



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-098

**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,
Neha Dewan, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, 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') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

With respect to the student's educational history, the hearing record shows that the student previously attended the McCarton School from July 2005 through August 2007 and has attended the Rebecca School since September 2007 (see Tr. pp. 544, 624-25).¹

¹ 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).

On February 14, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Parent Exs. D at pp. 1, 14; E at p. 1). Finding the student eligible for special education as a student with autism, the February 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school (Parent Ex. D at pp. 1, 9-10, 13).² In addition, the February 2012 CSE recommended weekly related services on an individual basis, consisting of five 40-minute sessions of individual speech-language therapy, three 40-minute sessions of physical therapy (PT), and five 40-minute sessions of occupational therapy (OT) (*id.* at p. 10). The January 2012 IEP also included supports for the student's management needs (including sensory support, verbal redirection, reminders, and breaks from group activities), 11 annual goals with corresponding short-term objectives (in the areas of academics, daily living skills, speech-language, PT, and OT), and a set of transition activities relative to preparing the student for post-secondary school activities (*id.* at pp. 2-9, 11-12).

On April 15, 2012, the parents signed an enrollment contract with the Rebecca School for the student's attendance during the 12-month 2012-13 school year (see generally Parent Ex. T).

By letters dated April 19 and May 30, 2012, the parents requested that the district provide them with a copy of the February 2012 IEP (Parent Exs. F at p. 1; G at p. 1; see Tr. p. 657). According to the hearing record, the parents subsequently received a copy of the February 2012 IEP on June 2, 2012 (Tr. p. 640).

By final notice of recommendation (FNR) dated June 8, 2012, the district summarized the 6:1+1 special class and related services recommended in the February 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 Parent Ex. I).³ By letter to the district, dated June 11, 2012, the parents requested additional information about the assigned public school site (see Parent Ex. J at pp. 1-2).

By way of letter, dated June 15, 2012, the parents informed the district about their disagreements with the recommendations contained in the February 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year and, as a result, notified the district of their intent to unilaterally place the student at the Rebecca School (see Parent Ex. K at pp. 1-2). Specifically, with respect to the February 2012 IEP, the parents identified the following deficiencies: "[i]nsufficient 1:1 teacher intervention" and level of services, no parent counseling and training, and inappropriate or insufficient behavioral interventions (*id.* at p. 1). The parents informed the district that, based on their visit, they found the assigned public school site to be inappropriate due to: the physical size of the school and classrooms; the lack of information provided about the proposed classroom; the likelihood that the student would be assigned to a different classroom in September; the lack of sensory support or activities available, including the lack of a sensory gym, appropriate sensory integration equipment, and an outdoor recreation area; and the district's failure to assure the

² 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]).

³ The FNR included a handwritten notation, reading "For September 2012" (Parent Ex. I).

parents that the assigned school could implement the student's related services mandates (id. at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 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. 3). The due process complaint notice contained a large number of legal and factual allegations embodied within 109 numbered paragraphs, of which the parties' familiarity is presumed (see id. at pp. 3-12). As relief, the parents requested the costs of the student's tuition at the Rebecca School for the 2012-13 school year, as well as transportation, up to four hours monthly of parent counseling and training, and an award of compensatory additional services for any pendency services to which the student was entitled but did not receive (id. at p. 12).

B. Impartial Hearing Officer Decision

On July 26, 2012, an impartial hearing convened in this matter and concluded on January 8, 2013, after five days of proceedings (Tr. pp. 1-750).⁴ By decision, dated May 6, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that Rebecca was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 15-21).

Initially, the IHO noted that the district's primary witness, the district school psychologist who attended the February 2012 CSE meeting, did not have knowledge of the student outside of the CSE meeting and had little recollection of the February 2012 CSE meeting (IHO Decision at p. 16). The IHO noted testimonial evidence that the February 2012 CSE did not discuss placement options for the student other than the 6:1+1 special class and the CSE would not discuss a particular public school site or methodology during the CSE meeting (id. at p. 17). The IHO determined that the February 2012 CSE relied upon insufficient evaluative data about the student (id. at p. 16). In addition, the IHO found that the reports the February 2012 CSE did rely upon did not support the 6:1+1 special class and, further, that the district failed to explain during the impartial hearing how the recommended 6:1+1 special class placement was appropriate for the student (id. at pp. 16, 17). The IHO determined that the February 2012 IEP included insufficient sensory supports to address the student's needs, failed to include provision for parent counseling and training, and failed to include necessary transition planning or vocational training (id. at p. 17). Further, the IHO found that, given that the student exhibited occasional aggressive outbursts, the February 2012 CSE should have conducted an FBA and developed a BIP to, among other things, determine whether the student's behaviors were a manifestation of sensory deprivation (id. at pp. 17-18). The IHO concluded that the "cumulative effect of the [district's] program violations," identified above, resulted in a denial of a FAPE (id. at p. 18). As to the assigned public school site, the IHO found that the district "created confusion" by virtue of information in the FNR that the student was assigned to attend the particular school as of

⁴ The proceedings on July 26, 2012 addressed the student's pendency (stay-put) placement and, on August 17, 2012, a prehearing conference was held (see Tr. pp. 1-59). The IHO issued an interim decision, dated July 31, 2012, identifying Rebecca as the student's pendency placement (see Interim IHO Decision at pp. 3-4).

