The University of the State of New York

The State Education Department
State Review Officer
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No. 12-025

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

Appearances:
Susan Luger Associates, Inc., attorneys for petitioners, Lawrence D. Weinberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's determination that it was required to reimburse the parents for independent educational evaluations (IEEs) they obtained. The appeal must be dismissed. The cross-appeal must be dismissed.

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, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process

hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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

The student's prior educational history was discussed in Application of the Dep't of Educ., Appeal No. 11-049, and will not be repeated at length here. The student has received diagnoses of an autistic disorder and mental retardation (Parent Exs. F at pp. 2, 7; O at pp. 1, 4).[1] He has significant cognitive and language deficits, is impulsive, and exhibits difficulty attending (Parent

[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (Dist. Ex. 11 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Exs. F at pp. 4-5, 6; J at p. 3; O; see Dist. Ex. 7). The student has a history of aggressive and self-injurious behaviors that have varied in intensity over time (Dist. Exs. 6 at p. 2; 7; Parent Exs. F at pp. 1-3, 6; O at p. 1). The parents unilaterally enrolled the student in the Rebecca School for the 2010-11 school year, where he attended a 5:1+2 special class and received related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Tr. p. 73; Dist. Ex. 8 at pp. 1-4).

On May 23, 2011, the CSE met for the student's annual review and to develop an IEP for the 2011-12 school year (Dist. Exs. 10; 11).[2] The CSE recommended that the student be placed in a 6:1+1 special class in a special school with related services of speech-language therapy, OT, PT, counseling, a 1:1 crisis management paraprofessional, and a special transportation paraprofessional (Dist. Ex. 11 at pp. 1, 17). The IEP reflected the student's aggressive and self-injurious behaviors, noted that his behavior seriously interfered with instruction and required additional adult supervision, and indicated that a behavioral intervention plan (BIP), which was attached to the IEP, had been developed for the student (id. at pp. 4, 18). The CSE also recommended the student receive adapted physical education and extended school year services mirroring those he received during the regular school year (id. at p. 1).

By letter dated June 4, 2011, the district summarized the recommendations made by the May 2011 CSE and notified the parents of the school to which the student was assigned (Dist. Ex. 13). In a letter response dated June 14, 2011, the student's mother reported that she had visited the public school site and found it to be inappropriate for the student (Parent Ex. G at p. 1). The parents rejected the district's offer and advised the district that if it did not offer the student an appropriate program, they would have no alternative but to send the student to the Rebecca School for the 2011-12 school year and seek tuition reimbursement (id. at pp. 1-2).

A. Due Process Complaint Notice

By amended due process complaint notice filed July 12, 2011, the parents requested an impartial hearing (Parent Ex. B).[3] The parents asserted that the May 2011 IEP was inappropriate because the CSE failed to conduct a functional behavioral assessment (FBA) or prepare a BIP (id. at p. 4). The parents further asserted that the IEP failed to specify the provision of parent counseling and training and recommended an inappropriate level of related services (id.). With regard to the recommended placement, the parents asserted that the student-to-teacher ratio and classroom size were inappropriate, and that the recommendation did not reflect the suggestions of the student's Rebecca School teachers (id.). The parents also asserted that their concerns were

[2] I remind the district that "IEPs developed for the 2011-12 school year, and thereafter, shall be on a form prescribed by the Commissioner" (8 NYCRR 200.4[d][2]; "Model Forms: Student Information Summary and Individualized Education Program (IEP)," Office of Special Educ. Mem. [Jan. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm; see also "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents: Miscellaneous Questions," Office of Special Educ. Question 2, [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-misc.htm).

[3] The amended due process complaint notice is dated June 16, 2011, which is the same date of the original due process complaint notice (Parent Ex. B at p. 1; see Parent Ex. A at p. 1). The hearing record indicates that the date the complaint was amended is not in dispute (IHO Decision at p. 2; Pet. ¶ 4).

