The University of the State of New York

The State Education Department
State Review Officer
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No. 11-110

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Steven L. Goldstein, attorneys for petitioner, Steven L. Goldstein, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, John Tseng, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied his request to be reimbursed for his daughter's tuition costs at the Rebecca School for the 2010-11 school year. Respondent (the district) cross-appeals from the impartial hearing officer's award of additional services for the student. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was attending the Rebecca School (Tr. pp. 572-73; Dist. Ex. 10). The Rebecca School is a nonpublic school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

The hearing record reflects that the student attended public school up to fifth grade and began attending the Rebecca School in September 2006 (Tr. pp. 347, 714). The Rebecca School primarily serves children with neurodevelopmental delays in relating and communicating, including children that have received diagnoses on the autism spectrum, and the school utilizes the Developmental Individual Difference Relationship-based Model (DIR) (Tr. p. 324).

On March 30, 2010, the student underwent a private comprehensive psychological evaluation (Dist. Ex. 4). The resulting report reflected that the student was currently attending the Rebecca School, where she was receiving speech-language, occupational, art, and music therapies as well as counseling services (id. at p. 1). The report also reflected that the student was reportedly taking medications prescribed by a psychiatrist to address aggressive behaviors, including biting herself and others and throwing herself on the ground when upset (id.). Behavioral observations made during the evaluation noted that the student rocked back and forth, covered her eyes, talked to herself, and demonstrated echolalia (id. at p. 2). The evaluation report also reflected that the student was frequently distracted and at times did not respond to redirection from the examiner; however, she responded well to verbal prompts from her mother and appeared to attempt all items to the best of her ability (id.).[1] Administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) yielded a full scale IQ of 44, placing the student's overall level of cognitive functioning within the moderate range of mental retardation and below the 1st percentile (id. at p. 4). Administration of the Wide Range Achievement Test-4 (WRAT-4) reading subtest, which is a measure of word recognition and decoding skills and not of reading comprehension, yielded a standard score of 67, at the 1st percentile and at a 1st grade equivalent (id.). The student's adaptive functioning was assessed via her mother's responses to the Vineland Adaptive Behavior Scales–Survey Interview Form (2nd Edition) Spanish Edition (id. at p. 3). The student's current functioning yielded an Adaptive Behavior Composite standard score of 55, which was characterized as within the low level of adaptive functioning and below the 1st percentile (id. at pp. 3-4). The evaluators opined that taken together, the student's background information, test data, and behavioral observations were consistent with her previous diagnosis of autism (id. at pp. 4-5). The psychological evaluation report contained recommendations which included among other things, continuation of the student's current educational placement and related services and continued monitoring of her medications (id. at p. 5).

The student's performance in her Rebecca School classroom was summarized in an interdisciplinary report of progress dated December 2009 which was signed by the student's parent, special education teacher, and related service providers (Dist. Ex. 3). The report reflected that the student attended a class with four other students, one head teacher, and three teaching assistants and that she received speech-language therapy, occupational therapy (OT), art therapy, music therapy, counseling and adapted physical education (id. at p. 1). The student's abilities in six areas of "education/functional emotional developmental levels" were described, including among other things, that the student was able to maintain regulation and share attention with a preferred adult or peer for five to ten minutes in activities involving puppets, dolls, or stories (id.). However, the student was reportedly often dysregulated, particularly the week before and during menstruation, when she exhibited a higher occurrence of repetitive behaviors; difficulty making transitions, characterized by needing to hold something in her hands, not wanting to get on the elevator, or come into the classroom; as well as difficulty accepting boundaries and limits (id.). At these times, the student usually laid on the ground, moaning and flailing, but at times displayed aggressive behavior toward others including biting or pulling (id.). The report reflected that deep pressure or cool compresses were provided in an effort to calm the student and that the parents were working

[1] The psychological evaluation reflected that since the student was English dominant, test items were administered in English; however, failed items were re-administered in Spanish with no change in response (Dist. Ex. 4 at p. 2).

with a psychiatrist and the school psychologist in order to address the student's dysregulation related to pain during menstruation (id.). The student was reported to have formed meaningful relationships with staff and some peers; had increased her interest in being with her peers in the classroom; was demonstrating ability to transition into and remain in the classroom approximately 75 percent of the day; and was participating in group activities such as morning group/afternoon wrap-up, music therapy, and read alouds (id. at pp. 1-2). With regard to two-way communication, the report reflected that when regulated, the student often initiated interaction with staff by verbally asking for a specific activity and often responded to the initiations of others using expressive language, gesturing, or eye gaze (id. at p. 2). However, the student had difficulty with two-way communication when she was dysregulated as a result of pain or anxiety (id.). The report also reflected that the student was able to problem solve in order to have her needs met in situations such as eating lunch or snack early, but often struggled to problem solve in situations such as when making transitions (id.). According to the report, the student had also successfully participated in pretend play, reciting lines and doing some of the actions to the Goldilocks and the Three Bears story, and had demonstrated emerging ability to make connections between ideas and answer "wh" questions other than "why" questions (id. at pp. 2, 3).

The interdisciplinary progress report also provided details regarding the student's academic curriculum, OT, speech-language therapy, mental health services (counseling) and art therapy (Dist. Ex. 3 at pp. 3-7a). Overall, the report summarized that the student had made progress in her individualized program since starting school in September 2009, but continued to demonstrate difficulties with regulation and engaging with adults and peers around others' interests which inhibited her ability to participate in prolonged interactions around interests and curriculum goals (id. at p. 7a). The report included a recommendation to continue the student's current program and indicated specific goals related to the programming areas addressed in the Rebecca School report of progress (id. at pp. 7a-10).

The student's progress at the Rebecca School since December 2009 was reflected in an unsigned May 2010 interdisciplinary progress report update which indicated that the student's class size had increased by two children (Dist. Ex. 5 at p. 1). In addition to the related services reflected in the December 2009 interdisciplinary report, the student now also participated in Floortime (id.). The report reflected that the student communicated verbally, with gestures, and by nodding her head and described her as a "loving and affectionate young lady who loves to be in interactions with staff members" (id.). Since December 2009 the student was reported to have demonstrated a decrease in the amount of time she spent prone or lateral in the hallway, had demonstrated a greater interest in interacting with an adult in this position, and spent more time participating in activities both in and out of the classroom (id.). The report also reflected that the student's communications were becoming calmer and more frequent in verbalization and that she did not remain as physically closed off from her peers and could now look toward and listen to her peers (id.). The student was also reported to initiate interactions by asking questions using single words or sentences (id.). With regard to academics, the May 2010 update reflected among other things, that the student had developed decoding skills in addition to a sight word bank; that she had demonstrated an understanding of basic facts in fairy tales and other short stories; that she could answer "what," "who," and "where" questions with a verbal response or gesture and was working on understanding inferences and conclusions; and that the student had improved in her fluency and emotional intent (id. at p. 2). The report reflected that the student had also increased her abilities with regard to math, activities of daily living (ADL), and in her acknowledgement of classroom rules (id. at p.