September 2012, notwithstanding that the February 2012 IEP mandate for a 12-month school year (id.). The IHO found that "[t]his confusion [wa]s cause enough, independent of the aforementioned program violations, to constitute a . . . denial of FAPE" (id.)

Next, the IHO found that the parents met their burden of establishing that the Rebecca School constituted an appropriate unilateral placement, in that evidence showed that the school offered specially designed instruction to address the student's needs and that the student made progress during the 2012-13 school year (IHO Decision at p. 20). With respect to equitable considerations, the IHO determined that the parents cooperated with the district, acted reasonably in securing a spot for the student at Rebecca for the 2012-13 school year, and provided the district with timely and adequate notice of their intent to unilaterally place the student (id. at pp. 21-22). Accordingly, the IHO ordered the district to reimburse the parents and/or directly fund the costs of the student's attendance at the Rebecca School for the 2012-13 school year (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief. Initially, to the extent the IHO noted that the February 2012 CSE would not discuss either a particular public school site or a teaching methodology at the CSE meeting, the district asserts that it was not required to specify such things on the IEP. Next, contrary to the IHO's finding, the district asserts that the February 2012 CSE had before it sufficient and timely evaluative data, including a variety of assessment tools and strategies. The district asserts that the IHO erred in finding that the 6:1+1 special class was insufficiently supportive of the student's needs and also contends the February 2012 IEP recommended sufficient sensory supports and accommodations. The district also argues that the information before the February 2012 CSE did not indicate that the student engaged in significant disruptive or self-injurious behaviors such that would warrant an FBA or a BIP. In any event, argues the district, the supports recommended in the IEP would have addressed any behavioral needs. With respect to transition services, the district asserts that the February 2012 IEP included goals that targeted daily living skills and identified transition activities and, further, that a vocational training program was programmatic at the assigned public school site. Finally, the district argues that, to the extent deemed procedural violations, neither the lack of a transition plan nor the lack of parent counseling and training or the failure to conduct an FBA or develop a BIP, individually or cumulatively, rose to the level of a denial of a FAPE. As for the assigned public school site, the district asserts that the parents were aware that the February 2012 IEP recommended a 12-month school year and that, notwithstanding any alleged notation on the FNR to the contrary, the district did not fail to offer the student a school site for the summer 2012.

Next, the district asserts that the IHO erred in finding Rebecca to be an appropriate unilateral placement because the student would not have received all of the related services mandated on the February 2012 IEP. Finally, the district argues that the IHO erred in finding that equitable considerations supported the parents' requested relief because the parents did not truly consider enrolling the student in a district program. Further, the district argues that the

parents failed to notify the district of any concerns about a lack of an assigned public school site for the summer 2012.

In an answer, the parents respond to the district's petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition.

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 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. February 2012 CSE

1. Parental Participation

The district asserts on appeal that, to the extent the IHO noted that the February 2012 CSE would not discuss certain topics at the meeting, the CSE was not required to include the disputed details on the IEP and, therefore, did not need to discuss the same. In their answer, the parents argue that all decisions at the CSE meeting were made by district personnel, thereby depriving the parents of a meaningful opportunity to participate.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In the present case, although the parents signed the attendance page for the February 2012 CSE meeting, specifying "attendance only," the hearing record shows meaningful and active parental participation in the development of the student's February 2012 IEP (Tr. pp. 285, 629, 727-28; Dist. Exs. 3 at p. 12; Parent Exs. D at p. 16; E at p. 7; PP at pp. 1-5).

The parents objected to the alleged statements of the district school psychologist during the February 2012 CSE meeting that it was "district policy" not to recommend a particular public school site or methodology on the student's IEP (see Parent Ex. PP at p. 4; see also Tr. pp. 311-12; Parent Ex. E at p. 7). With regard to whether the CSE should have limited the student's teachers to the use of certain methodologies and set forth such limitations on the student's IEP, the selection of educational methodologies to be used with an individual student is generally reserved for the school professionals charged with implementing the student's educational program and is not always discussed in CSE meetings (e.g., Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576, 2014 WL 5463084 [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 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]. Moreover, while the hearing record shows that the student received benefit from the Developmental Individual-difference Relationship-based (DIR) methodology employed by Rebecca and that the parent held "preference[s]" regarding particular methodologies, none of the evidence in the hearing record establishes that the student could only receive educational benefit if DIR was used exclusively (see Tr. pp. 721-22).⁵ In fact, the parent indicated that she would be "open" to alternative methodologies and that, while she would have concerns about certain teaching approaches, she would "like to see that in action" (Tr. p. 722).⁶ Thus, this case does not present one of the exceptions in which the evidence shows that the CSE was required to limit the teacher and provider professional discretion in the delivery of the student's IEP services to one specific methodology in order for the student to receive a FAPE.

As to the parent's allegation that the assigned public school site was not set forth on the IEP as a result of district policy, the Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. Aug. 19, 2011]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). Further, there is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Thus, 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. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013] [noting that a parent "does not have a procedural

⁵ 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 (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"]).

