



# The University of the State of New York

The State Education Department  
State Review Officer  
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No. 11-136

**Application of the NEW YORK CITY DEPARTMENT OF  
EDUCATION for review of a determination of a hearing officer  
relating to the provision of educational services to a student with  
a disability**

**Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, G. Christopher Harriss, Esq., of counsel

Thivierge & Rothberg, PC, attorneys for respondents, Randi M. Rothberg, Esq., of counsel

## DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2009-10 school year. The appeal must be sustained.

The hearing record reflects that for the 2009-10 school year, the student attended the Rebecca School (Tr. pp. 301-02, 372-73, 405, 446-47; Parent Exs. A at p. 4; H at p. 1; I at p. 1; K at p. 1; N), which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has been attending the Rebecca School since September 2007 (see Tr. pp. 301-02, 508, 531; Dist. Exs. 4 at p. 1, 6 at p. 1; Parent Exs. G; J at p. 1).

The hearing record further reflects that the student previously received diagnoses of a pervasive developmental disorder, not otherwise specified (PDD-NOS), an autism spectrum disorder, cerebral palsy (CP), strabismus, and periventricular leukomalacia (PVL), a neurological condition characterized by brain lesions and low white matter resulting in significant brain damage, and that the student was nonverbal, had blind spots in his vision, and did not ambulate independently, requiring leg braces and a mobile walker (Tr. p. 505; Dist. Exs. 3 at p. 1; 5 at p. 1; 6 at p. 1; 7 at p. 1; Parent Exs. A at pp. 1, 3; B at pp. 3, 5, 13). The student received Early Intervention (EI) services since birth (Dist. Ex. 3 at p. 1), and then received special education and related services through the district's Preschool Committee on Special Education (CPSE) (Tr. pp. 506, 531). The student's eligibility for special education and related services as a student with multiple disabilities is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

## Background

On July 28, 2008, a psychoeducational evaluation of the student was conducted to ascertain the student's level of cognitive/emotional functioning and to assess his academic needs in preparation for the student's transition from preschool to grade school (Dist. Ex. 3). On September 26, 2008, the Committee on Special Education (CSE) convened a review meeting to develop an individualized education program (IEP) for the student's 2008-09 school year (Dist. Ex. 1). The CSE determined the student eligible for special education programs and related services as a student with multiple disabilities and deferred his placement to the district's central based support team (CBST) (id. at p. 1; see Dist. Ex. 7 at p. 2).

On April 1, 2009, the parents executed an enrollment contract with the Rebecca School and remitted a nonrefundable deposit to reserve the student's seat at the school for the 2009-10 school year (Parent Exs. M; O at pp. 1-2). Also in April 2009, the Rebecca School issued a multidisciplinary progress report summarizing the student's educational performance from January 2009 to April 2009 (Parent Ex. J).

On June 2, 2009, a district special education teacher conducted a 40-minute classroom observation of the student at the Rebecca School (Parent Ex. G.). On June 5, 2009, the CSE convened for the student's annual review to develop the student's IEP for the 2009-10 school year (Parent Ex. B; Dist. Ex. 7). In a notice dated June 12, 2009, the district summarized the recommendations made by the June 2009 CSE and informed the parents of the particular school to which the district assigned the student (Parent Ex. F). After visiting the assigned school on June 17, 2009, the parents informed the district in writing that they were rejecting the assigned school and intending to continue the student's placement at the Rebecca School and his "extended day/weekend programming" of related services at public expense (Tr. pp. 5, 512-14; Parent Ex. E). They further expressed their willingness to consider any other programs that the district may offer the student in the meantime (Parent Ex. E).

On June 25, 2009, the district informed the parents telephonically of another school<sup>1</sup> to which the district assigned the student (Parent Ex. D). The parents visited this assigned school, accompanied by a privately retained behavioral consultant, in June or July 2009 (Tr. pp. 514-23; Parent Ex. C; see Parent Ex. L).<sup>2</sup>

On July 6, 2009, the student began the 2009-10 school year at the Rebecca School (see Parent Exs. M at p. 1; N). The student was enrolled in a special class that had a student-to-teacher ratio of 8:1+6 in December 2009 and a student-to-teacher ratio of 8:1+3 in May 2010, and received 1:1 paraprofessional services, occupational therapy (OT), physical therapy (PT), and speech-language therapy, all three times per week for 30 minutes per session in a 1:1 setting, music therapy once per week for 30 minutes per session in a 1:1 setting, and adapted physical education (Tr. pp. 297-98, 307-08, 311, 316, 319-20, 378, 414; Parent Exs. H at pp. 1, 3-4; I at pp. 1, 3-7).

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<sup>1</sup> Hereafter in this decision, the "assigned school" refers to the school to which the district assigned the student via telephone call to the parents on June 25, 2009, which is the assigned school that is the subject of the instant appeal (see Parent Ex. A at pp. 3-4).

<sup>2</sup> The hearing record contains conflicting evidence regarding the exact date upon which the parents visited the assigned school (Tr. pp. 522, 552; compare Parent Ex. C at p. 1, with Parent Ex. K at pp. 1-2).

In a letter to the district dated July 29, 2009, the parents expressed their concerns with the assigned school and the assigned 6:1+1 special class, asserting that: (1) the assigned school was unable to guarantee that the student would receive a full-time 1:1 orientation and mobility paraprofessional as mandated in his June 2009 IEP; (2) the assigned school would not be able to provide the level of OT recommended in the IEP; (3) the assigned school's OT facilities and services were inadequate; (4) an elevator malfunction at the assigned school would have necessitated that the student temporarily "attend school in a small trailer without access to the school's other therapy rooms;" and (5) the staffing ratio of the assigned 6:1+1 special class was "less intense and insufficient" to address the student's needs (Parent Ex. C at p. 1). For those reasons, the parents rejected the assigned school as inappropriate for their son, again advised the district of their intention to continue the student's placement at the Rebecca School and program of related services at public expense, and expressed their willingness to consider other placements recommended by the district (*id.* at pp. 1-2).

### **Due Process Complaint Notice**

By due process complaint notice dated June 23, 2010, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year (Parent Ex. A). Specifically, the parents alleged that the June 2009 CSE was improperly composed because it lacked a regular education teacher, an additional parent member, a social worker, and an individual qualified to interpret the results of the student's evaluations (*id.* at p. 2). The parents also alleged, among other things, that the June 2009 CSE failed to properly assess the student's reading, writing, and math skills, relying solely on teacher observation to assess these needs; the student's present levels of performance in the IEP were inadequate; the annual goals and short-term objectives were deficient; the CSE failed to offer assistive technology or an adaptive chair for the student; and the "1:1 adult support" recommended in the IEP was "vague" (*id.*). Moreover, the parents contended that the IEP recommended insufficient related services and supports, failed to offer individualized parent counseling and training; failed to include a behavioral intervention plan (BIP) based upon a functional behavioral assessment (FBA); and failed to identify the assigned school for the student (*id.* at pp. 2-3). The parents also contended that the assigned school was inappropriate (*id.* at pp. 3-4). The parents sought an order from an impartial hearing officer directing the district to reimburse them for the student's tuition at the Rebecca School and expenses incurred in privately obtaining weekly OT, PT, speech-language therapy, and music therapy services during the 2009-10 school year, and to continue to provide the student with transportation services for the balance of the 2009-10 school year (*id.* at p. 4).<sup>3</sup>

### **Impartial Hearing Officer Decision**

The parties proceeded to an impartial hearing that began on December 7, 2010, and concluded on August 2, 2011, after eight days of proceedings. On September 22, 2011, the impartial hearing officer issued a decision finding that the district did not offer the student a FAPE for the 2009-10 school year because the June 2009 IEP was not reasonably calculated to enable the student to make measurable gains, the recommended placement was insufficient to meet the student's physical needs and address his sensory issues, and the district did not make a valid placement offer or "take appropriate steps to offer a suitable placement" (IHO Decision at p. 13).

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<sup>3</sup> The hearing record indicates that the parents ultimately withdrew their claim for reimbursement for expenses "for all services outside of the Rebecca School" during the impartial hearing, and sought only tuition reimbursement for the 2009-10 school year (Tr. p. 443).

The impartial hearing officer then found that the Rebecca School was an appropriate placement and was reasonably calculated to confer educational benefits upon the student because the student made "consistent progress" in the academic program there, and that equitable considerations supported the parents' claims (id. at pp. 13-14). The impartial hearing officer ordered the district to reimburse the parents for the student's tuition at the Rebecca School for the 2009-10 school year (id. at p. 14).

