The University of the State of New York

The State Education Department
State Review Officer
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No. 12-035

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, Jessica C. Darpino, Esq., of counsel

Mayerson & Associates, attorneys for respondent, Gary S. Mayerson, 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 education program to respondent's (the parent's) son and ordered it to pay the costs of the student's tuition at the Aaron School from September 2011 through June 2012 and to issue related services authorizations (RSAs) for the student to receive additional speech-language therapy and occupational therapy (OT) services. The appeal must be sustained in part.

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 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

On February 3, 2011, the CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Parent Ex. E at pp. 1-2).[1] Finding that the student remained eligible to receive special education and related services as a student with autism, the CSE recommended a 12-month school year program and to place the student in a 12:1+1 special class in a specialized school with the following related services: three 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of small group speech-language therapy; three 30-minute sessions per week of individual OT; two 30-minute sessions per week of individual physical therapy (PT); and one 30-minute session per week of counseling

[1] Based upon his age, the student would have been a fifth grade student if he had attended a public school during the 2011-12 school year (see Parent Ex. E at p. 1; see also Tr. pp. 50-54, 57-64, 679-81).

services in a small group (id. at pp. 1-2; 19-21).[2] The CSE also developed a behavioral intervention plan (BIP) for the student (id. at pp. 6, 22).

On March 25, 2011, the parent executed an enrollment contract with the Aaron School for the student's attendance from September 2011 through June 2012 (Parent Ex. JJ at pp. 1, 3, 5).[3]

By letters to the parent dated June 7, 2011, the district summarized the student's recommended special education program and related services, and identified the particular school to which the district assigned the student to attend for both summer 2011 and for September 2011 through June 2012 (see Parent Exs. I at p. 1; J at p. 1). The parent visited the public school site on June 13, 2011, and by letter dated June 15, 2011, wrote to the district rejecting the assigned school (see Parent Ex. H at p. 1). According to the parent the assigned school was not appropriate for the student because there were only two 12:1+1 special classrooms and neither were appropriate for the student; the students in the observed 12:1+1 special classes had "vastly different needs and functioning levels" compared to the student; and during her observation, "[n]o one could identify what teaching methods and/or curriculum [was] used" at the assigned school (id.). In the June 15, 2011 letter, the parent notified the district of her intention to unilaterally place the student at the Aaron School for the 2011-12 school year—from July 1, 2011 through June 30, 2012—and to seek reimbursement for the costs of the student's tuition and for the following additional services: round-trip transportation to the Aaron School; five 45-minute sessions per week of speech-language therapy; five 30-minute sessions per week of speech-language therapy; six 30-minute sessions per week of OT; one 60-minute session per week of parent counseling and training; 10 hours per week of applied behavior analysis (ABA) services; two hours per month of ABA supervision services; and "[s]ummer camp/program" (id.).

A. Due Process Complaint Notice

By due process complaint notice, dated June 30, 2011, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, and alleged a total of 76 procedural and substantive violations (see Parent Ex. A at pp. 1-8).[4] Relevant to this appeal, the parent alleged that the student's IEP was not reasonably calculated to provide the student with a FAPE, the district failed to offer adequate levels and frequencies of related services, the district did not offer supports for school personnel on behalf of the student,

[2] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]; Tr. pp. 393-94).

[3] The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student began attending the Aaron School for the 2010-11 school year, where he was placed in a second grade classroom (see Tr. pp. 541-42, 544; Dist. Ex. 1 at p. 1). During the 2011-12 school year at the Aaron School, the student was placed in a third grade classroom (see Tr. pp. 541-42, 544).