⁶ During the impartial hearing, the student's mother opined that the student "had essentially maxed out on ABA" (applied behavioral analysis) in response to a hypothetical question posed by counsel (Tr. 643; see 49 8-99), even assuming that the parent's statement is correct, it does not lead me to the conclusion that the IEP—which does not require the use of ABA—was inappropriate. Other testimony indicated that the TEACCH approach had not been attempted since the student was in elementary school (Tr. pp. 712, 722). The statements about prior attempts with other methods were vague and there is no indication in the record that any method other than DIR had been seriously attempted in any years. While it is understandable that the parents preferred to continue the Rebecca approach, there was little recent evaluative information to support that the district should limit the IEP exclusively to DIR other than the fact that that was the only method recently attempted.

right in the specific locational placement of his child, as opposed to the educational placement"], aff'd, 556 Fed. App'x 1, 2013 WL 6726899 [2d Cir. Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D. N.Y. Feb. 20, 2013] [holding that the parents' rights to participation "extend only to meaningful participation in the child's 'educational placement,'" not to selection of a particular school building]; see also R.E., 694 F.3d at 191–92 [district may select a specific public school site without the advice of the parents]; F.L., 2012 WL 4891748, at *11 [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; K.L., 2012 WL 4017822, at *13; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. 2011]; S.F., 2011 WL 5419847, at *12, *14; A.L., 812 F. Supp. 2d at 504; S.H. v. New York City Dep't of Educ., 2011 WL 666098, at *5 [S.D.N.Y. Feb. 15, 2011]).⁷ In stead, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A., 371 Fed. App'x at 154; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553, 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents, 629 F.2d at 756; Tarlowe, 2008 WL 2736027, at *6; see also Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

The CSE's decision not to accede to the parent's requests on the two foregoing topics at the CSE meeting was not improper and any lack of extended discussion on those topics during the CSE meeting did not significantly impede the parents' opportunity to participate in the development of the student's IEP. In fairness to the parent, I find one area of potential concern: I can understand how unqualified statements such as the one made by the CSE chairperson during testimony—"It's not appropriate for a CSE review team to include recommended specific methodologies for services or instruction on an IEP"—would cause unease and may, in different circumstances, become highly problematic if the information before a CSE clearly shows that a particular methodology must be used (or avoided) in order for a student to receive a FAPE (Tr. p. 311). Although not present in this case, there may be special instances when strict adherence to a general policy of methodological deference to a teacher or provider charged with implementing an IEP is unwarranted because of specific information about a student's deficits before the CSE that dictates against such deference; therefore, district is cautioned that taking positions solely based on broad general policies that lack any exceptions may, in some instances, ultimately lead to a failure to address unique needs of a student (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014] [finding that the IDEA's LRE requirement is not limited, in the extended school year (ESY) context, by what programs the school district already offers, but rather must be based on the student's needs]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require

⁷ 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 [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 (20 U.S.C. §§ 1401[9][D], 1414[d][2]; 34 CFR 300.17[d], 300.323; 8 NYCRR 200.4[e]).

that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases , placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

Finally, the parents continue to argue on appeal that the district predetermined the student's placement recommendation. A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D.S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013]).

The crux of the parents' allegation of predetermination arises from their claim that the CSE failed to adopt the recommendations proffered by Rebecca personnel after considering their reports. This did not amount to predetermination. The February 2012 IEP indicates that the CSE also considered and rejected a special class in a community school, as well as an 8:1+1 or a 12:1+4 special class in a specialized school (Parent Ex. D at p. 15; see Parent Exs. E at p. 7; PP at p. 4). In addition, the February 2012 CSE meeting minutes, as well as the parents' notes of the meeting, reflect that the CSE discussed the provision of a 1:1 paraprofessional for the student (Parent Exs. E at p. 7; PP at p. 4). Finally, while the parents may have preferred the 8:1+4 class ratio of the student's class at the Rebecca School (see Tr. p. 313; Parent Exs. E at p. 7; MM at p. 4), districts are not required to replicate the identical setting used in private schools (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]).

Accordingly, the IHO's determination and the parent's assertions with respect to claims relating to parental participation and predetermination are without merit.

2. Evaluative Data

Turning to the parties dispute regarding the evaluative data before the February 2012 CSE, 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]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Under the IDEA and State regulations, the CSE must review each student's IEP at least once each year to determine its adequacy and recommend an educational program for the next school year (34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see 20 U.S.C. § 1414[d][4][A][i]; Educ. Law § 4402[1][b][2]). 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]).

In developing the February 2012 IEP, in addition to input from the parents and the student's then-current Rebecca School teacher, the district relied on the student's IEP from the 2011-12 school year, a December 2011 Rebecca School interdisciplinary transition program report of progress, a November 2010 psychoeducational evaluation report, and an October 2010 classroom observation, as well as the student's CSE file (see Tr. pp. 275-78, 420, 449; Parent Ex. PP at pp. 15; see generally Dist. Exs. 5-6, 8; Parent Ex. OO).

