and collaboration" (compare Dist. Ex. 5 at p. 13, with Dist. Ex. 6 at pp. 8-9). Rather than using a musical experience, however, the short-term objectives focused on the student's communication experience with the counselor (id.).

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<sup>12</sup> Here, these terms appear in approximately 4 annual goals and approximately 7 short-term objectives (see Dist. Ex. 6 at pp. 3-9).

<sup>13</sup> Notably, although the student's music therapist testified at the impartial hearing, he did not attend the May 2012 CSE meeting (compare Nov. 19, 2012 Tr. pp. 216-310, with Dist. Ex. 6 at p. 16).

In addition, contrary to the IHO's decision the December 2011 Rebecca School progress report indicated that the student "primarily communicat[ed] through the use of verbal language" (*id.* at p. 5). In the same progress report, the Rebecca School teacher noted that the student could participate in "two-way purposeful emotional interactions" and "shared social problem solving," and since May 2011, the student demonstrated the ability to engage in symbolic or "pretend play by incorporating things around the classroom into her familiar memory based phrases as well as by using things around the classroom to act out some of the familiar fairy tales read in class" (*id.* at pp. 1-2). In addition, the Rebecca School teacher reported that since May 2011 the student demonstrated an understanding of emotions in herself and others (*id.* at p. 2).<sup>14</sup> Therefore, based upon the information available to the May 2012 CSE, the student demonstrated skills that would have allowed her to participate in other forms of counseling, such as talk or play therapy, and the May 2012 CSE did not err in substituting the annual goals related to music therapy for the annual goals related to counseling.

Overall, the evidence in the hearing record supports a finding that the annual goals and short-term objectives in the May 2012 IEP targeted the student's needs in the areas of academic skills; sensory processing; regulation; attention and engagement; social interaction; social/emotional skills; communication skills, including oral motor skills, and expressive, receptive, and pragmatic language skills; ADL skills; motor planning; and visual spatial and perceptual skills, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at \*18-\*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at \*9; 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, 146-47 [S.D.N.Y. 2006]).

### **3. Consideration of Special Factors—Interfering Behaviors**

Next, the district asserts that the FBA and BIP adequately addressed the student's sensory and behavioral issues. The parents argue to uphold the IHO's decision, noting that the IHO correctly found that the district improperly created the FBA after the May 2012 CSE meeting and the FBA did not include the required information, such as describing the student's behavior of climbing on furniture in "concrete terms." A review of the evidence in the hearing record supports a determination that, when read in conjunction, the FBA, BIP and IEP adequately addressed the student's behavioral needs.

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<sup>14</sup> In contrast to the December 2011 Rebecca School progress report, the Rebecca School director—who did not attend the May 2012 CSE meeting—testified at the impartial hearing that the student did not receive "play therapy" at the Rebecca School because the student experienced a "hard time at a symbolic play level" (Nov. 19, 2012 Tr. p. 185). The Rebecca School director further explained that the student did not "play or use play therapy techniques" and did not "play out her themes using doll houses or puppets or things like that" (*id.*). In addition, the Rebecca School director testified that the student did not receive "psychodynamic therapy" because the student did not have the "language to be able to participate in that type of treatment," noting that the student used "scripted" language (Nov. 19, 2012 Tr. pp. 185-86, 198-201).

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 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160, 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. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). 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 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavritsky 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]).

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," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA 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 Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

- (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).<sup>15</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [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

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<sup>15</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

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, it is undisputed that although the May 2012 CSE discussed the student's behaviors that interfered with instruction, both the FBA and the BIP were created after the conclusion of the May 2012 CSE meeting based upon the notes taken by the district social worker and by the district special education teacher during the CSE meeting (see Nov. 8, 2012 Tr. pp. 261-64).<sup>16</sup> Here, while the creation of the FBA and the BIP after the conclusion of the May 2012 CSE meeting, alone, would not result in a finding that either the FBA or the BIP was deficient or resulted in a finding that the district failed to offer the student a FAPE, even a cursory review of both the FBA and the BIP reveal deficiencies and an overall, general noncompliance with State regulations set forth above (see Dist. Exs. 7 at p. 1; 8).<sup>17</sup> For example, the FBA did not specifically identify the student's problem behaviors or define the student's behaviors in concrete terms, but rather, generally identified the student's dysregulated behavior as a target behavior (see Dist. Ex. 7 at p. 1). The FBA also failed to include baseline information related to the student's problem behaviors with regard to the frequency, duration, intensity and latency across activities, setting, people or times of the day (id.). Similarly, the BIP briefly described the student's target behaviors, and provided limited information about the student's expected behavior changes (see Dist. Ex. 8). At the impartial hearing, the district school psychologist testified that although brief, both the FBA and the BIP—in addition to the May 2012 IEP—would be available to the student's teachers and service providers and that the BIP did not exist in isolation (see Nov. 8, 2012 Tr. pp. 261-66).

