The University of the State of New York

The State Education Department
State Review Officer
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No. 11-137

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, Tracy Siligmueller, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Sonia Mendez-Castro, 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') daughter and ordered it to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2010-11 school year. The parents cross-appeal from the impartial hearing officer's determination that the district relied upon adequate evaluations to develop the student's individualized education program (IEP). The appeal must be sustained. The cross-appeal must be dismissed.

Background

At the time of the impartial hearing, the student was attending a third grade classroom comprised of 11 students and 2 teachers at the Aaron School, where she has continuously attended school since kindergarten (Tr. pp. 167-68, 171, 175, 322; see Dist. Ex. 1 at p. 1; Parent Ex. E at p. 1). The student also received speech-language therapy, occupational therapy (OT), and counseling services at the Aaron School during the 2010-11 school year (see Parent Ex. E at p. 1). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility to receive special education programs and related services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; Tr. pp. 288-89).

On May 5, 2010, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop her IEP for third grade during the 2010-11 school year

(Dist. Ex. 1 at pp. 1-2; see Tr. p. 31).[1] The following individuals attended the meeting: a district school psychologist, special education teacher (who also acted as the district representative), and regular education teacher;[2] an additional parent member; the student's then-current teacher at the Aaron School (via telephone); and the student's mother (Dist. Ex. 1 at p. 2; see Tr. pp. 22, 301, 303).[3] The CSE relied upon information contained in the following sources to develop the student's 2010-11 IEP: a February 2010 mid-year report from the Aaron School; a 2008 psychoeducational evaluation report; an April 2010 physical therapy (PT) update; and an October 2009 classroom observation report prepared by the district's special education teacher who attended the May 2010 CSE meeting (Tr. pp. 17-19, 22, 318-19; Dist. Exs. 2-3; 6 at pp. 1-9; 7 at pp. 1-4; 8-10; compare Dist. Ex. 1 at p. 2, with Dist. Ex. 10 at pp. 1-2).[4] In addition, the student's then-current teacher at the Aaron School described the student's present levels of academic performance in decoding ("end of 2nd grade"), reading comprehension ("beginning to mid 2nd grade"), writing ("mid 2nd grade"), mathematics computation ("end of 2nd grade"), and mathematics problem solving ("mid 2nd grade"), which the CSE recorded in the IEP (see Tr. pp. 19-20, 31-36; Dist. Exs. 1 at p. 3 [noting "Teacher Observation" as the method used to determine the student's present levels of academic performance reported in the IEP]; 2).[5, 6]

In the present levels of academic performance, the CSE noted that the student's ability to transition had improved; the student could be "easily distracted, both internally and externally;"

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[1] By letter dated April 28, 2010, the parents enclosed the following documents to the CSE in preparation for the student's May 2010 annual review: the student's "fall educational report and related services reports, [the student's] mid-year school report, a letter from [the student's] physical therapist recommending termination of services, [and the student's] most recent psychological evaluation" (Dist. Ex. 8; see Dist. Exs. 6 [February 2010 Aaron School mid-year report]; 7 [October/November 2008 psychoeducational evaluation report]; 9 [recommending termination of the student's physical therapy services provided through the district]).

[2] The district's school psychologist testified that the regular education teacher who attended the May 2010 CSE meeting last taught in a classroom in January 2010 (see Tr. pp. 23-24).

[3] In preparation for the May 2010 CSE meeting, the district's school psychologist reviewed the current Aaron School reports and the student's 2008 psychoeducational evaluation report, which had been provided to the district by the parents (see Tr. p. 17; Dist. Exs. 6-8). In addition, the school psychologist reviewed "older materials" in the student's "clinical file," which included her 2009-10 IEP (Tr. p. 17).

[4] For the classroom observation, the district's teacher observed the student for 45 minutes during a "writing and reading" session in a class with a total of 8 students and 2 teachers (Dist. Ex. 10 at p. 1). The district's teacher reported that the student demonstrated an ability to "follow her teacher's directions and classroom instructions," and the student did not "display any disruptive behaviors" and remained "on task most of the time" (id. at p. 2).