The December 2011 Rebecca School progress report, considered by the February 2012 CSE, was fairly comprehensive with respect to the student's needs and progress (see generally Dist. Ex. 5).⁸ The progress report described that the student: communicated using single words, two to five word sentences, and gestures; used to certain songs to interact with specific people; sought a lot of sensory input; was beginning to interact more with his peers; benefited from sensory support during transitions; remained engaged during group activities for longer periods

⁸ A district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56 [2d Cir. Feb. 11, 2014]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

of time with sensory support, verbal redirection, and frequent breaks; and was beginning to show logical thinking in determining a self-regulation strategy (id. at pp. 1-2).

With respect to literacy, the December 2011 Rebecca School progress report indicated that the student was able to recognize emotionally meaningful words as well as approximately 45 sight words (Dist. Ex. 5 at p. 3). The report stated that, when regulated, the student was able to join the class and participate in read alouds and activities; however, when dysregulated, the activity would at times need to be adapted for the student to complete outside of the classroom (id.). In addition, the report stated that, with adult support and redirection, the student worked on an additional reading program to work on basic vocabulary, reading sight words, and working on automaticity and fluency for short sentences (id.). The report indicated that the student was able to follow two-step directives when regulated and was more consistently doing so, even when dysregulated (id.). The report indicated that the Test of Word Reading Efficiency-2 (TOWRE-2) had been administered in October 2011 and that, although the scores did not reflect a standard assessment due to the many accommodations made, the student received a standard score of 57 on an untimed version of the read words section of the exam (id.). The report indicated that, based on the results, the student's reading program should focus on increasing his sight word bank and developing comprehension (id.).

In mathematics, the report indicated that, focusing on independent daily living skills, the student was able to count five pennies and was challenged to select those five pennies from a pile of ten and hand them to his teacher to "pay" for a snack (Dist. Ex. 5 at p. 4). For science, the report indicated that the student was able to identify the basic body parts on himself and in pictures (id. at p. 5). In social studies the student showed independence in hygiene skills but required reminders (id.). The student also required reminders and prompts with skills such as packing and unpacking possessions (id.). The December 2011 Rebecca School progress report reflected the transition focus of the student's program and noted that increasing the student's regulation and ability to stay engaged in a task would be a major goal of the program, as would increasing independence through development of daily living skills and food preparation (id. at p. 6).

Turning to related services, the December 2011 Rebecca School progress report indicated that the student received four sessions of OT per week (two individually, one "in a co-treatment with his speech language pathologist and one other peer," and one in a group), which took place either in the classroom, the sensory gym, the occupational therapist's office, the school hallways, or in the community (Dist. Ex. 5 at p. 8). The report stated that the student transitioned well to OT with minimal verbal assistance (id.). The occupational therapist reported that the student benefited from "[m]usic and deep pressure" in order to regulate (id.). Further, the report indicated that the student was "a sensory seeker" and that his ability to execute fine motor tasks improved following proprioceptive or deep pressure into his hands (id.).

The student received two 30-minute individual sessions of PT per week in either the adaptive physical education gym or the hallway at the Rebecca School (Dist. Ex. 5 at p. 8). The progress report indicated that the student transitioned to and from PT "with minimal coaxing" (id.). According to the report, the student displayed improved sequencing and visual-spatial abilities, initiation, postural control, and in the development of his sense of laterality (id. at pp. 8-

9). As for speech-language therapy, the student received five 30-minute sessions per week, four individually and one with the occupational therapist and a peer (id. at p. 9). The report indicated that the student remained engaged for preferred activities depending on his level of regulation but required maximum support to remain engaged in non-preferred activities, including verbal and visual cues (id.). According to the report, the student's speech-language therapy focused on improving the student's pragmatic, receptive, and expressive language skills (id.). Finally, as to counseling, the progress report indicated that the student attended two 30-minute sessions of individual music therapy per week at the Rebecca School (id.). The report also described the student's progress towards all of his goals implemented at Rebecca and set forth new goals based on such progress (id. at pp. 4-7, 10-14).

The February 2012 CSE also considered a November 2010 psychoeducational evaluation report (see generally Dist. Ex. 6). Administration of the Stanford Binet Intelligence Scales-Fifth Edition (SB-5) to the student yielded a nonverbal IQ of 42, a verbal IQ of 43, and a full scale IQ of 40, in the moderate range of intellectual disability (id. at p. 2).⁹ In addition, the student received an adaptive behavior composite score of 48, suggesting low functioning, based on administration of the Vineland-II Adaptive Behavior Scales (VABS) (id. at p. 4). The evaluator reported that the student demonstrated fleeting eye contact, a tendency to engage in repetitive stereotyped behaviors, and difficulties with change or transitions, self-regulation, impulse control, modulating aggressions, mood stabilization, and attention (id. at pp. 1-3, 5). The report stated that the student exhibited delays in verbal/expressive and receptive language skills, relying largely on gesturing and vocalizations in order to express his needs, and low overall adaptive functioning (id. at pp. 2, 4). The evaluation report indicated that, in regard to pre-academic skills, the student could point to at least one letter of the alphabet, at least one number, at least one geometrical design, and several colors and body parts (id. at pp. 3-4). The evaluator continued, noting that the student demonstrated emerging, but inconsistent, recognition of pre-mathematic concepts and visual/spatial terms (e.g., directions or positions), self-awareness, awareness of familiar people, and awareness of his immediate environment (id. at p. 3-4).