ignored and that they were denied meaningful participation at the CSE meeting (id.). The parents asserted that the May 2011 CSE failed to consider State-approved nonpublic schools as a placement option for the student (id.). The parents alleged that the particular school to which the district had assigned the student was inappropriate because of its size, the location of the school, the methodology used, and the student's failure to make progress in a similar program (id. at pp. 4-5). The parents also asserted that the May 2011 CSE used private IEEs obtained by the parents after the district had failed to evaluate the student (id. at pp. 2-3). For relief, the parents requested that the district pay for the student's Rebecca School tuition, provide transportation and crisis management paraprofessionals, and reimburse them for the cost of the privately obtained IEEs (id. at pp. 6-7).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on September 7, 2011, and continued on November 17, 22, and 30, 2011 (Tr. pp. 1-382).[4] In a decision dated December 23, 2011, the IHO found that the district offered the student an appropriate program, but awarded the parents reimbursement for private psychological and speech-language evaluations that they obtained (IHO Decision). The IHO found that the lack of parent counseling and training on the IEP and the size of the classroom in the assigned school did not deny the student a free appropriate public education (FAPE) (id. at pp. 15, 18-19). Regarding the parents' challenges to the use of applied behavior analysis (ABA) methodology at the assigned school and the failure of the student's IEP to indicate the inappropriateness of ABA-style instruction to teach him, the IHO found that the hearing record reflected that the use of ABA caused the student to engage in self-injurious behaviors (id. at p. 16). However, the IHO found that because the IEP noted the parents' concerns that the use of ABA methodology was not appropriate, it was not necessary to include such a statement in the BIP or with regard to the student's social/emotional needs (id.). Furthermore, the IHO found that the assigned school did not adhere strictly to ABA methodology, and credited the testimony of the classroom teacher at the assigned school that she used whatever methodology worked best for each student (id. at pp. 16-17). With regard to the district's failure to conduct an FBA, the IHO noted that a BIP was created which listed specific strategies to address the student's self-injurious behaviors and that an FBA could have been conducted in the event that the student attended a district school (id. at pp. 17-18). Based on the foregoing, the IHO found that the district offered the student an appropriate program for the 2011-12 school year (id. at p. 19).

The IHO additionally found that the parents failed to establish that the Rebecca School met the student's related service needs for speech-language therapy and counseling (IHO Decision at pp. 19-20). However, the IHO awarded the parents reimbursement for the private IEEs, finding that the district used the IEEs to develop the student's IEP and that the district did not seek an impartial hearing to defend its failure to timely evaluate the student (id. at pp. 20-21).

[4] While the IHO granted several extensions to the 45-day timeline in which she was required to issue a decision at the requests of the parties, the hearing record does not reflect that she properly documented her responses to each extension request in writing as required by State regulation (8 NYCRR 200.5[j][5][i], [iv]). I remind the impartial hearing officer to comply with this requirement.

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in finding the district offered the student a FAPE and the Rebecca School was not an appropriate placement. The parents assert that the BIP was insufficient to address the student's interfering behaviors because it failed to address the functions of the student's behaviors, did not provide any manner to increase the student's frustration tolerance, and failed to measure the frequency or duration of the behaviors. With respect to the recommended program, the parents assert that the district "presented no evidence" that placement in a 6:1+1 special class with related services was appropriate for the student. The parents argue that the student required a more supportive student-to-teacher ratio and that the provision of a 1:1 paraprofessional was an inappropriate substitute for additional teacher support. Furthermore, the parents assert that a 1:1 paraprofessional was not appropriate for the student because it would make it more difficult for him to generalize skills.[5] In any event, the parents assert that the behavioral interventions used by the teacher of the assigned classroom constituted the use of ABA methodology, which according to the parents was inappropriate for the student.

The district answers, denying the parents' assertions and requesting that the IHO's determinations with respect to the appropriateness of the placements offered by the CSE and the Rebecca School be affirmed. The district also cross-appeals from the IHO's award of reimbursement for the speech-language and psychological IEEs obtained by the parents, asserting that the parents were not entitled to reimbursement for the IEEs because they were not obtained to establish the inappropriateness of evaluations conducted by the district. Furthermore, the district asserts that the parents failed to establish that the district relied on the IEEs when developing the May 2011 IEP. Finally, the district asserts that even if it had relied on the IEEs in developing the student's IEP, the parents would not be entitled to reimbursement unless the district relied on them to the exclusion of any other evaluative materials.[6]

The parents answer the cross-appeal, contending that the IHO was equitably empowered to award reimbursement for the IEEs even if the parents did not meet the regulatory requirements for an IEE at public expense.

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

[5] The parents assert that the IHO erroneously stated that the student attended a school that is not mentioned in the transcript of the impartial hearing or exhibits admitted into the hearing record (Pet. ¶ 48). Responsibility for any error does not lie with the IHO insofar as the named school is in fact specifically referenced as the student's placement during his fourth grade school year in the version of the speech-language IEE submitted into evidence at the impartial hearing by the parents (Parent Ex. J at pp. 1, 4). It is unclear why the versions entered into evidence by the district and the parents vary in this respect (compare Dist. Ex. 4, with Parent Ex. J); however, the differences do not affect my analysis of the issues presented in this case.