[5] The district's school psychologist testified that the May 2010 CSE did not include a grade level in the IEP to describe the student's present level of listening comprehension skills because the student could read, and thus, the IEP included a grade level to describe the student's present level of reading comprehension skills (see Tr. pp. 33-34). She explained that the CSE would want to know the student's present level of listening comprehension only if a student could not yet read independently (see id.).

[6] State and federal regulations require a CSE to consider "[o]bservations by teachers and related services providers" as part of an initial evaluation or a reevaluation of a student (34 C.F.R. § 300.305[a][1][iii]; see 8 NYCRR 200.4[b][1][iv] [requiring an "observation of the student in the student's learning environment . . . to document the student's academic performance and behavior in the areas of difficulty" as part of a student's initial evaluation]; 8 NYCRR 200.4[b][5][i], [ii][b] [requiring that the CSE, as part of an initial evaluation or reevaluation, review "existing evaluation data of the student including . . . classroom-based observations" to identify, what if any, additional evaluation data is needed to determine, among other things, the "present levels of academic achievement and related developmental needs of the student"]).

the student lost focus, and exhibited "avoidance behaviors" with challenging tasks; the student responded well to teacher redirection; she benefitted from "advanced preparation and explanation for changes in routine, frequent 'check-ins' to reflect her understanding of instruction and having visual and verbal prompts to stay on task;" and that "[t]eacher support and positive encouragement [was] essential" (Dist. Ex. 1 at p. 3). In addition, the CSE noted the student's strengths in "decoding, spelling and reading fluency" as well as her "relative weaknesses . . . in abstract thinking and creative writing"(id.). To support and address these needs, the CSE recommended the following: "visual and verbal cues; redirection, sensory breaks; manipulative[s] for math activities; graphic organizer/check list; chunking of information to small increments; [and] modified seating" (id.).

Turning to the student's present levels of social/emotional performance, the CSE noted that "[o]ngoing concerns with self-regulation, attention and inflexibility as well as pragmatic language and processing deficits negatively impact upon [the student's] reciprocity and social emotional development" (Dist. Ex. 1 at p. 4). Referring to a "current school report," the CSE indicated that the student had "difficulty with higher order cognition, social cognition, attention and self regulation" (id.). In addition, the CSE noted that the student "often trie[d] to control peers and her environment" (id.). Among other things, the CSE indicated that although the student was "learning to be more flexible," she benefitted from "role playing, teacher assistance with perspective taking and social thinking skills," and that the student was "easily distracted by internal and external stimuli" (id.). In addition, the CSE noted that according to a "current counseling report" the student demonstrated "below age appropriate play skills" and frequently relied on "familiar scripts and play sequences" (id.). The CSE indicated that with adult support, the student could show "interest in others during social interactions for increased lengths of time," and with reminders, the student could "establish social relatedness such as non verbal cues and body language" (id.). The CSE also reported that according to the student's teacher, the student "may engage in avoidant behaviors when overwhelmed by challenging tasks," and according to the student's mother, the student had "difficulty acknowledge[ing] . . . challenging tasks and insist[ed] that her concerns [were] physical" (id.). The student also required "reminders to establish social relatedness such as non verbal cues and body language" (id.). Finally, the CSE indicated that the student could be "very self directed" and had "difficulty engaging in non-preferred activities and topics of conversation" (id.).

After the CSE read the description of the student's present levels of social/emotional performance to the student's then-current teacher at the Aaron School and to the student's mother, the student's mother stated that it "sounds like my kid" (Dist. Ex. 2). According to the CSE meeting minutes, the CSE had "modified" the information about the student's social/emotional needs with "teacher input" and further noted that the student's mother "added" that the student had "difficulty engaging [in] non-preferred topics" (id.; see Dist. Ex. 1 at p. 4).

To support and address the student's social/emotional needs, the CSE recommended the following: "sensory breaks and sensory input during the school day;" "access to sensory materials;" "advanced preparations and explanations for changes in her routine;" counseling services; behavioral support provided by a special education teacher, a counselor, an occupational therapist, and a speech-language therapist; "[t]eacher support to help [the student] process social/peer relationships;" and "[r]eminders to follow teacher directions and to worry only about herself (not others)" (Dist. Ex. 1 at p. 4). The CSE indicated that the student's behaviors did not seriously interfere with instruction and could be addressed by a special education teacher (id.).

According to the CSE meeting minutes, the Aaron School provided annual goals to address the student's identified needs in the areas of counseling, OT, and speech-language therapy, which the CSE reviewed and revised with the participation of both the student's mother and the student's then-current teacher at the Aaron School (Dist. Exs. 1 at pp. 8-14; 2; see Tr. pp. 25-26, 29-30, 35-42). To develop annual goals to address the student's academic skills, the CSE reviewed the academic annual goals in the student's 2009-10 IEP, questioned the student's then-current teacher from the Aaron School attending the meeting to determine whether the student had met the annual goals in the previous year's IEP, and then developed annual goals in the 2010-11 IEP to address the student's needs in areas of reading comprehension, mathematics problem solving, and writing (see Tr. pp. 32-37; Dist. Exs. 1 at pp. 6-7; 2).[7] At the CSE meeting, the parent expressed concerns regarding the student's social/emotional functioning, her pragmatic language, her ability to self-regulate in a group, and her ability to engage in socially appropriate interactions with peers (see Tr. p. 296). According to the parent, the district's school psychologist "listened" to her concerns, and "incorporated some of [her] concerns into the goals" (Tr. pp. 296-97).

Based upon the information presented, the CSE recommended placing the student in a 12:1+1 special class in a community school with related services of OT, speech-language therapy, and counseling (Dist. Ex. 1 at pp. 1-2, 16-17).[8] In addition, the CSE recommended the provision of OT, speech-language therapy, and counseling during July and August 2010 to the student to "prevent a significant regression of skills" (id. at pp. 1, 16).[9] According to the IEP, the CSE discussed that the student continued to require a "small, supportive classroom environment," and that a general education environment would not provide "adequate support to meet [the student's] specific constellation of needs" (id. at p. 16). The CSE also considered and discussed the following recommendations: a 12:1 special class in a community school, which the CSE rejected as "insufficiently supportive" because the student required "additional adult support due concerns regarding her social functioning, distractibility and communication delays;" a 12:1 special class in a community school without the provision of 12-month related services, which the CSE rejected as "insufficiently supportive" because the student required related services in order to prevent a "significant regression of skills;" and a 12-month program in a 6:1+1 special class in a specialized

[7] The district's school psychologist testified that the May 2010 CSE did not develop annual goals to address the student's decoding skills or mathematics computation skills because the student, at that time, was functioning "on grade level" in those areas (Tr. p. 34). She explained that the CSE only wrote annual goals "for areas of delay or deficit in an attempt to, of course, remediate those deficits" (id.). The school psychologist also testified that the CSE did not draft short-term objectives for the student because only those students who were "exempt" from taking State and local examinations required short-term objectives in their IEPs (see Tr. pp. 45-46). The CSE also drafted the student's annual goals with the method of measurement imbedded within the annual goal itself, and the CSE, therefore, did not fill out the charts accompanying the annual goals to indicate the method of measurement (see Tr. pp. 65-67; see, e.g., Dist. Ex. 1 at p. 6).

[8] The district's school psychologist admitted in testimony that the May 2010 CSE did not address the issue of parent training and counseling or recommend parent training and counseling services (see Tr. pp. 46-47, 61; see also Tr. pp. 304-05).

[9] The 2010-11 IEP indicated that although the CSE did not find the student eligible to receive services for the 12-month school year, the CSE ultimately recommended related services during July and August 2010 to prevent significant regression of skills (Dist. Ex. 1 at pp. 1-2, 16). I remind the district that here, as in Application of the Dep't of Educ., Appeal No. 11-057, the CSE's failure to find the student eligible for a 12-month school year based upon the rationale that the student did not require an "academic component" during July and August is not consistent with State and federal regulations (see 34 C.F.R. § 300.106[a], [b]; 8 NYCRR 200.1[eee], 200.4[d][2][x], 200.6[k][1], [k][1][v]; Application of the Dep't of Educ., Appeal No. 11-057 at pp. 7-8, n.7).

school, which the CSE rejected as "overly restrictive" because the student could "benefit from a larger classroom environment with greater socialization opportunities as well as access to non-disabled peers during the school day" (id.).

By notice to the parents dated July 9, 2010, the district summarized the special education program and related services recommended for the student for the 2010-11 school year, and advised the parents of the particular school to which the district assigned the student (Dist. Ex. 11). By letter to the district dated July 19, 2010, the parents indicated that based upon a visit to the assigned school and discussions with the principal on July 17, 2010, they believed that the assigned school was not appropriate for the student (Parent Ex. D at p. 2). Specifically, the parents expressed concerns about the academic levels and classifications of the students in the proposed classroom; the teacher of the proposed classroom; the "crowded atmosphere with many other students," such as the lunchroom and play yard, and its affect on the student's "significant sensory challenges;" and the lack of a sensory gym to provide the student with an "outlet" for her self-regulation needs (id.).[10] By letter dated August 24, 2010, the parents notified the district of their intentions to unilaterally place the student at the Aaron School for the 2010-11 school year and to seek public funding for the costs of the student's tuition from the district (Parent Ex. A at pp. 1-2).[11]

Due Process Complaint Notice

By due process complaint notice dated September 23, 2010, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year based on procedural and substantive violations (Joint Ex. A at pp. 1-4).[12] Specifically,

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[10] At the time of the parents' visit to the assigned school on July 17, 2010, school was not in session (see Tr. pp. 306-09). The parents revisited the particular school on September 17, 2010 (Tr. pp. 229, 310-12).

[11] The parents did not assert any specific concerns related to the student's 2010-11 IEP in either the July 19 or August 24, 2010 letters (see Parent Exs. A at pp. 1-2; D at pp. 2-3). The Individuals with Disabilities Education Act (IDEA) allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a free appropriate public education (FAPE) to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I] [emphasis added]; 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

[12] Although not explained in the hearing record, the impartial hearing officer noted in her decision that the parents did not file the September 23, 2010 due process complaint notice with the district until January 31, 2011 (IHO Decision at p. 2). In addition, the hearing record contains no information or evidence—such as a written waiver of the resolution meeting, written confirmation that the parties reached an agreement pursuant to mediation or resolution meeting, or that the parties were engaged in continued mediation—to explain why the parties did not convene for the impartial hearing until nearly five months after the parents' due process complaint notice was filed with the district in January 2011 (see 8 NYCRR 200.5[j][3][iii][b] [delineating the timeline for commencing an impartial hearing]).

the parents alleged that the May 2010 CSE was not validly composed because the regular education teacher in attendance was not qualified to serve in that role; the CSE did not rely on the "necessary evaluations to properly gauge [the student's] current skills levels," and instead, improperly relied upon "[t]eacher observation;" the annual goals and short-term objectives in the IEP were vague, generic, and failed to indicate the method of measurement; the "objectives" in the IEP related to the student's social/emotional needs were "insufficient;" the IEP did not include a recommendation for parent counseling and training; the assigned school was not appropriate to meet the student's needs because the teacher lacked experience working with students with autism; the proposed placement could not meet the student's social/emotional needs related to autism and her needs in the areas of social pragmatics, rigidity, and anxiety; the school was too large; and the school did not have a sensory gym (id. at pp. 2-3). As relief, the parents requested a settlement recommending that the district reimburse them for the costs of the student's tuition at the Aaron School (see id. at p. 4).

Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on May 12, 2011, and concluded on June 24, 2011, after three days of nonconsecutive testimony (see Tr. pp. 1-343; IHO Decision at p. 2).[13] By decision dated September 26, 2011, the impartial hearing officer concluded that the district failed to offer the student a FAPE for the 2010-11 school year because neither the student's IEP nor the assigned school offered parent counseling and training (IHO Decision at pp. 5-8).[14] However, the impartial hearing officer also concluded that the "CSE possessed adequate information to develop an appropriate educational plan for the student," and thus, found that the evaluative data—which included the student's most recent psychoeducational evaluation, updated reports from the student's providers at the Aaron School, and the classroom observation—relied upon by the district were sufficient to develop the 2010-11 IEP (id. at pp. 5-6). She further noted that the CSE "accurately reported [the student's] present levels of performance" in the 2010-11 IEP, and the IEP "accurately

[13] In a closing brief, the parents admitted that they agreed with the CSE that the student required a "small structured classroom placement of no more than 12 students" (Parent Ex. H at p. 2).

[14] According to the impartial hearing officer's decision, "timely extensions were granted" in this case at the parties' request, the parties submitted closing briefs on July 27, 2011, and the actual record close date was noted on the decision's cover page as September 9, 2011 (IHO Decision at p. 2). 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]). The hearing record does not include documentation of any extensions granted by the impartial hearing officer to adjust the applicable timeline to render a decision. 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 form 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]). 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]). I remind the impartial hearing officer to comply with State regulations by including a written response in the hearing record for each extension request that shows how the impartial hearing officer considered all of the factors for granting each extension beyond the 45-day timeline (see Application of a Student with a Disability, Appeal No. 11-112).

reflected the results of the student's evaluations and identified the students' needs, as well as contained levels of present performance that accurately reflected the evaluations" (id.).

Analyzing whether the district's failure to recommend parent counseling and training in the 2010-11 IEP denied the student a FAPE, the impartial hearing officer first noted that the IEP contained measureable academic annual goals targeting the student's weaknesses in "critical thinking and inferential skills, problem solving skills, [and] creative writing skills" (IHO Decision at pp. 6-7). The impartial hearing officer also found that the 2010-11 IEP contained measurable annual goals for OT that addressed the student's sensory needs, "sensory regulation, motor planning, postural control, graphomotor skills and cooperative group interaction" (id. at p. 6). The impartial hearing officer further found that the 2010-11 IEP contained measureable annual goals for counseling that addressed the student's "cognitive flexibility, to become more accepting of changes to her routine and to improve her play skills" (id.). The impartial hearing officer noted that the annual goals for counseling targeted the student's need to improve "her social interaction and social/emotional functioning" and that the annuals goals addressed the student's "identified social/emotional needs" (id.). To address the student's speech-language needs, the impartial hearing officer found that the 2010-11 IEP contained measureable annual goals to address the student's "attention issues, auditory and language processing skills and her expressive language skills," as well as her "critical thinking and verbal reasoning skills" (id.). In summary, the impartial hearing officer concluded that the evidence supported a finding that the 2010-11 IEP "properly identifie[d] and addresse[d] the child's needs and abilities," and further, that the IEP had been developed with "parental input" (id. at p. 7).

Notwithstanding these conclusions, however, the impartial hearing officer also noted that it was "undisputed" that the May 2010 CSE did not discuss parent counseling and training and that the 2010-11 IEP did not contain a recommendation for parent counseling and training, which was not consistent with State regulations governing the provision of educational programs for students with autism (IHO Decision at pp. 7-8). Although the district's witness from the assigned school testified that parent counseling and training could be made available through a variety of sources affiliated with the assigned school, the impartial hearing officer concluded that it was "insufficient to merely advise parents of available parent counseling and education options, or to develop such options after the IEP [was] created" (id.). In addition, the impartial hearing officer found that the evidence did not support a conclusion that parent counseling and training "existed at the time of the CSE meeting," and therefore, the district failed to establish its burden that the recommended program was appropriate (id. at p. 8).

Having determined that the district failed to offer the student a FAPE for the 2010-11 school year, the impartial hearing officer then determined that the parents' unilateral placement at the Aaron School was appropriate to meet the student's needs and abilities and that equitable considerations did not bar an award of tuition reimbursement as relief (IHO Decision at pp. 8-9). She, therefore, directed the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2010-11 school year upon proper proof of payment (id. at p. 9).

Appeal for State-Level Review

The district argues on appeal that the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE for the 2010-11 school year. Specifically, the district asserts that the procedural violations alleged by the parents—the failure to "rely" upon "necessary evaluations" to determine the student's current skill levels, the qualifications of the regular

education teacher attending the May 2010 CSE meeting, and the inappropriate annual goals and short-term objectives—did not rise to the level of a denial of a FAPE. In addition, the district argues that the parents' unilateral placement of the student at the Aaron School for the 2010-11 school year was not appropriate and equitable considerations preclude an award of tuition reimbursement. The district seeks to vacate the impartial hearing officer's decision.

In an answer, the parents respond to the district's allegations with general admissions and denials, and contend that the impartial hearing officer properly concluded that the district failed to offer the student a FAPE for the 2010-11 school year.[15] In a cross-appeal, the parents assert that the impartial hearing officer improperly concluded that the May 2010 CSE relied upon adequate evaluations to develop the student's IEP for the 2010-11 school year, and moreover, the impartial hearing officer failed to address the parents' allegations regarding the particular school to which the district assigned the student. The parents seek to uphold the impartial hearing officer's decision in its entirety, or in the alternative, to grant their cross-appeal.

In an answer to the parents' cross-appeal, the district responds with general admissions and denials to the allegations. In addition, the district argues that contrary to the parents' claims, the CSE relied upon sufficient evaluative information to develop the student's 2010-11 IEP and the particular school to which the student had been assigned was appropriate to meet the student's special education and related services' needs.

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,

[15] The parents affirmatively "abandoned their allegation regarding the general education teacher" in the answer (Answer ¶ 26).

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

Turning first to the issues presented in parents' cross-appeal, they argue that the impartial hearing officer erred in finding that the May 2010 CSE relied upon adequate evaluations to develop the student's 2010-11 IEP and that the impartial hearing officer—having determined that the IEP was insufficient—failed to address the parents' concerns with the assigned school. The district opposes the cross-appeal and seeks to uphold the impartial hearing officer's decision. For reasons discussed more fully below, the parents' cross-appeal must be dismissed.

Evaluative Information and the Development of the IEP

In the cross-appeal, the parents affirmatively allege that the CSE failed to appropriately reference necessary evaluations in the student's 2010-11 IEP. The parents argue that the May 2010 CSE failed to "meaningfully reference" the Aaron School progress report and the 2008 psychoeducational evaluation report in the 2010-11 IEP; the CSE failed to evaluate the student in listening comprehension or "otherwise reference" the student's "listening comprehension deficits" in the IEP as noted in the Aaron School report; the CSE failed to "meaningfully incorporate" the "professional opinion" of the student's then-current teacher at the Aaron School into the IEP; and the CSE did not have "reports or evaluations" to indicate that the student "would make progress in a less restrictive setting" or how the student's placement in a 12:1+1 special class in a community school was appropriate, and therefore, the district failed to prove that the student's needs could be met in a 12:1+1 special class without the supports and strategies described in the 2008 psychoeducational evaluation report (Answer ¶¶ 42-44).

However, upon review of the parents' September 2010 due process complaint notice, I find that it cannot be reasonably read to have raised the issues that the parents now specifically articulate in their cross-appeal to support their argument that the impartial hearing officer erred in concluding that the May 2010 CSE relied upon sufficient evaluative information to develop the student's 2010-11 IEP (compare Answer ¶¶ 42-45, with Joint Ex. A at pp. 1-4). 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. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint 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. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see C.F. v. New York City Dept. 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.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

In the September 2010 due process complaint notice, the parents specifically alleged with respect to the development of the IEP that the May 2010 CSE did not rely on the "necessary evaluations to properly gauge [the student's] current skills levels," and instead, that the IEP was inappropriate because the CSE improperly relied upon "[t]eacher [o]bservation" and that the IEP did not "reference any testing or evaluations" (Joint Ex. A at p. 2).[16] With respect to the particular school to which the district assigned the student, the parents alleged in the September 2010 due process complaint notice that the assigned school was not appropriate to meet the student's needs because the teacher lacked experience working with students with autism; the proposed placement could not meet the student's social/emotional needs related to autism and her needs in the areas of social pragmatics, rigidity, and anxiety; the school was too large; and the school did not have a sensory gym (id. at p. 3).[17] Giving these specific allegations—or even the due process complaint notice in its entirety—the broadest interpretation, it cannot reasonably be construed to encompass the claims now asserted on appeal (compare Answer ¶¶ 42-44, with Joint Ex. A at pp. 1-4).[18]

In addition, a review of the hearing record does not demonstrate that the district agreed to expand the scope of the impartial hearing to include these issues, or that the parents submitted, or that the impartial hearing officer authorized, an amendment of the parents' September 2010 due process complaint notice to include these issues.

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review the issues. To hold otherwise inhibits the development of the hearing record for the impartial hearing officer's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i];

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[16] While permissible, there is no requirement that an IEP contain specific references to criterion referenced testing, achievement testing or diagnostic testing. Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). Here, the district correctly argues that although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see Application of a Student with a Disability, Appeal No. 11-043). Nor is there any support for the proposition that "teacher estimates" or "teacher observations" cannot, as the parents suggest, be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F. v. New York City Dept. of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). In fact, such a viewpoint from a student's current teacher may be highly relevant when developing the written statement of the student's performance. In addition, I note that the parents did not allege either in the due process complaint notice, or argue during the impartial hearing, that the grade levels reported in the student's IEP to describe her present levels of academic performance were inaccurate.

[17] Moreover, to the extent that the September 2010 due process complaint notice could be interpreted to contain allegations that the CSE's recommendation to place the student in a 12:1+1 special class was not based upon appropriate evaluative information, I note that the parents' specific admission in their closing brief that they agreed with the CSE that the student required a "small structured classroom placement of no more than 12 students" completely undermines the argument now asserted in the cross-appeal (Parent Ex. H at p. 2).

[18] The September 2010 due process complaint notice also articulates both general and specific disagreements with the annual goals and short-term objectives in the IEP, which the impartial hearing officer analyzed and concluded were appropriate (compare Joint Ex. A at pp. 2-3, with IHO Decision at pp. 6-7). The parents do not challenge the impartial hearing officer's conclusions regarding the sufficiency of the annual goals and short-term objectives in the 2010-11 IEP (see Answer ¶¶ 42-45). Therefore, those determinations are final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dept. of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. and R.D v. Bedford Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 107381, at *33 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

In addition, I further note that the impartial hearing officer properly did not reach these issues and I find that these contentions are raised for the first time on cross-appeal and are outside the scope of my review and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

In her decision, the impartial hearing officer responded to the parents' allegation in the due process complaint notice, and concluded that the "CSE possessed adequate information to develop an appropriate educational plan for the student," and thus, found that the evaluative data—which included the student's most recent psychoeducational evaluation, updated reports from the student's providers at the Aaron School, and the classroom observation—relied upon by the district were sufficient to develop the 2010-11 IEP (IHO Decision at pp. 5-6). She further noted that the CSE "accurately reported [the student's] present levels of performance" in the 2010-11 IEP, and the IEP "accurately reflected the results of the student's evaluations and identified the students' needs, as well as contained levels of present performance that accurately reflected the evaluations" (id.). Thus, the parents' allegations set forth in the cross-appeal not only raise new issues not raised below, but their allegations also do not directly challenge the impartial hearing officer's specific conclusions or determinations on this issue, and therefore, the cross-appeal does not comply with State regulation, which requires that a party appealing an impartial hearing officer's decision must "clearly indicate the reasons for challenging the impartial hearing officer's decision, indentifying the findings, conclusions and order to which the exceptions are taken, . . . " (8 NYCRR 279,4[a]). Therefore, based upon the foregoing, the parents' cross-appeal relating to these issues must be dismissed.

Assigned School

Next, the parents assert in their cross-appeal that the impartial hearing officer erred in failing to address their allegations and concerns regarding the particular school to which the student had been assigned. The parents argue that the assigned school would not have provided the student with appropriate instruction; the student's sensory and social/emotional needs would

not have been met with respect to pragmatics, rigidity, dysregulation, and anxiety; the assigned school did not have a sensory gym; the assigned classroom did not have sensory materials in the classroom; and the teacher of the assigned classroom did not have experience teaching students with autism. As a result, the parents contend that the district failed to offer the student a FAPE for the 2010-11 school year. The district argues that the hearing record contains no evidence that the district would have failed to properly implement the student's 2010-11 IEP had the student attended the assigned school. To the extent that the teacher of the recommended 12:1+1 special class lacked experience teaching students with autism, the district asserts that even if this allegation constituted a procedural violation, it would not rise to the level of a denial of a FAPE in this case.

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 parents' claims with regard to implementation of the recommended 12:1+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 May 2010-11 IEP, which is in part speculative because in August 2010 it became clear that the parents would not accept the placement recommended by the district in the May 2010-11 IEP and that they intended to reenroll the student at the Aaron School (Parent Ex. A at pp. 1-2). 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 12:1+1 special class and related services at the assigned school, and thereby deny the student a FAPE. Therefore, the parents' allegations with respect to the assigned school are without merit and must be dismissed.

Parent Counseling and Training

I now turn now to the district's argument in its appeal. The district contends that the impartial hearing officer erred in concluding that the CSE's failure to recommend parent

counseling and training on the student's 2010-11 IEP resulted in a failure to offer the student a FAPE. The district argues that State regulations "do not mandate how or where this parent training and counseling is to be provided, nor do the regulations proscribe any specific formats or programs for parent training and counseling" (Pet. ¶¶ 42-43). Alternatively, the district contends that even if the CSE's failure to recommend parent counseling and training in the 2010-11 IEP constituted a procedural violation—as opposed to the impartial hearing officer's finding that it constituted a substantive violation—the violation did not rise to the level of a denial of a FAPE because the evidence in the hearing record indicates that the particular school to which the district assigned the student made parent counseling and training available to parents of students with autism through a variety of sources. Therefore, the district argues that if the student had attended the assigned school, the parents could have availed themselves of parent counseling and training consistent with the regulations. However, the district also argues that even if the parents had not received parent counseling and training, the student would not have been denied a FAPE because under the facts of this case, the parents did not articulate any need for the service and further, the parent—through her testimony at the impartial hearing—evidenced a "knowledge and understanding" of the student's "deficits and needs" (Pet. ¶ 46). In opposition, the parents contend that the impartial hearing officer properly concluded that the district's failure to recommend parent counseling and training in the IEP constituted a denial of a FAPE.

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 C.F.R. § 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F. 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. Mar. 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]).[19]

Upon review of the hearing record, the weight of the evidence does not support the impartial hearing officer's conclusion that the CSE's failure to recommend parent counseling and training on the 2010-11 IEP constituted a denial of a FAPE.

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

At the impartial hearing, the district presented a special education teacher who provided special education teacher support services (SETSS) at the particular school to which the district assigned the student (see Tr. pp. 152-53). The teacher testified that although the school did not, itself, provide parent counseling and training for parents of students with autism, the school had "connections" to provide that service (see Tr. pp. 153-54). The teacher testified that the assigned school offered parent counseling and training through a university organization, which partnered with the assigned school to provide "parent workshops, professional development, [and] different ways of monitoring progress," and in addition, the organization could also "create" whatever the school required (Tr. pp. 154-55). The teacher further testified that parents of students with autism also availed themselves of programs offered through the district's specialized schools to arrange for the provision of parent counseling and training services (see Tr. pp. 155-56). In addition, the assigned school had a relationship with a neighboring nonpublic school that provided educational services to students with learning disabilities, and parents attended workshops at the nonpublic school during the school year (see id.; see Tr. pp. 159-60). Finally, the teacher testified that as a member of the Council for Exceptional Children, she connected parents with meetings offered through that organization (see Tr. p. 156). The assigned school also had a social worker on staff that assisted parents interested in parent counseling and training (id.).

Therefore, while it is undisputed that the CSE did not recommend parent counseling and training on the student's 2010-11 IEP, the SETSS teacher's testimony persuasively demonstrates that had the student attended the particular school to which the district assigned the student, the parents would have had parent counseling and training available consistent with both State regulations and the courts' interpretation of those regulations. Based upon the circumstances of this case, I find that the district's failure to provide parent counseling and training on the May 2010 IEP did not comport with regulations (see 34 C.F.R. 300.34[c][8]; 8 NYCRR 200.4[d][2][v][b][5], 200.13[d]). However, given that parent counseling and training services were available through the student's recommended placement at this particular school, I conclude that under the circumstances of this case, the district's failure to incorporate parent counseling and training into the May 2010 IEP did not result in a denial of a FAPE (see M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the parents' unilateral placement of the student at the Aaron School was appropriate to meet the student's special education and related services' needs or whether equitable considerations favor an award of tuition reimbursement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision dated September 26, 2011, concluding that the district failed to offer the student a FAPE for the 2010-11 school year is hereby annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision dated September 26, 2011, ordering the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2010-11 school year is hereby annulled.

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

JUSTYN P. BATES
STATE REVIEW OFFICER