Finally, the CSE had before it an October 2010 classroom observation, in which a district special education teacher observed the student at Rebecca for almost an hour, described that the student required significant support, reminders, and prompting from an assistant teacher, including "hand over hand support" from an assistant teacher to complete a task involving counting pennies (Dist. Ex. 8 at pp. 1-2). The observer described the student's lack of engagement with the group, vocalizations, and self-stimulatory movements, and described three instances during the observation when the student left the classroom and went to the hallway where there were mats and another where the student requested and was directed to "the quiet room" (id. at pp. 2-4). The observer reported information from the teacher that the student often needed breaks from the classroom setting and that he was improving in telling staff of this need rather than running out of the classroom (id. at p. 4).

With regard to the sufficiency of the information about the student, the IHO's decision essentially faulted the school psychologist from the February 2012 CSE meeting for lacking a

⁹ The November 2010 psychoeducational evaluation report noted that the student's scores on the SB-5 "should be interpreted with caution" because accommodations were made during the testing, including extended time, prompting, and directions explained, re-read, and demonstrated (Dist. Ex. 6 at p. 3).

personal familiarity with student that was similar to the Rebecca personnel and her resulting reliance on documentary information as well as having a poor independent recollection of the CSE meeting during her testimony at the impartial hearing (IHO Decision at pp. 16-17). Although acknowledging at one point the October 2010 observation of the student, the IHO also appeared to fault the district for not conducting an observation of the student "not the child's initial evaluation for special education" (IHO Decision at p. 17). However, other than to opine that the evaluative information did not "even come close" to supporting the district's recommendation for a 6:1 +1 special class placement, the IHO did not appear to analyze any of the documentary, other than to criticize the November 2010 because the evaluator did not set forth placement recommendations in the document (IHO Decision at pp. 16-17).¹⁰ As discussed above, and as further discussed below, the IHO's conclusion is in error and the documentary evidence that was considered by the CSE did support its determination. I also reject the IHO's conclusion to the extent it was based upon the school psychologist's lack of familiarity with the student. As mentioned earlier in this decision, the IHO did not appear to consider the fact that the student had been privately placed by the parents since 2005, and after being placed outside the district for approximately seven years it was very unlikely that any public school personnel would have the same level of personal familiarity as the privately selected providers that were currently working with the student and it was unreasonable of the IHO to expect differently from the district's school psychologist.¹¹ The CSE meeting included the participation of the Rebecca School personnel who were familiar with the student and provided information about his performance in the private program and this was sufficient under the circumstances of this case.

Based on the foregoing, the hearing record reflects that the evaluative data considered by the February 2012 CSE, as well as input from the parents and the student's Rebecca School

¹⁰ It is not uncommon for evaluators to simply conduct the assessments during an evaluation and then allow a CSE to draw conclusions when it meets as a group. Nothing in the IDEA or State regulation either requires or prohibits an evaluator from opining upon service recommendations or offering other suggestions to a CSE for consideration, but the IHO's criticism of the evaluator in this case is unjustified—the actual determination of the content of the IEP is made by the CSE, not the individual evaluators.

¹¹ A high degree of personal familiarity of the district personnel who have provided services to the student and participate in the IEP development process can be very helpful in during the CSE meeting, but if the parents unilaterally opt for private school placement on a recurring basis (which is their right as loving parents who wish for the best for their child), that may not be possible and it does not follow that the viewpoint of those private school personnel most personally familiar with the child must be adhered to and will automatically prevail when resolving differences about the student's educational program in the proposed IEP. To hold otherwise would establish a requirement that districts automatically defer to the findings of private school providers as soon as a student spends any appreciable amount of time outside the public school, which is inconsistent with the IEP development process envisioned under the IDEA.

teacher, provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his 2012-13 IEP.¹²

B. February 2012 IEP

1. Sensory Needs

Turning from the process and information used by the CSE to the contents of the resulting IEP, on appeal, the district asserts that the IHO erred in finding that the February 2012 IEP included insufficient sensory supports to address the student's needs (see IHO Decision at p. 17).

As for the student's sensory needs, the February 2012 IEP described such needs in the context of the student's present levels of performance in academics, social development, and physical development (Parent Ex. D at pp. 1-2). With respect to academics and management needs, the February 2012 IEP identified the student's need for "a great deal of sensory support for regulation, especially during transitions and academic periods" and further specified that the student benefited from, among other supports, a weighted blanket, deep pressure on his back or hands from an adult, and use of the stairs as opposed to the elevator, and music (*id.* at pp. 1, 2). Further, the February 2012 IEP noted some of the student's sensory seeking behaviors, including running down the hall, jumping on a trampoline, positioning himself in tight places (between mats), or music (*id.*). The IEP indicated that the student's ability to execute fine motor tasks tended to improve following proprioceptive or deep pressure in his hands (*id.* at p. 2). The February 2012 IEP also reported that the student benefited from breaks from group activities during which he received sensory input (*id.*). In addition, the February 2012 IEP included an annual goal providing that the student would "improve his ability to use sensory information to understand and effectively interact with people and objects in school and home environments" (*id.* at p. 4). Short-term objectives associated with this annual goal indicated that, during a sensory-motor activity such as swinging or after receiving "vibro-tactile input to his palms and fingers," the student would engage in a certain level of interaction with a therapist or in a coloring activity, respectively (*id.*).

Contrary to the IHO's determination, this description of the student's sensory needs and identification of supports was consistent with the information before the February 2012 CSE and

¹² Moreover, irrespective of the fact that the February 2012 CSE had sufficient functional, developmental, and academic information concerning the student, to the extent that the IHO found the November 2010 psychoeducational evaluation report lacking by virtue of the absence of a statement of the evaluator's recommendations for the student's educational program (see IHO Decision at p. 16), this determination must be reversed. The CSE is required to develop the student's IEP based upon consideration of the students' needs, and even if recommendations were included in private evaluations offered by the parents, the CSE is not automatically bound to adopt them, but can make different selections provided they are consistent with the student's needs (see, e.g., *M.L. v. New York City Dep't of Educ.*, 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; *C.L.K. v. Arlington Sch. Dist.*, 2013 WL 6818376, at *10 [S.D.N.Y. Dec. 23, 2013]; *J.C.S. v. Blind Brook-Rye Union Free Sch. Dist.*, 2013 WL 3975942, at *11 [E.D.N.Y. Aug. 5, 2013]; *M.H. v. New York City Dep't of Educ.*, 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; see also *T.S. v. Bd. of Educ.*, 10 F.3d 87, 90 [2d Cir. 1993]; *Tarlowe*, 2008 WL 2736027, at *7-8; *Watson*, 325 F. Supp. 2d at 145).

sufficient to inform a teacher or provider as to this student's specific sensory needs (see Dist. Exs. 5 at pp. 1-2, 8; 8 at pp. 1-4).

2. Special Factors—Interfering Behaviors

The district appeals the IHO's determination that the February 2012 CSE should have conducted an FBA and developed a BIP for the student (see IHO Decision at pp. 17-18) and argues that, even if the student exhibited interfering behaviors, the February 2012 IEP sufficiently addressed them. 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, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. Ra mapo 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]).

In New York State, policy guidance explains that "[t]he 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, the "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]). 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 F.3d 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.).

In the instant matter, the district school psychologist testified as to his recollection of the meeting and that the CSE members reported that the student was not exhibiting negative behaviors and had improved in his interactions with peers and adults (Tr. pp. 334-35). The school psychologist testified that the CSE did not recommend an FBA or a BIP because the student did not exhibit significant disruptive or maladaptive behavior (Tr. p. 294). As noted above, the November 2010 psychoeducational evaluation report and the October 2010 classroom observation, relied upon by the February 2012 CSE, indicated that the student periodically exhibited maladaptive behavior, including distraction, mood issues, and difficulties with self-regulation, impulse control, and aggression that required intervention (Dist. Exs. 6 at pp. 1-3, 5;

8 at pp. 1-4). The December 2011 Rebecca School progress report described certain behaviors related to the student's sensory concerns, including tapping the wall and yelling, and noted the sensory related strategies used, which resulted in an improvement in the student's frustration and dysregulation (see Dist. Ex. 5 at pp. 2, 10). As described above, the February 2012 IEP included supports to address such sensory needs (see ___ Parent Ex. D at pp. 1-2, 5, 10). In addition, according to the CSE meeting minutes, the CSE discussed that the student took "several medications" administered at home to "reduce aggressive behavior, stabilize his mood, [and] increase his attending to tasks" (Parent Ex. E at p. 6).¹³

Thus, to the extent the student's behavior impeded his learning or that of others, information available to the February 2012 CSE identified the student's behaviors that interfered with learning and generally identified the contextual factors that contributed to the behaviors, and the recommended 6:1+1 special class with related services and supports for management needs, including sensory supports, adequately addressed the student's behavioral needs.

3. 6:1+1 Special Class

Next, after ascertaining the student's present levels of performance and developing annual goals to address his sensory and other needs, the February 2012 CSE recommended placement in a 6:1+1 special class (see Parent Ex. D at p. 9). State regulations provide that a 6:1+1 special class placement is designed for 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]). Management needs, in turn, are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]).

The February 2012 IEP identified supports for the student's management needs, including the sensory supports described above, as well as verbal redirection to remain engaged during group activities and reminders as to what comes next (Parent Ex. D at p. 2). In addition, the IEP specified that several of the student's annual goals and short-term objectives would be achieved with varying levels of prompts, redirection, verbal scaffolding, and/or support from adults (id. at pp. 3-6, 8).

The district school psychologist testified that a 6:1+1 special class was appropriate for the student because it was "a supportive" and "heavily structured program" in a small group (Tr. p. 291). However, the parents and the student's Rebecca School teacher expressed concerns during the CSE meeting that the proposed 6:1+1 special class placement would not provide the student with sufficient support (Parent Exs. E at p. 7; MM at p. 4; see Tr. p. 313).

To the extent that the parents argue that the CSE should have recommended a 1:1 paraprofessional because the student required more support than he could receive in a 6:1+1 special class, as noted above, the hearing record shows that the February 2012 CSE discussed the

¹³ While it unclear whether or not the February 2012 CSE reviewed it, the hearing record includes a February 2012 letter from the student's physician, which the parents provided to the district, indicating that the student had responded well to medications and had shown improvement in attention, focus, and irritability (Parent Ex. C at pp. 1, 5).

provision of a 1:1 paraprofessional for the student (Parent Exs. E at p. 7; PP at p. 4). Previously, the student's IEP for the 2011-12 school year included a 1:1 "transitional" paraprofessional (Parent Ex. OO at p. 14). The parents' notes of the meeting indicate that the district school psychologist informed them during the meeting that the "[t]ransitional [p]ara[professional] category no longer exists" and, as the student did not require a crisis management, mobility, health services, or transportation paraprofessional, no 1:1 paraprofessional was included on the February 2012 IEP (Parent Ex. PP at p. 4; see Tr. p. 316). The student's mother testified and clarified that she was told the "designation" of transition paraprofessional no longer existed, and that as a result she chose none of the paraprofessional designations because she felt none were a match for the student because he needed 1:1 support (Tr. pp. 636-39). Designations have changed from time to time and neither the IDEA nor State regulations establish subspecialties for paraprofessionals (known collectively as supplementary school personnel) (see 8 NYCRR 80-5.6, 200.1[hh]; see also "Supplementary School Personnel" Replaces the Term "Paraprofessional" in Part 200 of the Regulations of the Commissioner of Education" available at <http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf>). The Office of Special Education issued a guidance document in January 2012, which indicates that, with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (id. at p. 2).

In the present case, while it is possible that the change in the designations used by the could have been even more clearly described by the district school psychologist, the point is not as critical as the parents claim, as a student's needs must be the primary consideration in the development of an educational placement, under the present circumstances, the recommended 6:1+1 special class with the related services (consisting of a total of 13 individual sessions per week), annual goals, and supports for the student's sensory and management needs were sufficient to meet the student's needs and the information before the CSE did not indicate a need for a 1:1 paraprofessional for the student, regardless of the particular "categories" of paraprofessionals recognized by the district (see Parent Ex. D at pp. 1-10). Additionally the student's mother testified that the student did not require a 1:1 paraprofessional at Rebecca in either 8:1+3 (a 2:1 student-to-adult ratio) or 8:1+4 (an 8:5 student-to-adult ratio) special classes (Tr. p. 626), and I am not persuaded that the student-to-staff ratio in the proffered 6:1+1 special class (a 2:1 student to adult ratio) was so distinct as to require an additional 1:1 paraprofessional solely for the student because the recommended public special class setting instead of the private special class setting.

The hearing record indicates that, at the time of the February 2012 CSE meeting, the student attended an 8:1+4 special class at the Rebecca School and had made progress with respect to his ability to remain engaged in group activities (see Dist. Ex. 5 at pp. 1-2). Thus, consistent with State regulations, as a 6:1+1 special class necessarily implicates the provision of

individualized attention and intervention to a high degree (8 NYCRR 200.6[h][4][ii][a]; cf. R.E., 694 F.3d at 194), the CSE's recommendation was in accord with the available evaluative information.

4. Parent Counseling and Training

The district asserts that the IHO erred in finding that the lack of recommendation for parent counseling and training in the student's February 2012 IEP contributed to a denial of a FAPE (see IHO Decision at p. 17). 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 notwithstanding 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).

Here, while it is undisputed that the CSE did not recommend parent counseling and training as a related service in the student's February 2012 IEP (see generally Parent Ex. D), the hearing record in this case does not contain sufficient evidence upon which to conclude that such failure resulted—in whole, or in part—in a failure to offer the student a FAPE for the 2012-13 school year. Based on the foregoing, although the February 2012 CSE's failure to recommend parent counseling and training in the student's IEP violated State regulation, this violation alone does not support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d

at 191; see also F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 2014 WL 53264, at *4 [2d Cir. Jan. 8, 2014]; M.W., 725 F.3d at 141-42).¹⁴

5. Transition Services

The district asserts that the IHO erred in his finding that the February 2012 IEP lacked sufficient transition services or a vocational training component to the educational placement (see IHO Decision at p. 17). Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see also A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).

The February 2012 CSE had before it information about the student's transition needs included in the December 2011 Rebecca School progress report, which summarized a "transition meeting" and set forth a "transition plan" for the student (Dist. Ex. 5 at pp. 6-7). The progress report indicated that the transition program should target the student's "overall regulation and ability to stay engaged in a task" and focus on "increasing [the student's] independence, through a focus on daily living skills and food preparation," as well as functional academic skills (id. at p. 6). The progress set forth goals related to these needs (id. at p. 7).