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

The district appeals from the impartial hearing officer's decision, arguing that it offered the student a FAPE for the 2009-10 school year, that the parents failed to meet their burden of proving that the Rebecca School was an appropriate placement, and that equitable considerations favored the district. Specifically, the district argues that the June 2009 CSE was properly composed, that it considered appropriate and current evaluative data, and that the resultant IEP was reasonably calculated to provide the student with a FAPE for the 2009-10 school year. The district further argues that had the student enrolled at the assigned school, the district would have been able to implement the IEP. Moreover, the district contends that the impartial hearing officer's finding that the district did not offer the student a FAPE was unsupported by citation to the hearing record, and was "not elaborated on or otherwise explained;" therefore, such a finding is not a sufficient basis to find that the district did not offer the student a FAPE.

The district also contends that the Rebecca School was an inappropriate placement for the student for the 2009-10 school year because it did not offer the student a 1:1 paraprofessional and the levels of related services provided by the Rebecca School were lower than those recommended in the student's June 2009 IEP requiring the parents to have to supplement the student's program with outside services. Regarding equitable considerations, the district asserts that the parents failed to inform the district about their concerns regarding the recommended program prior to rejecting the assigned school, and that their visit to the assigned school and notification to the district of their rejection of the assigned school occurred one month after they received the district's placement offer and three weeks after the student began the 2009-10 school year at the Rebecca School. The district seeks annulment of the impartial hearing officer's decision.

The parents answer, countering that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE for the 2009-10 school year, that the Rebecca School was an appropriate placement for the student, and that equitable considerations supported the parents. Specifically, the parents contend that the June 2009 CSE was improperly constituted because it did not include an additional parent member or an individual qualified to interpret the results of the student's evaluations, that the CSE failed to meaningfully consider the requests of the parents and the student's teacher from the Rebecca School, that the June 2009 IEP was deficient because the annual goals did not identify methods of measurement of student progress, and that the IEP did not offer assistive technology to the student or parent counseling and training. The parents further assert that the assigned school was inappropriate for the student.

The parents also maintain that at the Rebecca School, the student was enrolled in an 8:1+3 class with students with similar developmental levels as his own; he had a 1:1 paraprofessional; the student learned pre-academic skills in an almost exclusively 1:1 setting; the school offered the student a 12-month program, related services, supports, and interventions designed to address his individual needs; the student made progress; and the school offered parent counseling and training. The parents also assert that they notified the district of their concerns about the recommended

program during the June 2009 CSE meeting, that they provided requisite notice to the district of their intention to reenroll the student at the Rebecca School and seek public funding, and that the hearing record reflects that they would have been willing to accept an appropriate public school placement. The parents seek dismissal of the district's petition and for the impartial hearing officer's decision to be upheld.

### **Applicable Standards**

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 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]; 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 least restrictive environment (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]).

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).

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**

### **Impartial Hearing Officer Misconduct/ Incompetence**

I note that the Commissioner of the State Education Department may suspend or revoke the certification of an impartial hearing officer upon a finding that a State Review Officer has determined that an impartial hearing officer engaged in conduct which constitutes misconduct or incompetence (see 8 NYCRR 200.21[b][4][iii]). I am compelled to address the district's arguments that the impartial hearing officer's decision in this case did not conform to State regulations by failing to cite to applicable law, failing to provide a legal basis for her decision, and citing only minimally to the hearing record in her decision. Furthermore, upon review, I note that it is evident from the hearing record that the impartial hearing officer failed to comply with regulations

governing the granting of extensions. These allegations are particularly troubling since the same impartial hearing officer has been the subject of specific warnings in past State Review Officer decisions on similar issues of noncompliance (see Application of the Dep't of Educ., Appeal No. 10-070 [noting that the impartial hearing officer was cautioned to comply with State regulations based on her failure to cite with specificity to the facts in the hearing record and the law upon which her decision was based, and failure to provide the reasons for her determinations]; Application of the Dep't of Educ., Appeal No. 10-066 [cautioning the impartial hearing officer "that it is incumbent upon an impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the hearing record includes documentation setting forth the reason for each extension"]; Application of a Student with a Disability., Appeal No. 10-064 [same as above]; Application of the Dep't of Educ., Appeal No. 08-082 ["encourage[ing]" the impartial hearing officer "to comply with State regulations, cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts, referencing applicable law, in support of her conclusions"]; Application of the Dep't of Educ., Appeal No. 08-041 [annulling the impartial hearing officer's "amended" decision because she lacked the authority to issue an amended decision "after issuing a prior decision on the same facts"]; Application of the Dep't of Educ., Appeal No. 08-024 [same as above]; see also Application of the Dep't of Educ., Appeal No. 11-108; Application of a Student with a Disability, Appeal No. 09-066).

Both federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). In particular, an extension "shall be for no more than 30 days" and absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts" (8 NYCRR 200.5[j][5][iii]). Moreover, an "[a]greement of the parties is not a sufficient basis for granting an extension" (*id.*). Additionally, impartial hearing officers are not permitted to accept appointment unless they are available to conduct a hearing in a timely manner (8 NYCRR 200.5[j][3][i][b]).<sup>4</sup> State regulations further set forth that each party shall have "up to one day" to present its case, and additional hearing days shall be scheduled on consecutive days to the extent practical (8 NYCRR 200.5[j][3][xiii]).

In this case, the parent initiated the instant due process proceedings by due process complaint notice dated June 23, 2010 (Parent Ex. A). However, the parties did not appear for the first date of the impartial hearing until December 7, 2010, more than five months after the date of

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<sup>4</sup> In a prior appeal rendered by this office, Application of the Dep't of Educ., Appeal No. 11-151, a State Review Officer declined to address the district's assertion of misconduct against the same impartial hearing officer who rendered the decision in this case because the appeal was dismissed as untimely (Application of the Dep't of Educ., Appeal No. 11-151 at p. 4 n.3). In taking judicial notice of the pleadings and impartial hearing officer decision underlying Application of the Dep't of Educ., Appeal No. 11-151, I note that many of the hearing dates took place within a day or two of the hearing dates in the case at bar; the impartial hearing officer decision in that case was rendered less than 3 weeks from the date of the decision in the case at bar; and the district alleged that the impartial hearing officer failed to ensure that the hearing progressed in an expeditious manner as required by regulations, that her findings were not supported by citations to the hearing record, and that her findings "were very similar, both in form and in substance, to those regarding" this instant case (Pet. underlying Application of the Dep't of Educ., Appeal No. 11-151, ¶¶ 61-65).

the due process complaint notice, and the hearing record does not indicate or otherwise document that any extensions were granted prior to that first date. The first day of hearing consisted only of the opening statements by the parties' counsel and admission of evidence (Tr. pp. 1-17). At the conclusion of the first hearing date, the parties scheduled the next hearing date for January 19, 2011, and the impartial hearing officer noted that "the parties have consented to an extension of the compliance date" (Tr. p. 17). Although there is no explanation in the hearing record or documentation of an extension request, the January 19, 2011 hearing date did not occur and actual testimony in the hearing did not begin until February 7, 2011 –two months after the first hearing date and more than seven months after the filing of the due process complaint notice (see Tr. pp. 19-148). At the conclusion of testimony on February 7, 2011, the impartial hearing officer indicated that the next hearing date would occur on March 21, 2011 (Tr. p. 145). Again, this hearing date did not occur and there is no explanation in the hearing record or documentation of an extension request. At the end of each of the remaining seven hearing dates, the impartial hearing officer solicited extension requests from the parties to extend the date by which her decision was due (Tr. pp. 145, 146-47, 200-01, 273-74, 363, 438, 535, 624); however, her solicitation of the requests directly contravenes State regulations and the hearing record does not reflect that she engaged in the procedure for extension requests mandated by the regulations; (see 8 NYCRR 200.5[j][5][iii], 200.5[j][5][i]-[iv]). I note that while the parties may have agreed that an extension of time is warranted, such agreements provide no basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in the federal and State regulations (see 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]).

At the end of the March 25, 2011 and April 14, 2011 hearing dates, the impartial hearing officer stated that hearing dates were scheduled for May 10 and June 2; however, these hearing dates did not occur, and again, the hearing record lacks an explanation or documentation of extension requests (see Tr. pp. 274, 363). Likewise, the July 15, 2011 hearing date that was set forth at the end of the June 9, 2011 hearing did not occur, without explanation (see Tr. p. 438). In total, the impartial hearing spanned 8 dates and the impartial hearing officer's September 22, 2011 decision was not rendered until 15 months after the parents' June 23, 2010 due process complaint notice was filed (compare Parent Ex. A, with IHO Decision at p. 14).