[4] The parent filed an amended due process complaint notice, dated September 14, 2011, alleging a total of 77 procedural and substantive violations (Parent Ex. D at pp. 2-8). The two due process complaint notices are virtually identical (compare Parent Ex. A at pp. 1-10, with Parent Ex. D at pp. 1-10).

and the district did not recommend parent counseling and training on the student's IEP (see id.).[5] As relief, the parent requested that the district pay the costs of the student's tuition at the Aaron School for the 2011-12 school year, including summer camp 2011, and for the following additional services: five 45-minute and five 30-minute sessions per week of home-based speech-language therapy; six 30-minute sessions per week of home-based OT; one 60-minute session per week of parent counseling and training; 10 hours per week of home-based ABA therapy services; two hours per month of ABA supervision services; round-trip transportation services for the 12-month school year; and compensatory education services for any pendency services not received by the student (id. at p. 9).[6]

B. Impartial Hearing Officer Decision

In a decision dated January 10, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 school year because the recommended program failed to provide transitional support services pursuant to State regulation, parent counseling and training pursuant to State regulation, and the recommended level of speech-language therapy services was not consistent with the student's "intensive language needs" (see IHO Decision at p. 17).[7] However, the IHO also concluded that the IEP accurately described the student's needs, the annual goals were collaboratively developed and were appropriate to meet the student's needs, the student's recommended placement in a 12:1+1 special class in a "[c]ommunity [s]chool" was appropriate,[8] the BIP adequately addressed the student's behaviors, and the recommended levels of OT and counseling services were appropriate to meet the student's needs (id.).[9] Next, the IHO found that the student would not "derive an educational benefit from placement" at the public school to which the student had been assigned, noting the proposed classroom teacher's lack of experience teaching

[5] Among other things, the parent asserted in the due process complaint notice that the student's IEP failed to accurately describe his needs, that the parent was denied an opportunity to meaningfully participate in the development of the annual goals in the IEP, that the student's recommended placement in a 12:1+1 special class in a specialized school was not appropriate, and that the BIP included in the IEP failed to adequately address the student's behaviors and was developed without conducting a functional behavioral assessment (FBA) (see Parent Ex. A at pp. 1-8).

[6] On July 14, 2011, the parent executed an enrollment contract with the Aaron School for the student's attendance during summer 2011 (Parent Ex. LL at p. 1).

[7] In the Findings of Fact and Conclusions of Law, the IHO appears to have mistakenly referred to 8 NYCRR 100.13(a)(6) in support of her finding regarding transitional support services, instead of 8 NYCRR 200.13(a)(6) (see IHO Decision at p. 17).

[8] In the Findings of Fact and Conclusions of Law, the IHO mistakenly referred to the district's recommendation as a 12:1+1 special class in a "[c]ommunity [s]chool," when the February 2011 IEP reflects that the CSE recommended placing the student in a 12:1+1 special class in a "specialized school" (compare IHO Decision at p. 17, with Parent Ex. E at p. 1).

[9] Given the number of allegations asserted in the due process complaint notice, I note that the IHO's decision did not address every allegation (compare Parent Ex. A at pp. 1-8 and Parent Ex. D at pp. 1-8, with IHO Decision at pp. 17-20). As a number of the enumerated allegations in the due process complaint notice were overlapping and even duplicative in some instances, I remind the IHO that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]) in order to determine which issues need to be addressed in the IHO's decision.

students with autism, the proposed classroom teacher's lack of familiarity with a sensory diet, and the classifications of the students in the recommended classroom (id.).

Addressing the unilateral placement, the IHO concluded that the parent established the appropriateness of the Aaron School with the additional related services of four 45-minute sessions per week of speech-language therapy and two 30-minute sessions per week of OT (see IHO Decision at pp. 18-20). However, the IHO also concluded that the parent failed to establish the appropriateness of the summer camp that the student attended at the Aaron School or the student's need for home-based ABA services in order to make educational progress, and therefore, she declined to order the district to reimburse the parent for the costs associated with these services (id. at pp. 19-20). Finally, the IHO found that equitable considerations did not warrant either a reduction or denial of tuition reimbursement in this case (id. at p. 20). As a result of her conclusions, the IHO ordered the district to pay the costs of the student's tuition at the Aaron School from September 2011 through June 2012 and to issue RSAs for the student to receive additional related services consisting of two 30-minute sessions per week of OT and four 45-minute sessions per week of speech-language therapy (id. at pp. 20-21).[10]

IV. Appeal for State-Level Review

The district appeals, and contends that the IHO erred in concluding that the district failed to sustain its burden to establish that it offered the student a FAPE for the 2011-12 school year due to the failure to provide transitional support services, parent counseling and training, and recommending an inadequate level of speech-language therapy to address the student's needs. In particular, the district argues that the IDEA does not require the development of a transition plan as part of a student's IEP when a student moves from one school district to another, that parent counseling and training was available through the assigned school the student would have attended during the 2011-12 school year, and finally, that the student's IEP, including the recommended level of speech-language therapy services, addressed the student's intensive language needs.