However, notwithstanding the deficiencies in the FBA and BIP, the May 2012 IEP otherwise addressed the student's behavioral and sensory needs. Here, the May 2012 IEP included an annual goal to improve the student's sensory processing with short-term objectives that included the provision of proprioceptive and vestibular input, as well as movement breaks to improve the student's ability to self-regulate (see Dist. Ex. 6 at p. 6). The May 2012 IEP further addressed increasing the student's ability to maintain sensory regulation with an annual goal and short-term objective that addressed the student's ability to request and utilize self-regulation strategies, such as seeking out a dark, quiet space or leaving the room rather than running away from the situation and becoming unavailable to process what was happening (id. at p. 3). The May 2012 IEP also reflected that music helped to regulate and engage the student as well as to

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<sup>16</sup> At the impartial hearing, the student's then-current teacher at the Rebecca School testified that the BIP was not appropriate because the student was not "having behavior problems" (Jan. 23, 2013 Tr. pp. 436, 469-70). In addition, the parents testified that although the May 2012 CSE did not discuss the FBA, she believed the information in the FBA was obtained while the May 2012 CSE discussed the student's "behavior," noting further that "everybody was pretty much agreeing that [the student] didn't really have any significant behavior problems that would prevent her from learning" (see Jan. 23, 2013 Tr. pp. 560-61). The parents further testified that although the student would "cry" and attempt to "hide" and then need to be "reregulated" after a period of time "because of her sensory needs," the May 2012 CSE may have interpreted this sensory need as a behavior to address through an FBA and BIP (Jan. 23, 2013 Tr. pp. 560-63).

<sup>17</sup> In addition, while created after the May 2012 CSE meeting, the information included in the FBA and BIP came from the Rebecca School teacher and service providers, the parents, and the January 2012 classroom observation of the student (see Nov. 8, 2012 Tr. pp. 148-52, 261).

express herself, and as such, the May 2012 IEP provided for the integration of music throughout the student's school day (id. at p. 1). Finally, the May 2012 IEP provided the student with both individual and small group OT services to address the student's sensory regulation needs, as well as the services of a full-time, 1:1 crisis management paraprofessional (id. at p. 10).

Based on the above, the evidence in the hearing record demonstrates that the May 2012 IEP—together with the FBA and BIP—adequately addressed the student's sensory regulation needs, and therefore, under the facts and circumstances of this case any deficiencies in the FBA and BIP would not result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year.

#### **4. 6:1+1 Special Class Placement with a 1:1 Paraprofessional**

The district alleges that the 6:1+1 special class placement with the services of a full-time, 1:1 crisis management paraprofessional was appropriate and would provide the student with a high level of support and structure. In the cross-appel, the parents argue that the 1:1 crisis management paraprofessional was overly restrictive. A review of the evidence in the hearing record supports the district's allegations.

As noted previously, the May 2012 CSE recommended a 6:1+1 special class placement and the services of a full-time, 1:1 crisis management paraprofessional—together with related services, strategies to address the student's management needs, annual goals and short-term objectives, and a BIP—to address the student's deficits in the areas of academics; sensory processing; regulation; attention and engagement; social interactions; social/emotional skills; communication skills, including oral motor skills, and expressive, receptive, and pragmatic language skills; ADL skills; motor planning; and visual spatial and perceptual skills (see Nov. 8, 2012 Tr. pp. 130-32, 146-47; 282-84; Dist. Exs. 3-5; 7 at p. 1; 8; 9 at pp. 2-5). State regulations provide that a 6:1+1 special class placement is designed for those 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]). In reaching the decision to recommend a 6:1+1 special class with the services of a full-time, 1:1 crisis management paraprofessional at a specialized school, the May 2012 CSE considered other placement options for the student (see Nov. 8, 2012 Tr. pp. 155-56; Dist. Exs. 6 at p. 15; 9 at pp. 4-5). As part of that decision, the May 2012 CSE discussed "what types of special education programs" constituted the district's special education programs, the specific programs, and how "those programs may or may not have been considered potentially appropriate for [the student]" (Nov. 8, 2012 Tr. p. 155). Based upon those discussions, the May 2012 CSE determined that the student required a "high level of support and structure" on a 12-month school year basis (Nov. 8, 2012 Tr. pp. 155-56). In order to provide the student with a 12-month school year program, the May 2012 CSE recommended a specialized school, and thereafter, considered the special class program options available to the student at a specialized school (Nov. 8, 2012 Tr. p. 156). In particular, the May 2012 CSE considered but rejected an 8:1+1 special class placement and a 12:1+1 special class placement at a specialized school because the student required more academic, social/emotional and speech-language support than offered by these placement options (see Nov. 8, 2012 Tr. pp. 155-56; Dist. Exs. 6 at p. 15; 9 at p. 4). Similarly, the May 2012 CSE considered but rejected a 12:1+4 special class placement at a specialized school because it was too restrictive to meet the student's academic, social/emotional, and speech-language needs (see Dist. Ex. 6 at p. 15). The district school

psychologist also testified that the placement options offered at other specialized schools would not provide an appropriate peer group for the student (see Nov. 8, 2012 Tr. p. 156). As a result, the May 2012 CSE recommended the 6:1+1 special class placement (see Dist. Ex. 6 at p. 9).

In addition to the 6:1+1 special class placement, the May 2012 CSE also recommended the services of a full-time, 1:1 crisis management paraprofessional (see Dist. Ex. 6 at p. 10). While the parents assert that the recommendation for a 1:1 paraprofessional was "overly restrictive," the evidence in the hearing record does not support this contention.

At the impartial hearing, the parents testified that they objected to the recommendation for a 1:1 paraprofessional at the May 2012 CSE meeting (see Jan. 23, 2013 Tr. p. 513). The district school psychologist explained to the parents that the 1:1 paraprofessional was a "service," so the particular individual "could be in the room and be engaged with other students" but would intervene if the student was attempting to "climb or run out of the classroom" (Jan. 23, 2013, Tr. pp. 513-14). In addition, the parents were told that the 1:1 paraprofessional would not "interfere with [the student's] spontaneous desire to learn to communicate with other kids in the class" (*id.*). The parents also testified, however, that based upon their own understanding of a 1:1 paraprofessional, they were concerned that the 1:1 paraprofessional would be there for the student and that the student would be "very inclined to want to play with, tickle and chase, talk to, [and] request things from this particular individual that was supposed to be assigned to her" (Jan. 23, 2013 Tr. p. 514). As a result, the parents were concerned that the student may miss opportunities to "seek out" and interact with her peers if the student had a particular paraprofessional assigned to her (*id.*). In addition, the parents were concerned that if a particular paraprofessional was assigned to the student, she would become "heavily reliant" on that paraprofessional and the student would become "dysregulated" if the particular paraprofessional was absent (Jan. 23, 2013 Tr. pp. 514-15).

At the impartial hearing, the district school psychologist testified that the May 2012 CSE recommended a 1:1 crisis management paraprofessional to assist the student in "maintaining positive behaviors in the classroom and school setting" (Nov. 8, 2012 Tr. p. 157; see Dist. Ex. 6 at p. 10). In addition, the May 2012 IEP indicated that the student required "very close classroom management" because she exhibited "very poor self-preservation and safety skills" (Dist. Ex. 6 at p. 2). According to the January 2012 classroom observation of the student, she required an aide sitting in close proximity in order to sustain her attention and focus and to provide the student with prompts and redirection (see Dist. Ex. 3).

Thus, even in light of the parents' concerns about the student's potential attachment to the 1:1 crisis management paraprofessional, the student's behavior and safety needs justified the May 2012 CSE's decision to recommend the services of a paraprofessional.<sup>18</sup>

In addition to the 6:1+1 special class placement with a 1:1 crisis management paraprofessional, the May 2012 CSE also recommended strategies to address the student's

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<sup>18</sup> State guidance issued in January 2012 describes the considerations for determining if a student requires a one-to-one aide, as well as the roles and responsibilities of a one-to-one aide (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at pp. 1-5, Office of Special Educ. Mem. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>).

management needs embedded throughout the May 2012 IEP (see generally Dist. Ex. 6). For example, the May 2012 IEP indicated that given the student's enjoyment of sound, music should be "integrated throughout the school day" as it engaged the student across a variety of environments and helped the student to regulate and express herself (Dist. Ex. 6 at p. 1). In addition, the May 2012 IEP indicated that the student required a "very small class" and "very close classroom management" due to "poor self-preservation and safety skills" (*id.* at p. 2). The May 2012 IEP further indicated that the student required self-regulation strategies, such as "seeking out a dark, quiet place or leaving the room;" proprioceptive and vestibular input to address her sensory seeking needs; choices when given questions to answer; redirection and breaks during group activities; and verbal, visual and tactile cueing and support (*id.* at pp. 1-3, 5-7).

To further address and support the student's special education needs, the May 2012 CSE also created annual goals and short-term objectives to address the student's deficits in academics (literacy and mathematics); sensory processing; regulation; attention and engagement; social interaction; social/emotional skills; communication skills, including oral motor skills, and expressive, receptive, and pragmatic language skills; ADL skills; motor planning; and visual spatial and perceptual skills (see Dist. Ex. 6 at pp. 3-9). The May 2012 CSE also recommended the related services, including four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, two 30-minute sessions per week of individual PT, four 30-minute sessions per week of individual OT, one 30-minute session per week group of OT in a small group, and one 30-minute session per week of individual counseling (*id.* at pp. 9-10).

Based on the foregoing, the evidence in the hearing record supports a finding that the 6:1+1 special class placement with the services of a full-time, 1:1 crisis management paraprofessional—together with related services, strategies to address the student's management needs, annual goals and short-term objectives, and a BIP—was reasonably calculated to enable the student to receive educational benefits.

## **5. Related Services—Parent Counseling and Training**

With regard to parent counseling and training, it is undisputed that the May 2012 IEP did not include a recommendation for this related service; however, under the circumstances of this case, the district correctly argues the failure to recommend such service did not, by itself, result in a failure to offer the student a FAPE for the 2012-13 school year. 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 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see *R.E.*, 694 F.3d at 191;

M.M., 583 F. Supp. 2d at 509). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent 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 M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). 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).

Therefore, while it is undisputed that the May 2012 CSE did not recommend parent counseling and training as a related service in the student's May 2012 IEP, the hearing record in this case does not contain sufficient evidence upon which to conclude that the failure to recommend parent counseling and training in the May 2012 IEP resulted in the district's failure to offer the student a FAPE for the 2012-13 school year. In addition, although the May 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, this violation alone does not support a finding that the district failed to offer the student a FAPE (R.E., 694 F.3d at 191; see also F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also M.W., 725 F.3d at 141-42).<sup>19</sup>

## 6. Methodology

Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at \*4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86, 2013 WL 3814669 [2d Cir. 2013]; M.H., 685 F.3d at 257 [finding that the district was imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2, 2014 WL 53264 [2d Cir. 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*11-\*12 [W.D.N.Y. Sept. 26, 2012], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at \*15, \*17 [S.D.N.Y. May 24, 2012], aff'd, 528 Fed. App'x 64 [2d Cir. June 24, 2013]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation

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<sup>19</sup> The district is cautioned, however, that it can not continue to disregard its legal obligation to include parent counseling and training in a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction, and after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner, which, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

(see R.B., 2014 WL 5463084, at \*4; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R. E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also R.B., 2014 WL 5463084, at \*4; A.S., 573 Fed. App' x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

Here, while it appears that the student benefited from the educational program at the Rebecca School where the staff used the DIR methodology and where the student received mental health services in the form of music therapy, the hearing record does not contain sufficient evidence upon which to conclude that the student could only make progress in such an environment (see generally July 16, 2012 Tr. pp. 1-11; Sept. 10, 2012 Tr. pp. 12-72; Sept. 20, 2012 Tr. pp. 73-96; Nov. 8, 2012 Tr. pp. 97-313; Nov. 19, 2012 Tr. pp. 97-312; Jan. 14, 2013 Tr. pp. 313-424; Jan. 23, 2013 Tr. pp. 425-571; Dist. Exs. 1-10; Parent Exs. A-K; IHO Exs. I-VIII). Consequently, the district correctly argues that the May 2012 CSE was not required to recommend a specific methodology in the IEP in order for the student to receive a FAPE.

### **C. Challenges to the Assigned Public School Site**

Finally, the district asserts that any allegations regarding the classroom composition, the failure to list a specific classroom on the FNR, or the assigned public school site's ability to provide the student with the related services recommended in the May 2012 IEP were speculative as the student never enrolled in the assigned public school site. The parents argue to uphold the IHO's conclusion that the district failed to present any evidence regarding the assigned public school site's ability to implement the May 2012 IEP. As explained more fully below, the IHO's conclusion must be reversed.

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 district's 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., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; 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"]).

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., 526 Fed. App'x 135, 141,

2013 WL 2158587 [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., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). 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]).<sup>20</sup> When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the May 2012 IEP because a retrospective analysis of how the district would have implemented the student's May 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the May 2012 IEP (see Parent Exs. E at pp. 1-2; F at pp. 1-4). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and

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<sup>20</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K., 2013 WL 6818376, at \*13 [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the May 2012 IEP.<sup>21</sup>

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist., 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

## VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of

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<sup>21</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 370-72 [E.D.N.Y. 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B., 2013 WL 5438605, at \*17; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir. Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).

whether the student's unilateral placement at the Rebecca School was an appropriate placement or whether equitable considerations weighed in favor of the parents' requested relief (Burlington, 471 U.S. at 370; see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that that the IHO's decision, dated March 6, 2013 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2012-13 school year; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated March 6, 2013, is modified by reversing that portion which directed the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year.

**Dated:** Albany, New York  
March 5, 2015

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**