The February 2012 IEP does not include postsecondary goals but broadly sets forth a set of transition activities, indicating that the student would "participate in appropriate educational

¹⁴ 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 parent with prior written notice on the form prescribed by the Commissioner that, 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]).

opportunities," "participate in all mandated related services," "continue to participate in community experiences", and "explore areas of career/vocational interest" (Parent Ex. D at pp. 11-12). However, consistent with the December 2011 Rebecca School progress report and the items identified in the CSE meeting minutes as constituting the student's "transition plan," the February 2012 IEP, in general, also focused on transition needs more specific to the student (see Dist. Ex. 5 at pp. 6-7; Parent Ex. E at p. 4; see generally Parent Ex. D). For example, in the present levels of performance, the IEP indicated that the student "need[ed] to increase his independence through a focus on daily living skills and food preparation," that the student should focus on applying skills to "real world situations," and that the student was physically independent in hygiene skills (Parent Ex. D at pp. 1, 2). The February 2012 IEP also included an annual goal targeting the student's daily living skills with short-term objectives related to meal preparation, hygiene routines, using street signs, identifying body parts, dressing, and functioning in the community, as well as short-term objectives in the functional academic realm that related to identification and use of money (see id. at pp. 4-5). Moreover, according to the parents' notes of the CSE meeting, the CSE discussed particular job skills and the district school psychologist indicated that a vocational counselor would identify the student's specific areas of interest (Parent Ex. PP at p. 3).

Accordingly, the evidence in the hearing record shows that the transition plan developed by the February 2012 CSE contained some deficiencies as noted above; however, the IEP did address skills that the student would need as he began moving toward a postsecondary environment and such deficiencies constituted defects of a more technical nature that did not render the February 2012 IEP, as a whole, inappropriate or deny the student a FAPE.

C. Implementation

1. Access to Special Education Services

As noted above, the IHO found that the student was denied a FAPE for the 2012-13 school year, in part, because the FNR in this matter noted that the school site identified was intended for September 2012 despite the fact that the February 2012 IEP recommended that the student attend a 12-month school year (IHO Decision at p. 18). However, while it is uncontroverted that the FNR in this matter includes the handwritten notation "For September 2012" (Parent Ex. I; see Tr. pp. 659, 731), the IHO erred in finding that this alone amounted to a denial of a FAPE.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K. L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and 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).

Here, the hearing record reflects that the district developed an IEP for the student for the 2012-13 school year, that the parents received a copy of this IEP on June 2, 2012, and that an FNR offering a public school site was received by the parents on June 9, 2012, prior to the beginning of the 2012-13 school year (Tr. p. 640; Parent Exs. K at p. 1; MM at p. 1; see generally Parent Ex. D). Thus, while the FNR received by the parents may have included a misleading handwritten notation (see Parent Ex. I), this evidence alone does not amount to a substantive denial of a FAPE. This is especially true since there is nothing in the IDEA, State law, or the regulations implementing these statutes that requires a district to formally provide parents with a notice with the school address in a specified format in order to either offer the student a FAPE or to implement a student's IEP. Moreover, unlike an IEP which is an entitlement created by the IDEA, an FNR is simply one mechanism by which this district notifies parents of the school to which their child has been assigned and at which his or her IEP will be implemented.

Further, even assuming that the particular FNR in this case and the alleged misunderstanding arising therefrom could be considered a violation under IDEA, it would not, in this case, justify an award of tuition reimbursement. The hearing record does not support the conclusion that any confusion regarding the FNR had any bearing on the parents' decision to reject the February 2012 IEP and/or to unilaterally place the student at the Rebecca School for the 2012-13 school year (see generally Parent Ex. K). Rather, the record reflects that the parents did not articulate that the handwritten notation had caused any confusion, visited the assigned public school site, and rejected it due to concerns with the site itself (see id. at pp. 1-2; see also Parent Exs. J at pp. 1-2; MM at pp. 1-5). As such, any confusion over the assigned public school site identified in the FNR did not, by itself, prejudice the parents or cause a deprivation of educational benefit to the student.

2. Challenges to the Assigned Public School Site

To the extent the parents continue to claim that the assigned public school site was inappropriate, for example, based on allegations that it could not implement the student's related services mandates, for the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parents' claims are without merit. Because it is undisputed that the student did not attend the district's assigned public school site (see generally Parent Exs. K; T), the district was not obligated to present evidence as to how it would have implemented the February 2012 IEP (R.E., 694 F.3d at 186-88; see F.L., 553 Fed. App'x at 9 [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; K.L., 530 Fed. App'x at 87; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F., 746 F.3d at 79; D.N. v. New York City Dep't of Educ., 2015

WL 925968, at *7 [S.D.N.Y. Mar. 3, 2015]; J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014]; C.L. K., 2013 WL 6818376, at *13; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Rebecca School was appropriate or whether equitable considerations weighed in favor of the parent's request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 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 May 6, 2013, is modified by reversing that portion which ordered the district to reimburse the parent and/or directly fund the costs of the student's tuition at the Rebecca School for the 2012-13 school year.

IT IS FURTHER ORDERED that the district shall ensure that when the CSE next convenes with respect to the student's IEP, that the inclusion of parent counseling and training shall be considered for inclusion on the IEP and prior written notice shall be issued thereafter consistent with the body of this decision.

Dated: Albany, New York
March 9, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER