



# The University of the State of New York

The State Education Department

State Review Officer

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No. 13-131

**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.

Mayerson and Associates, attorneys for respondents, Jean Marie Brescia, 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 their daughter's tuition costs at the Rebecca School as well as the costs of supplemental after-school services and transportation for the 2012-2013 school year. The appeal must be sustained in part.

### **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]-[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**

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here in detail. Briefly, with respect to the

student's educational history, the hearing record shows that, at the time of impartial hearing, the student had attended the Rebecca School for six years, since kindergarten (see Tr. pp. 738-39).<sup>1</sup>

On March 8, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-2013 school year (Dist. Ex. 3 at p. 16). Finding the student eligible for special education as a student with autism, the March 2012 CSE recommended a twelve-month school year program consisting of a 6:1+1 special class placement in a specialized school with weekly related services consisting of three 30-minute sessions of individual speech-language therapy, one 30-minute session of group (3:1) speech-language therapy, one 30-minute session of individual counseling, one 30-minute session of group (3:1) counseling, four 30-minute sessions of individual occupational therapy (OT), one 30-minute session of group (3:1) OT, and two 30-minute sessions of individual physical therapy (PT) (id. at pp. 1, 11-13, 15-17).<sup>2</sup> The March 2012 CSE also recommended support for management needs (visual and verbal prompts, redirection, repetition, and access to sensory tools and support) and 19 annual goals with corresponding short-term objectives (id. at pp. 2-11). By final notice of recommendation (FNR), dated June 7, 2012, the district summarized the 6:1+1 special class and related services recommended in the March 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 5).

The parents disagreed with the recommendations contained in the March 2012 IEP, as well as with the assigned public school site, and, as a result, by letter dated June 15, 2012, notified the district of their intent to unilaterally place the student at the Rebecca School for the 2012-13 school year and their intent to seek "additional services" at public expense (see Parent Ex. S). In an amended due process complaint notice, dated July 13, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 (see generally Parent Ex. C).<sup>3</sup>

On August 28, 2012, an impartial hearing convened in this matter and concluded on February 20, 2013, after eight days of proceedings (see Tr. pp. 1-975). On September 10, 2012, the IHO issued an order on pendency based on an unappealed IHO decision, dated January 25, 2010, which directed the district to provide the following as the student's pendency (stay put) placement: attendance at the Rebecca School, six hours per week of home-based ABA services, three hours per week of speech-language therapy, and transportation to and from the Rebecca School (Interim IHO Decision at pp. 2, 4; see generally Parent Ex. B). In a final decision, dated June 12, 2013, the IHO found 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' requests for relief.

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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).

<sup>2</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>3</sup> Although the hearing record includes a copy of a subsequent version of the due process complaint notice (see Parent Ex. D), the IHO disallowed the second amendment (Tr. pp. 135-36). The due process complaint notice contained a large number of legal and factual allegations embodied within 116 numbered paragraphs (see Parent Ex. C at pp. 3-14).

The IHO found that, whereas the district did not complete any evaluations of the student and the March 2012 CSE relied only on the Rebecca School progress report, nothing before the CSE supported the recommendation for a 6:1+1 special class for the student (IHO Decision at p. 19). Moreover, the IHO noted that the district did not call any other witnesses in support of the March 2012 IEP, notwithstanding that the district school psychologist did not have knowledge of the student outside of the CSE meeting and little recollection of the March 2012 CSE meeting (*id.* at pp. 18-19, 20). Further, the IHO found that "[n]either the IEP nor [the district school psychologist's] testimony provide[d] evidence that the child's recommended IEP program provided for appropriate sensory supports and accommodations for the child" (*id.* at p. 20). This, observed the IHO, was despite evidence from the Rebecca School staff regarding "the child's needs for sensory supports including a sensory diet and a sensory gym to enable her to maintain a regulated sensory state in order for her to be able to learn" (*id.*). The IHO found that the student needed much more support than available in a 6:1+1 special class and that the district offered such a placement "as a matter of administrative convenience and a pre-determined outcome which was destined to fail as a matter of its design" (*id.*). The IHO further found that the March 2012 CSE failed to provide for parent counseling and training or to conduct an FBA or develop a BIP for the student (*id.*). Consequently, the IHO found that the cumulative effect of the foregoing deprived the student of a FAPE for the 2012-13 school year (*id.*). The IHO found that evidence regarding whether or not the assigned public school site could implement the student's IEP did not factor into his determination (*id.* at p. 21).

The IHO also found that the parents satisfied their burden to establish that the Rebecca School, along with the after-school speech-language therapy and home-based ABA, constituted an appropriate unilateral placement and that equitable considerations supported the parents' requested relief (IHO Decision at pp. 22-24). The IHO ordered the district to pay the costs of the student's tuition at the Rebecca School, as well as the costs of six hours weekly of home-based ABA services and three hours weekly of speech-language therapy services, transportation to and from the Rebecca School, and four hours of parent counseling and training per month (*id.* at pp. 24-25).

#### **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. The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer thereto is also

presumed and will not be recited here in detail.<sup>4</sup> Briefly, the following issues presented on appeal must be resolved in order to render a decision in this case:

1. whether the March 2012 CSE was properly composed;
2. whether the district afforded the parents a meaningful opportunity to participate in the development of the student's March 2012 IEP and whether the IHO erred in determining that the CSE predetermined the student's placement;
3. whether the IHO erred in determining that the March 2012 IEP failed to sufficiently address the student's sensory needs and that the 6:1+1 special class recommended in the March 2012 IEP was not sufficiently supportive to address the student's needs;
4. whether the IHO erred in determining that the student required an FBA and a BIP to address her behaviors;
5. whether the IHO erred in determining that the March 2012 CSE's failure to include parent counseling and training on the student's IEP contributed to a denial of a FAPE;
6. whether the March 2012 CSE inappropriately failed to recommend home-based services on the student's IEP;
7. whether the March 2012 CSE inappropriately failed to recommend a particular educational methodology on the student's IEP;
8. whether the district was required to present evidence regarding the particular public school site to which the district assigned the student to attend;
9. whether the IHO erred in determining that the Rebecca School and the after-school related services constituted an appropriate unilateral placement; and
10. whether the IHO erred in determining that equitable considerations favored the parents' claim for relief.

## **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

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<sup>4</sup> In addition to the issues enumerated below, although not addressed by the IHO, on appeal, the district also asserts that the March 2012 CSE was not required to include special transportation services in the student's IEP. The parents, on the other hand, appear to pursue the transportation issue largely as it related to relief and not as a violation in and of itself. In any event, the hearing record does not reveal any basis for finding that the student required special education transportation as a related service or, if she did, that the omission of the same on the IEP rose to the level of a denial of a FAPE (see Tr. pp. 216, 760-61, 764; Dist. Ex. 3 at p. 15; see also 20 U.S.C. § 1401[26]; Educ. Law § § 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 34 C.F.R. 300.34[a], [c][16]; 8 NYCRR 200.1[ww]).

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. Mamaroneck 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. Mootness

Before reaching the specific questions of law and fact before me in this appeal, it is worth noting that, for all practical purposes, this appeal has become moot as the parents have received all of the relief sought in this matter pursuant to pendency (see Interim IHO Decision at pp. 2, 4). In fact, the district was required to pay for the student's tuition at the Rebecca School for the entire 2012-13 school year and for all requested services before the IHO's decision was issued, prior to the instant appeal being filed (see id.; see also IHO Decision at p. 25).

Thus, it is unclear at this juncture the value of the parties continuing this dispute, as the district is responsible for the costs of the student's unilateral placement the 2012-13 school year and the adequacy of the March 2012 IEP is only marginally relevant to any new IEP generated at a different CSE meeting, during which the district is required by the IDEA to assess the student's continuing development in a new annual review process (see 20 U.S.C. § 1414[d][4]; (34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). That is, each school year must be treated separately for purposes of a tuition reimbursement claim, and evaluating a prior year program that the student never attended is usually not educationally sound on a going forward basis for new IEP planning (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Board of Educ., 2009 WL 904077, at \*21-\*26 [N.D.N.Y. Mar. 31, 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008]; Application of a Student with a Disability, Appeal No. 13-199).

Therefore, the tuition reimbursement claim for the 2012-13 school year has been rendered moot by virtue of pendency. However, in light of a limited number of district court decisions holding that tuition reimbursement cases may, in some circumstances, be subject to an exception to mootness even when the requested relief has been achieved as a result of pendency, in the interest of administrative and judicial economy, I have nevertheless addressed the merits of the appeal out of an abundance of caution even though my view is that the exceptions to mootness do not apply in this case (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at \*2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V. S., 2011 WL 3273922, at \*9-\*10 [E.D.N.Y. July 29, 2011]; but see V.M. v. No. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-20 [N.D.N.Y. 2013] [explaining that claims seeking changes to the student's IEP/educational programming for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at \*1, \*3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254-55 [S.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010] [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school

year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA").

## **B. March 2012 CSE**

### **1. CSE Composition**

Although not addressed by the IHO, the parties continue to dispute the composition of the CSE. The parents' due process complaint set forth a broad allegation regarding CSE composition (see Parent Ex. C at p. 3). The district argues, on appeal, that a regular education teacher was not a required member and that the parents chose not to postpone the CSE meeting in order to ensure the attendance of an additional parent member (see Pet. ¶ 22). The hearing record shows that attendees at the March 2012 CSE meeting included a district school psychologist (who also served as the district representative), a district social worker, a district special education teacher, the parent, and the student's teacher and social worker from the Rebecca School (Dist. Ex. 3 at p. 18; see Tr. pp. 206-07).<sup>5</sup>

As neither of the parties argues that the student should have been educated in a general education environment, a regular education teacher was not a required member of the CSE (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at \*6 [S.D.N.Y. Sept. 29, 2012]).

However, at the time of the May 2008 CSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 366 Fed. App'x 239, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July

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<sup>5</sup> To the extent the parents initially alleged that the CSE should have included the student's related service providers (see Parent Ex. C at p. 3), the IDEA and State and federal regulations provide that, in addition to the required special education teacher or, where appropriate, special education provider of the student, the CSE may include "other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate" (8 NYCRR 200.3[a][1][iii], [ix]; see 20 U.S.C. § 1414[d][1][B][iii], [vi]; 34 CFR 300.321[a][3], [6]). Here, the district school psychologist testified that the district made attempts to invite related service providers from the Rebecca School but that they were not available to attend (Tr. pp. 274-75). In any event, the CSE had before it the December 2011 Rebecca School progress report, which included updates from the student's related services providers (see Dist. Ex. 4 at pp. 4-6) and, further, the parents do not pursue any claims regarding the sufficiency of the related services offered to the student in the March 2012 IEP; accordingly, I am unable to find that the lack of related services providers at the March 2012 CSE amounts to a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415 [f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5 [j][4]).

11, 2005]).<sup>6</sup> However, assuming that the lack of an additional member at the March 2012 CSE meeting constituted a procedural violation, the parents have not alleged and there is no evidence in the hearing record that the absence of an additional parent member impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or that the lack of a parent member caused a deprivation of educational benefits (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*13-\*14 [E.D.N.Y. Aug. 19, 2013]). As discussed below, the parents had ample opportunity to participate in the CSE meeting.

## 2. Parental Participation / Predetermination

The district appeals the IHO's determination that the March 2012 CSE predetermined the student's placement recommendation. In addition, the parents continue to argue on appeal that the district deprived them of an opportunity to participate in the development of the student's IEP. 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 their answer, the parents also argue that they were denied participation because the district members of the CSE made the decision regarding the student's placement. The hearing record reflects that the parent and the Rebecca School staff expressed their disagreement with the placement recommendation at the CSE meeting (see Tr. pp. 213-14, 709-10, 729; Parent Ex. M at p. 6). However, although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]). Therefore, the parents' claim in this regard is without merit.

Further, contrary to the IHO's determination that the district impermissibly predetermined the student's 6:1+1 special class placement as a matter of administrative convenience (see IHO Decision at p. 20), the hearing record reflects a pattern of meaningful participation from the parents, as well as the Rebecca School staff, with respect to the creation of the IEP (see, e.g., Tr. pp. 208-10, 212, 706-08, 713, 717). 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,

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<sup>6</sup> Effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

2011], *aff'd* 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; R.R., 615 F. Supp. 2d at 294). 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 Edu., 2013 WL 25959, at \*18 [S.D.N.Y. Jan. 2, 2013]).

The crux of the parents' allegation of predetermination arose from their claim that the district school psychologist informed them that the CSE did not have the authority to recommend a class ratio other than those available within the district (*see* Tr. pp. 729-31). However, the March 2012 IEP indicates that the CSE considered and rejected a special class in a community school, as well as both an 8:1+1 and a 12:1+4 special class, because they would not meet the student's needs (Dist. Ex. 3 at p. 17). Moreover, contemporaneous CSE meeting minutes indicate that the CSE also discussed "the types of paraprofessionals available to students" and concluded that the student's needs did not require the support of a 1:1 paraprofessional (Parent Ex. M at p. 6). Finally, while the parents may have preferred the 8:1+3 class ratio of the student's class at the Rebecca School (*see* Dist. Ex. 4 at p. 1), 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.

### **3. Evaluative Information**

While the IHO did not squarely address the sufficiency or the CSE's consideration of evaluative information about the student, he did determine that the ultimate placement recommendation did not align with the student's needs as described in the report available to the CSE (*see* IHO Decision at p. 19). Therefore, before reaching a discussion of the recommendations included in the May 2012 IEP, a review of the evaluation information reviewed by the CSE is warranted. 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]).

According to the hearing record, in addition to the input of Rebecca School staff who attended the meeting, the March 2012 CSE considered the student's IEP from the 2011-12 school year and a December 2011 Rebecca School progress report that described the student's academic abilities, communication skills, social/emotional functioning, motor development, and daily living skills (Tr. p. 211; *see* Parent Ex. M at p. 1; *see generally* Dist. Ex. 4).<sup>7</sup> As described

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<sup>7</sup> A copy of the student's IEP from the 2011-12 school year was not included in the hearing record.

below, the December 2011 Rebecca School progress report considered by the March 2012 CSE was fairly comprehensive with respect to the student's needs and progress (see generally Dist. Ex. 4). Moreover, 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]).

The December 2011 Rebecca School progress report described that the student: communicated using three to five word utterances and sometimes full sentences, demonstrated the ability to answer simple "wh" questions related to familiar stories frequently read in class, sought a lot of sensory input, and initiated and responded to interactions with her peers (Dist. Ex. 4 at pp. 1-2). With respect to literacy, the report noted that the student enjoyed looking at books and demonstrated an ability to read 120 sight words, as well as teacher created stories comprised of 6-10 simple sentences incorporating sight words (id. at pp. 2, 4). The report indicated that the Test of Word Reading Efficiency-2 (TOWRE-2) had been administered in November 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 55 on untimed versions of both the read words section and the nonsense or phonetic section of the exam (id. at pp. 3-4). The report interpreted such results, along with teacher observations, to reflect that the student knew "the sounds that letters make, but [wa]s not decoding words or attempting to sound them ou[t] phonetically" (id. at p. 3). According to the progress report, the student demonstrated her comprehension by following directions and paying attention to and following along with various classroom activities (id.). In mathematics, the report indicated that the student "was able to rote count to 50 without adult support," identify number words one to ten, identify groups with "less," identify coins, and differentiate between left and right and answer some questions relating to the sequence of events (id.).

The progress report noted that the student "continue[d] to join all group activities" and was "[t]ypically . . . attentive and engaged" though she at times needed reminders to attend (Dist. Ex. 4 at p. 4). The report noted that the student required adult support during community outings (id.). With respect to ADLs, the report indicated that the student could successfully pack and unpack her backpack and put her things in the appropriate places with verbal support from adults, required some adult support during mealtimes to cut her food, and demonstrated independence in the bathroom other than reminders to wipe and wash her hands (id.).

Turning to related services, the December 2011 Rebecca School progress report indicated that the student received three individual sessions of OT per week either in the classroom, in one of two sensory gyms, in the occupational therapist's office, in "the overall school environment," or in the community (Dist. Ex. 4 at p. 4). The report stated that the student transitioned well to OT and benefited from activities involving swinging (id.). Further, the report noted that the student's "willingness to engage in a novel challenge following vestibular input has increased" (id.). The student's occupational therapist further report that, although the student would "occasionally become upset when a novel challenging task [wa]s presented," "she [wa]s able to recover quickly with verbal re-direction" (id.). The report continued, noting that the following

strategies were useful in helping the student reengage: increased time to process, with clear limit setting and warm affect (*id.*). The student also participated, with support, in a customized "Therapeutic Listening" program and a "(Pre-) Astronaut Training" group, both of which provided the student with sensory support (*id.* at p. 5).

The student received two 30-minute individual sessions of PT per week at the Rebecca School (Dist. Ex. 4 at p. 5). The progress report indicated that the student transitioned to the sensory gym but occasionally required some coaxing to return to the classroom (*id.*). According to the report, the student was motivated by games involving vestibular and proprioceptive input and benefited from use of the swing (*id.*). As for speech-language therapy, the student received three 30-minute sessions per week; two individually and one in a cooking group consisting of three peers, the speech-language pathologist, and two assistants (*id.*). The report indicated that the student primarily communicated through verbal language and required "[m]inimum verbal and tactile cueing for redirection when necessary" (*id.* at pp. 5-6). According to the report, the student's speech-language therapy focused on improving the student's pragmatic, receptive, and expressive language and oral motor skills (*id.* at p. 6). 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 noted that the student had become more intentional in her ideas and began to take more initiative in offering her ideas in the session (*id.*). The report also described the student's progress towards all of her goals implemented at Rebecca and set forth new goals based on such progress (*id.* at pp. 7-15).

Based on the above, the evidence in the hearing record demonstrates that the March 2012 CSE had sufficient evaluative information upon which to develop the student's 2012-13 IEP. Further, review of the March 2012 IEP reveals that the CSE incorporated much of the information from December 2011 progress report into the description of the student's present levels of performance (*see* Dist. Ex. 3 at pp. 1-2). The March 2012 IEP also contains 19 annual goals with corresponding short-term objectives that address the student's needs related to maintaining regulation, social/emotional/communication, literacy, mathematics, science, and safety and activities of daily living (ADL), as well as goals related to the student's related services of OT, PT, speech-language therapy, and counseling (*see* Dist. Ex. 3 at pp. 3-11). These annual goals were developed based upon the information contained in the December 2011 Rebecca School progress report as well as a discussion among the members of the CSE (*compare* Dist. Ex. 3 at pp. 3-11, *with* Dist. Ex. 4 at pp. 7-15; *see also* Tr. pp. 230-44).

## **B. March 2012 IEP**

### **1. 6:1+1 Special Class**

On appeal, the district asserts that the IHO erred in finding that the recommended 6:1+1 special class placement was insufficiently supportive to address the student's needs. After ascertaining the student's present levels of performance and developing annual goals to address her areas of need, the March 2012 CSE recommended placement in a 6:1+1 special class (*see* Dist. Ex. 3 at p. 11). 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 NYC RR 200.6[h][4][ii][a]).

Management needs, in turn, are defined as "the nature of a certain 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 March 2012 IEP included supports for the student's management needs, including verbal and visual prompts, redirection, repetition, and access to sensory tools and support (Dist. Ex. 3 at p. 2). In addition, the IEP indicated that the student would "occasionally become upset when a novel[,] challenging task was presented to her in therapy" but that she was "able to recover quickly with verbal redirection" (*id.*). The IEP continued, noting that "[i]ncreased time to process, with clear limit setting and warm affect have been useful" in helping the student reengage (*id.*). The IEP also noted that the student tended to seek "a lot of sensory input" throughout the day" (*id.*).

Specifically as to the student's sensory needs, which the IHO found the March 2012 IEP failed to sufficiently address (see IHO Decision at p. 20), the contemporaneous CSE meeting minutes show that the CSE discussed that the student struggled with sensory seeking and indicated that she benefited from sensory supports including a weighted vest, a swing, therapeutic listening, a body sock, and sensory equipment (Parent Ex. M at p. 2). The March 2012 IEP, in addition to stating that the student required access to sensory tools and supports, included an annual goal that called for the student's participation "in a multisensory movement sequence involving vestibular input and proprioceptive input (e.g., hanging from a trapeze bar, wheelbarrow walking, playing catch with a weighted bar, holding herself up against gravity while supported on a physioball)" (Dist. Ex. 3 at p. 6). While the IEP could have offered more examples of the sorts of tools and supports from which the student received benefit, I find that the information contained in the IEP was sufficient to inform a teacher or provider as to the student's sensory needs.

The district school psychologist testified that a 6:1+1 special class was appropriate for the student because it was "structured to be a very supportive, educational setting, one that is capable of providing services to [the student] on a 12-month basis" (Tr. p. 214). Although the CSE meeting minutes note that the student's "teacher didn't feel the 6:1+1 [was] the most appropriate ratio," they also stated that the CSE determined that the "6:1+1 [was] the program that could best meet [the student's] cognitive, academic, language and social/emotional needs" (Parent Ex. M at p. 5). Moreover, at the time of the CSE meeting the student's classroom ratio at the Rebecca School was 8:1+3, a ratio substantially not so dissimilar to the 6:1+1 configuration recommended by the March 2012 CSE (compare Dist. Ex. 3 at p. 11, with Dist. Ex. 4 at p. 1).

Thus, consistent with the student's needs and State regulations, the March 2012 CSE appropriately recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school together with related services to address the student's needs in the area of academics, language, sensory regulation, social/emotional functioning, and motor skills (see generally Dist. Ex. 3).

## 2. Special Factors—Interfering Behaviors

The district appeals the IHO's determination that "a failure of the district to develop an FBA or a BIP to address and support efforts to curb and replace the child's interfering behaviors such as tapping, licking and running" contributed to a denial of FAPE (see IHO Decision at p. 20). 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. 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]).

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.*).

Here, it is undisputed that the March 2012 CSE did not conduct an FBA or develop a BIP for the student (see Dist. Ex. 3 at p. 2). However, the CSE did not have before it information about the student's behaviors such that would have indicated such a need (see generally Dist. Ex. 4). The student's Rebecca School classroom teacher testified that she did not think she included information on the student's behaviors in the December 2011 Rebecca School progress report but testified that she spoke about them at the March 2012 CSE meeting (Tr. pp. 711-713, 714-15, 717). Review of the December 2011 Rebecca School progress report reveals no mention of the behaviors of running or licking but does describe the student's progress with tapping and addresses this behavior in a short-term objective, which the March 2012 IEP incorporated, requiring that "[d]uring unstructured time in the classroom, [the student] would maintain regulation and choose to share attention or engage in interactions with adults and/or peers rather than tap" (Dist. Exs. 3 at p. 3; 4 at p. 7). Further, consistent with the CSE meeting minutes, the

IEP notes that the student became overwhelmed by sensory stimuli and "use[d] her mouth to explore preferred items" (Dist. Ex. 3 at p. 2; Parent Ex. M at pp. 2, 4). The meeting minutes also noted that the student was "not aggressive at all" (Parent Ex. M at p. 2). Ultimately, the district school psychologist testified that the student was not described "as manifesting behaviors that were considered extreme, dangerous, or would compromise either her education or the education of others," such that they would necessitate an FBA and/or a BIP (Tr. p. 309).

As there was no indication that the "student exhibits persistent behaviors that impede[d] . . . her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; or that the student's behavior place[d] [her] or others at risk of harm or injury" (8 NYCRR 200.22[b][i]-[ii]), there was no legal mandate for the team to conduct an FBA or develop a BIP and the failure to do so was not a procedural violation in this instance. Further, to the extent the student exhibited some behavioral needs, the March 2012 IEP recommended sufficient supports and strategies to address them, including the annual goal targeted to address the tapping behavior, as well as prompts, redirection, repetition, and access to sensory tools and support (Dist. Ex. 3 at p. 2).

### 3. 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 March 2012 IEP contributed to a denial of a FAPE (see IHO Decision at p. 20). 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 March 2012 IEP, 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, where the hearing record reflects that parent counseling and training was briefly addressed during the meeting and the parent made no objections at the meeting, and, further, it appears that the service was provided as a standard part of the placement offered to the student (Tr. pp. 225-26, 272-73, 773). Based on the foregoing, although the March 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).<sup>8</sup>

#### 4. Home-Based Services

While also not addressed by the IHO, the district argues that the student did not require a recommendation for home-based, after-school services in her IEP.

While the hearing record reflects the opinion of the student's after-school providers that generalization was an important goal for the student (see Tr. pp. 601-03, 845-49), several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir. 1991]; see also Walczak, 142 F.3d at 132 [stating that the "norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families"]; Application of the Dep't. of Educ., Appeal No. 12-086).

At the impartial hearing, the student's home-based ABA therapist and her after-school speech-language therapist—neither of whom attended the March 2012 CSE meeting—testified that, in their opinions, the student needed the home-based and after-school services (Tr. pp. 572, 590-91, 603-04, 845, 848; see Parent Exs. G at p. 3; H at p. 3; QQ at p. 3; see also Dist. Ex. 3 at p. 18). Notwithstanding this testimony and the recommendations in the after-school providers' reports, which were not provided to the CSE, a review of the evidence in the hearing record reveals that none of the information before the April 2012 CSE indicated that the student required home-based services (see, e.g., Tr. pp. 293-94, 727, 741; Dist. Exs. 4 at pp. 1-15; Parent Ex. M at pp. 1-6).

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<sup>8</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 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]).

Therefore, the evidence in the hearing record supports a conclusion that the district offered the student an appropriate educational program that would address the student's significant needs during the school day and that the evidence does not suggest that, based on the information before it, the student required after-school or home-based programming in order to make progress during the in-school portion of her program or to receive educational benefits. Although it is understandable that the parents, whose daughter has substantial needs, desire greater educational benefits through the auspices of special education, it does not follow that the district must be made responsible for them. 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). The IDEA 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, 873 F.2d at 567 [citations omitted]).

## 5. Methodology

Although not addressed by the IHO, the district argues that the March 2012 CSE was not required to specify a particular methodology, such as DIR, on the student's IEP.

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 [the district is 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 (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 there is evidence that the student benefited from the educational program at the Rebecca School that used the DIR methodology (Tr. p. 258; see generally Dist. Ex. 4), there is no indication in the hearing record that the student could only make progress in such an

environment.<sup>9</sup> Moreover, to the extent the annual goals are at issue in this appeal, the parent's challenge appears confined to the fact that the goals, as adopted from the Rebecca School progress report, were intended for implementation at the Rebecca School and not the recommended 6:1+1 special class placement. To the extent the IHO determined and the parent claims the March 2012 IEP's annual goals were insufficient because they were meant to be used in conjunction with the DIR/ Floortime model, a review of the annual goals reveals no impediment to their implementation in a classroom that, or by a related service provider whom, used a methodology other than DIR (see IHO Decision at p. 19; Dist. Ex. 3 at pp. 3-11; cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*12 [S.D.N.Y. Mar. 19, 2013]). Indeed, I find, as the district school psychologist testified, that terms included in the IEP, such as regulation, flow, and interaction, were not "unique" to the DIR methodology (Tr. pp. 268-69, 271).

Based on the foregoing, there is no evidence that the March 2012 CSE had before it information to suggest the student's instruction should be limited in the IEP to one specific methodology in order to enable her to receive educational benefit.

### **C. Assigned Public School Site**

The district asserts that the parents' claims relating to the assigned public school site's were speculative. The parents, in turn, argue that the district failed to rebut testimony from the parent regarding the assigned public school's ability to implement the student's related service 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 Parent Exs. S at p. 2; KK at p. 1; OO), the district was not obligated to present evidence as to how it would have implemented the March 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. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; 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. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

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<sup>9</sup> Indeed, while it is unclear whether the March 2012 CSE was made so aware, at the time of the meeting, the student was receiving his home-based services through a special education teacher support services (SETSS) provider using the applied behavioral analysis (ABA) methodology and receiving educational benefit therefrom (see Parent Ex. G at pp. 1-3).

**VII. Conclusion**

Having determined that the evidence in the hearing record establishes 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 this issues of whether the Rebecca School and the after-school services constituted an appropriate unilateral placement for the student or whether equitable considerations weighed in favor of the parents' request for relief (see Burlington, 471 U.S. at 370; Voluntown, 226 F.3d at 66). I have reviewed the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated June 12, 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 June 12, 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, after-school services, transportation, and parent counseling and training for the 2012-13 school year.

**Dated: Albany, New York  
February 17, 2015**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**