3). With regard to OT, the report reflected that the focus of the therapy continued to be on sensory regulation and modulation, gross and fine motor coordination, shared social problem solving, and engaging in a continuous flow and that the student had been more playful and engaged during the sessions (id. at pp. 3-4). With regard to the student's speech-language therapy, the report reflected that sessions generally focused on shared attention, basic affective communicative exchanges, and lengthening back and forth interactions (id. at p. 4). Since December 2009, the student had demonstrated increased interest in engaging in back and forth interactions during sessions, was initiating and responding to more bids for interaction, and had begun to interpret another person's affective cues and alter her responses accordingly (id.). However, the student's ability to engage in back and forth interactions continued to be heavily influenced by her mood and regulatory state (id.). With regard to counseling, the report reflected that since December 2009, the student had made great strides in her independent request for, and use of, relaxation strategies such as deep breathing, stretching, calming vocalization, and deep pressure leg or hand massage as a method of calming her body down and avoiding escalating her anxiety to a crisis state (id.). However, despite this progress, the student had demonstrated an increase in crisis behavior such as running away from staff, crying, and becoming very tense in her body, pushing or pursuing staff to obtain a desired object, and self-injurious biting (id.). Notwithstanding the increase in certain interfering behaviors described above, the report reflected that the student had demonstrated an overall trend toward increased initiation and playfulness in counseling sessions, had shifted from a passive to collaborative partner in play, and was using gestural and verbal communication to involve the clinician in the interaction (id.). The clinician noted that with the student's gains in more intentional communication, the student had moved toward a developmentally appropriate state of testing limits (id.). The clinician further noted that the student refused to comply with directives especially when transitioning from an activity or relationship that she enjoys (id.). The May 2010 progress update report also reflected that the student had primarily met or progressed toward long and short term goals in the following areas: educational/DIR/Floortime; curriculum; OT; speech-language therapy; counseling; and art therapy (id. at pp. 6-12).

On May 21, 2010, the Committee on Special Education (CSE) convened for an annual review of the student and to develop her individualized education program (IEP) for the 2010-11 school year (Tr. p. 249; Dist. Ex. 6 at p. 1). Meeting attendees included the parents, an interpreter, an additional parent member, a district special education teacher who also served as the district representative, a district school psychologist, and a social-worker from Rebecca School (Tr. pp. 249-50; Dist. Ex. 6 at p. 2). The student's classroom teacher and psychologist from the Rebecca School also participated in the May 2010 CSE meeting via telephone (id.). The hearing record reflects that the CSE discussed the student's needs and developed a statement of present levels of performance in the areas of academic and functional performance, social/emotional performance, and health and physical development (Tr. pp. 267-70, 274-76; Dist. Ex. 6 at pp. 3-5). The IEP reflected academic and social/emotional management needs, including the provision of visual and verbal prompts; repetition and redirection; time to process information; sensory breaks; access to sensory tools including deep pressure, cool wash cloths, and light touch on feet and hands; relaxation strategies to relieve anxiety; and sensory regulating strategies including calming body exercises, using favorite songs and characters, engaging in deep breathing, and calming verbalizations (Dist. Ex. 6 at pp. 3, 4). The May 2010 IEP included 16 annual goals with corresponding short term objectives addressing the student's needs in academics, regulation and engagement, interaction, motor planning, emotional modulation, and expressive and receptive language skills (id. at pp. 6-11).

The May 2010 CSE determined that the student was eligible for special education programs and related services as a student with autism and recommended that she be placed in a 12-month 6:1+1 special class in a specialized school (Dist. Ex. 6 at p. 1). The CSE increased the student's counseling services to two 60-minute individual sessions per week; modified the student's OT services to five 40-minute individual sessions per week; and increased the student's speech-language therapy services to three 40-minute individual and one 40-minute group (of 3) sessions per week (id. at p. 14). The IEP also included a transition plan that reflected long term adult outcomes for the student (id. at p. 15). The CSE considered placement in a 12:1+1 or 8:1+1 special class, but rejected both placement options for the student because she experienced significant anxiety in large group settings and the higher student to teacher ratios would not provide her with sufficient support (id. at p. 13).

The CSE issued a notice of deferred placement dated May 21, 2010, indicating that it recommended the student remain in her current program until June 30, 2010 as the May 21, 2010 IEP was developed for the 2010-11 school year (Dist. Ex. 7). The notice also indicated that the parent would receive notification by June 15, 2010 of the particular school to which the student would be assigned for the 2010-11 school year and provided contact information if the parent wished to arrange an appointment to visit a sample of the type of program recommended for the student (id.).

By letter to the district dated May 27, 2010, and sent by facsimile on May 29, 2010, the parent requested information regarding the recommended program and the student's assigned class, including the teaching techniques and methodologies employed there, the learning profiles and behavioral characteristics of the students, and the qualifications and training requirements of the staff (Parent Ex. H at p. 2). The parent also requested assistance in setting up appointments to view various classrooms where the recommendations that the district made for the student may be implemented (id.).

In a letter to the parent dated June 15, 2010, the district summarized the recommendations made by the May 2010 CSE and identified the particular school to which the student was assigned for the 2010-11 school year (Dist. Ex. 8). The parent responded to the district in a letter dated June 16, 2010, indicating that he believed that the district had failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year and that he was placing the student at the Rebecca School as of July 2010 (Parent Ex. G at pp. 1-3). The parent further indicated that he intended to retain counsel and file for an impartial hearing and that he would be seeking to have the district reimburse and/or pay the student's tuition (id. at p. 2). He also requested that the district arrange and provide the student with roundtrip transportation to the Rebecca School as of the first day of school in July 2010 (id.).

By letter to the district dated June 21, 2010, the parent requested help to arrange a visit to the assigned school (Parent Ex. F at p. 2). The parent further requested information regarding the class to which the student would be assigned and additional information about the assigned school, including but not limited to information concerning its size, physical layout, and class profiles (id.). The parent also requested information regarding the type of related services available at the assigned school and the types of remedial interventions, teaching methodologies, and behavioral modifications and interventions used at the assigned school (id.). The hearing record reflects that

sometime in June 2010, the parent visited the assigned school along with the social worker from the Rebecca School (Tr. pp. 486, 692-94).

On June 23, 2010, the parent executed an enrollment contract with the Rebecca School for the student's attendance for the 2010-11 school year (Parent Ex. O at pp. 3-4). The parents made two nonrefundable payments totaling $1000 on June 26, 2010 (Tr. p. 700; Parent Exs. O at p. 1; P at pp. 1, 2).

In a letter dated August 16, 2010, the parent again notified the district that he believed that it had failed to offer the student a FAPE for the 2010-11 school year on both procedural and substantive grounds (Parent Ex. E at pp. 1-2). The parent further advised that he would place the student at the Rebecca School for the 2010-11 school year and planned to commence an impartial hearing to seek reimbursement and/or funding for the student's tuition at the Rebecca School (id. at p. 2).

Due Process Complaint Notice

By due process complaint notice dated January 6, 2011, the parent asserted that the district failed to offer the student a FAPE for the 2010-11 school year and requested an impartial hearing to adjudicate claims for pendency and payment of the student's tuition costs at the Rebecca School (Parent Ex. A).

The parent asserted that the CSE process was procedurally flawed because the May 2010 CSE team was not "duly constituted" (Parent Ex. A at pp. 4-5). According to the parent, the district representative and the district's special education teacher who attended the May 2010 CSE meeting were not properly qualified to participate as members of the CSE (id.). The parent also asserted that the CSE did not consider the opinions of Rebecca School personnel and did not provide them with copies of all the evaluations and reports relied on by the CSE, which thereby denied the Rebecca School personnel and the parent the opportunity to meaningfully participate at the CSE meeting (id. at p. 5). In addition, the parent asserted that he was denied meaningful participation because (1) the district representative just "reported" the results of the evaluations and failed to explain their meaning to the parent (id. at p. 10); (2) he was not able to participate in the creation of the student's goals and short-term objectives (id. at p. 7); (3) the CSE refused to consider his request for an approved nonpublic school placement (id. at p. 4); and (4) he did not have the opportunity to participate in the selection of the assigned school and the district then failed to provide him with sufficient information regarding the composition of the assigned school and class as well as the qualifications of the teachers and providers at the assigned school (id. at pp. 3-4, 11). The parent further argued that the student's IEP was predetermined (id. at p. 10).

The parent asserted that the IEP was based on outdated present levels of performance; the IEP contained no statement on how the student's ability to progress in a general education curriculum was impacted by her disability; the IEP did not list what evaluations or standardized tests the recommended program was based upon; and the district failed to collect, conduct or consider all of the required evaluations, including a vocational assessment, or an assessment to determine the student's need for adaptive physical education (Parent Ex. A at p. 6). The parent also asserted that the district failed to conduct a functional behavioral assessment (FBA) and create a behavioral intervention plan (BIP) (id. at pp. 6, 8, 9). As for the annual goals and short term

objectives outlined in the student's IEP, the parent asserted among other things that they were inappropriate and insufficient because they were not individually tailored for the student, were too broad to allow guidance in their implementation, lacked objective measurable criteria, and did not comply with statutory and regulatory requirements (id. at pp. 7-8). The parent also asserted that the IEP lacked transitional support services to aid in the student's transition from private to public school, and lacked promotional criteria and provision for parent counseling and training (Parent Ex. A at pp. 9, 11-12). Finally, the parent asserted that the transition plan was inappropriate because it was too vague, generic, not individually tailored to the student, and incomplete since no diploma objective was listed (id. at p. 10).

The parent also asserted that the district would not have been able to properly implement the student's IEP because the student required the DIR/Floortime methodology in order to achieve certain goals, and the district did not have any teachers certified in that methodology, and since the goals and short-term objectives were vague and immeasurable, the teachers would not be able to properly evaluate the student during the school year (Parent Ex. A at pp. 7-8). As a remedy, the parent proposed that, among other things, the district provide direct funding to the Rebecca School for the student's 2010-11 school year tuition (id. at p. 14).

On January 7, 2011, the district notified the parent that it had received the parent's request for an impartial hearing and that a resolution meeting had been scheduled for January 20, 2011 (Parent Ex. D at pp. 2-3). In a January 10, 2011 response to the parent's due process complaint notice, the district asserted that it offered the student a FAPE and the May 2010 CSE relied upon a psychoeducational evaluation, related service progress reports and evaluations, and the May 2010 Rebecca School interdisciplinary progress update report (Dist. Ex. 2 at pp. 2-3).[2]

Impartial Hearing Officer Decision

An impartial hearing convened on February 18, 2011, and concluded on July 1, 2011 after five days of testimony (Tr. pp. 1, 82, 229, 430, 676). In a final written decision dated August 11, 2011, the impartial hearing officer determined that the student's pendency placement was her Rebecca School program and ordered the district to pay for the student's tuition costs at the Rebecca School from January 6, 2011 (the date of the due process complaint notice) until such time as the pending matter came to a final conclusion (IHO Decision at pp. 3-4). The impartial hearing officer further determined that the district offered the student a FAPE for the 2010-11 school year and denied the parent's request for payment of the student's tuition (id. at pp. 37, 40-41).

The impartial hearing officer determined that the May 2010 CSE developed a procedurally and substantively valid IEP (IHO Decision at p. 37). Regarding the composition of the May 2010 CSE, the impartial hearing officer noted that although the district representative, who also participated as the district's special education teacher, would not have implemented the student's program, the Rebecca School participants included a special education teacher, social worker, and school psychologist (id.). The impartial hearing officer also determined that the lack of a regular

[2] By letter to the district dated February 3, 2011, the parent asserted, among other things, that the district's response to the due process complaint notice failed to comport with applicable law and regulations (Parent Ex. B at pp. 1-2).

education teacher at the CSE meeting was a de minimus error because a general education class was not considered for the student and there was nothing in the record to contradict the presumption that the district representative had the requisite knowledge to serve in the regular education teacher capacity (id.).

The impartial hearing officer also determined that the parent was afforded meaningful participation because he had the assistance of an interpreter and he brought his own witnesses from the Rebecca School who also fully participated (IHO Decision at p. 37). Further, the impartial hearing officer found that the May 2010 CSE discussed the Rebecca School evaluations and documents that the parent provided and used those materials to assist in the creation of the IEP, including the goals and short-term objectives, management needs, instructional levels, and related services (id. at pp. 37, 39). The impartial hearing officer also noted that although the district's school psychologist brought a draft IEP with her to the CSE meeting, the draft was read to all the parties, it was edited to conform to the updates and information provided at the CSE meeting, and the final IEP included some elements of DIR, especially in the areas of communication and regulation and attention (id. at p. 37).

With respect to the lack of an FBA and BIP, the impartial hearing officer determined that they were not required because the student's behaviors had de-escalated and did not seriously interfere with instruction (IHO Decision at pp. 37-38). The impartial hearing officer determined that the student's academic management needs included repetition and redirection in the classroom and her social/emotional management needs included sensory tools and sensory breaks and strategies, which were noted in the Rebecca School 2010 progress report (id. at p. 38). The impartial hearing officer also determined that the IEP included goals and short-term objectives in communication, stress regulation, peer interaction, motor planning, ADL, language, social/emotional expression, and academics (id. at pp. 38, 40). The impartial hearing officer noted that the parent did not object to the recommended goals at the May 2010 CSE meeting, and that the teacher who would have implemented the student's IEP found the goals quantifiable (id. at p. 38). Furthermore, although the Rebecca School director testified that the goals were vague and broad and were not broken down between reading and comprehension, she could not identify where on the IEP these issues occurred (id. at p. 39).

The impartial hearing officer also determined that the district's recommended program was in the least restrictive environment (LRE) for the student; it provided personalized instruction; addressed the student's academic, behavioral, and social needs; and offered the foundation to enable the student to become more interactive with her peers, independent in her functionality, and ultimately able to integrate into the community (IHO Decision at p. 40). With respect to the lack of a specified methodology on the IEP, the impartial hearing officer found that the determination of methodology was left to the district teacher to determine what was best for the student and there was no reason to believe that the teacher could not utilize whatever strategy was appropriate for the student (id. at pp. 37, 39). The impartial hearing officer did not credit the testimony of the Rebecca School director that DIR was the only method appropriate for the student, particularly where behavioral techniques, such as repetition and reinforcement, and structured teaching methods, such as calendaring, have been used with the student with success (id.). The impartial hearing officer determined that the only flaw in the district's recommended program was the lack of a "transitional bridge to ensure a smooth adaptation to the new classroom;" however, this was not a fatal flaw since the IEP offered strategies to ease the student's anxiety once the change of

schools had been accomplished (id. at pp. 40-41). The impartial hearing officer suggested that a paraprofessional may be necessary to accompany the student to the new school (id. at p. 40).

The impartial hearing officer rejected the parent's claims that the district's assigned school was inappropriate because it was too noisy in the cafeteria; the related services room was too small and had several therapies being conducted at the same time, which would be too noisy and over stimulating for the student; the classroom was too dark; students were running around and the teacher was doing nothing; the bathroom was too far away; there was no air conditioning or heat in the classroom; and there was a train nearby; and she determined that the assigned school was appropriate (IHO Decision at pp. 39-40). According to the impartial hearing officer, the academic levels were comparable in the class, differentiated instruction was utilized, workstations with color coded schedules offered predictability, it offered a relaxation station to address regulation and included sensory equipment, it used a structured teaching approach to provide predictability, the classroom had a color coded emotional literacy chart so students can communicate their feelings and/or energy levels, it utilized a transition board that displayed the work each student had done toward their transitions, it used visual schedules and cues, had a one-on-one teacher center, it allowed for generalization opportunities in the community, and the parent found the grouping by development levels to be good (id. at pp. 38-40).

In conclusion, the impartial hearing officer determined that the district's recommended program was reasonably calculated to enable the student to receive educational benefits; however, she remanded the case to the CSE to add a paraprofessional or other trained individual, and any additional strategies to ensure a smooth transition from the Rebecca School to the district school classroom (IHO Decision at pp. 40-41).

Appeal for State-Level Review

The parent appeals the impartial hearing officer's determination that the district offered the student a FAPE, reasserting both procedural and substantive claims that were before the impartial hearing officer, among which are that the parent was denied meaningful participation in the IEP development process, the IEP substantively denied the student a FAPE, the district's assigned school would have appropriately implemented the IEP, and that the impartial hearing officer's decision is internally inconsistent with a finding of FAPE.

The parent asserts that he was denied meaningful participation because the district representative lacked the requisite knowledge of all of the available district placement [specific schools and classrooms] options and further lacked the authority to bind the district's resources. The parent further asserts that he was denied meaningful participation because the CSE would not consider either the Rebecca School staff's input, nor would the CSE consider an approved non-public school, and that the only option available was a district placement.

In asserting the program that the CSE created for the student was substantively flawed, the parent asserts that the IEP did not list the evaluations and tests that the CSE used to create the IEP; the CSE did not conduct an FBA and subsequently create a BIP; the goals and short term objectives were, for various reasons, flawed; and the IEP contained no provisions for parent training and counseling. The parent also specifically alleges that the impartial hearing officer erred in

determining that a lack of transitional support services was not a fatal flaw in the program, and that this decision is inconsistent with her finding that the district offered a FAPE.

With respect to the impartial hearing officer's determinations regarding how the district would have implemented the student's IEP at the assigned school, the parent asserts that the impartial hearing officer erred when she determined that the hearing record demonstrated that DIR/Floortime method was not the only methodology that was appropriate for the student, and the assigned school used a myriad of methodologies, and that the methodology to be implemented at the assigned school was best left to the teacher. The parent also asserts that the student would not have been properly functionally grouped at the assigned school.

Finally, notwithstanding the fact that the impartial hearing officer made no determinations as to the appropriateness of the Rebecca School and the issue of equitable considerations, the parent appeals the fact that the impartial hearing officer made no determinations on these issues, and that even if she had made those determinations, the district had waived these issues because it had not raised any defenses to them in its response to the due process complaint notice.

The district cross-appeals that part of the impartial hearing officer's order which remanded the case back to the CSE in order to add a paraprofessional or other trained individual, and any additional strategies to ensure a smooth transition. The district asserts that since the impartial hearing officer found that the district offered the student a FAPE, she cannot award a remedy.

Applicable Standards

Two purposes of the Individuals with Disabilities Education Act (IDEA) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]). A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at

370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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

Discussion

Scope of Review

With regard to the impartial hearing officer's decision that the district offered the student a FAPE, the parent's only specific claims of error are that her decision 1) contained "limited findings and conclusions," 2) was against the weight of the evidence, and 3) that the impartial hearing officer "admitted that her reasoning was flawed" because she found that the district had offered a FAPE but ordered the district to offer additional transitional support to ensure a smooth transition. As for the first contention,[3] I disagree and note that in support of her conclusion that the district offered a FAPE, the impartial hearing officer made specific factual findings with regard to a substantial number of issues, including parent participation at the CSE, the composition of the CSE, the need for an FBA or a BIP, the annual goals, transition support services, least restrictive environment and methodology. State regulations require that a petition for review "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]; see Application of a Student with a Disability, Appeal No. 09-110; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096; see also Application of the Bd. of Educ., Appeal No. 06-122).). Furthermore, State Review Officers have exercised their discretion and dismissed petitions that failed to comply with 8 NYCRR 279.4(a) (see, e.g., Application of a Student with a Disability, Appeal No. 09-110; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024).

In this case, the parent reiterates the allegations asserted against the district in the due process complaint notice and, rather than identifying the reasons why the impartial hearing officer's factual findings on these claims were made in error, for the most part relies on a blanket statement that the impartial hearing officer's determination was against the "substantial weight of the evidence." While the petition for review refers to very few specific factual findings or conclusions in the impartial hearing officer's decision with which the parent disagrees, the parent's position and his disagreement with the impartial hearing officer's overall determination that the

[3] I address the remaining contentions in my analysis below.

district offered the student a FAPE for the 2010-11 school year is nevertheless apparent from the petition. However, generalized or conclusory assertions in a petition for review that an impartial hearing officer's overall determination was incorrect, against the weight of the evidence, or blanket challenges to specific factual determinations are not sufficient under Part 279 and a State Review Officer is not required to infer from the pleadings, which of the impartial hearing officer's "findings, conclusions and orders to which exceptions are taken" (8 NYCRR 279.4[a]), and I am not required to simply presume that every last factual finding in the impartial hearing officer's decision was incorrect and unsupported by the evidence.

On the other hand, I note that the petition is not without substance and sets forth numerous specific allegations that the district failed to offer the student a FAPE. In addition, I note that the district has cogently formulated responses to these allegations in petition for review. Thus, under the circumstances of this case and in the exercise of discretion, I will not dismiss the petition for failure to conform with 8 NYCRR 279.4(a), but caution that future petitions or cross-appeals should provide sufficient particulars as to which impartial hearing officer's factual determinations or conclusions of law should be annulled.

At this point I also note the parent's assertion that the district was precluded from challenging the appropriateness of the Rebecca School and equitable considerations at the impartial hearing because it did not raise these allegations in its response to the parent's due process complaint notice is unavailing (see R.B. v. Dep't of Educ., 2011 WL 4375694, at *5-*7 [S.D.N.Y. Sept. 16, 2011] [holding that a response to a due process complaint required of the school district pursuant to 8 NYCRR 200.5[i][4] must contain the information required under state and federal regulations, it does not function as a waiver of unasserted defenses]).

CSE Process

CSE Composition

The parent contends that the CSE was not properly composed because the special education teacher who also functioned as the district representative at the May 2010 CSE meeting was not a special education teacher who might have worked with the student if the IEP was implemented in the upcoming school year. The parent further asserts that district representative did not have the knowledge or authority required of a district representative team member.

The IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 C.F.R § 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). The hearing record reflects that a special education teacher from the district and the student's classroom teacher from the Rebecca School participated in the May 2010 CSE meeting (Tr. pp. 249-50; Dist. Ex. 6 at p. 2).[4] The hearing record reflects that the district's special education teacher was not teaching within a classroom at

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[4] The hearing record reflects that the teachers at the Rebecca School either have a Master's degree or are enrolled in a Master's in special education program (Tr. p. 327).

the time of the May 2010 CSE meeting (Tr. pp. 292-94). Although I find that the May 2010 CSE lacked a special education teacher who would likely have taught the student in the upcoming school year had the student attended the district's proposed program, I decline to find that this constituted a procedural violation, as the language of the IDEA and State regulations do not require that the special education teacher "of the student" at the CSE meeting be a district employee, and the language used in the comment to the applicable federal regulation (34 C.F.R § 300.321[a][2]-[3]) indicating that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (see IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement and appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement. In addition, I find that the hearing record demonstrates the active participation of the student's then-current classroom teacher from the Rebecca School (Tr. pp. 254-55, 265-68, 271-72, 274-76) and demonstrates that the CSE incorporated information from the Rebecca School progress reports (Tr. pp. 272-73; see Dist. Exs. 3 at p. 7; 5 at p. 4; 6 at pp. 3, 4).

Based on the foregoing, I am not persuaded by the evidence in the hearing record that the lack of an individual at the May 2010 CSE meeting who could have taught the student in the upcoming school year was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's 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 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]), particularly in light of the participation of the student's private school teacher at the May 2010 CSE meeting (see Application of the Dep't of Educ., Appeal No. 11-040; Application of the Dep't of Educ., Appeal No. 08-105).

As for the parent's assertion that the district representative did not have the requisite knowledge or authority required of a district representative team member, a district representative member of the CSE is described as a representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. § 1414[d][1][B][iv]; 34 C.F.R. § 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist provided that such individual meets the above statutory qualifications (8 NYCRR 200.3[a][1][v]). Here, uncontradicted testimony by the district psychologist indicated that the district representative who participated at the student's May 2010 CSE meeting had knowledge about the resources available to the district and therefore I decline to find that the May 2010 was not duly constituted because the individual who served as the district representative was incapable of serving in that capacity (Tr. p. 250).

CSE Consideration of Other Placements

The parent contends that the CSE failed to adhere to appropriate procedures by considering placing the student in any program other than a district 6:1+1 placement despite the student's need for a more restrictive setting and the fact that the student had been attending a nonpublic school for children with neuro-developmental disabilities for the past four school years. I disagree. The IEP reflects that the CSE discussed that the student required 12-month services in order to prevent a significant regression in her skills and accordingly rejected all programs that did not provide for

12-months of service (Dist. Ex. 6 at p. 13). The IEP also reflects that 12:1+1 and 8:1+1 placements were discussed but rejected as having too high student to teacher ratios which would provide insufficient support for the student and because the student experienced significant anxiety in large group settings (id.). Testimony by the district psychologist indicated that the CSE did not consider any state approved or nonpublic school placements because they believed that a 6:1+1 special class in a specialized school would be appropriate for the student (Tr. p. 297). She testified that had the CSE felt the student needed something different, it would have been discussed, and that she did not recall the parent raising that at the CSE meeting (id.). Furthermore, testimony by the parent confirmed that at the CSE meeting, he did not object to the program that was recommended for the student (Tr. pp. 714-15). In light of the above, there is no basis for concluding that the CSE failed to consider other alternative placements other than a district 6:1+1 special class.

The May 2010 IEP

Goals and Short-Term Objectives

I now turn to the parent's contentions with respect to the annual goals and short-term objectives. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee, and when periodic reports on the progress the student is making toward annual goals will be provided to the student's parents (8 NYCRR 200.4[d][2][iii][b], [c]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3][i], [ii]).

With regard to the parent's contention that the goals and short-term objectives on the student's May 2010 IEP were vague, immeasurable, and meaningless, the hearing record reflects that three of the sixteen goals on the student's IEP related to academics toward improving the student's reading, math, and writing skills "to her ability" (Dist. Ex. 6 at pp. 6-7). Although the parent maintains that the term "to her ability" is meaningless and renders these goals vague and immeasurable, I note that the IEP includes corresponding short-term objectives related to these goals which contain sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, gauge the need for continuation or revision, and contain adequate evaluative criteria (id.). For example, one short-term objective that addressed improving the student's reading skills reflected that the student would answer "wh" questions such as "who," "where," and "what," five times during a story when probed by an adult, with 80 percent accuracy (id. at p. 6). Accordingly, I find that the corresponding short-term objectives to these three annual goals were detailed and measurable, and therefore the structure and content in these short-term objectives sufficiently cured any deficiencies in the three annual goals (see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *11 [S.D.N.Y. Sept. 29, 2008]; Tarlowe, 2008 WL 2736027, at *9; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]). Additionally, although the teacher in the assigned class testified that she was not familiar with the term "circle of communication" which was used in several of the short-term objectives, she did not testify, as the

parent contended, that she would have to find out about the student during the school year because the IEP was insufficient (Tr. p. 203).[5] I do not find that this rises to the level of a denial of a FAPE (id. at pp. 8-10).

6:1+1 Special Class Placement

Turning to the parent's assertion that the district's recommended 6:1+1 special class placement was not restrictive enough, I note that State regulations call for a 6:1+1 special class to be designed to address the needs of 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]). Testimony by the district psychologist indicated the CSE chose the 6:1+1 class size specifically because it would allow for the student's anxiety to be addressed and for the student to receive 12-month programming (Tr. p. 254). The district psychologist testified that the 6:1+1 classrooms utilize individualized instruction using a variety of methodologies to address students' needs and that the 6:1+1 teacher works with the individual differences of the students (Tr. pp. 303-05). Testimony by the teacher in the assigned class indicated that 6:1+1 teachers are required to assess their students during the first week of school in the areas of ELA and math and reassess students during the last week of the school year (Tr. p. 118). She testified that a 6:1+1 class provides individual work stations for each student as well as a large group instruction area and that one to one instruction is provided to each student in each class based on the students' needs (Tr. pp. 119, 138). The teacher also indicated that differentiated instruction is provided and that each student follows an individual, personalized, color coded schedule based on the structured methods of teaching (Tr. pp. 119-20, 136-37). The teacher further indicated that a 6:1+1 class utilizes word walls to display and access vocabulary words learned in lessons across the curriculum, that students have access to classroom computers, and may work on short-term transition objectives (Tr. pp. 120-23). The teacher also indicated that a 6:1+1 class includes a relaxation center that contains items that pertain to students' sensory needs as indicated on their IEPs, and that when ready, students can utilize an emotional literacy chart to communicate their emotional state and energy level for example, pleasant and low energy (Tr. pp. 120-21). The teacher in the assigned class testified that she employs strategies reflected in the academic and social/emotional management needs section of the student's IEP such as deep pressure, visual cues, repetition and redirection, sensory tools, sensory breaks, and relaxation strategies to address student's needs (Tr. pp. 125-132; Dist. Ex. 6 at pp. 3, 4). She also testified that challenges similar to those reflected in the student's IEP, including difficulty with transitions, dysregulation, and

[5] The director of the Rebecca School described the term "circle of communication" as engaging in questioning and answering, and used the question and answer format of the impartial hearing as an example (Tr. pp. 422-23). Although the district's special education was candid in her admission that she was unfamiliar with the particular term, I find that the skill, as used in the IEP and described by the Rebecca School director, which is akin to a dialogue or back and forth conversation, was not so specialized as to render the IEP inappropriate or preclude a duly certified special education teacher from ascertaining the particular meaning of the term and thereafter appropriately implement an IEP. To hold otherwise would mean that whenever a person, whether a public school or a private school employee is unfamiliar with a particular term, the public school or private school placement is per se inappropriate. I decline to adopt such a broad rule, particularly under the facts in this case. Communicative dialogs are certainly not exclusive to the DIR/Floortime model, which is why it was not inappropriate to include that element on the student's IEP, especially when the student had been educated at Rebecca in previous school years and the parent and private providers participated in the development of the goals.

aggression were commonly addressed in a 6:1+1 special class (Tr. pp. 127, 129; Dist. Ex. 6 at pp. 3, 4). She further indicated that the goals reflected in the student's IEP were similar to goals typically addressed in a 6:1+1 special class (Tr. pp. 139-40). The special education teacher in the assigned class also indicated that any changes deemed necessary to the student's IEP would be done via an IEP meeting and a team approach including the student's parents, related service providers, a school administrator, and herself (Tr. p. 119). The special education teacher also indicated that 6:1+1 teachers had access to a teaching coach to assist them in lesson planning and implementation as well as access to related service providers for guidance regarding students' speech-language, OT, and physical therapy (PT) needs (Tr. p. 115). Based on the above, the hearing record supports a conclusion that the 6:1+1 special class placement recommendation was appropriate to address the student's needs.[6]

Special Factors in an IEP and Interfering Behaviors

Next, I turn to the parent's contention that the district did not conduct or consider an FBA or a BIP and as such did not adequately develop strategies to alleviate the student's anxiety. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H., 2009 WL 3326627; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, at 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380 ; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/

[6] To the extent that the parent claims that the CSE did not consider the evaluative materials because it recommended a 6:1+1 special class placement, I find this argument unpersuasive.

iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or Pre-school Committee on Special Education (CPSE) "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]" (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[7] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at

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

http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Initially, I note that the hearing record reflects that prior to the CSE meeting, the district psychologist prepared a draft IEP based on information she extrapolated from the December 2009 and May 2010 Rebecca School reports and the March 2010 private comprehensive psychological evaluation (Tr. pp. 251-52, 306). Testimony by the district psychologist indicated that at the May 2010 CSE meeting she read the entire draft IEP aloud, and made handwritten changes and additions based on updated information provided by the Rebecca School teacher, social worker and psychologist who participated during the CSE meeting (Tr. pp. 271-72, 273, 276, 277, 305-07). The resultant present levels of performance on the IEP indicated among other things, that the student's regulation state fluctuated due to anxiety and general pain perception related to menstruation and that her ease of transition was dependent on her regulation (Dist. Ex. 6 at pp. 3, 4). The present levels of performance also reflected that over the past school year the student had made significant gains in her ability to maintain a regulated state, had "dramatically decreased" her behaviors and was currently not aggressive toward people around her (id. at p. 4). Testimony by the district psychologist indicated that based on the CSE's discussion that much of the student's behavior had de-escalated and input from the Rebecca School participants that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher, the CSE did not believe that a BIP was necessary (Tr. pp. 274-75, 277-78, 305). Accordingly, the IEP appropriately reflects that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher with the support of the student's speech-language therapist, occupational therapist, and counselor and also reflects that a BIP was not developed for the student (Dist. Ex. 6 at p. 4).

However, although the CSE determined that a BIP was not required, several other components of the IEP were developed to address the student's regulation state and related anxiety. The IEP reflects academic and social/emotional management needs to help the student calm herself including access to sensory breaks and sensory strategies such as the use of deep pressure or light touch on her feet and hands, cool wash cloths, and the use of relaxation strategies to relieve anxiety including calming body exercises, using favorite songs and characters, engaging in deep breathing, making calming verbalizations, and allowing the student additional time to process information (Dist. Ex. 6 at pp. 3, 4). I note that this information was in part extrapolated from the December 2009 and May 2010 Rebecca School reports and in part provided by Rebecca School staff at the May 2010 CSE meeting (Dist. Exs. 3 at p. 7; 5 at p. 4; 6 at pp. 3, 4). The CSE further addressed the student's anxiety with their decision to place the student in a 6:1+1 class as opposed to a larger class specifically because the student was reported to experience significant anxiety in large group settings (Dist. Ex. 6 at p. 13). The IEP also reflects the CSE's recommendation for an increase in the duration of the student's twice weekly individual counseling services from 30-minute to 60-minute sessions based on input from the Rebecca School reports and staff that the student was a

"slow transitioner" and that she took some time to "get into" the sessions (Tr. pp. 255-56).[8] Accordingly, the IEP reflected a goal that specifically addressed increasing the student's ability to apply relaxation strategies in order to maintain regulation in moments of distress (Dist. Ex. 6 at p. 8). Furthermore, I note that the CSE's recommendation for individual OT services of five 40-minute sessions per week and goals specifically targeting improving the student's emotional modulation for increased self regulation and functional participation in school and at home also addressed the student's needs in this domain (id. at pp. 10, 14). Additionally, the IEP also reflected information provided by the private March 2010 comprehensive psychological evaluation that the student was taking and responding well to medication to address behaviors exhibited when the student was upset (id. at p. 5; Parent Ex. K at p. 2). Based on the above, the hearing record supports a conclusion that an FBA and BIP were not required in order to adequately develop strategies to address the student's decreasing level of anxiety (see A.C., 553 F.3d at 172; C.F. v. New York City Dept. of Educ., 2011 WL 5130101, at *9-*10 [S.D.N.Y. Oct. 28, 2011]; C.T. v. Croton-Harmon Union Free Sch. Dist., 2011 WL 2946706, at *9 [S.D.N.Y. Jul. 18, 2011]).

Parent Counseling and Training

Next, I turn to the parent's assertion that the omission of individualized parent counseling and training in the May 2010 IEP denied the student a FAPE. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 C.F.R. § 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F., 2011 WL 5130101, at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. March 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M., 583 F. Supp. 2d at 509; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011]; adopted at 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).[9]

[8] The CSE also increased the student's OT and speech-language therapy from 30 to 40-minute sessions although the hearing record reflects that this was to accommodate the 40-minute periods of the school schedule (Tr. p. 295).

[9] To the extent that P.K. or R.K. may be read to hold that the failure to adhere to the procedure of listing parent counseling and training on an IEP constitutes a per se, automatic denial of a FAPE, I note that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y., Oct. 30, 2008]).

Here, the provision of parent counseling and training is not listed on the May 2010 IEP (Dist. Ex. 6). When considering the effect of the lack of parent counseling and training, I note that although the April 2010 comprehensive psychological evaluation reflected that the student's mother had requested a referral for in-home habilitation services to assist the student in working on daily living skills, the hearing record does not reflect that the parents required parent counseling and training (Parent Ex. K at p. 6). Testimony by the student's father reflected that the student was currently very communicative with the family and was speaking more, that she was able to pick out and put on her own clothing, shower independently, use the phone and headphones for music, was able to decide where she wants to go when she wants to go out, was able to pick what kind of food she wants and that she had greatly increased her motivation to go to school (Tr. p. 705). Testimony by the student's social worker at Rebecca School who attended the May 2010 CSE meeting, indicated that she had worked with the student's family for the past two years, that she had kept in touch with the parents via weekly phone calls with the student's mother, that she has visited the student's home, and that she attended weekly team meetings after which she is in touch with the parents (Tr. pp. 482-83). I note also that testimony by the program director of Rebecca School indicated that she oversaw parent training at Rebecca School (Tr. p. 330). Given these circumstances, I find that, while the lack of the provision for parent counseling and training on the IEP was inconsistent with State regulations, this inconsistency does not rise to the level of a denial of FAPE in this instance because the evidence in the hearing record does not lead to the conclusion that the parent suffered from a lack of understanding regarding the student's special education needs, or her development, or that the parent lacked the skills to support the implementation of the student's IEP (see 34 C.F.R. § 300.34[c][8]; 8 NYCRR 200.1[kk]).

Transition Plan

The parent contends that the postsecondary transition plan on the student's May 21, 2010 IEP was not individualized to address the student's needs, was vague, and did not provide the information necessary for the school to support the student in moving from school to her post high school life. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables 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 C.F.R. § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and regulations, an IEP for a student who is at least 16 years of age 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][viii]; 34 C.F.R. § 300.320[b]). It must also include the transition services needed to assist the student in reaching those goals (id.). Taking into account these requirements, "[i]t is up to each child's IEP Team to determine the transition services that are needed to meet the unique transition needs of the child" (Transition Services, 71 Fed. Reg. 46668 [Aug. 14, 2006]; see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F. 3d 18 [1st Cir. 2008]; Virginia S. v. Dept. of Educ., 2007 WL 80814 at * 10 [D. Hawaii, Jan. 8 2007]). Additionally, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]).

Under State regulations, beginning when the student is age 15, an IEP must include a statement of the student's needs taking into account the student's preferences and interests as they

relate to transition from school to post-school activities including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation (8 NYCRR 200.1[fff], 200.4[d][2][ix]). For such students, the IEP is also required to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]; Application of a Student with a Disability, Appeal No. 10-069, Application of the Dep't. of Educ., Appeal No. 08-080).

Here, a review of the May 2010 IEP reflects that the transition plan contains general long term adult outcomes for the student in community integration, postsecondary placement, independent living and employment, however, the diploma objective and transition services sections of the transition plan were not completed, and the IEP does not include any transition services related to instructional activities, community integration or post high school that would assist the student in her transition to life after high school (Dist. Ex. 6 at p. 15). However, I note that at the time the IEP was created, the student was not chronologically near graduation age and was not yet 15 years of age, and this was the first IEP under which the district was required by State regulations to develop a transition plan (id. at p. 1).[10] Testimony by the teacher in the assigned class reflected that a vocational "survey" is typically completed with the student and the parent to determine what the student is interested in and that based on the survey, the details of the transition plan are determined which, accordingly, the teacher would address in the student's lessons (Tr. pp. 186-87). I note that the hearing record does not reflect whether a vocational survey was completed on the student. When considering the harm resulting from the incomplete transition plan, I note that the teacher of the assigned class, although uncertain of the student's precise age, indicated that the student was not yet 16 and was not required to decide at this time, specifically what she wants to do after high school although she opined that it would have been helpful to get an idea of what she is interested in (Tr. pp. 188-89). She further testified that once she had identified the student's interests by way of the vocational survey, she could use that knowledge to assist her in creating a more effective transition plan (Tr. pp. 220-21). Based on the foregoing, I decline to find that these procedural deficiencies in the transition plan rose to the level of a denial of a FAPE to the student.

Transition Support Services

The parent contends that the CSE failed to develop transition support services for the student, asserting that moving the student from her then placement to the district's recommended 6:1+1 special class would constitute moving the student to a less restrictive setting. I note that the student would have remained in the same placement on the continuum of educational services; that is, the student would have remained in a special education class that did not contain general

[10] Transition plans are not generally required under the Federal regulations until a student reaches age 16.

education students (see 34 C.F.R. §§ 300.115, 300.39; see also, IEP Team, 71 Fed. Reg. 46586 [Aug. 14, 2006]).

I also note that the IDEA does not specifically set forth the provisions requiring a school district to formulate such services as part of a student's IEP when a student moves from one school to another; however, under separate State regulations, "transition support services" are to be provided to a regular or special education teacher to aid in the provision of services to a student with a disability who is transferring to a regular program or to a program or service in a less restrictive environment (8 NYCRR 200.1[ddd]; 200.4[fff]). In this case, the district's school psychologist testified that counseling was changed from 30 minute to 60 minute sessions because the student was a "slow transitioner" (Tr. pp. 255-56). The special education teacher at the district's assigned school testified that she implements several strategies for students in order to assist them in transitioning within the classroom, between classes, and within the school building, including among other things, first/then charts, faded incentives, visual cues, and sensory tools such as deep pressure, which would be implemented after placing the student in the relaxation center (Tr. pp. 127-28, 130).

Thus, although transition services were not identified on the student's May 2010 IEP, the hearing record shows that had the student attended the assigned school, the assigned school would have been responsive in addressing any transition needs related to the student's enrollment at the public school (see A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *12 [S.D.N.Y. Aug. 19, 2011]). Under the circumstances of this case, I find that the lack of specified services on the IEP to assist the student in transitioning from the Rebecca School to the public school program did not impede the student's right to a FAPE, significantly impede the parent's meaningful participation in the CSE process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Having reviewed the evidence in the hearing record described above, I concur with the impartial hearing officer that the May 2010 IEP was reasonably calculated to enable the student to receive educational benefit(see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Assigned School

The parent argues that the student's IEP would not have been properly implemented at the district's assigned school. Specifically, the parent asserts that the student would not have been functionally grouped in the recommended class and that the proposed assigned class utilized certain behavioral methodologies which would not have met the student's needs, rather than using the DIR methodology, which the parent asserts is the appropriate methodology.

I initially note that the parent's claims with respect to the assigned school are in part speculative insofar as the parent did not accept the recommendations of the CSE or the programs offered by the district, the student did not attend the district's assigned school, and therefore, the district was not required to prove that it could implement the May 2010 IEP. Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010

WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L., 2011 WL 4001074, at *9; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). Additionally, as discussed below, even assuming for the sake of argument that the student had attended the public school and the district would have been required to establish that it had properly implemented the student's IEP, the parent's concerns are not adequately supported by the evidence in the hearing record.

Functional Grouping

The parent contends that the functional grouping of the student would have been inappropriate in the assigned class. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]–[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in

reading and math would exceed three years (see Application of a Student with a Disability; Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, the hearing record reveals that the 6:1+1 special class at the assigned school would not have placed the student within suitable grouping for instructional purposes. The hearing record shows that in July 2010 on the first day of school, the assigned class contained two students ages 14 and 15 (Tr. pp. 113-14). Testimony by the teacher of the assigned class indicated that the instructional levels for the 14 year old student were at the second grade level in ELA and math and that the instructional levels for the 15 year old student were at the pre-kindergarten level in ELA and math (Tr. p. 114). Based on the instructional levels reflected in the student's IEP which ranged from grade 2.5 in math, a 2.3 in writing, beginning third grade in reading comprehension, and at a third to fourth grade level in decoding, the district would have been required under State regulations to provide the parent with a description of the range of achievement in reading and mathematics by November 1, 2011 (8 NYCRR 200.6[h][7]). The parent has not argued that the lack of the provision of such a notice deprived the student of a FAPE; rather, he erroneously argues that the students in the class had functional levels that were not appropriate for the student and that this constituted a violation of the State regulations. I further note that testimony by the teacher in the assigned class indicated that her class roster changed after the 2010 summer program when school resumed in September 2010 (Tr. pp. 166, 174), which provides for even greater speculation as to the composition of the assigned class, and its resultant functional grouping. Given these facts and circumstances, I decline to find a denial of a FAPE, particularly in the case here where the student never attended the assigned class.

Methodology

The parent alleges that, because the assigned class employed a "behavioral methodology" and not the DIR methodology, the inclusion of DIR goals on the student's IEP indicates that the IEP would not have been implemented in the assigned class. However, I note that a review of the IEP reveals that there is nothing in the IEP that states that the goals are "DIR" goals. Furthermore, testimony by the district psychologist indicated that the CSE does not dictate methodology on an IEP (Tr. pp. 285, 303) and that the district 6:1+1 classes that she has observed use an eclectic approach including among other things, some applied behavioral analysis (ABA) and DIR Floortime (Tr. pp. 285). She further testified that goals that focus on regulation, attention, and communication are often included in an IEP for students in a 6:1+1 class, however, she stated "it doesn't mean that you have to just adhere to a DIR methodology to work on regulation issues, attention issues, those kinds of issues at all" (id.). The psychologist also stated that she believed that a good teacher in a 6:1+1 class would be able to work on those areas of deficit and that although certain ideas such as communication, socialization and regulation issues stem from DIR, they are very much part and parcel of a 6:1+1 program (Tr. pp. 285-86, 304).

Based on the above, with regard to the parent's contentions related to the assigned school, the hearing record does not support a conclusion that had the student attended the assigned school, the district would have deviated from the IEP in a material way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see D.D.-S., 2011 WL 3919040, at *13; A.L., 2011 WL 4001074, at *9).

Ordered Relief

The district contends that the impartial hearing officer improperly awarded relief related to the 2010-11 school year despite finding that the district offered the student a FAPE via the May 2010 IEP. Absent a determination by the impartial hearing officer that there was a denial of a FAPE, no basis exists upon which to predicate the awarding of any relief (see 34 C.F.R. § 300.148[a]; Application of a Student with a Disability, Appeal No. 11-032, Application of the Dep't of Educ., Appeal No. 11-026; Application of the Dep't of Educ., Appeal No. 11-014, Application of a Student with a Disability, Appeal No. 08-078).

In this case, the hearing record demonstrates that the impartial hearing officer determined that the May 2010 IEP was not procedurally defective (IHO Decision at pp. 37, 38), and that while the district did not offer a transitional bridge to ensure a smooth adaptation from the private school to the district's program, that failing did not render the IEP substantively deficient (id. at pp. 40-41). As noted above, the hearing record does not support the conclusion that the CSE process when the May 2010 IEP was created was flawed, nor does the hearing record support the contention that the recommended program and placement were inappropriate. Furthermore, the hearing record demonstrates that any flaws in the IEP did not rise to the level of a denial of a FAPE. Moreover, where, as here, the parent has exercised his right to unilaterally place the student at the Rebecca School for the 2010-11 school year and there is no indication in the hearing record that the parent intended to return the student to the district for the remainder of the school year, it is unnecessary to direct the district to provide the parent with such relief. Consequently, in the absence of any other basis, the impartial hearing officer's remedial directive awarding relief to the parent by remanding the case to the CSE in order to add a paraprofessional or other trained individual, and any additional strategies to ensure a smooth transition from the Rebecca School to the district school classroom must be annulled (id. at p. 41).

Conclusion

Having found that the district offered the student a FAPE for the 2010-11 school year, I need not reach the issues of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parent's request, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated August 11, 2011 which remanded the matter to the CSE to add a paraprofessional or other trained individual, and any additional strategies to ensure the student's smooth transition from the nonpublic school to the district school is hereby annulled.

Dated: **Albany, New York**
December 7, 2011

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JUSTYN P. BATES
STATE REVIEW OFFICER