In addition, the district asserts that the IHO erred in concluding that the student would not have been appropriately placed in the assigned school. The district argues that the proposed classroom teacher had experience teaching students with autism and that the assigned school had an autism coach available to work with the teacher and parent if necessary. In addition, the district contends that although the argument is speculative because the student did not attend the assigned school, the IHO erred in concluding that the student would not have been functionally grouped or that he was not appropriately placed in a classroom with students who were eligible for special education and related services as students with intellectual disabilities.

Next, the district asserts that the IHO erred in concluding that the parent sustained her burden to establish the appropriateness of the student's unilateral placement at the Aaron School. The district contends that the Aaron School did not provide sufficient levels of speech-language therapy and OT to meet the student's unique special education needs because testimony by the Aaron School related services' providers indicated that the student required the additional related

[10] In addition, the IHO also ordered the district to issue RSAs to compensate the parent for ABA services or related services the student did not receive pursuant to an interim decision on pendency, dated July 13, 2011 (see IHO Decision at p. 21). The district affirmatively noted in its petition for review that it did not challenge this portion of the IHO's decision and order, and therefore, it will not be disturbed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

services to make academic progress. In addition, the district argues that since the Aaron School is a 10-month school, it is not appropriate because the student requires a 12-month program.

Finally, the district asserts that the IHO erred in finding that equitable considerations did not preclude an award of tuition reimbursement in this case. The district argues that the parent failed to provide proper notice of her intention to unilaterally place the student at the Aaron School because the parent did not express any concerns with the IEP. The district seeks to annul the IHO's decision in its entirety.

In an answer, the parent responds to the district's allegations, and asserts additional arguments to support upholding the IHO's decision in its entirety.[11]

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 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]).

[11] As noted above, the IHO did not address many of the parent's claims raised in the due process complaint notice. However, a review of the parent's answer indicates that she did not cross-appeal from the IHO's decision. A party who fails to obtain a favorable ruling with respect to an issue submitted to an IHO is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]. Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6; see Application of the Bd. of Educ., Appeal No. 11-050).

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).

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

As noted above, an IHO's determination of whether a student received a FAPE must generally be made upon substantive grounds (20 U.S.C. § 1415[f][3][E][i]). While the IHO's decision does not distinguish, explain, or otherwise identify whether the district's failure to recommend parent counseling and training and transitional support services pursuant to State regulation constituted either substantive violations or procedural violations rising to the level of a denial of a FAPE, neither the law nor the evidence in the hearing record supports the IHO's conclusion that the district's recommended program did not offer the student a FAPE because the IEP did not include either one, or both, of these services.

A. Parent Counseling and Training

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011], adopted at, 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).[12]

In the instant case, although the provision of parent counseling and training was not set forth in the February 2011 IEP, the hearing record reflects that such services were available at the

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

assigned school. At the impartial hearing, the district presented the teacher of the proposed classroom at the assigned school as a witness (Tr. pp. 49-175, 281-94; see Tr. pp. 295-96). The teacher testified that although she, herself, did not provide parent counseling and training for parents of students with autism, the service was offered at the assigned school through the parent coordinator (Tr. pp. 93-94, 96-97). The parent coordinator at the assigned school set up opportunities for parents to receive specific training or "any kind of help" that parents may need (Tr. p. 94). In addition, the parent coordinator, if necessary, contacted organizations, camps, and after-school programs, and she also referred parents to outside programs and set up trainings at the assigned school for parents to attend (Tr. pp. 94-95). During summer 2011, the teacher referred one parent to the parent coordinator for assistance (Tr. pp. 96-97).

Given that parent counseling and training was available at the assigned school, I find under the circumstances of this case that the district's failure to incorporate parent counseling and training into the February 2011 IEP did not result in any substantive harm, nor did it, in this case, rise to the level of a denial of a FAPE to the student (see C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

B. Transitional Support Services

In this case, the IHO found that the district failed to offer the student a FAPE based, in part, upon the district's failure to recommend transitional support services pursuant to State regulations governing the provision of educational services to students with autism (IHO Decision at p. 17). The particular State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]).[13] Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]).[14]

While it is undisputed that the February 2011 CSE did not recommend transitional support services in the student's IEP, the weight of the evidence does not support the IHO's conclusion. First, evidence developed at the impartial hearing by both parties primarily focused on what

[13] In this case, the hearing record indicates that had the student attended the proposed classroom in the assigned school beginning in July 2011, the student would have been placed in a program containing students with other disabilities, triggering the district's obligation to include a recommendation for transitional support services under 8 NYCRR 200.13(a)(6) in the student's IEP (see Tr. pp. 59-62, 71-72, 108-09). The hearing record is unclear, however, whether the student's 12:1+1 special class at the assigned school would be considered a less restrictive environment than the Aaron School (Tr. pp. 435-39). According to the special education teacher of the proposed classroom, although regular education students attended summer programs at the same assigned school during summer 2011, the students in her 12:1+1 special class never interacted with their non-disabled peers (Tr. pp. 150-52). At the Aaron School, the hearing record contains little, if any, evidence regarding the extent to which the student interacted with non-disabled peers (see Tr. pp. 540-44, 558-59 [indicating that the student's then-current third grade teacher at the Aaron School took her students into the "community"]).

[14] In April 2011, the Office of Special Education issued an updated guidance document entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

services, if any, the district would have provided to the student to assist him in transferring from the Aaron School—a nonpublic school—to a new classroom in the assigned public school (see Tr. pp. 172-73, 244-45, 293-94, 353, 358-59, 374-76, 404; see also IHO Decision at p. 5, 8-9; IHO Exs. IV at p. 6; V at p. 8). The State regulation relied upon by the IHO, however, does not contemplate transitional support services as services provided directly to the student, but rather, refers to those temporary services provided by a special education teacher with a background in teaching students with autism to either a special education or regular education teacher (see 8 NYCRR 200.1[ddd], 200.13[a][6]). Thus, the evidence adduced at the impartial hearing regarding the student's transfer from a nonpublic school to a public school does not, and cannot, support the IHO's finding. Moreover, even if the IHO considered the student's transfer from a nonpublic school to a public school as transitional support services required to be included in a student's IEP, the IDEA does not specifically set forth provisions requiring a school district to formulate a "transition plan" as part of a student's IEP when a student moves from one school to another (A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *12 [S.D.N.Y. Aug. 19, 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. Jan. 24, 2011]).[15]

Next, at the impartial hearing the district presented the assistant principal (principal) of the assigned school as a witness (Tr. pp. 295-327).[16] The principal testified that the assigned school employed an "autism coach," who responded to parents' needs or to particular concerns arising with students with autism (see Tr. pp. 300-01). In addition, the autism coach was responsible for observing students in order to develop behavioral plans or to assist teachers to "help meet the child's needs in the classroom" (id.). The principal also testified that if the student had attended the proposed classroom at the assigned school, the classroom teacher would have had support available through not only the autism coach, but also through the principal, herself—who had approximately 20 years of experience working with students with autism—through behavioral specialists for autism,[17] and through a counselor employed at the assigned school who had familiarity dealing with students with autism and with their parents (see Tr. pp. 301-04, 319-23).[18] In addition, the district's school neuropsychologist testified that although the student's Aaron

[15] Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student has not yet attained the age of 15 (see Parent Ex. E at p. 1).

[16] In addition to holding a certification in school administration, the principal also holds certifications as a special education teacher and an elementary education teacher (Tr. pp. 301-02).

[17] According to the principal's testimony, the behavior specialists for autism also provided training to the paraprofessionals at the assigned school (see Tr. pp. 298-300, 325-27).

[18] At the time of the impartial hearing, the special education teacher of the proposed classroom at the assigned school had been employed by the district for 19 years, having initially worked as a paraprofessional for approximately 10 years at the district (Tr. pp. 50-52). The special education teacher testified about her experience teaching students with autism and about the specific training she received with respect to teaching students with autism, which included particular methodologies (ABA and TEACCH), discrete trials, implementing annual goals, social stories, and "all aspects of working with the autistic population" (see Tr. pp. 52-53, 100-03).

School teacher believed that the student's behavior did not warrant a BIP, the CSE nonetheless included a BIP in the student's IEP, explaining that because the student would have been "going from one program, like Aaron, to a [district] program," the BIP "would have been a nice support system" and it would have given "the teacher some direction, and would have also been able to provide an extra support system" for the student (Tr. pp. 352-53; see Parent Ex. E at pp. 1-2, 6, 22).[19]

Accordingly, the hearing record reflects that the district was capable of providing transition support services in order to facilitate the student's placement in the assigned school (see A.L., 2011 WL 4001074, at *12). Under the circumstances of this case, I find that the lack of specified transitional support services pursuant to State regulations governing the provision of educational services to students with autism on the February 2011 IEP did not impede the student's right to a FAPE, significantly impede the parent's meaningful participation in the CSE process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

To the extent that the parent argues that the district is not permitted to speculate on what might have occurred had the student attended the public school regarding matters that are not in the IEP, I do not believe the testimonial evidence was necessary to establish that the district designed an IEP that was sufficient to offer the student a FAPE (Answer ¶¶ 18, 35-36, 38). The IEP offered a detailed description of the student and an array of services and supports to enable him to receive educational benefits (see Parent Ex. E), and in this instance the hearing record does not support the conclusion that the student would fail to make progress because transitional support services for the special education teacher in the special school were not listed on the IEP. Assuming for the sake of argument that the student had been enrolled in and attended the public school, the hearing contains evidence suggesting that the district would have made transitional support services available to the extent required (see A.L., 2011 WL 4001074, at *12; E.Z-L., 763 F. Supp. 2d at 598; but cf. R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011] [holding that the sufficiency of a district's recommended program must be determined on the basis of the IEP itself]).[20] Based on the foregoing, I decline to find under the circumstances of this case a denial of a FAPE on the basis of a lack of transitional support services.

C. Speech-Language Therapy Services

In addition to the conclusory findings regarding parent counseling and training and transitional support services, the IHO similarly found that the district's program was not appropriate because the recommended level of speech-language therapy service in the IEP was not sufficient to address the student's intensive language needs (IHO Decision at p. 17). A review of the hearing record indicates, however, that the weight of the evidence does not support the IHO's conclusion.

[19] Both the school neuropsychologist and the student's Aaron School teacher participated at the February 2011 CSE meeting (compare Parent Ex. E at p. 2 and IHO Ex. I, with Tr. pp. 188-90, 329-30, 334-36, 346-54).

[20] Judicial viewpoints have differed within the Second Circuit as to whether adjudicators should rely on retrospective evidence regarding a district's program (C.F., 2011 WL 5130101, at *8 [collecting cases]); however, if the district should not engage in such speculation, the same principle should apply to the parent's claims regarding the implementation of the IEP in the assigned school, which are discussed below.

Here, the IHO determined—and the parent does not cross-appeal—that the student's IEP accurately described his needs, the annual goals in the IEP were collaboratively developed and were appropriate to meet his needs, the student's recommended placement in a 12:1+1 special class in a specialized school was appropriate, the BIP included in the IEP adequately addressed the student's behaviors, and the recommended levels of counseling services and OT services were appropriate to meet the student's needs (see IHO Decision at p. 17; Answer).

According to the hearing record, the February 2011 CSE reviewed, discussed, and relied upon several documents to generate the student's 2011-12 IEP, including the following: a 2010-11 Aaron School Fall Report, an October 2010 Aaron School Speech and Language Therapy Plan, an October 2010 Aaron School Counseling Plan, a November 2010 Aaron School Occupational Therapy Plan, a November 2010 Speech and Language Progress Note (Speech Zone report), a November 2010 Speech Language Therapy Progress Note (IDC report), an undated Occupational Therapy Progress Report, and a December 2010 Classroom Observation report conducted by the district social worker who participated in the February 2011 CSE meeting (district social worker) (Tr. pp. 180-84, 209-20; Dist. Exs. 1-8).

Based upon the IDC report, the student presented with moderately-delayed to severely-delayed auditory comprehension skills and difficulty understanding sentence structure (Dist. Ex. 6 at p. 1). Although he displayed a relative strength in the area of basic concepts, the student had difficulty processing longer utterances, which affected his ability to answer "wh" questions and to follow complex directions (id.). In addition, the student exhibited "significantly delayed" expressive language skills (id. at p. 2; see Dist. Ex. 5 at pp. 1-2 [noting particular difficulty with syntactic development]). Specifically, the student could only recall sentences up to four words in length; he could not formulate simple sentences using various morphological and syntactic structures; he could not independently answer simple "wh" questions; he could not make simple inferences about objects or places described without visual aids; and although his vocabulary had improved, it remained below age norms (Dist. Ex. 6 at p. 2).

The IDC report further indicates that the student displayed difficulty with pragmatic language skills (Dist. Ex. 6 at p. 2). Specifically, the student did not initiate the majority of conversations, but would initiate conversations about a favorite topic such as super heroes; he did not ask questions to gain information about others; and he did not respond to his communication counterpart's emotions, but would make intermittent eye contact and tended to anticipate others' reactions to his statements (id.). In addition, the evidence also reveals that the student displayed moderate to severe receptive language delays (Dist. Ex. 5 at pp. 1-2). It was noted that the student required speech-language therapy to improve syntactic skills in order to narrate events, recall information, initiate and sustain conversation with familiar adults and peers, and on developing clear and intelligible written thoughts, as well as on improving auditory memory skills, listening comprehension skills, and overall attention (id. at p. 2).

At the Aaron School during the 2010-11 school year, the student's annual goals focused on pragmatic language skills and peer interactions, sustained attention and processing of orally presented material, expressive language skills, and critical thinking, reasoning, and problem solving (see Dist. Ex. 2).

With respect to the student's speech-language needs, the CSE described his present level of performance by transposing, nearly verbatim, information contained in the IDC report (see Tr. pp. 198-99, 227-28; compare Parent Ex. E at p. 5, with Dist. Ex. 6 at pp. 1-5). In addition, the

CSE discussed the student's speech-language deficits and the student's functioning levels when the CSE reviewed and discussed related services and, in particular, the annual goals submitted by the Aaron School with respect to speech-language therapy services (see Tr. pp. 198-99; compare Parent Ex. E at pp. 5, 13-14, with Dist. Ex. 2). To create the annual goals and short-term objectives for the student's related services, the CSE relied upon and transposed, nearly verbatim—and in agreement with the parent—the annual goals and short-term objectives submitted by the Aaron School in the speech-language therapy plan, the OT plan, and the counseling plan (see Tr. pp. 245-46; compare Parent Ex. E at pp. 13-18, with Dist. Exs. 2-4). Reviewing the student's IEP reveals that the speech-language annual goals and short-term objectives were specifically aligned to his speech-language needs (compare Dist. Ex. 6 at pp. 1-5, with Parent Ex. E at pp. 13-14).[21]

In formulating a recommendation for speech-language therapy services to address the student's needs, the district social worker testified that while the CSE was aware of the student's then-current level of speech-language therapy services at the Aaron School and through outside providers, the CSE recommended five 30-minute sessions per week of speech-language therapy due, in part, to the student's age, and in part, because the recommended placement in a 12:1+1 special class would provide the student with language-based instruction within the classroom (see Tr. pp. 245-51; Parent Ex. E at p. 21; see also Tr. pp. 76, 78-79, 87-93, 154-56 [describing strategies and techniques used in the proposed classroom to target language skills; identifying proposed classroom as "language-based"], 675-76 [indicating that the parent informed the CSE about the level of related services the student received]; Dist. Exs. 2; 5-6).[22] Relying upon this rationale, the February 2011 CSE recommended three 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of small group speech-language therapy to address the student's needs (see Tr. pp. 250-51). The district social worker also testified that the February 2011 CSE did not discuss the provision of speech-language therapy "outside school" or as an "extended school day service" because "[i]t never came up" (Tr. p. 228; see Tr. p. 675). The parent, who also participated at the February 2011 CSE meeting, testified that she expressed "all [her] concerns at the IEP meeting" (Tr. pp. 707, 713). Specifically, the parent testified that she expressed to the CSE what services she believed supported her son's progress and asked the CSE to continue those services; namely, the ABA services, the speech-language services, and the OT services (see Tr. pp. 714-15). However, she was told at the CSE meeting that the district could not implement those services in the IEP (see id.).