[6] The district submitted an exhibit with the hearing record that was not admitted into evidence at the impartial hearing (Dist. Ex. 9). As the district does not request that I consider this evidence and expressly withdrew it from consideration at the impartial hearing (Tr. pp. 15-20), I have not considered it.

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., 557 U.S. 230, __, 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 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], aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an 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][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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. Scope of Review

Neither party has appealed from the IHO's determinations that the lack of parent counseling and training on the IEP, the size of the classroom in the assigned school, and the size and location of the assigned school did not deny the student a FAPE. Accordingly, those matters have become final and binding on the parties and have not been considered on review (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

B. May 2011 IEP

1. 6:1+1 Special Class Placement

First, I address the parents' assertion that the CSE's recommendation for a 6:1+1 special class placement with the support of a 1:1 paraprofessional was inappropriate for the student. I find that the IHO properly determined that the district established it offered the student an appropriate program.

The hearing record shows that the May 23, 2011 CSE considered evaluative reports submitted by the parents and progress reports from the Rebecca School, in addition to the district's own assessments of the student (Dist. Ex. 10 at p. 1). In December 2010, the district conducted a classroom observation of the student during a movement group led by an occupational therapist at the Rebecca School (Dist. Ex. 6). The observer noted that the teaching assistant and occupational therapist provided physical prompting to assist the student with participating in movement group activities (id. at p. 1). The observer also noted that either the teaching assistant or occupational therapist held the student's hands throughout the group activities and that when the student's hands were released he punched himself in the neck (id.). The observer noted that on one occasion when

the occupational therapist released the student's hands, he immediately went over to a teaching assistant who held his hands tightly (id. at p. 2). The observer reported that, in a conversation with the teacher regarding the student's propensity to punch himself, the teacher acknowledged the student sought the support of staff to hold his hands (id. at p. 3).

In April 2011, the district's social worker completed an updated social history, with the student's mother serving as informant (Dist. Ex. 5). The social worker recounted the student's educational history, as described by his mother, including the student's difficulty functioning in highly structured educational settings; his deteriorating behavior in the district's highly structured, physically small class; and the parents' decision to remove the student from the public school and unilaterally enroll him in the Rebecca School (id. at p. 2). Based on parent report, the social worker stated that the student had poor sensory integration and engaged in sensory seeking behaviors (id. at p. 3). She noted that the student was prescribed medication in 2010, which initially calmed the student and decreased his self-injurious behaviors (id.). However, she further noted that the student's behavior usually escalated with increased tolerance to the medication (id.). According to the social worker, the student's mother reported that at home he liked to play with the computer, listen to TV, and play on the trampoline and with the beanbag, albeit for very short periods of time (id. at p. 4). She noted that the student could sit for longer periods of time when he was doing homework when food was used as a reward (id.).

The CSE also had available to it the private psychological and speech-language IEEs of the student (Parent Exs. F; J). In September 2010, the parents arranged for the student to be evaluated by a private neuropsychologist in an effort to help clarify the student's educational needs and understand the difficult behaviors the student was experiencing prior to attending the Rebecca School (Parent Ex. F at pp. 1, 6). In her evaluation report, the neuropsychologist included a developmental and school history reported to her by the parents (id. at pp. 3-4). According to the neuropsychologist, the student spent much time pacing around the room and engaged in frequent whining to indicate his displeasure with the evaluation process (id. at p. 5). She further reported that the student began beating his chest and arms and was restrained by his mother or father to stop (id.). She indicated that it was very difficult to engage the student in joint attention (id.). In addition, the neuropsychologist reported that it was extremely difficult, if not impossible to engage the student in formal testing and that the testing situation appeared to make the student "overall quite anxious" (id. at p. 6).

The psychological evaluation conducted by the district in April 2011 reflected the findings of the private September 2010 psychological evaluation, as well as the results of the school psychologist's clinical interview, observations, and attempt at formalized testing (Dist. Ex. 7). The school psychologist reported that, according to the student's father, since enrolling the student in the Rebecca School there had been an improvement in the student's ability to tolerate school, along with a decrease in his self-injurious behaviors (id. at p. 1).

The school psychologist noted that prior to the evaluation, she observed the student pacing back and forth, occasionally growling loudly and attempting to leave the reception area (Dist. Ex. 7 at p. 2). She indicated that the student was in "virtually constant motion" and his parents were attentive and kept him from hurting himself (id. at p. 2). The school psychologist explained that she briefly attempted to engage the student in formalized testing, but that he was able to attend to only four items before he began pacing and attempting to leave the room (id.). The student was

able to identify three pictures, two verbally, but then was unable to attend to any other tasks (id.). The school psychologist reported that while she was discussing the student's "issues" with his father, the student occasionally came over to the table, forcefully banging it with his fist or elbow without any apparent evidence that he was injured (id.). In summary, the school psychologist stated that the student was "unable to sit for formalized testing and displayed almost constant motion, little eye contact, almost no speech other than a couple of words and a growling sound, and self-injurious behavior" (id.).

In May 2011, staff from the Rebecca School completed an updated interdisciplinary report of the student's progress at the school (Dist. Ex. 8). The report included a program description which indicated that the student participated in a 5:1+2 classroom setting and in accordance with the Developmental Individual Difference Relationship-based (DIR) model the student's individualized program consisted of language arts, visual-spatial and regulatory-sensory processing activities, Floortime sessions, personal autonomy skills, music integration, and adapted physical education (id. at p. 1). The interdisciplinary report further indicated that the student received speech therapy, OT, and PT (id.).

With respect to the student's functional emotional developmental levels, the student's teacher indicated that in December 2010, the student was mostly functioning at a level one, shared attention and regulation, but that he was now beginning to function more frequently at level two, engagement and relating, and occasionally at level three, two-way purposeful communication, under optimal conditions of regulation (Dist. Ex. 8 at p. 1). The teacher stated that the student spontaneously requested sensory input and accepted co-regulation strategies from adults (id.). The teacher further noted that the student usually communicated using one or two word requests, as well as through eye contact and facial expressions (id.). According to the teacher, when the student became frustrated or could not communicate his feelings or desires he often engaged in self-injurious behavior in the form of physical aggression toward himself using his fists or feet or by hitting objects such as the wall or table (id.). The teacher stated that a major focus in the classroom was on fostering the student's initiation and indicated that the student was starting to initiate with a variety of adults (id. at p. 2). According to the teacher, the student had increased the number of circles of communication that he was able to open and close (id.). In addition, the student had increased his use of verbal and gestural communication as opposed to immediately resorting to self-injurious behavior (id.).

The teacher described the student's reading skills including, among others, his ability to attend for up to 30 minutes during read aloud activities; identify some sight words and words paired with picture symbols; and answer explicit who, what, and where questions when regulated, surrounded by highly motivating situations and pictures with concrete choices, verbal prompting, and visual support (Dist. Ex. 8 at p. 2). In math, the teacher indicated that the student was increasing his ability to identify numbers 1-10 in a field of two with moderate adult support; demonstrating emerging gains in his ability to identify more and less in comparison situations with maximum adult support and prompting; and being able to stand in space more independently, mapping the room by skipping around and touching base with various points, such as the windows, walls, and door (id. at p. 3). The student continued to struggle with 1:1 number correspondence and being able to stand or sit independently for longer periods of time (id.). According to the teacher, the student required maximum adult support to complete his arrival routine (id.).

The student's occupational therapist reported that the student responded to proprioceptive and vestibular input by smiling or laughing, and while receiving such input he opened and closed circles of communication by requesting more pushes or squeezes from the therapist (Dist. Ex. 8 at p. 4). The occupational therapist noted that the student would frequently hit himself in the back of the neck or on his leg and that staff used sensory support and co-regulation strategies to decrease the student's self-injurious behaviors (id.). The student's physical therapist reported that during therapy sessions she addressed the student's relating and communicating through gross motor play and assisted the student in improving motor planning and increasing his strength and endurance (id.). She reported that the student enjoyed being physically active but that his ability to engage and participate with peers was dependent on his state of regulation (id.). The physical therapist explained that when dysregulated the student may cry, yell, and hit himself or others, and required "'squeezes'" (id.). The student's speech-language pathologist reported that the student communicated primarily using a combination of gestures and single words (id.). She noted that since December the student had expanded his use of single-word and multi-word utterances to answer questions and request preferred activities (id.). According to the speech-language pathologist, therapy sessions focused on expanding the student's pragmatic, receptive, and expressive language, as well as oral motor skills, in support of increasing the student's comprehension and intentional communication (id.).

The May 2011 Rebecca School report included both academic and related services goals, as well as a summary of the student's progress toward those goals (Dist. Ex. 8 at pp. 5-11). Notably, the goal narratives indicated that the student often used aggressive or self-injurious behaviors as a means of initiating communication; that he presented with a hypo-sensitive sensory system and at times required intensive proprioceptive input that was achieved by placing an adult's arms around him and providing him with squeezes (deep pressure); and that the student was using approximately 12 single-word utterances consistently and independently to make requests (id. at pp. 5, 7, 9-10).

When the CSE convened on May 23, 2011, the student's Rebecca School classroom teacher participated in the review by telephone (Tr. p. 72; Dist. Ex. 11 at p. 2). In developing the student's IEP for the 2011-12 school year, the CSE reviewed "to varying degrees" the December 2010 classroom observation, April 2011 social history and psychological evaluation, September 2010 speech-language evaluation, September 2010 psychological evaluation, and May 2011 Rebecca School interdisciplinary report (Tr. pp. 73-75, Dist. Exs. 3; 10; see Tr. pp. 67-69).

The student's May 23, 2011 IEP reflected the information considered by the CSE and was reasonably calculated to enable the student to receive educational benefits. To address the student's academic and social/emotional needs, the CSE recommended that the student be placed in a 6:1+1 special class in a specialized school with the support of a 1:1 crisis management paraprofessional (Dist. Ex. 11 at pp. 1, 17). The CSE identified environmental modifications and human/material resources needed to address the student's academic and social/emotional management needs including redirection; repetition; visual and verbal prompts; sensory input and sensory breaks; co-regulation with an adult; verbal redirection to de-escalate self injurious behaviors; proprioceptive and vestibular input including deep pressure, bouncing, spinning and jumping; and adult narration during transitions (id. at pp. 3-4). The CSE indicated on the student's IEP that his behavior seriously interfered with instruction and that a BIP, which was attached to the IEP, had been developed (id. at pp. 4, 18). In addition, the CSE recommended that the student receive two 30-

minute sessions of individual counseling per week (id. at pp. 2, 17). The proposed IEP included academic goals, social/emotional goals, and goals related to activities of daily living (id. at pp. 6-7, 13-14).

To address the student's speech-language deficits, the CSE recommended that he receive individual speech-language therapy for five 30-minute sessions per week (Dist. Ex. 11 at pp. 2, 17). The school psychologist testified that the recommendation for daily speech-language therapy reflected an increase in speech-language therapy from the student's previous IEP, was based on the student's significant language delays, and was consistent with the recommendations in the speech-language evaluation submitted by the parents (Tr. pp. 83-84). The proposed IEP included speech-language goals related to improving the student's engagement and pragmatic language skills, expressive and receptive language skills, and oral motor/articulation skills (Dist. Ex. 11 at pp. 10-12). The CSE recommended that the student receive OT for five 30-minutes sessions per week to improve his sensory processing, motor planning and sequencing, and visual spatial skills, and developed goals and objectives targeting the student's deficits in these areas (id. at pp. 8-9, 17). In addition, the CSE recommended that the student receive individual PT for two 30-minute sessions per week and developed goals designed to address the student's deficits in balance, coordination, core muscle strength, endurance, motor planning, and gross motor skills (id. at pp. 9-10, 17). Lastly, the CSE recommended that the student receive adapted physical education, a special transportation paraprofessional, and extended school year services (id. at pp. 1, 5, 16-17).

Consistent with the student's needs, the May 23, 2011 CSE recommended that he be placed in a 6:1+1 special class, which is designed for students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention (8 NYCRR 200.6[h][4][ii][a]). The CSE also recommended that the student be individually supported by a 1:1 crisis management paraprofessional (Dist. Ex. 11 at p. 17). According to CSE meeting minutes, the student's Rebecca School teacher stated that a 6:1+1 special class would not provide the student with enough support, and the student's mother agreed (Dist. Ex. 10 at p. 2). The Rebecca School program director testified that the student was not assigned a 1:1 paraprofessional at the private school because, although he required significant adult support, he did not require 1:1 support in that way (Tr. pp. 170-71). She indicated that the Rebecca School program with a 5:1+2 ratio provided the student with individual attention, but from many different people, which was important for the student (Tr. pp. 171-72). The program director further explained that there was a rigidity to the student and when he became attached to someone it was difficult to transfer him and have him generalize his skills to a different adult (Tr. pp. 171, 206-07). She opined that the student needed to move throughout his day with different adults to be able to generalize skills (Tr. p. 171). The Rebecca School program director indicated that 1:1 paraprofessionals were not allowed to rotate among students and were only allowed to work with the student to whom they were assigned (Tr. pp. 207). The student's mother testified that during the 2009-10 school year, the student became very attached to his 1:1 paraprofessional and would have "rage attacks" when she went to lunch (Tr. pp. 310-11). However, the teacher of the district's assigned class testified that there was one classroom paraprofessional and two 1:1 paraprofessionals in her classroom and that she would rotate the students among her and the three paraprofessionals every day during work time (Tr. p. 119). She indicated that rotation of staff assisted the students in her classroom with generalization (id.).

Based on the above, I find that the recommendation that the student attend a 6:1+1 special class placement with the support of a 1:1 paraprofessional and receive extensive related services was an appropriate placement in which to address the student's needs.

2. ABA Methodology

I turn now to the parents' concerns regarding the May 2011 IEP's failure to explicitly state that the use of ABA methodology was not appropriate for the student and the use of ABA at the assigned school. The hearing record shows that the parents strongly believed that the student did not respond well to instruction provided using ABA (Tr. pp. 301-02, 333-35; Dist. Ex. 10 at p. 2; Parent Ex. G at p. 1; see Parent Ex. F at pp. 2-3, 7).

The school psychologist testified that, in the context of discussing State-approve schools, the CSE discussed that in the past the student had not responded well to a strict ABA approach, specifically that the student found it stressful and that it increased the likeliness of him engaging in self-injurious behaviors (Tr. p. 86). According to the school psychologist, the CSE ruled out placement in a State-approved school for students with autism, believing that those schools employed an ABA approach (id.). The school psychologist explained that she noted the student's poor response to ABA under the "Other Programs/Services Considered" section of the IEP, rather than under the "Social/Emotional Performance" section, because it accurately reflected the nature of the CSE's discussion (Tr. pp. 90-91). She further testified that in terms of social/emotional functioning, the CSE relied on what the student was doing at that time (Tr. p. 91). When asked if a student's poor response to a particular methodology should be reflected in the student's social/emotional performance, the school psychologist stated that the information was "within the body of the IEP" (Tr. p. 92). The student's mother confirmed that there was a discussion about ABA at the May 23, 2011 CSE meeting (Tr. pp. 300-01). She testified that the discussion related to "New York State certified private school[s]" and their use of ABA or "rigid" teaching (Tr. p. 301).

The parents' contention is without merit. The IDEA explicitly states that it is unnecessary "to include information under [one] component of a child's IEP that is already contained under another component of such IEP" (20 U.S.C. § 1414[d][1][A][ii][II]; 34 CFR 300.320[d][2]; see Klein Indep. Sch. Dist. v. Hovem, 745 F. Supp. 2d 700, 727-28 [S.D. Tex. 2010]). I agree with the IHO that the IEP sufficiently reflected the parents' concerns that use of ABA-style instruction was not appropriate for the student (IHO Decision at p. 16), and note that the student's special education teacher and related service providers are required by State regulation to be given a complete copy of the student's IEP (8 NYCRR 200.4[e[][3][i]; see 34 CFR 300.323[d][1]).

Turning to the parents' concerns about the use of ABA in the particular classroom that the district offered the student, the teacher in the assigned classroom testified that she did not use any particular methodology, but taught to each student's individual needs and deficits, using whatever

methodology was "best for each child" (Tr. p. 116).[7] The teacher specifically disavowed using ABA during the 2010-11 school year or the summer session of the 2011-12 school year (Tr. pp. 133, 139). The teacher conceded that she used a behavior plan that employed the use of interventions including preferred activities and items to redirect students from deleterious behaviors, but denied that it constituted ABA (Tr. pp. 116-17, 129-30, 133-34). I find that, based on the above, there is no reason to disturb the IHO's determination because the evidence does not support the parents' contention that the district would have used an inappropriate methodology when implementing the student's IEP.[8]

3. Consideration of Special Factors—Interfering Behaviors

Addressing next the parents' objections to the student's BIP, 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

[7] Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045). To the extent that the parents challenge the district's intention to use appropriate methodology upon the implementation of the student's IEP, I note failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 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]). In this case, the parents rejected the IEP and enrolled the student at the Rebecca 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 there were no deviations from substantial or significant provisions of the student's IEP in a material way upon implementation of the student's IEP (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]; T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at * 14 [E.D.N.Y. Mar. 30, 2012]; 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].

[8] I agree with the parents that the IHO erred in stating that the parents failed to establish that the assigned school was inappropriate because of the use of ABA; however, from the context of her decision it is clear that, regardless to which party she assigned the burden of proof on that issue, the IHO found credible the teacher of the assigned classroom's testimony that she used whatever methodology worked best for each student (IHO Decision at pp. 16-17). Accordingly, the evidence on this issue was not in equipoise, and any error was harmless (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; Application of a Student with a Disability, Appeal No. 12-007).

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.).[9] 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

[9] 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, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234, at *2).

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 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]).[10] 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 Educ. [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]).

The parents' main objections to the BIP appear to be that it insufficiently addressed the student's low frustration tolerance and that it did not specify how the frequencies of behaviors were arrived at. I find both objections to be without merit. The May 2011 IEP stated the student's need for a BIP and also recommended that the student receive counseling and the services of a 1:1 paraprofessional to address his sensory needs and self-injurious behaviors (Dist. Ex. 11 at pp. 4, 17-18). The BIP indicated that the student exhibits self-injurious behaviors "when frustrated, when demands are placed on him, when limits are set or he is in pain" (id. at p. 18). The student's self-injurious behaviors included "banging his head with his fists and banging his elbows on the table" (id.). The district's school psychologist testified that the BIP was developed after a discussion involving the student's behaviors that interfered with his learning, specifically his self-injurious behaviors, which resulted from the student's frustration at his inability to communicate and his

[10] 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]).

sensory needs (Tr. pp. 79-80). The CSE discussed the frequency and duration of the behaviors (Tr. pp. 80-81), and developed a BIP that included a range of strategies designed to address the student's self-injurious behaviors, including the use of sensory supports and breaks, adult narration during transitions to reduce anxiety, proprioceptive and vestibular input, high affect play, and oral motor input (Dist. Ex. 11 at p. 18; see Tr. pp. 81-82). Additionally, the IEP set goals for the student to decrease self-injurious behaviors by accepting redirection and independently seeking out sensory input (Dist. Ex. 11 at p. 13). The school psychologist testified that counseling was added as a related service because of the student's need for support with regard to reducing his self-injurious behaviors (Tr. pp. 83-84). The classroom teacher in the assigned school testified that, when she previously taught students with self-injurious behaviors, she kept data using an "ABC" (antecedent, behavior, consequence) format (Tr. p. 134). To address these behaviors, she would provide the student with a preferred object (Tr. pp. 129-30). Finally, although not dispositive, the strategies to reduce the student's instances of self-injurious behaviors listed in the BIP comported in large part with those that were used by the Rebecca School (compare Dist. Ex. 11 at p. 18, with Tr. p. 231, and Dist. Exs. 6; 8). I find that the foregoing supports the IHO's determination that the IEP and BIP sufficiently addressed the student's self-injurious behaviors.[11] To the extent that the parents imply that the frequencies of behaviors listed on the BIP were fabricated because the district did not take data regarding the frequency or duration of the behaviors, I note that the student was enrolled in a unilateral placement not under the district's control, making it difficult for the district to conduct an in-depth observation (see 8 NYCRR 200.22[a]). Furthermore, the school psychologist's testimony clearly indicated that the CSE discussed the frequency of the student's behaviors; therefore, it is reasonable to infer that the information was provided by participants at the CSE meeting (Tr. pp. 80-81; Dist. Ex. 11 at p. 2).

C. IEE Reimbursement

Finally, I turn to the district's cross-appeal challenging that portion of the IHO's decision granting the parents reimbursement for the private speech-language and psychological evaluations they obtained in September 2010. The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]). IEEs are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). In addition to having an IEE considered by the CSE, parents have the right to have one IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]).

The district contends that because the parents did not disagree with a district evaluation, they were not entitled to reimbursement for the September 2010 private evaluations. The district is correct in its assertion insofar as the hearing record contains no indication that the parents disagreed with any district evaluation, but under the circumstances of this case, the inquiry does

[11] The parents seem to argue that the student's BIP was required to specify a means of increasing the student's frustration tolerance; I decline to read substantive requirements into State regulations governing the content of BIPs beyond those already present (8 NYCRR 200.22[b][2], [4]; see T.W. v. Unified Sch. Dist. No. 259, 2005 WL 1324969 at *6 [10th Cir. 2005]; Alex R. v. Forrestville Valley Community Unit Sch. Dist. No. 221, 375 F.3d 603, 615 [7th Cir. 2004]; Williams v. Milwaukee Pub. Schs., 2012 WL 1205124, at *6 [E.D. Wis. Apr. 11, 2012]).

not end there. The hearing record indicates that the student's mother gave consent for the district to evaluate the student in April 2010; it had not yet conducted the evaluation by September 2010 when the parents obtained the private psychological and speech-language evaluations (Tr. pp. 302-03; Parent Exs. F; J; P).[12] Rather, by letter dated April 6, 2011 the district further informed the parents that the CSE required a social history and psychological and educational evaluations to assess the student's educational needs and scheduled an evaluation appointment for April 21, 2011 (Dist. Ex. 1 at p. 1).[13] The student's mother again gave consent for the district to evaluate the student on April 21, 2011; the same day that the district conducted a social history and psychological evaluation (Dist. Exs. 2 at p. 2; 5; 7). Although the mother stated that she did not disagree with the psychological evaluation conducted by the district, she noted that it contained "really nothing new" to add to the private psychological evaluation (Tr. pp. 316-18). I note that the district's psychological evaluation relied heavily on and referenced the information contained in the private psychological evaluation (compare Dist. Ex. 7, with Parent Ex. F). The district also admitted that it did not conduct a speech-language evaluation of the student and that it used the private evaluations for the purpose of developing the student's IEP (Tr. pp. 45, 92-93).

The United States Education Department's Office of Special Education Programs has stated that it would be consistent with federal regulation to allow reimbursement for an IEE when the district failed to provide an evaluation in compliance with the IDEA (see Letter to Anonymous, 55 IDELR 106 [OSEP 2010]). The hearing record indicates that the district did not evaluate the student for over three years or determine that reevaluation was unnecessary (Dist. Ex. 7; Parent Ex. O), in violation of the IDEA's procedural requirements (20 U.S.C. § 1414[a][2][B][ii]; 34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). Although the parents obtained the private evaluations approximately three months before the district's three-year window to timely reevaluate the student closed (see Dist. Ex. 4; Parent Exs. F; O), under the circumstances of this case, I find that the parents are nevertheless entitled to reimbursement for the cost of the September 2010 private evaluations.[14] While it would have been preferable for the parents to request that the district conduct the necessary evaluations prior to obtaining one themselves, where, as here, the district acknowledged the need to evaluate the student and failed to do so, I find that the parents are entitled to reimbursement of the speech-language and psychological IEEs. Finally, the district does not offer evidence to challenging the qualifications of the evaluators or the cost of obtaining the evaluations, and the hearing record presents no reason to reduce the reimbursement granted by the IHO (34 CFR 300.502[e]; 8 NYCRR 200.5[g][1][ii]; see Letter to Parker, 41 IDELR 155 [OSEP

[12] Neither the hearing record in this case nor in the prior appeal involving this student contains any explanation for the district's failure to evaluate the student after obtaining consent from the parents to do so and despite the consent form's statement that "additional assessments are required" (Parent Ex. P). If the district determined that it did not require further evaluative data after obtaining parental consent, it should have complied with procedures requiring that it notify the student's parents of that determination, its reasons for making the determination, and the parents' right to request additional assessments (34 CFR 300.305[d][1]; 300.503; 8 NYCRR 200.4[b][5][iv]; 200.5[a]).

[13] I note that the district conducted its own evaluations of the student despite being in possession of the private evaluations since at least December 2010 (see Application of the Dep't of Educ., Appeal No. 11-049).

[14] To the extent that the district asserts that the parents are not entitled to reimbursement for the IEEs because they failed to establish that the district "relied on either private evaluation to the exclusion of any other documents" (Answer ¶ 74 [emphasis in original]), its argument is unsupported by citation to authority.

2004]; Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). In summary, the district has in this instance essentially attempted to impermissibly shift public responsibility for the costs of the student's evaluation to the parents in order to properly formulate the student's IEP and, therefore, shall be required "to belatedly pay expenses that it should have paid along and would have borne in the first instance" (Burlington, 471 U.S. at 370-71).

VII. Conclusion

Having found that the district offered the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and I need not determine the appropriateness of the student's unilateral placement or whether equitable considerations support the parents' request for reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]). The IHO properly found the parents to be entitled to reimbursement for the IEEs they obtained, as the district had failed to timely evaluate the student and later relied on the IEEs in developing the student's May 2011 IEP. I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
May 25 , 2012

JUSTYN P. BATES
STATE REVIEW OFFICER