Moreover, although the last hearing date took place on August 2, 2011 and the record was closed on that date (IHO Decision), the impartial hearing officer solicited a 30-day extension from the parties at the end of the last hearing date and did not issue her decision until 50 days after the close of the record, again without explanation for the delay (see Tr. p. 624). A guidance document issued by the Office of Special Education in August 2011 reminds impartial hearing officers that "[a] record is closed when all post-hearing submissions are received by the IHO . . . Once a record is closed, there may be no further extensions to the hearing timelines [and] the written decision of the IHO must be rendered and mailed within 14 days" of the record close date ("Changes in the Impartial Hearing Reporting System," available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf>). In this case, the impartial hearing officer rendered her decision on September 22, 2011, ignoring the guidance document and relevant State regulations (see IHO Decision at p. 14).

When reviewing the findings and decisions of an impartial hearing officer, a State Review Officer must ensure that procedures at the impartial hearing were consistent with the requirements of due process (34 C.F.R. § 300.514[b][2][ii]). "Non-compliance with the IDEA's time limit for issuance of IHO decisions may constitute a violation of due process rights as provided under the Act" (Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236, 247 [S.D.N.Y. 2000]). State

regulations expressly set forth that suspension, revocation, or other appropriate action to the certification of an impartial hearing officer may occur upon a finding that an impartial hearing officer "failed to issue a decision in a timely manner where such delay was not due to extensions granted at the request of either party as documented in the record" (8 NYCRR 200.21[b][4][ii]). Based on foregoing, I find that the impartial hearing was not conducted in a manner consistent with the requirements of due process and the impartial hearing officer granted multiple extensions contrary to the regulations and failed to conduct the matter expeditiously, undermining the policy of quickly and efficiently resolving disputes between parents and school districts underlying the IDEA's administrative hearing process (34 C.F.R. § 300.514[b][2][ii]; see 20 U.S.C. § 1415). Furthermore, the hearing record does not reflect the reasons for the granted extensions, that the impartial hearing officer fully considered the relevant factors, or that the impartial hearing officer responded in writing to the extension requests (8 NYCRR 200.5[j][5][i], [ii], [iv]).

Additionally, reviewing the impartial officer's decision, I agree with the district that she failed to cite applicable legal standards in rendering her determinations and cited only minimally to the hearing record, which violates State regulation (see 8 NYCRR 200.5[j][v]; IHO Decision at pp. 1-14). State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity (see Application of a Student with a Disability, Appeal No. 10-086; Application of a Student with a Disability, Appeal No. 10-007; Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-138; Application of a Student with a Disability, Appeal No. 08-043). Moreover, State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision (see Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-064).

Here, the impartial hearing officer failed to substantiate her findings by citing to specific portions of the hearing record that supported her determinations, and delivered her findings in four conclusory paragraphs devoid of any meaningful analysis. While I acknowledge that the impartial hearing officer did cite to relevant transcript pages in the portion of the decision describing the background of the case, her failures to reference any legal authority to support her determinations, to cite with specificity to the facts in the hearing record and the law upon which the decision is based, and to provide the reasons for her determinations, are not helpful to the parties in understanding the decision. Thus, I find that the decision does not comport with State regulations at 8 NYCRR 200.5(j)(5)(v) requiring the decision to set forth the reasons and the factual basis for the determination. The impartial hearing officer has been previously admonished to comply with State regulations in this regard as well (Application of the Dep't of Educ., Appeal No. 10-070; Application of the Dep't of Educ., Appeal No. 08-082).

For the foregoing reasons, I find that the impartial hearing officer disregarded the regulations governing the granting of extensions and rendering her decision, and has, therefore engaged in misconduct (8 NYCRR 200.21[b][4][iii]). These findings shall be forwarded to the Office of Special Education which has been designated by the Commissioner of Education to

address matters regarding impartial hearing officer misconduct and incompetence (8 NYCRR 200.21[b][4][iii]).

### **Scope of Review**

Since the impartial hearing officer's decision is unclear and fails to cite to the hearing record to provide a rationale for her findings and ultimate determination, it is difficult to determine what issues are necessary to address on appeal. However, the hearing record in this appeal is sufficiently developed to enable a determination of the issues raised by the parties; therefore, in the interests of judicial economy, I will consider the merits of the parties' claims pertaining to whether the student was offered a FAPE for the 2009-10 school year and whether the parents are entitled to an award of tuition reimbursement for the student's 2009-10 school year at the Rebecca School.

In determining the issues that may be appropriately considered on appeal from the September 22, 2011 impartial hearing officer decision, State regulations provide, in pertinent part, that "[t]he petition for review shall 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 briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). A review of the impartial hearing officer's decision reflects that she did not specifically address many of the allegations raised in the parents' June 2010 due process complaint notice (compare, Parent Ex. A at pp. 2-4, with IHO Decision at pp. 13-14). The district's petition challenges the impartial hearing officer's general finding that it failed to offer the student a FAPE for the 2009-10 school year, and specifically asserts that the June 2009 CSE was properly constituted and considered appropriate and current evaluative data, that the June 2009 IEP was reasonably calculated to provide the student with a FAPE for the 2009-10 school year, and that the assigned school was appropriate.

I note that the parents assert in their answer that the June 2009 IEP was deficient because it failed to indicate whether the student's related services would be delivered on a push-in or pull-out basis,<sup>5</sup> that the assigned school was inappropriate for the student because it did not offer transition support services, and that the parents and Rebecca School teacher were denied meaningful participation at the CSE meeting. State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; A.B. v. San Francisco Unified Sch. Dist., 2008 WL4773417, at \*9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 10-055; Application of a Student with a Disability, Appeal No. 09-140). In this case, the hearing record demonstrates that the parents failed to assert these claims in their due process complaint notice, and there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing to include these issues or that the impartial hearing officer addressed them in the

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<sup>5</sup> Assuming for the sake of argument that this issue had been properly raised below, I note that the June 2009 IEP indicated that the student's related services were to be delivered on a pull-out basis (see Parent Ex. B at p. 15), thereby rendering the parents' argument on this point unpersuasive.

decision (see IHO Decision; Parent. Ex. A; see also S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*6 [S.D.N.Y. Dec. 8, 2011]; C.F. v. Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125, 159 [S.D.N.Y. 2010]; Application of the Bd. of Educ., Appeal No. 11-129; Application of the Bd. of Educ., Appeal No. 11-096; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 99-060). Consequently, because these issues are not properly before me, I decline to consider them in this appeal.

### **Composition of the June 2009 CSE**

The parents asserted in their due process complaint notice that the June 2009 CSE lacked a regular education teacher, an additional parent member, and an individual to interpret the instructional implications of the student's evaluations.<sup>6</sup> The district argues in its petition that the June 2009 CSE was properly constituted and did not require the participation of a regular education teacher because the student was not being considered for a general education placement. The district further argues that since the CSE meeting did not involve the student's initial placement in a special class but was an annual review, an additional parent member was therefore not required. Further, the district asserts that the lack of an additional parent member at the June 2009 CSE meeting did not impede the parents' opportunity to participate in the decision-making process or impede the student's right to a FAPE.

The June 2009 CSE meeting was attended by a district representative who also served as a special education teacher, a district school psychologist, and both parents; the student's special education teacher from the Rebecca School participated telephonically (Parent Ex. B at p. 2).

The district concedes that there was no regular education teacher at the June 2009 CSE meeting. The IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; see also 8 NYCRR 200.3[a][1][ii]). However, as the district maintains, the hearing record demonstrates that the student was not being considered for placement in a general education classroom, and neither party asserted below or on appeal that he would be appropriately placed in a general education setting (Tr. p. 272; see Parent Ex. B at p. 14). Therefore, I find that a regular education teacher of the student was not required at the June 2009 CSE meeting because the evidence does not support the conclusion that there was a reasonable likelihood that the student would have been assigned to such a teacher (34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see J.G. v. Kiryas Joel U.F.S.D., 777 F. Supp. 2d 606, 644-45 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ. of New York City, 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dept. of Educ., 700 F. Supp. 2d 356, 365-66 [S.D.N.Y.

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<sup>6</sup> Regarding an individual to interpret the instructional implications of the student's evaluations, State regulations provide that "[s]uch individual may also be the individual appointed as the ... special education teacher ... the school psychologist, the representative of the school district or a person having knowledge or special expertise regarding the student ..." (8 NYCRR 200.3[a][1][vi]). In this case, although not designated on the June 2009 IEP as such (see Parent Ex. B at p. 2), the district representative/special education teacher and the school psychologist could have served in this role on the June 2009 CSE under State regulations. Consequently, the parents' argument is not persuasive.

2010]; Tarlowe, 2008 WL 2736027, at \*5-\*6 [S.D.N.Y., July 3, 2008]; see also Application of the Bd. of Educ., Appeal No. 11-129; Application of a Student with a Disability, Appeal No. 08-035).

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.321), in some circumstances, New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (see 8 NYCRR 200.5[c][2][v]). Under New York State law, CSE subcommittees have the authority to perform the same functions as the CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

In the instant matter, there is no indication in the hearing record that the parents waived the participation of an additional parent member at the June 2009 CSE meeting. Although the IEP characterized the meeting as a "CSE Review" meeting (Parent Ex. B at pp. 1-2), the evidence contained in the hearing record also establishes that the student was not being considered for initial placement in a special class, a school primarily serving students with disabilities, or a school outside of the student's district (see Tr. pp. 506, 531; Dist. Ex. 1 at pp. 1, 14-15). Accordingly, the June 2010 CSE could have permissibly proceeded as a CSE subcommittee, and an additional parent member would not have been a required participant (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4][i]-[iii]).

However, even if an additional parent member had been a required participant at the CSE meeting, the hearing record demonstrates that the absence of an additional parent member did not (a) impede the student's right to a FAPE, (b) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) 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]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at \*2; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d 415). The school psychologist testified during the impartial hearing that with regard to the development of the June 2009 IEP, "[e]veryone had input .... [w]e allowed everyone to have input," and noted that those sections of the IEP describing the student's health and physical development, annual goals and short-term objectives were "discussed with everyone at the meeting," and developed "in conjunction with the parent's approval and discussion" (Tr. pp. 219, 222-27). She added that the June 2009 IEP "was a draft that everyone had input into, and no one expressed disagreement with ..." and, when asked if the parents raised any general concerns regarding the student during the CSE meeting, responded "I don't recall any specific concerns that they voiced that we did not address throughout the [meeting] in terms of changing language and wording of the document"

(Tr. pp. 219-20, 222-23). She also testified that although the parents were not shown the final copy of the June 2009 IEP at the time of the CSE meeting, "... every word of the document was reviewed" and that "every sentence was gone over" (Tr. p. 258).<sup>7</sup> The CSE meeting minutes contained in the hearing record further reflect input from the parents regarding the student's reading level and active collaboration in the development of the June 2009 IEP annual goals and short-term objectives (Dist. Ex. 7). The student's special education teacher from the Rebecca School, who participated in the June 2009 CSE meeting telephonically, confirmed that parental input was sought by the CSE during the June 2009 meeting (Tr. pp. 448-49), and the student's mother acknowledged that she was afforded the opportunity to fully discuss concerns that she had, and described the members of the CSE as "nice" (Tr. p. 532). The hearing record also demonstrates that the parents were familiar with the CSE process by virtue of their attendance at the June 26, 2008 CSE meeting which developed the student's IEP for his 2008-09 school year (see Dist. Ex. 1 at p. 2). Accordingly, I decline to find a denial of a FAPE on the basis that no additional parent member participated at the June 2009 CSE meeting.

## **June 2009 IEP**

### **Adequacy of Evaluative Information and Present Levels of Performance**

The parents assert that the June 2009 CSE improperly relied on "teacher observation" to report the student's skills in reading, writing, and math, without assessing the student. The district argues that the June 2009 CSE considered appropriate and current evaluative data, including input from the student's parents and then-current special education teacher at the Rebecca School.

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parents that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of a Student with a Disability, Appeal No. 11-100; Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

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<sup>7</sup> The hearing record reflects that the district mailed the final copy of the June 2009 IEP to the parents four days after the annual review meeting (see Tr. p. 258; Parent Ex. B at p. 2).

In the instant appeal, the hearing record reflects that the June 2009 CSE considered a July 28, 2008 psychoeducational evaluation (Dist. Ex. 3), the student's September 2008 IEP (Dist. Ex. 1), an April 2009 Rebecca School multidisciplinary progress report (Parent Ex. J), and a June 2, 2009 classroom observation report (Parent Ex. G) in making its recommendations for the student for the 2009-10 school year (Tr. pp. 212-13; Dist. Ex. 7 at p. 1). The hearing record also indicates that the June 2009 CSE actively sought and considered input from the parents and from the student's special education teacher from the Rebecca School (Tr. pp. 448-49, 532). The hearing record reflects that all of the documents considered by the June 2009 CSE had been generated less than one year prior to the annual review meeting. Furthermore, there is no indication in the hearing record that the parents sought any additional evaluations prior to the annual review meeting. Based on the evidence contained in the hearing record and as further explained below, I find that the evaluation reports, together with input from the student's parents and from his special education teacher from the Rebecca School, provided the June 2009 CSE with sufficient functional, developmental, and academic information about the student and his individual needs in order to develop an appropriate IEP (see M.H. v. New York City Dept. of Educ., 2011 WL 609880, at \*9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

The July 2008 psychoeducational evaluation report reflected that the student's cognitive functioning was within the "very low range," and identified "moderate deficits" in his adaptive functioning (Dist. Ex. 3 at pp. 2-3). The evaluator indicated that the student's needs had to be anticipated, and described the student at that time of the evaluation as nonverbal, with the ability to "sign" a few words such as "more," "yes," or "I want," but "typically communicat[ing] via vocalizations and gestures," although it was noted that the student did not demonstrate such behaviors during the evaluation (*id.* at p. 3). The report identified as strengths the student's friendliness, cooperativeness, and demonstrated improvements in attention and level of awareness, attention sharing, and ability to interact 1:1, and noted that the student was learning to communicate using simple signs, was in fair health, and had a supportive family (*id.*).

The student's September 2008 IEP that was reviewed by the June 2009 CSE recommended a 12-month special education program including OT three times per week for 30 minutes per session in a 1:1 setting, PT four times per week for 30 minutes per session in a 1:1 setting, and speech-language therapy three times per week for 30 minutes per session in a 1:1 setting, and also determined the student eligible to participate in alternate assessment (Dist. Ex. 1 at pp. 1, 15). The September 2008 IEP assessed the student's reading and writing and math functional levels to fall in the pre-academic range based upon teacher estimates; noted that he was nonverbal; documented his delay in adaptive functioning; his very low range intellectual functioning; his orientation and mobility challenges; and his health status, and indicated that the student "would benefit from a small, structured class setting that [would] provide the appropriate supports needed to address deficits in [the student's] academic and physical abilities" (*id.* at pp. 3-6, 14).

The April 2009 Rebecca School multidisciplinary progress report described the student's current performance levels and his abilities to regulate attention; engage, interact, and communicate across educational and therapeutic instructional domains including English language arts (ELA), math, OT, PT, speech-language therapy, and creative arts/therapies (music, art,

drama); and noted that the student experienced difficulties in regulation, shared attention, and engagement as a result of his ongoing sensory needs and challenges (Parent Ex. J).

The June 2, 2009 classroom observation report described a 40-minute observation of the student conducted by the district at the Rebecca School during morning snack time and the student's transition to the school's sensory gym (Parent Ex. G at p. 1). The observer commented that when she arrived at the student's classroom, she was advised that the student had a 1:1 paraprofessional "for mobility" (*id.*). During the observation, the student was observed seated in an adaptive chair with a seatbelt around his waist to receive assistance with feeding, to receive PT intervention, and to transfer from a stroller to a walker, the latter of which he demonstrated skill in using (*id.* at pp. 1-2). The observer noted in the classroom observation report that "[i]t was apparent that [the student] need[ed] assistance with all activities due to very considerable fine and gross motor difficulties and the fact that he is nonverbal;" that the student expressed his emotions by head turning, moving his body from side to side, making some sounds, and screaming when angry; and that he was able to feed himself small quantities of food cut into small pieces (*id.*).

Among other elements, an IEP must include a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; *see* 8 NYCRR 200.1[ww][3][i]).

Relative to the student's present levels of performance, the minutes of the June 2009 CSE meeting and testimony of the school psychologist indicated that, as described during the June 2009 CSE meeting by the student's special education teacher from Rebecca School and as gleaned from the aforementioned evaluative data available to the CSE at the time of the meeting, academics "[weren't] an area that was being focused on for [the student]" (Tr. p. 216; Dist. Ex. 7 at p. 2). Also consistent with the evaluative data available to the June 2009 CSE, the school psychologist noted the student's significant impairments that "globally" affected how he functioned and that the student presented as nonverbal and nonambulatory and did not yet demonstrate academic readiness skills (Tr. pp. 216-17; Dist. Ex. 7 at p. 1). As reported by the student's teacher from the Rebecca School, who also participated in the CSE meeting, emphasis was placed on developing the student's ability to maintain a regulated state, whereby he would remain "focused, calm, and available for interaction and engagement" (Tr. p. 217; Parent Ex. B at p. 2).

Academically, the June 2009 IEP reflected the student's diagnoses of autism, CP, and PVL, and noted that he presented with significant developmental delays including difficulties with auditory processing, visual perception (blind spots in his eyes), and receptive and expressive language (Parent Ex. B at pp. 3, 5, 13). Consistent with the evaluative data available to the June 2009 CSE, the IEP indicated that the student was nonverbal, used gestures and one word approximations to communicate his wants and needs, and was not toilet trained (*id.*; Parent Ex. J at p. 1). The IEP indicated that in class, the student enjoyed music, responded well to preferred adults, and benefited from building relationships (Parent Ex. B at p. 3). The IEP also noted that the student had not yet developed any readiness skills and per teacher observation, was functioning at a pre-kindergarten instructional level (Tr. p. 217; Dist. Ex. 7 at p. 1; Parent Ex. B at p. 3).

With regard to his social/emotional needs, the June 2009 IEP indicated that consistent with the April 2009 Rebecca School multidisciplinary report, the student generally presented with an "inquisitive demeanor" throughout the school day, but occasionally demonstrated anxiety in loud environments (Parent Exs. B at p. 4; J at p. 1; *see* Tr. p. 221). The IEP further reflected the student's

growth in his ability to attend to peers in his environment; noted that the focus and attention required for the student to engage in activities such as sitting in a chair or moving his body to attain a desired object sometimes led to dysregulation; indicated that he responded to peer initiated interactions and showed preferences for certain peers in the classroom; reported that the student showed a larger range of emotions and degrees or variations in happy and sad feelings; and noted increased intentionality of the student's communication, as exemplified when he would "pull on a staff member or hold his arm out toward a desired item" (Parent Ex. B at p. 4; see Tr. pp. 221-22). Furthermore, the IEP detailed how the student "close[d] circles of communication"<sup>8</sup> by clapping his hands and making excited noises and indicated that the student began to interpret and imitate vocal tones and responded appropriately by clapping and smiling in response to high affect or by increasing his attentiveness when whispered to; that he showed "islands of strength" in his ability to two-way problem solve; and that he demonstrated a sense of humor and "mischievousness" (Parent Ex. B at p. 4; see Tr. p. 222).

Regarding the student's health and physical development, in addition to noting the student's diagnoses and ambulation and mobility challenges, the June 2009 IEP described the student as "hypo-responsive" to physical sensations, having blind spots in his vision; demonstrating "irregular" auditory processing skills and EEG readings, and indicated that he was suspected of having "absent seizures" (Parent Ex. B at p. 5). The June 2009 IEP also reflected the student's gluten-free diet and indicated that he was not independent in his activities of daily living (ADL) skills, was not toilet trained, and was not verbal, and that although the student had no medical/health care needs during the school day, he did have mobility limitations consistent with CP (id.).

Moreover, the school psychologist testified that there was no disagreement voiced among the CSE members regarding the accuracy of the student's present levels of performance as described in the June 2009 IEP, and that the student's special education teacher from the Rebecca School expressly agreed with the present levels of performance as developed by the CSE (Tr. pp. 219, 449-54).

Based on the foregoing, I find that the June 2009 CSE adequately developed a description of the student's present levels of academic and social/emotional performance, health and physical development, as well as his strengths, deficits, needs, and related services based upon the descriptions provided in the evaluative data available to the CSE at the time of the student's annual review (see Dist. Exs. 1; 3; Parent Exs. G; J).

### **Annual Goals**

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 (see 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

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<sup>8</sup> The student's speech-language pathologist from the Rebecca School for the 2009-10 school year testified that "circles of communication" referred to back and forth communication interactions with a communication counterpart (Tr. pp. 372, 374, 383).

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]). Here, the parents argue that the annual goals contained in the June 2009 IEP were deficient because they are vague, insufficient, and did not identify methods of measurement of student progress, and were therefore inappropriate to address the student's needs.

A review of the evidence contained in the hearing record demonstrates that the pre-academic, PT, OT, and speech-language annual goals and short-term objectives<sup>9</sup> included in the student's IEP were created based on skills and needs identified in the April 2009 Rebecca School multidisciplinary progress report, in conjunction with input from the parents and the student's special education teacher from the Rebecca School (Tr. pp. 225-27, 259-69, 455-56, 483; see Parent Exs. B at pp. 2, 6-12; J at pp. 5-11). The school psychologist testified that during the June 2009 CSE meeting, the student's teacher from the Rebecca School advised the CSE that the school was not "particularly working on academics [with the student] in the classroom," which was consistent with evidence in the hearing record describing the student's needs as discussed above (Tr. pp. 216-17; Dist. Ex. 7 at pp. 1-2).

Review of the 12 annual goals contained in the June 2009 IEP, when considered by themselves, indicates they were vague and not measurable; however, the 26 short-term objectives in the IEP were related to and served to clarify the annual goals (Parent Ex. B at pp. 6-12). Seventeen of the short-term objectives were detailed and measurable and addressed the student's areas of need specific to pre-academic skills; his abilities to navigate his environment with the support of an orientation and mobility paraprofessional; and his abilities to process and integrate sensory information, motor planning and sequencing skills, visual spatial skills, postural alignment through strengthening, positioning and adaptive seating, muscle strength and endurance (to assist with functional transfer and ambulation), and range of motion and muscle flexibility (*id.* at pp. 6-10). The remaining nine short-term objectives addressed the student's speech-language/communication abilities related to annual goals targeting engagement/pragmatic language, receptive and expressive language, and oral motor/articulation skills; and specifically addressed sustaining the student's shared attention with adults during sensory play, sustaining the student's engagement in reciprocal social interactions with adults, identifying familiar items in a field of two, following simple one-step directions during play activities given gestural support, using American Sign Language (ASL) signs to make needs known given demonstrations and tactical support, ability to initiate purposeful interactions and close circles of communication following an adult's response to the initiative, increasing oral motor skills to improve strength and range of motion of articulators, improving sensory deficits in and around oral musculature to reduce mouthing of objects, and increasing repertoire of consonant and vowel sounds (*id.* at pp. 10-12). I note that while these particular short-term objectives related to the student's speech-language/communication areas of need were not measurable, for reasons discussed more fully below, I find that such a procedural error did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, 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]; Winkelman, 550 U.S. at

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<sup>9</sup> Because the student was recommended to participate in New York State alternate assessment, the district was included short-term objectives in the June 2009 IEP as required by State regulations (8 NYCRR 200.4[d][2][iv]); Parent Ex. B at p. 15).

525-26; A.H., 2010 WL 3242234, at \*2; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d 415).

The speech-language annual goals and short-term objectives contained in the June 2009 IEP addressed the student's needs as identified in the evaluative information before the CSE, and according to the student's special education teacher from the Rebecca School, "were taken just straight from the Rebecca School progress report" (Tr. pp. 446, 455-56; Parent Ex. B at pp. 3-5). The student's 2009-10 speech-language pathologist from the Rebecca School testified that the student worked on the same areas at the school as were targeted by the June 2009 IEP's annual goals and short-term objectives, and that these goals and objectives reflected those written in May 2009 by the student's previous speech-language pathologist for summer 2009, which his 2009-10 speech-language pathologist worked on with the student at the beginning of the 2009-10 school year (Tr. pp. 374-76, 383-86, 396-97). Additionally, review of the speech-language short-term objectives contained in the June 2009 IEP demonstrated consistency with those parts of the April 2009 Rebecca School multidisciplinary progress report pertinent to the student's functional emotional developmental capacities, and educational instruction in ELA, math, OT, PT, and creative arts and therapies (compare Parent Ex. B at pp. 10-12, with Parent Ex. J at pp. 1-5). These speech-language short-term objectives were also consistent with the speech-language therapy note included in the April 2009 Rebecca School multidisciplinary progress report citing the student's "slow but steady progress" and indicating that he was "primarily motivated to participate in sensory-based activities" (compare Parent Ex. B at pp. 10-12, with Parent Ex. J at p. 4). Additionally, these short-term objectives were consistent with the global goals listed in the April 2009 Rebecca School multidisciplinary progress report indicating that the student would "increase his capacities" in engagement, imitation, receptive language, and expressive language (compare Parent Ex. B at pp. 10-12, with Tr. pp. 229-30, and Parent Ex. J at p. 6). Upon review of the evidence contained in the hearing record, I find that the testimony of the student's 2009-10 speech-language pathologist from the Rebecca School discussed above, coupled with the alignment of the June 2009 IEP's short-term objectives with the student's present levels of performance and needs as demonstrated in the hearing record, support a conclusion that the student was not precluded from receiving educational benefits under the June 2009 IEP (Parent Exs. B at pp. 10-12; J at p. 4).

Furthermore, although none of the annual goals in the June 2009 IEP relating to pre-academic skills, PT, and OT contained evaluative criteria or schedules (see Parent Ex. B at pp. 6-12), I find that their related short-term objectives "contained sufficiently detailed information regarding 'the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress'" and remedied any deficiencies in the annual goals (Tarlowe, 2008 WL 2736027, at \*9; see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). I also note that the June 2009 IEP indicated that progress toward meeting the goals would be measured by written reports three times during the school year (Parent Ex. B at pp. 6-12).<sup>10</sup> Additionally, I note that the measurement method box for each annual goal in the June 2009 IEP was left blank

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<sup>10</sup> I note that while six pages of June 2009 IEP's section containing annual goals and short-term objectives provided for the student's progress to be reported three times during the 2009-10 school year, one page provided for two progress reports annually (compare Parent Ex. B at p. 6, with Parent Ex. B at pp. 7-12).

(see id.), and although the district's unit coordinator testified during the impartial hearing that the student's teacher would determine the method of measurement (Tr. pp. 155-59), I decline to find that such a technical violation resulted in a denial of a FAPE, particularly here, where I have otherwise determined that the annual goals and short-term objectives were appropriate for the student (see W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289 [S.D.N.Y. 2010], Tarlowe, 2008 WL 2736027, at \*9).

In summary, based upon the hearing record, I find that the annual goals and short-term objectives contained in the June 2009 IEP adequately addressed the student's needs in the areas of pre-academic skills, PT, OT, and speech-language as identified in the evaluative data available to the June 2009 CSE. I also find that for the reasons stated above, the district's inclusion of annual goals and speech-language short-term objectives that lacked evaluative criteria or schedules did not result in a denial of FAPE to the student for the 2009-10 school year (see T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 419 [2d Cir. 2009] [holding that the inadequacies present in the student's IEP did not render it substantively deficient as a whole and could be corrected]; Karl v. Bd. of Educ. of the Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ. of Albuquerque Pub. Schs., 2008 WL 5991062, at \*34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at \*6-\*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S., 454 F. Supp. 2d at 146-47 [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).

### **Program Recommendation**

The district refutes the findings of the impartial hearing officer that the June 2009 IEP was not reasonably calculated to enable the student to make measurable gains.

To address the student's developmental delays, academic weaknesses, and mobility concerns, the June 2009 CSE continued the student's classification as a student having multiple disabilities, and recommended a 12-month educational program consisting of a 6:1+1 special class in a special school; related services consisting of OT, PT, and speech-language therapy, each five times per week for 30 minutes per session in a 1:1 setting; and program modifications consisting of access to sensory tools, special seating, 1:1 adult support, and oral motor protocol prior to eating (Parent Ex. B at pp. 1-5, 13-15). The June 2009 IEP also included 12 annual goals and 26 short-term objectives addressing the student's preacademic skills, PT, OT, and speech-language needs (id. at pp. 6-12). Additionally, the June 2009 CSE found the student eligible to participate in alternate assessment (id. at p. 15). To further address the student's mobility concerns, the June 2009 CSE recommended a full-time 1:1 orientation and mobility paraprofessional for the student

(Parent Ex. B at pp. 2, 13, 15). The June 2009 CSE also recommended adaptive seating for the student (Parent Ex. B at pp. 3-4).<sup>11</sup>

To address the student's academic needs as identified in the evaluative data available to the CSE, the June 2009 IEP recommended sensory tools, special seating, and 1:1 adult support (Parent Ex. B at p. 3; see Tr. pp. 218-19). Access to sensory materials and adaptive seating were recommended to address the student's social/emotional management needs (Parent Ex. B at p. 4; Tr. pp. 223-24). The June 2009 IEP addressed the student's health and physical needs through recommendations for an accessible program, adapted physical education with a 6:1+1 staffing ratio, continuation of OT and PT, and provision of an oral motor protocol prior to eating (Parent Ex. B at p. 5). The June 2009 IEP also reflected an increase in the student's individual OT, PT, and speech-language therapy services to five times per week, each for 30 minutes, and provision of a full-time 1:1 orientation and mobility paraprofessional (compare Dist. Ex. 1 at pp. 1, 15, with Parent Ex. B at pp. 2, 15; see Tr. pp. 223, 230-32).

The parents argue that the 1:1 adult support listed in the June 2009 IEP as an academic management need was "vague" and "failed to specify any level of 1:1 instruction" or support for the student (Parent Ex. A at p. 2; see Parent Ex. B at p. 3). However, this argument is unpersuasive. According to the school psychologist, the June 2009 CSE believed the student needed 1:1 support throughout the day and recommended a full-time 1:1 orientation and mobility specialist for him because at that time he was nonambulatory (Tr. pp. 218-19; Parent Ex. B at pp. 13, 15).<sup>12</sup> One of the annual goals developed by the CSE with input from the student's parents and special education teacher from Rebecca School addressed the student's ability to navigate his environment with the support of an orientation paraprofessional, with associated short-term objectives targeting the student's independent use of a walker and with support, ambulating up and down one flight of stairs (Dist. Ex. 7 at p. 1; Parent Ex. B at p. 7).

In summary, I conclude that the evidence contained in the hearing record establishes that the district's recommended educational program as embodied in the June 2009 IEP, was at the time of its development, reasonably calculated to enable the student to receive educational benefits in the LRE for the 2009-10 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]).

### **Assistive Technology**

The parents argue that the June 2009 IEP was inappropriate because it did not recommend assistive technology services as part of the student's recommended program for the 2009-10 school year. The hearing record establishes that the student was using an assistive communication device during both the 2008-09 and 2009-10 school years at the Rebecca School (Tr. pp. 302-03; Parent Ex. J at 10). However, during the impartial hearing, when questioned about whether the CSE discussed assistive technology for the student, the school psychologist testified that "I did ask again because he [was] a nonverbal student, and the parent told me that they were in the process of

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<sup>11</sup> During the impartial hearing, the school psychologist distinguished "adaptive" seating, in which "because of [the student's] physical delays ... the chair needed to be adapted to him specifically and that's what we were indicating here," from "preferential" seating, which, for example, could mean "seating ... at the front of the room" (Tr. p. 253).

<sup>12</sup> Testimony by the program director from Rebecca School indicated the district provided a 1:1 paraprofessional for the student at the private school during 2009-10 (Tr. p. 356).

having [the student] evaluated for assistive tech[nology], so I included that of course [i]n the [m]inutes because I felt that that was significant" (Tr. pp. 221, 241-42). Consistent with this testimony, the CSE meeting minutes contained in the hearing record noted that the student was "[i]n the process of being evaluated for assistive technology" (Dist. Ex. 7 at p. 1), but there is no indication in the hearing record as to whether the referenced evaluation was being conducted by the district or privately obtained by the parents, or what the ultimate result of this purported evaluation was. Although there is no reference to assistive technology contained in the June 2009 IEP, the hearing record does not reflect that based on the information the CSE had before it at the time of the IEP, the student's needs were such that he required a recommendation for assistive technology in order to receive a FAPE. For example, a review of the April 2009 progress report from the Rebecca School that the CSE used in developing the student's IEP and which, as discussed above, the goals in the IEP were taken directly from, made no mention of assistive technology and included no goals related to assistive technology (see Parent Ex. J). Therefore, I do not find sufficient basis in the hearing record to support a finding that the lack of an assistive technology recommendation on the June 2009 IEP resulted in a denial of a FAPE to the student.<sup>13</sup>

### **Parent Counseling and Training**

The parents further contend that the June 2009 IEP was inappropriate for the student because it did not recommend parent counseling and training. 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]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). 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]). However, Courts have held that a failure to include parent training and counseling on an IEP does not constitute a denial of a FAPE where a school provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. March 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; 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])<sup>14</sup>

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<sup>13</sup> Assuming for the sake of argument that the hearing record supported a finding that the lack of an assistive technology recommendation on the June 2009 IEP constituted a procedural violation, during the impartial hearing, the district's unit coordinator testified that if the student's parents or teacher believed that the student could benefit from an assistive technology device, the district's "technology committee," consisting of OT and speech-language professionals, could have evaluated the student and addressed his assistive technology needs (Tr. pp. 197-98).

<sup>14</sup> To the extent that RK 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]).

In the instant matter, the provision of parent counseling and training was not included in the June 2009 IEP (Parent Ex. B). The student's mother acknowledged that she did not inquire about the availability of parent counseling and training during the June 2009 CSE meeting (Tr. p. 533). Moreover, the district's unit coordinator testified that during the school year, the assigned school offered workshops for parents, including a "mobility workshop" conducted by a physical therapist and speakers from different agencies, and that the school was "teaching [parents] as well, technique and methodology and everything, which can help [parents] to manage the kids at home" and through daily communication between teachers and parents as maintained in "notebooks" in which "the teachers [were] writing about the day in school, what [students were] learning" (Tr. pp. 69-70, 139-40). The opportunities testified to by the district's unit coordinator were similar to the parent counseling and training offered by the Rebecca School as described by the school's program director and the student's mother during the impartial hearing (Tr. pp. 323-24, 526-28). Based upon the circumstances of this case, although parent counseling and training was not identified on the June 2009 IEP, I decline to find a denial of a FAPE on the basis that it was not incorporated into the challenged IEP given that the hearing record reflects that parent counseling and training would have been available at the assigned school (see C.F., 2011 WL 5130101, at \*10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

### **Special Factors and Interfering Behaviors**

The parents allege that the June 2009 IEP was deficient because it lacked a BIP based upon an FBA for the student. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP (see 20 U.S.C. § 1414[d][3][B]). 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 the use of 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. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S., 454 F. Supp. 2d at 149-50 [S.D.N.Y. 2006]; 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. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Cent. 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]).

Consistent with the IDEA, State policy guidance explains that an "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, and specifically notes that in the case of a student whose behaviors impede learning, a CSE "must consider strategies,

including behavioral interventions and supports and other strategies to address that behavior," and identify the "behavioral interventions and/or supports . . . under the applicable section of the IEP" to address those behaviors ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). Moreover, the CSE—if necessary—must document "[a] student's need for a [BIP] . . . in the IEP" (id.).<sup>15</sup>

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 conducting a functional behavioral assessment (FBA) and developing a BIP for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment," and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234, at \*3-\*4).

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

- (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions;
- (ii) the student's behavior places the student or others at risk of harm or injury;
- (iii)

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<sup>15</sup> While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP a FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at \*3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

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 of this Title

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

Once again, State regulations require that "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student, the BIP shall identify:

- (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ;
- (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and
- (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals

(8 NYCRR 200.22[b][4]).<sup>16</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Spec. Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-needs.htm>). 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" (8 NYCRR 200.22[b][5]). In addition, 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" (id.).

In this case, I find that the hearing record lacks sufficient evidence to establish that the student required a BIP in order to obtain educational benefits under the June 2009 IEP. Consistent with the student's IEP, the hearing record demonstrates that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher and through support provided by the student's OT, PT, and speech-language service providers; consequently, the June 2009 CSE did not recommend development of a BIP for the student (Parent Ex. B at p. 4). The school psychologist testified that that during the June 2009 CSE meeting, the student's special education teacher from the Rebecca School advised her that the student's behavioral concerns, namely anger, yelling, loud vocalizations, crying, and hitting his legs, did not seriously interfere with classroom instruction and in the special education teacher's opinion, could be addressed by the student's special education teacher (Tr. pp. 222, 254-58, see Tr. pp. 425-26; Parent

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<sup>16</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [Aug. 14, 2006]).

Ex. B at p. 4). Furthermore, the student's special education teacher from the Rebecca School testified that she concurred with the June 2009 CSE's determination that the student did not require a BIP because the student was not "outwardly aggressive towards other people," and opined that the student's behavioral difficulties were reflective of his difficulty with sensory regulation, which she explained that she addressed by taking the student to a sensory gym for sensory breaks, playing music, or allowing the student to play a guitar and "hav[e] some sort of interaction again, to approve that engagement while helping him to calm down and become regulated" (Tr. pp. 454-55, 488-89). The student's Rebecca School speech-language pathologist and occupational therapist testified that when the student demonstrated the aforementioned dysregulated behaviors, the related service providers managed his behaviors by offering the student sensory-based activities that were "soothing or pleasurable to him" (Tr. pp. 390, 414, 417, 425-26). Based upon the foregoing, I find that the lack of a BIP did not deny the student a FAPE for the 2009-10 school year.

### **Assigned School**

The district argues that had the student enrolled at the assigned school, it could have implemented the student's June 2009 IEP during the 2009-10 school year. The parents allege that the assigned school was inappropriate for the student because, among other things, the staffing ratio of the assigned 6:1+1 special class was inadequate to address the student's needs, the assigned school could not guarantee the availability of a full-time 1:1 orientation and mobility paraprofessional for the student, the assigned school's OT facilities were inadequate, the assigned school would not have been able to fulfill the student's levels of OT called for in the student's IEP, and the assigned school did not utilize sign language.

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.*, 584 F.3d at 420). 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, *aff'd* 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). 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]). 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 Dep't of Educ.*, 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]; *but see C.F. v. New York City Dep't of Educ.*, 2011 WL 5130101, at \*8 [S.D.N.Y. Oct. 28, 2011]). 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; *see Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 [9th Cir. 2007]; *Houston Independent Sch. Dist. 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. v. Dep't of Educ.*, 2011 WL 4001074, at \*9 [S.D.N.Y. Aug. 19, 2011]; *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73 [D.D.C. 2007]).

In this case, a meaningful analysis of the district's claims with regard to implementation of the recommended 6:1+1 special class at the assigned school would require me to determine what might have happened had the district been required to implement the student's June 2009 IEP, which is in part speculative because in July 2009, it became clear that the parents would not accept the placement recommended by the district in the June 2009 IEP and that they intended to enroll the student at the Rebecca School. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless does not support the conclusion that the district would have deviated from the IEP in a material way in the 6:1+1 special class and related services at the assigned school and thereby deny the student a FAPE.

### **Appropriateness of the 6:1+1 Special Class**

The district's unit coordinator testified during the impartial hearing that the assigned 6:1+1 special class consisted of six students who were diagnosed with autism, one teacher, and one paraprofessional, adding that there may be an additional paraprofessionals in the class who were assigned to specific students (Tr. pp. 24-25). She explained that the classroom paraprofessional supported teachers "during the ADL skills and academic skills," and helped students reach their goals, as well as assisted the teacher (Tr. pp. 25, 94-95). She further advised that in summer 2009, the 6:1+1 special class that the student was assigned to consisted of five students and three paraprofessionals.<sup>17</sup> She described how the classroom teacher of the assigned 6:1+1 special class used differentiated instruction to teach students of varying academic levels, with the level of individual instruction determined by each individual student's needs, and how the classroom paraprofessional would use redirection and positive reinforcement to address the student's emotional issues (Tr. pp. 54, 110-13, 134-35, 194-95). The school psychologist who participated in the June 2009 CSE meeting testified that she recommended the 6:1+1 special class program for the student because she believed the student could "fit into that program, that his needs c[ould] be met in that program given the support of a one-to-one para[professional] as well" (Tr. pp. 232-33, 243-45). She also expressed her belief that the assigned 6:1+1 special class, with the additional support provided by the classroom paraprofessional and the student's 1:1 orientation and mobility paraprofessional, would have afforded the student support comparable to the special class in which he was enrolled at the Rebecca School (Tr. p. 256). Although the hearing record reflects that the student's mother and the parents' private behavioral consultant voiced disagreement with the student-to-teacher ratio of the assigned 6:1+1 special class, the hearing record also indicates that at the time of their visit to the assigned school in June or July 2009, they did not actually observe the class to which the student would have been assigned (Tr. pp. 520-22, 563-67; Parent Ex. K at p. 3). In summary, I do not find support in the hearing record for the parents' contention that the student-to-teacher ratio of the assigned 6:1+1 special class was inadequate to enable the student to receive educational benefits.

### **Availability of 1:1 Paraprofessional**

In their due process complaint notice, the parents asserted that the 1:1 orientation and mobility paraprofessional mandated in the June 2009 IEP could not be "guaranteed" at the assigned

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<sup>17</sup> The district's unit coordinator testified that there were three paraprofessionals in the assigned 6:1+1 special class as of summer 2009, including one classroom paraprofessional, one health paraprofessional assigned to a student in the class who had a mobility problem, and one crisis management paraprofessional assigned to another student in the class (Tr. pp. 34-35, 94).

school (Dist. Ex. A at p. 4; see Parent Ex. B at pp. 2, 13, 15; see also Dist. Ex. 7 at p. 2). The student's mother testified that during her visit to the assigned school in June or July 2009, she was informed that the orientation and mobility paraprofessional recommended for the student in his IEP would not have been specifically assigned to the student, but rather, to the assigned classroom at large (Tr. pp. 519-20). However, this contention does not find support elsewhere in the hearing record. The district's unit coordinator described the 1:1 orientation and mobility paraprofessional as a distinct service, apart from the classroom paraprofessional working in the assigned classroom (Tr. p. 256; see Tr. pp. 38, 40), and testified that the student's 1:1 paraprofessional would have been continued from summer 2009 into the start of the 2009-10 school year and the assigned school would have implemented the student's IEP goal targeting improvement of his ability to navigate his environment "with the supervision or support of his paraprofessional" (Tr. p. 75; see Tr. p. 165; Parent Ex. B at p. 9). Based upon the foregoing, I do not find support in the hearing record for the parents' contention that the assigned school was inappropriate for the student because it could not guarantee the availability of a full-time 1:1 orientation and mobility paraprofessional for the student during the 2009-10 school year.

### **OT Services**

The parents argued in their due process complaint notice that the assigned school was inappropriate to address the student's needs because it offered insufficient OT facilities and would not have been able to fulfill the student's levels of OT services recommended in the June 2009 IEP.

Specifically, the parents contended that an elevator breakdown at the assigned school during summer 2009 would have resulted in the student being temporarily "confined to a trailer" (Parent Ex. A at p. 4; see Tr. pp. 122, 520). However, the district's unit coordinator testified that while the assigned school's elevator was out of service, the assigned classroom and the OT/PT room were relocated to the first floor of the school building, which would have afforded the student access; additionally, she advised that OT could have been administered to the student on a push-in basis in the classroom, if necessary (Tr. pp. 44-45).

Upon visiting the assigned school in summer 2009, the student's mother reported that the "sensory gym ... didn't really have very much that would have been of use to him," and added that "[a]ll in all, it just wasn't – I didn't see it as a place where he could peacefully regulate himself" (Tr. pp. 520-21). The parents' private behavioral consultant commented that "... there was not a lot of equipment there. There was – I think there was a trampoline and a swing, and that was about it" (Tr. p. 560). When comparing the OT facilities at the assigned school to those of the Rebecca School, she added "[having seen [the student] working in his current program . . . where it's all mats, and he's able to . . . use his walker. He can be down on a mat and it's a very comfortable situation" (Tr. pp. 560-61; see Tr. pp. 412-14; Parent Ex. K at p. 3). However, I note that the district was not required to furnish "every special service necessary to maximize each handicapped child's potential," provide the optimal level of services, or even a provide level of services that would confer additional benefits (A.H., 2010 WL 3242234 at \*3 [2d Cir. Aug. 16, 2010]; Cerra, 427 F.3d at 195; D.B. v. New York City Dep't. of Educ., 2011 WL 4916435, at \*12 [S.D.N.Y. Oct. 12, 2011] [although IEP did not provide student with all of the services her parents would have liked and which were available to the student at a private school, the IEP did provide the student with a FAPE in the LRE]; see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]).

In summary, I do not find support in the hearing record for the parents' contention that the assigned school lacked the requisite resources to address the student's OT needs. Although I can

fully appreciate that the parents may have preferred a school with sensory equipment more similar to the sensory equipment available at the Rebecca School, I find that the hearing record does not support a finding that had the student attended the assigned school, the district was obligated to provide the same equipment that the private school provided or that the district was incapable of addressing the student's sensory needs sufficiently to enable him to receive educational benefits.

Furthermore, the hearing record does not support the parents' allegation that the assigned school would have been unable to deliver the level of OT services mandated in the June 2009 IEP. The hearing record demonstrates that OT was available at the assigned school in the beginning of the 2009-10 school year. The district must have an IEP in effect for each student with a disability at the beginning of each school year (20 USC § 1414(d)(2)(a); see Tarlowe, 2008 WL 2736027, at \*6, quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*8 n.26 [S.D.N.Y. Nov. 20, 2007]; Application of a Student with a Disability, Appeal No. 10-055; Application of a Student with a Disability, Appeal No. 08-088). The student was recommended to receive a 12-month program in his IEP (Parent Ex. B at p. 1); thus, the district was required to offer him a placement before July 2009.<sup>18</sup> Here, the hearing record indicates that the district offered the student a placement by July 2009 and OT was available at the assigned school at that time (see Tr. pp. 37-38; see also Parent Ex. A D). Testimony by the district's unit coordinator further revealed that due to a shortage of available providers in September 2009, the district issued related services authorizations (RSAs) to students who were not receiving OT (Tr. pp. 40-43, 119-21; see Tr. p. 519). A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).(<http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; see <http://www.emsc.nysed.gov/resources/contractsforinstruction>).

In sum, the hearing record does not support a finding that the assigned school would not have been able to fulfill the student's OT level as recommended in the June 2009 IEP or that the

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<sup>18</sup> In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

district would have denied the student a FAPE under the circumstances of this case where the district may have had to issue an RSA to the student for the provision of OT services.

### **Sign Language**

The parents argued in their due process complaint notice that the assigned school "did not use any sign language to communicate" (Parent Ex. A at p. 4). The parents' private behavioral consultant noted in her March 7, 2010 educational observation report that she was informed by the assistant principal of the assigned school that "they do not use sign language in this facility" (Parent Ex. K at p. 4). However, the district's unit coordinator testified that "we're not using sign language in school a lot ... we're trying to teach [students] to more use symbols, instead of sign language," but acknowledged that the assigned school's teachers and speech-language providers knew "[s]imple sign language, everybody in school knows, like, thank you, give me, enough, finished" (Tr. pp. 80, 178-79). Moreover, although the parents' private behavioral consultant testified that when she observed the student at the Rebecca School during her February 3, 2010 visit, school staff were "using sign language with [the student] to communicate" (Tr. p. 579; Parent Ex. K at p. 6), there is no evidence contained in the hearing record suggesting that the level of sign language offered in the assigned school would not have enabled the student to receive educational benefits from the district's recommended program; consequently, in consideration of the foregoing, I do not find the parents' argument persuasive.

In sum, assuming that the district had been required to implement the student's IEP and upon consideration of the totality of the evidence contained in the hearing record, I find the parents' concerns regarding the assigned 6:1+1 special class and the abilities of the assigned school to provide the student with a full-time 1:1 orientation and mobility paraprofessional, OT, and sign language to address the student's educational needs, are not supported by the preponderance of the evidence contained in the hearing record (see generally, M.H. v. New York City Dep't of Educ., 2011 WL 609880 [S.D.N.Y. Feb. 16, 2011], citing Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). I also find that the hearing record supports a conclusion that the 6:1+1 special class at the assigned school was designed to offer the student educational benefits.

### **Conclusion**

In summary, I find that the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year must be reversed. The hearing record contains evidence showing that the June 2009 IEP recommending a 6:1+1 special class in a special school with a 1:1 orientation and mobility paraprofessional and related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2009-10 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Having reached this determination, it is not necessary to address the appropriateness of the student's unilateral placement at the Rebecca School, and I need not consider whether equitable considerations support the parents' requests; thus, the necessary inquiry is at an end (see Voluntown, 226 F.3d at 66; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 11-124; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 11-100; Application of the Dep't of Educ., Appeal No. 11-080; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal

No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated September 22, 2011 which determined that the district failed to offer the student a FAPE for the 2009-10 school year and awarded the parents reimbursement for the student's tuition at the Rebecca School is hereby annulled.

**Dated:** Albany, New York  
January 13, 2012

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**STEPHANIE DEYOE**  
**STATE REVIEW OFFICER**