Based upon the evidence, I cannot conclude that the recommended level of speech-language therapy services in the student's IEP so insufficiently addressed the student's language needs that the student was denied a FAPE. The evidence reveals that the student's IEP accurately described the student's language needs, that the annual goals and short-term objectives targeted the student's identified needs, and that the CSE carefully considered all of the information related to the student's language needs prior to making its recommendation for speech-language therapy services. The evidence shows that the speech language services offered were carefully considered

[21] At the impartial hearing, a speech-language therapy provider who provided services outside of school testified that she did not develop annual goals and short-term objectives for the student to work on, but rather, she worked on the annual goals listed in the student's 2011-12 IEP (see Tr. pp. 665-67).

[22] The district social worker testified, upon clarification from the IHO, that the February 2011 CSE was aware that at that time the student was receiving two 30-minute sessions per week of speech-language therapy at the Aaron School and an additional five 45-minute sessions per week of speech-language therapy outside of school (see Tr. pp. 246-50).

and were not merely trifling or inconsequential and, notwithstanding that one might very reasonably conclude that an increased amount of speech language services might have resulted in even greater educational benefits to the student in this case, that is not the measure of the district's obligation to offer an appropriate educational program. To the extent that the recommended level of speech-language services does not align with the parent's preferred level of services, the IDEA only requires that a district provides 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), or one that maximizes a student's potential (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Notwithstanding this determination, however, even if the level of speech-language therapy services was insufficient to address the student's intensive language needs, the IEP as a whole was reasonably calculated to enable the student to receive educational benefits, and thus, offered the student a FAPE.

Generally, a district meets its obligation to offer a FAPE by developing an IEP that is reasonably calculated to enable the student to receive educational benefits, and a deficiency in a single component of the IEP may not suffice to conclude that an IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).

Here, the evidence reveals that to create the student's academic annual goals and short-term objectives, the district's special education teacher at the CSE meeting collaborated with the student's then-current Aaron School teacher at the CSE meeting, which produced annual goals for comprehension, computation, and problem-solving based upon the student's functioning levels and his "needs moving forward" (see Tr. pp. 200-01, 231-33; Dist. Ex. 1 at pp. 6-8; Parent Ex. E at pp. 2-3, 8-12). Also, the February 2011 CSE transposed, nearly verbatim, the annual goals and short-term objectives from the Aaron School's counseling plan, which focused not only addressing the student's social/emotional needs, but also on the student's expressive and receptive language needs related to the student's ability to "follow, appropriately respond and sustain interactions with peers during group instruction and periods of play" (compare Parent Ex. E at pp. 6, 18, with Dist. Ex. 3 at pp. 1-2). Thus, a review of the IEP indicates that the CSE also addressed the student's speech-language needs related to social interaction and pragmatics, comprehension, and syntax by incorporating annual goals and short-term objectives specific to his academic areas—such as reading, mathematics, and writing—as well as counseling (see Parent Ex. E at pp. 10, 12, 18).

D. Assigned School

In addition to the IHO's findings noted above, the IHO also concluded that the student would not "derive an educational benefit from placement" in the assigned school, noting the

proposed classroom teacher's lack of experience teaching students with autism, the proposed classroom teacher's lack of familiarity with a sensory diet, and the classifications of the other students in the proposed classroom (IHO Decision at p. 17). For the reasons discussed below, I agree with the district's arguments that the IHO erred in reaching issues alleged by the parent regarding the assigned school, and thus, the IHO's conclusions must be annulled.

