The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-022

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, John Tseng, Esq., of counsel

The Law Offices of Melvyn W. Hoffman, attorneys for respondents, Melvyn W. Hoffman, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to partially reimburse the parents for their daughter's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

In this case, the student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The CSE met on May 26, 2010 for the student's annual review and to develop the student's IEP for the 2010-11 school year (Dist. Exs. 3; 4; 5). The CSE recommended the student's placement in a 10-month 12:1+1 special class in a community school with a 12-month related

services program consisting of speech-language therapy, occupational therapy (OT), and counseling (Tr. pp. 20-21, 44-45; Dist. Ex. 3 at pp. 1-2, 14, 16).

In a letter dated July 21, 2010, the district summarized the recommendations made by the May 2010 CSE and identified the particular school to which it assigned the student for the 2010-11 school year (Dist. Ex. 14). In an undated letter, the student's mother informed the district that she had made unsuccessful attempts to contact the assigned school by telephone, and when she attempted to visit the assigned school, she was not allowed into the building because it was under construction (Parent Ex. B). She also informed the district that she therefore could not accept the assigned school at that time because she did not have an opportunity to assess it (id.).

In a letter to the district dated November 14, 2010, the student's mother stated that she had visited the assigned school on October 25, 2010 and that she was "reluctant to consider the school for [the student]" (Parent Ex. A). The parent asserted that she toured the assigned school and observed the classroom to be chaotic and noisy, and she thought that the students in the classroom seemed "low functioning and extremely hyper" (id.). According to the parent, the student would not benefit in that type of classroom as she required a structured environment (id.).

A. Due Process Complaint Notice

The parents filed a due process complaint notice alleging that the district denied the student a free appropriate public education (FAPE) for the 2010-11 school year by preparing an IEP that was procedurally and substantively flawed (Dist. Exs. 1 at p. 1; 15 at p. 1).[1] Specifically, the parents alleged that: (1) the CSE was improperly constituted; (2) the IEP was prepared without sufficient evaluative data; (3) the goals in the IEP were too general and not measurable; (4) a behavioral intervention plan (BIP) was not developed despite the student having sensory issues, social issues, and inappropriate behavior; and (5) a 12-month program was not recommended (id.). The parents further alleged that the size of the assigned school would be overwhelming to the student and that the assigned classroom was not appropriate for the student because of a lack of structure, disorganization, and noise level that would negatively impact the student's sensory and auditory processing difficulties (id.). The parents also alleged that the students in the assigned class were "hyperactive and low functioning," and that the student needed a small nurturing school, a small class environment, and to be grouped with similarly functioning peers with full-time special education and structure provided by two teachers to receive educational benefits (id.). The parents requested that the district reimburse them for the student's tuition at the Aaron School for the 2010-11 school year, as well as provide transportation and related services (id.).

[1] The hearing record contains two due process complaint notices, both of which are dated November 4, 2010 (Dist. Exs. 1; 15). Additionally, one of the exhibits contains a handwritten notation that it is a second request and bears the date of February 7, 2011 (Dist. Ex. 1). The other exhibit contains a handwritten notation that it is a third request and bears the date of July 6, 2011 (Dist. Ex. 15). The content of the due process complaint notices is otherwise identical (compare Dist. Ex. 1, with Dist. Ex. 15).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 23, 2011 and concluded on December 15, 2011, after four days of proceedings (Tr. pp. 1-285).[2] In a decision dated December 23, 2011, the IHO determined that the district failed to meet its burden of proving that it offered the student a FAPE for the 2010-11 school year (IHO Decision at pp. 11-12). Specifically, the IHO found that the student's IEP recommending an educational program on a 10-month basis with only related services during the summer months did not provide an appropriate educational program for the student (id.). The IHO further found that the student required a "structured behavioral program," and that the IEP did not include a BIP and the assigned classroom did not provide a "structured, positive behavioral system" (id. at p. 12). The IHO credited the testimony of the student's mother at the impartial hearing that the assigned class was noisy and unstructured, and found that her testimony that the students in the assigned class were lower functioning than the student was supported by the testimony of the district's special education teacher from the assigned school (id.). The IHO also found that the recommended summer programming consisting of only related services did not guarantee any social interaction with other children and did not address the student's need to attend school on a 12-month basis in order to retain the academic and social skills she had acquired (id.).

The IHO further determined that the parents demonstrated that the Aaron School was an appropriate placement for the student (IHO Decision at p. 13). Regarding equitable considerations, the IHO determined that the parents had cooperated with the district by providing evaluations and reports, participated in the CSE meeting, and visited the assigned school, but that the student's mother had failed to communicate her disagreement with the recommended program at the May 2010 CSE meeting (id. at p. 14). The IHO found that although the student's mother had notified the CSE that she had visited the assigned school and found it inappropriate, the parents never informed the district that they would be seeking reimbursement for their unilateral placement of the student at the Aaron School (id.). The IHO also noted that at the time of the May 2010 CSE meeting, the parents had already enrolled the student at the Aaron School for the 10-month and summer programs, yet the student's mother did not express any disagreement to the CSE with its recommendation that the student attend a 10-month program and receive only related services in the summer (id.). The IHO also noted that there was no indication in the hearing record that the student's mother requested a BIP, which would have given the district the opportunity to correct any deficiencies in the recommended program (id.). Based upon her findings, the IHO determined that tuition reimbursement should be reduced by 50 percent (id.). The IHO ordered that the district reimburse the parents for 50 percent of the cost of tuition for the student to attend the Aaron School for the 2010-11 school year, including the summer program (id.).

IV. Appeal for State-Level Review

This appeal by the district ensued. The district alleges that the IHO erred in determining that it did not offer the student a FAPE for the 2010-11 school year. Specifically, the district

[2] There are four transcript volumes from the impartial hearing. The first three transcript volumes, dated November 23, 2011, November 29, 2011, and December 8, 2011, are consecutively paginated from page 1 to page 268. The last transcript volume, dated December 15, 2011, is paginated from page 151 to 167. All citations in the decision to the transcript refer to the first three consecutively paginated volumes unless otherwise noted.

alleges that: (1) the CSE's recommendation of a 10-month academic program in a 12:1+1 special class in a community school with 12-month related services was appropriate to meet the student's academic and social/emotional needs; (2) a BIP was unnecessary for the student, the student's IEP provided for a structured and supportive behavioral program, and the district would have implemented the student's IEP; and (3) the IHO erred in considering the parents' allegations regarding the assigned school and class because they did not accept the recommended placement and the student did not attend the assigned school. The district does not appeal the IHO's findings regarding the appropriateness of the Aaron School for the student or the findings relating to equities, but alleges that the IHO erred in only reducing the student's tuition by 50 percent. The district alleges that the appropriate remedy given the IHO's findings on equities is a denial of tuition costs in its entirety. The district requests reversal of the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year or, alternatively, that tuition reimbursement be denied based upon equitable considerations due to the parents actions in this matter.

Although the parents requested an extension to the time period in which to respond to the district's petition, the parents ultimately did not file an answer to the petition. Although the parents have not responded to the petition, I am nevertheless required to examine the entire record and make an independent decision based on the entire hearing record (20 U.S.C. § 1415[g]; 34 CFR 300.510[b][2][i]; see 8 NYCRR 279.3).[3]

V. Applicable Standards

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

[3] I note that the IHO did not address some of the allegations contained in the parents' due process complaint notice, such as whether the May 2010 CSE had sufficient evaluative data before it in making its recommendations (see Dist. Exs. 1 at p. 1; 15 at p. 1). State regulations provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer (8 NYCRR 279.4[b]). Here, since the parents did not cross-appeal from the IHO's decision, I will confine my review to the issues presented by the district (see Application of the Dep't of Educ., Appeal No. 11-127).

a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; 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 IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak 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 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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 CFR 300.148).

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

VI. Discussion

A. Special Factors and Interfering Behaviors

I will first consider the district's argument that the IHO erred in determining that the May 2010 CSE should have developed a BIP for the student. As set forth in greater detail below, the hearing record supports the district's contention that the student did not require a BIP, that the CSE properly considered special factors, and that the May 2010 IEP appropriately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board 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. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; 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 CFR 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 Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[4] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is

[4] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), 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 [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]).

considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[5] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed /formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the parents asserted in their due process complaint notice that the student required a BIP due to her "sensory issues, social issues, and inappropriate behavior" (Dist Exs. 1 at p. 1; 15 at p. 1). In determining that a BIP was necessary, the IHO relied on a private psychological evaluation conducted in fall 2008 that indicated that the student had difficulty with attention and self-direction (IHO Decision at p. 12; see Dist. Ex. 6 at p. 2). The fall 2008 psychoeducational evaluation further indicated that the student engaged in echolalia, presented as anxious, and at times refused to participate in required tasks unless they were on her own terms (Dist. Ex. 6 at p. 2).

The student's May 2010 IEP indicates that academically, the student benefited from a structured setting, predictable routine, preplanning or previewing, visual and verbal cues, and responded well to positive reinforcement and a token economy (Dist. Ex. 3 at p. 3). The IEP also notes that the student needed redirection, preferential seating, visual and verbal prompts, sensory tools and breaks, and enhanced auditory input (Tr. p. 30; Dist. Ex. 3 at p. 4). The IEP reflects the student's social/emotional management need for support to help maintain social engagement through CSE recommendations for sensory breaks, tools, and materials, and a predicable routine and a visual schedule (Dist. Ex. 3 at p. 4). The student's IEP reflects that the student's behavior

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

does not seriously interfere with instruction and could be addressed by a special education teacher (id.).

According to the district's special education teacher who participated at the May 2010 CSE meeting, the CSE did not develop a BIP for the student because it believed that one was not necessary (Tr. p. 29). She indicated that the CSE discussed with the student's special education classroom teacher whether the student's behavior seriously interfered with classroom instruction, and that the student's teacher indicated to the CSE that it did not (Tr. p. 30). The CSE determined, with input from the student's special education classroom teacher, that the student's behavior could be addressed by a special education teacher through the implementation of the academic, social, and health/physical management needs reflected in the IEP with a structured setting, predictable routine, preplanning or previewing, visual and verbal cues, positive reinforcement and token economy, redirection, preferential seating, visual and verbal prompts, sensory tools and breaks, enhanced auditory input, visual schedule, movement breaks to keep her sensory system organized, and OT (id.; Dist. Ex. 3 at pp. 3-5).

Additionally, based on the information available to the CSE at the time, the special education teacher assigned to the May 2010 CSE testified that there was no need to develop a BIP for the student because she did not engage in behaviors that were self-injurious, nor did she run out of the classroom (Tr. p. 32). Moreover, although review of the December 2009 classroom observation report reveals the student was observed to tantrum for approximately five to ten minutes when her demands were not met, the student was noted to be responsive to the special education teacher's verbal feedback and her teacher's "firm limit-setting" (Dist. Ex. 13 at pp. 1-2; see Tr. p. 76).

In light of the above, I find that the lack of a BIP does not compel a finding that the district failed to offer the student a FAPE, accordingly, the IHO erred in finding to the contrary (see A.C., 553 F.3d at 172-73; see also Application of the Dep't of Educ., Appeal No. 11-156; Application of a Student with a Disability, Appeal No. 11-110).[6]

B. 12-Month Program

I now turn to the district's assertion that the IHO erred in holding that the district denied the student a FAPE by offering the student only related services during the summer instead of a 12-month academic program. As set forth below, the hearing record reflects that the CSE considered 12-month programming for the student (Tr. pp. 43-44; Dist. Ex. 3 at p. 15).

Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because

[6] I further note that, as set forth above, State regulations require in pertinent part that a CSE consider developing a BIP when "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" (8 NYCRR 200.22[b][1]). Here, because the student has not attended the district's recommended program, there has been no opportunity to determine if the student's impeding behaviors would have persisted despite consistently implemented general school-wide or class-wide interventions. Moreover, the district's special education teacher testified that they are trained to address the behaviors the student exhibited (Tr. p. 68).

of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]; see Application of the Bd. of Educ., Appeal No. 11-058; Application of a Student with a Disability, Appeal No. 09-088; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-073; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106 [defining ESY]).[7]

The student's mother testified at the impartial hearing that in consideration of the student's progress in kindergarten at the Aaron school during the 2009-10 school year, she was concerned that a two-month lapse in programming for the summer might result in "some regression" for the student (Tr. p. 249). An April 27, 2010 rationale for provision of a 12-month educational program written by the student's kindergarten teacher from the Aaron School reported that the student needed a 12-month program to prevent regression (Dist. Ex. 10 at pp. 1-2). The basis for the teacher's rationale focused on the student's needs in speech-language, play, and social/pragmatic skills (id.). The teacher did not indicate any significant regression in the student's academic skills, other than stating that, with respect to school breaks, it took "a significant amount of time" for the student to "return to the level of both academic and social performance demonstrated before the break" (id.). At the time of the May 2010 CSE meeting, one month after the student's kindergarten teacher wrote the April 2010 rationale for provision of a 12-month educational program, the Aaron School kindergarten teacher indicated that the student's math and reading abilities were on an appropriate kindergarten level (Dist. Exs. 3 at p. 3; 4).

The district special education teacher who participated in the May 2010 CSE meeting testified that the CSE considered the fact that the Aaron School was a 10-month program; however, it also offered a summer program to students (Tr. p. 44). The special education teacher further testified that the CSE also considered the student's age, and added that if the student needed any services that they should be given to her while the student was young (id.). Consistent with the parent's aforementioned testimony, the district's special education teacher testified that although

[7] The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

> A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(http://www.p12.nysed.gov/specialed/publications/policy/esy/qa2006.htm).

the student displayed some behavioral delays, she was "not that delayed;" that the student's behavior reflected that she was cognitively inflexible and had sensory needs that needed to be addressed in order for her to calm down; and that 12-month related services were recommended to address the student's major difficulties related to her speech-language needs, sensory needs, and cognitive inflexibility (Tr. pp. 46-47, 62). Under the circumstances, the CSE determined that the student could experience regression, if they stopped all programming for the summer (Tr. p. 45). As a result, the CSE recommended the continuation of the student's related services for the summer, because all of the student's related services were "more on target to address her deficits … every day, she will have something there to support her" (id.). According to the special education teacher, the CSE addressed the student's social needs by recommending 12-month counseling and speech-language services with a peer, and that it addressed the student's sensory needs by recommending 12-month OT services (Tr. p. 58).

Although the district's special education teacher testified that the student would receive three sessions of speech-language therapy per week, the student's IEP provides for five sessions per week (Tr. pp. 45, 57; Dist. Ex. 3 at p. 16). According to the district's special education teacher, the parent specifically requested two push-in sessions of speech-language therapy per week; however, during the summer months while classes are not in session, it is impossible to offer speech-language therapy on a push-in basis, so the CSE recommended the continued provision of all related services even if they were not delivered in the classroom setting (Tr. pp. 57-58). She also testified that had the parent accepted the recommended summer 2010 related services, those services would have been provided in a separate location via related service authorizations (RSAs) (Tr. pp. 62, 73-74; Dist. Ex. 3 at p. 16).

Based on the foregoing, I find that the hearing record does not support a finding that the student was denied a FAPE based on a lack of recommended 12-month academic services.

C. Assigned School

I will now consider the IHO's finding that the student was denied a FAPE based upon the determination that the assigned school was not appropriate to meet the student's special education needs and specifically, that if the student had been enrolled in the district's assigned school, it would not have provided her with the necessary structured program or appropriate functional grouping (IHO Decision at p. 12). State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although

neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008], aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at the Aaron School prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of her IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless

shows that the 12:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see 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]).

Here, the hearing record indicates that on the first day of school, the assigned class consisted of 11 students, nine of whom were eligible for special education programs and related services as students with a speech or language impairment (Tr. pp. 89-90; Dist. Ex. 3 at p. 1). Of the remaining two students, one was eligible for special education programs and related services as a student with an other health-impairment and the other was eligible as a student with an emotional disturbance (Tr. p. 90).[8] The special education classroom teacher indicated that all of the students in the class were between the ages of five and seven years old (id.). The hearing record reflects that the highest instructional levels in the class for reading and math were at the beginning kindergarten level, but that all students were in pre-kindergarten to kindergarten range, and all students in the class had IEPs (Tr. pp. 90-91, 95). There were five adults in the classroom, consisting of the classroom teacher, a class paraprofessional, a health paraprofessional assigned to a specific student, a language paraprofessional assigned to a specific student, and a student teacher that was in the classroom three times per week (Tr. p. 92). The special education teacher indicated that she taught social skills, math, science exploration, and social studies (Tr. pp. 94-95).[9] The special education teacher testified that she used each student's IEP on a regular basis to determine how the students were progressing on their goals and for writing their progress reports (Tr. p. 95). The special education teacher noted that she used a multisensory approach in the classroom wherein she highlighted different senses by incorporating multisensory tools in her instruction, such as visual supports, hands-on manipulatives, and movement, scaffolding, modeling, visual and physical prompts, and redirection (Tr. pp. 96-99). In order to help her students handle feelings of frustration they might experience, the special education teacher indicated that she used visual charts to help them identify/name their feelings of frustration, taught and modeled appropriate manner of expression, used positive reinforcement and informal and formal programs specific to each student's needs (Tr. pp. 96-100).

Regarding grouping students in the class for instructional purposes, the special education teacher indicated that she differentiated instruction for her students and broke the class down into small groups daily according to their needs, abilities, and goals (Tr. pp. 100, 120, 125). The teacher noted that when students initially entered her classroom at the beginning of the school year she assessed their reading, writing, and math skills to assist her in planning for each student (Tr. p. 105). She indicated that she was familiar with this student's IEP and if the student had attended the 12:1+1 special class, the teacher described how she could have implemented the IEP to address the student's needs in reading, writing, and math (Tr. pp. 103-04, 108-18). Additionally, the

[8] According to the special education teacher, the student classified with an emotional disturbance was subsequently found eligible for special education programs and services due to autism (Tr. p. 90).

[9] The special education teacher of the assigned 12:1+1 special class testified that the students in the class also attended "specials" including music, gym, and art as a group and "never combined" with other classes for these subjects (Tr. p. 132).

12:1+1 classroom was equipped with an FM unit to help the students in the class "tune in and hear more clearly," which "help[ed] them focus and process language" (Tr. pp. 118, 127). Overall, the special education teacher opined that the student seemed similar to the other students in the 12:1+1 special class during the 2010-11 school year; that the student's goals, levels, and needs were similar to the other students; that most of the students in the class were classified as speech or language impaired and worked on social skills; and that the student was within the same academic range of many of the students in the class (Tr. p. 121).

The evidence also does not support a finding that the student would not have received the necessary structure in the assigned school to enable her to receive educational benefits. Testimony by the district's special education teacher of the assigned 12:1+1 classroom indicated that her classroom was structured and not too noisy, and that children were generally disciplined and quiet in the hallways (Tr. p. 130). The teacher indicated that for the 2010-11 school year, she used a classroom visual schedule as well as individual visual and tactile schedules for her students to foster independence, particularly during morning routines (Tr. pp. 136-37).

Accordingly, upon review of the hearing record, I find that the evidence shows that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 12:1+1 special class at the assigned district school, and that the evidence does not support a finding that the student would not have received the necessary structure in the assigned school to enable her to receive educational benefits.

VII. Conclusion

Having determined that the IHO erred in determining that the district denied the student a FAPE for the 2010-11 school year, it is not necessary for me to consider the appropriateness of the Aaron School, or whether the equities support the parents' claim for tuition reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have also considered the district's remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated December 23, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year and awarded the parents partial reimbursement for the student's tuition at the Aaron School is hereby annulled.

Dated: **Albany, New York**
March 5, 2012

STEPHANIE DEYOE
STATE REVIEW OFFICER