Federal and State regulations specify that parents have the right to participate in meetings to determine the "identification, evaluation and educational placement of the child" (34 CFR 300.501[b][1][i]; A.L., 2011 WL 4001074 * 11; S.F. v. New York City Dep't of Educ., 2011 WL 5419847 * 12 [S.D.N.Y. Nov. 9, 2011]). In A.L., the court noted however that this right extends "only to the general type of educational program in which the child is placed" (citing Concerned Parents v. City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). In S.F., the court further clarified that parents do not have the right under the IDEA to visit a proposed school or classroom before the recommendation is finalized or prior to the start of the school year. Furthermore, while parents must be afforded the opportunity to participate in the formation of an educational program—the classes, individualized attention, and additional services—they are not entitled to determine the bricks and mortar of an actual school's location (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir.2009]). In this case, the parent was present at, and meaningfully participated in, the February 2011 CSE meeting (see Tr. pp. 707, 713-15). The hearing record also shows that district provided the parent with notification of the assigned school (see Parent Exs. I-J). Furthermore, although not required by the IDEA or the Education Law, the parent did visit the assigned school offered by the district, and based upon her visit, she rejected the assigned school prior to the start of the 12-month school year recommended for the student for the 2011-12 school year (see Parent Ex. H).[23] Thus, the hearing record shows that the district complied with, and exceeded its procedural obligations (S.F., 2011 WL 5419847, at *12). Even assuming for the sake of argument that the parent had a right to visit the assigned school and object to it prior to the start of the school year, I would still find that the IHO's findings must be annulled.

In this case, a meaningful analysis with regard to the assigned school would require me to determine what might have happened had the district been required to implement the student's IEP. A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E., 785 F. Supp. 2d at 42). 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

[23] Nothing in this decision, however, is intended to discourage districts from offering parents the opportunity to view school or classroom placements as such opportunities can only foster the collaborative process between parents and districts. If parents visit a particular classroom and, at that point, have new concerns, the IDEA and the Education Law contemplate that the collaborative process for revising the IEP will continue—namely, that the parents will ask to return to the CSE and share those concerns with the objective of improving the student's IEP.

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 Indep. School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parent 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 (see Parent Exs. E at p. 1; H-J). Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, there is no evidence in the hearing record to 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. 2011 WL 4001074, at *9).[24]

Moreover, while parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on an 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 189-90, 194 [finding that the district did not violate its procedural obligations under the IDEA when it did not provide the parents with requested class profiles of the student's proposed reading class and resource room sessions, "which would identify the other students in the classes" and the student did not attend the district's recommended public school placement]). 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 by, for instance, personally viewing and approving the classroom or classmates of their own choosing (see T.Y., 584 F.3d at 420; C.F., 2011 WL 5130101, at * 8).

Thus, in this case, the issues of the special education teacher's qualifications and the classifications of the other students in the proposed classroom at the recommended school, are in part speculative because the parent did not enroll the student in the public school and the district,[25] therefore, was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. The IHO's conclusion that the district failed to offer the student a FAPE, in part, due to these issues related to the assigned school must be annulled.

[24] I also note that under the factual circumstances of the present case, the district did not have the obligation to present evidence at the impartial hearing that it would have provided special education services in conformity with the student's IEP, and thus, a parent's unsubstantiated allegations regarding what might have happened had the student attended the public school may not form a basis for concluding that the district failed to offer the student a FAPE by failing to implement the student's IEP in a material or substantial way.

[25] Even if the student had enrolled in the public school, upon grouping the student in accordance with the State regulations at the time of implementation of an IEP, contrary to the IHO's statement (see IHO Decision at p. 17), the regulations do not preclude grouping a student identified as eligible for special education as a student with an intellectual disability with a student identified as eligible for special education as a student with autism (see 8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]).

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the parent's unilateral placement of the student at the Aaron School was an appropriate placement (Burlington, 471 U.S. at 370; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 10, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to pay the costs of the student's tuition at the Aaron School from September 2011 through June 2012; and

IT IS FURTHER ORDERED that the IHO's decision, dated January 10, 2012, is modified by reversing that portion which directed the district to issue RSAs to supplement the unilateral placement at Aaron School with additional four 45-minute sessions per week of speech-language therapy services and to fund an additional two 30-minute sessions per week of OT services.

Dated: **Albany, New York**
April 18, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER