



The University of the State of New York

The State Education Department
State Review Officer
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No. 12-045

Application of a STUDENT WITH A DISABILITY, by her 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:

Law Offices of Regina Skyer and Associates, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, 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 found that respondent (the district) offered the student an appropriate educational program and denied their request to be reimbursed for their daughter's tuition costs at the Rebecca School for the 2011-12 school year. The 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 was diagnosed at a young age as having a pervasive developmental disorder-not otherwise specified (PDD-NOS), and received services through the Committee on Preschool Special Education (CPSE) (Tr. pp. 499-502). At age five, the student was found eligible for a special education program and related services as a student with autism (see Tr. pp. 500, 502) and recommended for a 6:1+1 special class in a district specialized school, which she attended for kindergarten (Tr. pp. 502, 505; see Parent Ex. A at p. 5). According to the parents, the student regressed in the district's program (Tr. p. 506; see Parent Ex. A at p. 5). The parents removed the

student from the public school after kindergarten and, in September 2008, placed her in the Rebecca School (Tr. pp. 505-06, 508-09). The student has attended the Rebecca School continuously since that time (Tr. p. 510).

The student has most recently received diagnoses of an autistic disorder and an attention deficit-hyperactivity disorder (ADHD) (Dist. Ex. 10 at p. 4). She has a mild intellectual disability and, although she uses verbal language as her primary means of communication, the student presents with significant pragmatic language delays and limited functional communication (Dist. Exs. 9; 10 at pp. 3-4). The student is highly distractible and tends to lose focus easily (Dist. Exs. 3 at p. 3; 10 at pp. 2, 4). She is sensitive to physical and environmental stimuli (Dist. Ex. 10 at pp. 3-4; Parent Ex. 7 at p. 2). The student presents with significant delays across all domains of adaptive behavior (Dist. Ex. 10 at pp. 3-4). She engages in behaviors that interfere with instruction such as elopement, verbal aggression, and tantrums (Dist. Ex. 3 at p. 20).

In November 2010, a social worker from the district conducted a classroom observation of the student at the Rebecca School (Dist. Ex. 6).

In December 2010, the student's teacher and therapists at the Rebecca School completed an interdisciplinary report of progress which described the student's program at the private school, as well as her functional emotional developmental levels, academic functioning, sensory profile and motor abilities, and social emotional functioning (Dist. Ex. 7). The progress report included goals that targeted the student's academic, social/emotional, attending, sensory, and fine motor needs (id. at pp. 10-12). Addendums to the December 2010 progress report described the student's gross motor and speech-language strengths and weaknesses, and included goals in these areas (Dist. Exs. 8; 9).

On March 16, 2011, the CSE met for an annual review of the student's program (Dist. Ex. 3). The CSE recommended continuation of the student's eligibility for special education and related services as a student with autism, and placement in a 6:1+1 special class with the support of a 1:1 crisis management paraprofessional (id. at pp. 1, 19). The CSE also recommended that the student receive related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling (id. at p. 18). The resultant IEP indicated that the student's behavior seriously interfered with instruction and that she required additional adult support (id. at p. 4). A behavioral intervention plan (BIP), which described the student's interfering behaviors and strategies that would be tried to address her behaviors, was developed by the CSE and attached to the IEP (id. at p. 20). Additionally, the CSE recommended the student for adaptive physical education, a special transportation paraprofessional, and 12-month school year services (id. at pp. 1, 5, 19).¹

¹ At the time of the CSE meeting the parents requested that the special transportation paraprofessional be terminated; however, following the meeting they requested that it be reinstated (Dist. Exs. 3 at pp. 19, 21; 5 at p. 2; 12). On April 13, 2011, the student's IEP was amended to continue the services of a special transportation paraprofessional (Dist. Ex. 3 at p. 21).

On May 16, 2011, the parents signed a contract enrolling the student in the Rebecca School for the 2011-12 school year (Parent Ex. F). The parents also paid a \$2000 non-refundable deposit pursuant to the enrollment contract (id. at p. 5; see Parent Ex. G).

By letter dated June 17, 2009, the district notified the parents of the particular school to which the student was assigned for the 2010-11 school year (Dist. Ex. 4). On that same day, the parents informed the district in writing that they intended to place the student at the Rebecca School as of the first day of the 12-month school year for the 2011-12 academic year, and that they intended to seek payment of the student's tuition from the district (Parent Ex. C).

On June 24, 2011, the student's mother visited the particular public school identified in the June 17, 2009 notice, and determined that it was not appropriate for the student (Parent Exs. D; E). The student began the 2011-12 school year at the Rebecca School (Parent Ex. L).

A. Due Process Complaint Notice

The parents filed a due process complaint notice dated July 5, 2011, alleging that the district denied the student a free appropriate public education (FAPE) for the 2011-12 school year on both procedural and substantive grounds (Parent Ex. A). The parents alleged that: (1) the CSE did not "rely" on necessary evaluations to properly gauge the student's current skill levels; (2) the goals and short-term objectives developed for the student were generic, vague, and do not provide a baseline from which to work; (3) a functional behavioral assessment (FBA) was not conducted prior to the development of a behavioral intervention plan (BIP); (4) the CSE failed to include parent counseling and training as a related service on the student's IEP; (5) the recommended 6:1+1 placement was not appropriate for the student as it was inadequate to meet the student's needs and the student's previous experience with such a district placement resulted in regression; (6) applied behavior analysis (ABA) methodology, which is primarily used in the district's programs for students with autism, has not worked in the past for the student; and (7) the assigned public school site was inappropriate in that it was large and unsafe, and it would not provide the student with a suitable and functional peer group for instructional and social/emotional purposes (id. at pp. 3-6).

The parents alleged that the Rebecca School was an appropriate placement for the student, and that it addressed the student's academic and social/emotional needs and is reasonably calculated to enable the student to receive educational benefits (Parent Ex. A at p. 6). The parents further alleged that there were no equitable considerations that would bar entitlement to the cost of tuition, and that the parents had cooperated in the CSE review and placement process, participated in the CSE review, and visited the recommended placement (id.). The parents requested the costs of the student's tuition at the Rebecca School for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 19, 2011, and concluded on December 19, 2011, after four days of proceedings (Tr. pp. 1-570). In a decision dated January 26, 2010, the IHO determined, as an initial matter, not to consider the student's mother testimony that she was told by an assistant principal that there was no spot for the student at the assigned school until at least September because the district was not given proper notice of this issue prior to the hearing (IHO Decision at p. 15). The IHO next determined that the district offered the student a FAPE for the

2011-12 school year (*id.* at pp. 16-18). Specifically, the IHO determined that: (1) the CSE had reviewed prior evaluations of the student, conducted an observation, and obtained input from staff at the Rebecca School; (2) the student's BIP was developed at the CSE meeting with active participation from the student's mother, provided strategies to address interfering behaviors, and that a crisis management paraprofessional was recommended; (3) the lack of parent counseling and training specifically delineated on the IEP was a deficiency but did deny the student a FAPE as the services were actually provided and it was explained to the student's mother at the CSE meeting; (4) the 6:1+1 special class was appropriate for the student; (5) testimony at the impartial hearing demonstrated that the assigned school was safe; and (6) functional grouping was in place in the assigned class (*id.* at pp. 16-18). The IHO denied the parents' request for costs of the student's tuition, but determined that the evidence supports a finding that the Rebecca School was appropriate for the student and that the parents have reasonably cooperated with the CSE process (*id.* at pp. 18-19). The IHO determined that the costs of tuition would have been ordered if the district had denied the student a FAPE (*id.* at p. 19).

IV. Appeal for State-Level Review

This appeal by the parents ensued. The parents allege that the IHO erred in determining that the district's recommended placement and program "would likely have provided a meaningful educational experience" for the student, and in denying the parents' request for the costs of the student's tuition at the Rebecca School for the 2011-12 school year.

Among other things, the parents allege that the CSE did not rely on the necessary evaluations in developing the student's IEP, and allege that the IHO erred in determining that there was sufficient testimony regarding the parents' opportunity for discussion at the CSE meeting; determining that the CSE reviewed prior evaluations, conducted an observation, and obtained input from the staff of the Rebecca School; and failing to make a finding regarding the appropriateness or adequateness of the CSE's review of documents or whether the CSE team memorialized such information within the student's IEP. The parents further allege that, as a result of the CSE's failure to ascertain the student's baseline functioning, the goals contained on the student's IEP are flawed. The parents allege that the IHO failed to reach this issue in the decision. Next, the parents allege that the CSE failed to conduct an FBA of the student, and the BIP developed by the CSE was not detailed and lacked appropriate strategies to address the student's interfering behaviors. They also allege that the hearing record lacks evidence that a crisis management paraprofessional would manage the student's behaviors. The parents allege that the recommended 6:1+1 placement is inappropriate for the student because of the teaching methodologies used in the classroom. In addition, the parents allege that the assigned school is inappropriate for the student because it is unsafe and functional grouping could not be provided to the student in the assigned class.

The parents request that the portion of the decision determining that the district offered the student a FAPE be reversed and that the district be ordered to pay the student's 2011-12 tuition at the Rebecca School.

The district responded in an answer, and denied many of the substantive allegations of the parents. It alleged that the IHO correctly determined that: (1) the CSE considered appropriate evaluations and adequately explained why additional evaluations of the student would not have been helpful; (2) the BIP was sufficient and an FBA was unnecessary; (3) the district recommended

an appropriate and safe placement for the student; (4) parent counseling and training was discussed at the IEP meeting and would have been offered at the assigned school; and (5) the recommended 6:1+1 placement was appropriate. The district further alleged that the goals contained in the IEP were appropriate for the student. The district requests that the IHO decision be upheld.

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]).

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Review – Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's finding with respect to his consideration of testimony about the lack of availability of a spot for the student at the assigned school and the absence of parent counseling and training as a related service on the student's March 2011 IEP (IHO Decision at p. 17). Additionally, the IHO's determinations that the Rebecca School was appropriate and that equitable considerations favored the parents was not cross-appealed. Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

B. CSE Process – Consideration of Evaluative Information

Turning to the parents' claims that the CSE failed to adequately consider information in developing the student's IEP, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]).² A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Additionally, a CSE is not required to use evaluative information from its own sources only in the preparation of an IEP and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student

² The parents assert that a reevaluation must be conducted yearly, which is not correct (Pet. ¶14).

with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80).

In this case, the hearing record shows that the March 16, 2011 CSE meeting attendees included the district representative, who was also a special education teacher; a district school psychologist; a social worker from the Rebecca School; the parents; and an additional parent member (Dist. Ex. 3 at p. 2). The student's classroom teacher from the Rebecca School also participated in the meeting by telephone (Tr. pp. 30-31; Dist. Exs. 3 at p. 2; 5 at p. 1).

According to the hearing record, in developing the student's March 2011 IEP, the CSE reviewed an April 2009 psychological evaluation, a November 2010 classroom observation, and a 13-page Rebecca School December 2010 interdisciplinary progress report and PT and speech-language therapy addenda (Tr. pp. 32-34; Dist. Ex. 5 at p.1; see Dist. Exs 6-10). The April 2009 psychological evaluation reviewed by the CSE was conducted as a reevaluation at the request of the student's parents to obtain a then-current assessment of the student's cognitive, language, and social-adaptive functioning (Dist. Ex. 10 at p. 1). The student's mother described her role at the March 2011 CSE meeting as that of an "advocate" for her daughter and reported that she was able to give her input on "just about whatever it is that we were discussing" (Tr. p. 520). Minutes from the March 2011 CSE meeting reflect the active participation of the student's mother, as well as the Rebecca School teacher and social worker (Dist. Ex. 5; see Tr. pp. 69-70). The student's mother testified that the documentation the CSE relied upon and discussed included the Rebecca School goals and private psychological report from 2009 (Tr. pp. 520-21). The student's mother also stated that she was provided with a copy of the classroom observation prior to the CSE meeting (Tr. p. 521).

The parents assert that the CSE did not review the results of the most recent evaluation of the student, namely, the April 2009 psychological evaluation, during the March 2011 CSE meeting. The school psychologist testified that she reviewed the April 2009 psychological evaluation prior to the CSE meeting (Tr. p. 48). She noted that the student had been seen by the evaluating psychologist for several years, that the student's scores were consistent over time, and that the report provided "an idea" of the student's overall cognitive functioning (id.). Although the typed portion of the form containing the minutes from the March 2011 CSE meeting indicated that the April 2009 psychological evaluation was "reviewed" by the CSE (Dist. Ex. 5 at p. 1), the school psychologist explained that the evaluation was not reviewed during the CSE meeting (Tr. pp. 71-72), and instead that prior to starting the meeting all of the current materials are spread out in the middle of the table and the parents are informed as to what materials the district has reviewed prior to the meeting (Tr. p. 71). The parents are asked if they have any concerns and, in this instance, the parents did not express any concerns (Tr. p. 71). Courts have explained that "consideration" of an evaluation does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). In this case, I

find that the evidence supports the conclusion that the district did not violate procedures in considering the April 2009 psychological evaluation.

According to the April 2009 psychological evaluation, the evaluating psychologist reported that he had assessed the student on three previous occasions (Dist. Ex. 10 at p. 1). According to the psychologist, the student was pleasant and alert during the evaluation (id.). He noted that the student was content to examine materials while he elicited information from her parents (id.). The psychologist observed that the student talked frequently, uttering sentences she had heard from either a computer or television programs, and that the utterances were unrelated to the student's activities or the discussion involving her parents (id.). The psychologist reported that the student became upset when her parents tried to leave the room and tried to follow them; however, she returned when directed to do so by her mother (id. at p. 2). The student initially ran around the room and attempted to turn off the lights, but with her mother present she was eventually able to calm down and showed interest in participating in some assessment tasks (id.). The psychologist reported that the student's attention span was very short and that the student required considerable prompting and redirection to sustain involvement (id.). He stated that the student completed several of the more highly structured nonverbal tasks but refused verbal activities (id.). He noted that throughout the session the student continued to echo scripted phrases (id.).

According to the psychologist, the results of the administered psychological testing were consistent with those of previous assessments (Dist. Ex. 10 at p. 2). He stated that overall the student's performance on formal measures indicated that she had significant delays in cognitive development (id.). Administration of the Differential Ability Scales (DAS) yielded a general conceptual ability (GCA) score of 69 (2nd percentile), which the psychologist characterized as "very low" (id.). He reported that the student's performance, in conjunction with the student's scores on the Vineland Adaptive Behavior Scales, Second Edition (Vineland II), reflected a mild intellectual disability (id.). According to the psychologist, the student scored slightly better on nonverbal tasks than on tasks involving language (id.). The student attained a nonverbal cluster score of 74 (4th percentile) and a verbal cluster score of 68 (2nd percentile) (id. at p. 3). The psychologist reported that he unsuccessfully attempted to assess the student's language by means of standardized testing, but that the student did not attend to presented tasks and refused his efforts to engage her (id.). He noted that in his previous assessment of the student, she appeared to have a good single word vocabulary, although it was below average for her age, and reported that the student's more significant problems with speech-language development related to her social-pragmatic skills such as responding to questions, initiating or responding to greetings, taking part in simple conversations, and showing interest in social interaction (id.). Based on her performance on the Developmental Test of Visual Motor Integration (VMI), the psychologist reported that the student demonstrated modest progress in visual-motor integration skills (id.). The psychologist reported that the parents' completion of the Vineland II yielded an adaptive behavior composite score of 60, which fell below the 1st percentile (id. at p. 4). He stated that the student was independent or near independent in many daily care routines but that her oversensitivity to physical sensations and noisy or busy environments were areas of concern (id. at pp. 3-4). According to the psychologist, the parents reported that the student was very active and restless, and had a short attention span which made it difficult for her to complete tasks (id. at p. 4). The psychologist diagnosed the student as having an autistic disorder and ADHD (id.). The psychologist noted that despite a short attention span and distractibility, the student had the ability to sustain concentration and effort on tasks that were motivating to her, most notably manipulative tasks involving pictures

or objects in which the demand to use expressive language was minimized (id.). He reported that the student had acquired important learning concepts and was able to engage in problem solving tasks involving matching, categorizing, object assembly, and basic number concepts (id.).

The psychologist reported that the student's social and pragmatic communication skills were significantly delayed and her functional communication abilities were limited (Dist. Ex. 10 at p. 4). He identified several behavioral concerns, including the student's high activity level, echolalia, and disorganization or intense reactions to increases in physical or environmental stimuli (id.). The psychologist concluded that the student continued to require an intensive special education program that specifically meets the needs of children who have significant impairments involving poor social relatedness, short attention span, and severe social-pragmatic communication problems (id. at p. 5). He also concluded that the student had good learning potential but required intensive 1:1 work to promote social attention, response to directives, task-oriented behavior, purposeful exploration, learning to learn skills, and intrinsic motivation (id.).

In addition to the psychological evaluation, the March 2011 CSE reviewed the November 2010 classroom observation of the student at the Rebecca School that was conducted by a social worker for the district (Dist. Ex. 6). Among other things, the social worker observed that the student ignored the teacher when the teacher asked her a question during a group activity (id. at p. 1). When the teacher read a story to the class, the student reportedly did not look at the teacher or book (id.). According to the social worker, the student ran out of the room when a classmate asked a question; however, the teacher reported that this behavior was atypical (id. at pp. 1-2). The social worker noted that the student had her head down on a pillow, but lifted it when the teacher mentioned that there would be "no school on Thursday" (id. at p. 1).

The December 2010 Rebecca School interdisciplinary progress report and related addenda reviewed by the March 2011 CSE detailed the student's Rebecca School program, as well as the student's functioning across educational domains (Dist. Exs. 7-9). The report indicated that during the 2010-11 school year, the student had attended a 9:1+4 special class made up of children ranging in age from 7 to 10 years old (Dist. Ex. 7 at p. 1). The student received speech-language therapy four times per week, OT three times per week, PT, and art therapy three times per week (Dist. Exs. 7 at pp. 6; 8; 9 at p. 1).³ With respect to the student's functional emotional development, the student's Rebecca School teacher reported that the student had improved her ability to remain regulated throughout the day and that the student generally used theraputty or fidgets to remain regulated and attentive to an activity (Dist. Ex. 7 at p. 1). According to the teacher, when the student was dysregulated she would run from the room or, in the alternative, sit down on a chair or the floor and refuse to move (id. at p. 2). The teacher indicated that the student's dysregulation could last up to 45 minutes, but that staff had not observed that since September (id.). The teacher stated that at the time of the report the student was able to respond to adult support and communication when dysregulated, and that her dysregulation only lasted up to five minutes (id.). The teacher commented that the student's dysregulation was related to her rigidity and disinterest in being flexible, or was in response to loud noises or the environment being too fast and unpredictable (id.). The Rebecca School teacher reported that the student was becoming more

³ The report does not indicate the frequency and duration of the PT that the student received at the Rebecca School for the 2010-11 school year.

aware of her peers and their interests (id.). According to the teacher, the student would often say the names of peers as if to initiate conversation, but that the initiation often stopped there (id.). The teacher reported that when the student wanted to have a conversation with a preferred peer she would try to direct the peer with gestures and verbal prompts (id.). The student was able to engage in purposeful moments of interaction with adults and peers, most often one on one, and would remain in purposeful engagement for up to 15-30 minutes with a highly preferred adult (id.). According to the teacher, the student's communication, although primarily verbal, was brief and fragmented as the student focused on using limited words that were most relevant to express her intent (id.). With respect to creating symbols and ideas, the student was able to engage in pretend play scenarios when she was calm and regulated (id. at p. 3). The teacher stated that the student had a deep understanding of her own emotions and was also astute to the feelings of others (id.).

In addition to describing the student's functional emotional development in the December 2010 Rebecca School interdisciplinary progress report, the Rebecca School teacher commented on the student's academic skills (Dist. Ex. 7 at p. 4). The teacher reported that the student was a solid reader and had a large bank of sight words, as well as solid decoding skills (id.). She noted that, as a result, the student's reading program focused on increasing her reading comprehension and fluency (id.). With respect to comprehension, the teacher reported that the student was assessed using the "Visualizing and Verbalizing Stories" comprehension probe and was able to answer fact and inferential based questions at the first level (id.). The teacher reported that based on observation, the student was able to answer explicit and basic who, what, where, and when questions related to text that was read aloud (id.). As an example, she noted that the student was able to answer a questions related to a familiar fairy tale when given verbal prompting and provided with two logical options (id.). The teacher reported that the student enjoyed acting out stories and also participated in many performance-based comprehension activities that exemplified her understanding of the story (id.). According to the teacher, the student generally read sentences with moderate speed and affect, loved reading, and paid close attention to details in books (id. at p. 5). In math, the teacher reported that the student was able to complete addition problems with sums to 20 using number lines, counting on, and manipulatives for support; work with coins to make change up to a dollar; and tell time to the hour and half hour (id.). In science, the student participated in cooking activities that required students to make predictions, measure amounts, take turns, and identify descriptive words for the foods and ingredients used (id. at p. 6). In social studies, the student was working on being part of a classroom community by following classroom rules, performing her classroom job, and participating in morning meeting (id. at p. 5). According to the teacher, during morning meeting the student was able to attend to content, participate in classroom votes, answer a question of the day, and identify elements of the calendar and schedule (id.). The teacher also reported that the student was able to complete various activities of daily living including packing and unpacking her backpack, and independently using the bathroom and washing her hands (id. at p. 6). The teacher noted that the student required moderate adult support in the form of verbal prompting to eat her food (id.).

The December 2010 Rebecca School interdisciplinary progress report also included a description provided by the student's occupational therapist of the student's sensory processing, motor planning, and visual motor abilities (Dist. Ex. 7 at pp. 6-8). The occupational therapist reported that since September the student had demonstrated the ability to remain clam and regulated in both loud and quiet environments (id. at p. 6). She noted that when the student became upset it was generally due to a non-preferred change in routine (id.). During these times, the

student would react by throwing herself onto the floor and she required additional time to process what had happened, especially if a limit had been set (id.). According to the occupational therapist, the student tended to gravitate toward vestibular and proprioceptive-based equipment, which aided the student in relaxing (id. at p. 7). The occupational therapist reported that during periods of emotional dysregulation, sensory input did not appear to assist the student with recovery, but that she did respond to co-regulation strategies with a familiar adult, suggesting that the student's dysregulation was emotionally based and not the result of her sensory system becoming overloaded (id.). The occupational therapist reported that the student demonstrated the ability to initiate, sequence, and successfully motor plan both familiar and novel multi-step tasks (id.). However, she also noted that the student demonstrated a decrease in body awareness and often appeared clumsy while navigating her environment (id.). The student required moderate to maximum assistance to participate in structured movement activities such as obstacle courses (id.). According to the occupational therapist, the student was working on movements that crossed midline and disassociate the right and left upper and lower portions of the body (id.). The occupational therapist reported that the student had become more visually aware and interested in her environment as evidenced by the student sitting and standing in a more upright posture throughout the day, which expanded her visual field (id.). According to the occupational therapist, the student demonstrated the ability to write both upper and lower case letters legibly, but had difficulty sizing and orientating her letters because she had her own ideas about how a specific letter should look (id.).

The interdisciplinary progress report indicated that the student received individual art therapy that included the use of both psychodynamic and DIR/Floortime principles and strategies (Dist. Ex. 7 at p. 8). The student's art therapist reported that the student was able to sustain back and forth interactions, but continued to struggle with taking another person's perspective during these interactions (id.). She noted an increase in the student's spontaneous comments about what has occurring in the environment (id.). According to the art therapist, the student continued to show interest in some play scenarios, but remained limited in her repertoire of play topics (id.).

A PT addendum to the interdisciplinary progress report indicated that the student tended to resist physical activities, preferring sedentary play by herself or in the company of an adult (Dist. Ex. 8). The student's physical therapist reported that the student displayed low muscle tone and decreased muscle strength throughout her body (id.). She further noted that the student displayed decreased postural control, lower extremity strength, and coordination, but that she had good balance on even and uneven surfaces, and fair ball skills (id.). According to the physical therapist, the student's overall muscle strength was decreased and she was unable to initiate supine flexion or prone extension (id.). The physical therapist reported that the student required frequent verbal cueing and physical demonstration for engaging in all activities due to sensory integration difficulties (id.).

A January 2011 speech-language addendum to the interdisciplinary progress report detailed the student's speech-language development (Dist. Ex. 9 at p. 1). According to the student's speech-language pathologist, the primary focus of the student's therapy was on developing pragmatic language skills (id.). The speech-language pathologist reported that the student independently used language to greet peers and adults, request, protest, and comment (id.). When engaged in a motivating activity with an adult, the student was able to sustain a continuous flow for 30-35 circles of communication using verbal and nonverbal language (id.). The speech-

language pathologist noted that the student benefited from verbal scaffolding to maintain a continuous flow of communication (id.). With respect to peer interaction, the speech-language pathologist stated that the student consistently relied on peers to initiate verbal interaction and, during semi-structured games, the student tended to be self-directed (id.). However, the speech-language pathologist noted that the student was responsive to clinician scaffolding designed to facilitate peer interaction (id.). According to the speech-language pathologist, during more motivating activities the student required less adult support, more readily acknowledged peers, and actively participated throughout the activity (id.). The speech-language pathologist reported that the student's play skills were targeted in therapy and that the student enjoyed acting out scenes from familiar books and plays (id. at p. 2). With respect to receptive language, the speech-language pathologist reported that the student consistently comprehended two-step routine directives with minimal verbal or gestural support (id.). However, she noted that the student had difficulty following novel and more complex directions that contained sequencing and temporal markers (id.). The speech-language pathologist reported that the student demonstrated the ability to answer a range of "wh" questions in a variety of contexts (id.). She noted, however, that the student had difficulty when presented with "why" questions related to more abstract ideas and responded well to logical choice cues (id.). With respect to expressive language, the speech-language pathologist reported that the student communicated primarily through verbal means, and typically used two-to-three word utterances that were unspecific (id.). The student's language production was marked by errors in grammar and syntax including pronoun confusion, errors in the use of past tense, and omission of prepositions (id.). The speech-language pathologist reported that the student often used non-descriptive language without adjectives or spatial terms (id.). According to the speech-language therapist, the structure and function of the student's oral mechanism, as well as her sensory processing skills, were judged to be within functional limits (id.). She noted that the student had a limited diet consisting mainly of crunchy and pureed textures and consistencies (id.). The student exhibited articulation errors that impacted her speech intelligibility (id.).

In this case, the hearing record shows that the March 2011 CSE reviewed the student's strengths; the academic, developmental, and functional needs of the student; the concerns of the parents for enhancing the education of the student; the educational progress and achievement of the student and her ability to participate in instructional programs in regular education and in the least restrictive environment; and the student's behavior as a special factor (Tr. pp. 32-34, 49-50; Dist. Exs. 3; 5-9). In view of the foregoing evidence, I find that the CSE considered adequate evaluative information in formulating the student's IEP and that the parents' contention is without merit.

C. March 2011 IEP

1. Present Levels of Performance

The parents assert that the IEP does not indicate numerous things about the student, including that she had a mild intellectual disability, frequently engaged in scripting and echolalia, had an aversion to positive reinforcement phrases like "good job," had stronger non-verbal skills than verbal skills, and met the criteria for ADHD. The school psychologist acknowledged that the IEP did not reflect objective measurements of the student's intellectual functioning (Tr. pp. 72-73). However, the student's IEP indicates that she was highly distractible and tended to lose focus easily, and generally reflects, as the psychological evaluation did, that both the student's verbal

and non-verbal skills were delayed (Dist. Ex. 3). The IEP also reflects that the student has significant global delays and therefore is to participate in alternate assessments (Dist Ex. 3 at p. 18).

The parents also assert that instructional levels described in the IEP were deficient and resulting in a denial of a FAPE. The student's March 2011 IEP includes a grid that reflects the student's instructional levels for reading comprehension (1st to 2nd grade range) and math computation (1st grade range) based on teacher observation (Dist. Ex. 3 at p. 3). The CSE did not set forth instructional levels for decoding, listening comprehension, writing, or math problem solving (*id.*).⁴ With respect to the student's academic ability, the school psychologist explained that the CSE did not review any objective test scores for reading or math (Tr. p. 74). She reported that the student had a lot of difficulty sustaining attention and focus for an extended period of time, which standardized measures would require (Tr. p. 76). She further noted that the student was not really able to engage in reciprocal interaction, which was also necessary (*id.*). Consequently, while the school psychologist testified that while standardized testing would likely yield objective measures, she also believed that there would be a disconnect between the scores and the student's day-to-day functioning in school (Tr. pp. 76-77, 80). She opined that the scores would not have been as meaningful in the development of the IEP as parent and teacher input (Tr. p. 77). She further noted that the student's teacher reported that the student was inconsistent and that her performance was dependent upon her interest and motivation (*id.*). The school psychologist stated that the decision not to assess the student "objectively" reflected her thinking, and that there was no concrete discussion about it at the CSE meeting (Tr. p. 78). She further indicated that she was already familiar with the student going into the meeting and she knew the student's functioning level (Tr. pp. 78-79). The school psychologist testified that the student had current cognitive testing and she did not think that academic testing would be that meaningful (Tr. pp. 135-36).⁵ The school psychologist testified that the Rebecca School did not teach reading using decoding and therefore felt that it was inappropriate to put an instructional level on the IEP for a skill that the student had not been taught (Tr. pp. 82-83).

I also note that according to CSE meeting minutes, the student's instructional levels were specifically discussed at the CSE meeting, with input from the student's mother and Rebecca School teacher (Tr. pp. 46-47; Dist. Ex. 5). Even the student's Rebecca School teacher who had been working with the student was not comfortable giving specific academic grade levels because the student's skills varied depending on her motivation (Tr. pp. 46-47, 84; Dist. Ex. 5 at p. 1). The minutes further reflect that the student's mother indicated that "someone may [underestimate]" the student and that the student's instructional level was increased from the "1st to 1st -2nd" grade level to reflect the parents' perspective (Tr. pp. 46-47; Dist. Ex. 5 at p. 1). Although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must

⁴ The State's model forms do not expressly require present levels of performance to be expressed in such a format (see, e.g., Individualized Education Program Form, located at: <http://www.p12.nysed.gov/specialed/formsnotices/IEP/IEPform.doc>).

⁵ I note that the December 2010 Rebecca School interdisciplinary report of progress indicates that the student was administered a standardized assessment of word reading efficiency but that staff made several accommodations and the exam could not be used as a "standard" assessment (Dist. Ex. 7 at p. 4).

come from (see 8 NYCRR 200.4[d][2][i]; Application of a Student with a Disability, Appeal No. 11-043). Nor is there any support for the proposition that "teacher estimates" or "teacher observations" cannot be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at *10).

Based on the foregoing, I find that the evaluative data considered by the March 2011 CSE and the input from the CSE participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student to develop her IEP (see D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]). To the extent the parents claims may be construed as alleging that a reevaluation of the student was required in order to formulate a sufficiently accurate IEP, I note that as referenced above the evaluative information was sufficient, the district did not feel that the student needed a reevaluation, and there is no evidence in the hearing record that reevaluation should have been considered due to a request by the parents.

2. Special Factors and Interfering Behaviors

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be

indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (*id.*).⁶ State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (*A.H.*, 2010 WL 3242234).

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

⁶ While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see *Cabouli v. Chappaqua Cent. Sch. Dist.*, 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).⁷ Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the hearing record shows that at the time of the CSE meeting, the parties were in agreement regarding the functions of the student's behaviors and that the student's March 2011 IEP provided for support and strategies to address the student's behavior. The present levels of performance on the student's March 2011 IEP reflected her interfering behaviors as described in the December 2010 Rebecca School interdisciplinary progress report, which behaviors included running from the classroom or sitting down and refusing to move (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 7). The student's IEP noted that her "dysregulation" was related to issues with rigidity, the presence of loud noises or an unpredictable environment, and feelings of sadness or fear (Dist. Ex. 3 at p. 4). The IEP also indicated that the student's behavior seriously interfered with instruction and that the student required additional adult support (id.). To address the student's social/emotional management needs, the CSE recommended that the student have access to sensory materials to help her remain regulated and attentive to a classroom activity, be provided with teacher supports for transitions, have a choice of activities, and have sensory breaks from the classroom as needed (id.). The CSE recommended that the student receive one individual counseling session for 30 minutes per week and one small group counseling session for 30 minutes per week (id. at p. 18). The CSE also recommended that the student receive the support of a full-time crisis management paraprofessional (id. at p. 19). In addition, the CSE developed annual goals and short term objectives targeting the student's ability to remain regulated, explain her feelings and actions, and identify coping strategies (id. at pp. 12-13, 15).

With the input from the student's mother and Rebecca School teacher, the CSE developed a BIP and attached it to the student's March 2011 IEP (Dist. Ex. 3 at p. 20; Dist. Ex. 5 at p. 2). The BIP identified the student's behaviors that interfered with instruction, including leaving the classroom, engaging in verbal aggression such as screaming and crying, and refusing to move (Dist. Ex. 3 at p. 20). The BIP indicated that the student's behaviors were a function of her rigidity and her inability to express her wants/needs/feelings, as well as her sensory needs (id.). The BIP also described expected behavior changes, such as reducing the number of times the student left the classroom without permission to one time per week (id.). According to the BIP, several strategies would be used in an effort to change the student's behavior, including co-regulation

⁷ 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]).

through the use of a calm and soothing voice, sensory supports built into the school day, the provision of positive behavioral choices before the student became dysregulated, expectations stated in a clear manner and advance preparation for schedule changes, validation of the student's feelings and desires for emotional support, and access to preferred adults with strong/positive relationships (*id.*).

The school psychologist testified that the BIP was developed at the CSE meeting with input from the district representative/special education teacher, school psychologist, the student's mother, and the student's teacher (Tr. pp. 51, 53; *see* Dist. Ex. 5 at p. 2). She indicated that the CSE discussed the function of the student's behavior, no one voiced disagreement with the stated function, and the function of the student's behaviors was therefore reflected in the BIP (Tr. pp. 51-52, 129). According to the school psychologist, the CSE discussed the frequency and duration of the student's behavior in terms of the student's goals and expected behavior changes (Tr. p. 112). The school psychologist testified that the CSE did not have data regarding how often the student was leaving the classroom at the Rebecca School because the Rebecca School did not keep data on its students (Tr. p. 113). However, she reported that the CSE discussed how often the Rebecca School teacher thought the student was leaving the classroom and what she believed would be an appropriate goal for the following school year (*id.*). She stated that she had the full input of the student's parent and teacher, and that the teacher was able to give estimates in the absence of concrete data (Tr. p. 114). The school psychologist acknowledged that the BIP did not indicate when the parents would get reports of the student's progress with regard to the BIP (Tr. pp. 115-16, 138).

Regarding the student's behavior, the parents also assert that the hearing record lacks any evidence that the 1:1 paraprofessional recommended for the student would manage her problem behaviors. The parents maintain that they were not provided with any information about the credentials of the 1:1 aide at the time of the CSE meeting. They further maintain that the teacher of the assigned class could not identify who the student's 1:1 aide would be and provided no information about the training a 1:1 aide is provided before working with a student with autism and behavior problems. I note that the hearing record indicates that the CSE recommended the 1:1 crisis management paraprofessional in addition to other supports and services designed to address the student's behavior, including placement in a 6:1+1 special class; the provision of speech-language therapy, OT, and counseling as related services; and numerous environmental modifications (Dist. Ex. 3).

Generally, when implementing a student's IEP, school districts have discretion to assign qualified staff to students, thus, they need not honor a parent's request for a particular teacher or related service provider (*Slama v. Independent Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 884-85 [D. Minn. 2003]; *Application of the Bd. of Educ.*, Appeal No. 07-007; *Application of a Child with a Disability*, Appeal No. 02-009; *Application of a Child with a Disability*, Appeal No. 98-31; *Application of a Child with a Disability*, Appeal No. 97-87; *Application of a Child with a Disability*, Appeal No. 95-50; *Application of a Child with a Disability*, Appeal No. 91-19; *Marple Newtown Sch. Dist.*, 46 IDELR 295 [SEA PA 2006]). However, administrative officers have jurisdiction to review health and safety concerns that arise in the development and review of an IEP (*Lillbask v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 94 [2d Cir. 2005]; *Bd. of Educ. of the Oakridge Pub. Schs.*, 40 IDELR 274 [SEA MI 2003]; *Freeport Sch. Dist. 145*, 34 IDELR 104 [SEA IL 2000]).

In this case, although the parents were not requesting a specific provider to be assigned as the student's 1:1 aide, they raise concerns regarding a lack of information on the identification and qualifications of the recommended 1:1 aide. The hearing record is sparse with information pertaining to a 1:1 aide, although the district special education teacher testified that she believed that the assigned paraprofessional would be trained to work with the student (Tr. p. 213). I find that there is insufficient reason to speculate that a 1:1 aide who would have been assigned to the student would not have been able to competently provide services or would have lacked the credentials necessary to perform the duties of the position, particularly here where the student never attended the district's assigned school.

In light of the circumstances of this case, particularly where the student's parents and teacher agreed at the time of the CSE meeting as to the function of the student's behaviors and helped to develop the BIP, where the IEP identifies the student's major interfering behaviors and provides services and supports to address them, and where it was not possible to conduct an FBA in the setting in which the BIP would have been implemented due to the then-current placement of the student, I find that the lack of an FBA does not compel a finding that the district failed to offer the student a FAPE (see Cabouli, 2006 WL 3102463, at **3; A.C., 553 F.3d at 172-73; see also Application of the Dep't of Educ., Appeal No. 11-156; Application of a Student with a Disability, Appeal No. 11-110). I further note that, as set forth above, State regulations require in pertinent part that a CSE consider developing a BIP when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1]). Here, because the student has not attended the district's recommended program, there has been no opportunity to determine if the student's impeding behaviors would have persisted despite consistently implemented general school-wide or class-wide interventions, yet the CSE proceeded to develop a BIP for the student anyway.⁸

3. Annual Goals and Short-term Objectives

The parents allege that the student's March 2011 IEP goals are flawed.⁹ Specifically, the parents allege that the CSE significantly deviated from the content available to them on the Rebecca School interdisciplinary progress report and, rather than provide a functional level in writing for the student in the academic performance section of the IEP, the CSE included a goal in the IEP to dictate the student's performance in writing. The parents further assert that one of the short-term objectives on the IEP states that the student will pick two new books to read per month, without specifying the difficulty or content of the books.

⁸ While the IDEA does not preclude a CSE from initially formulating a BIP, it is not unusual for a classroom teacher or other special education provider to formulate or modify a BIP over the course of a school year when a BIP is called for in the implementation of the student's IEP (see, e.g., Application of a Child with a Disability, Appeal No. 05-107). As noted above, if the district creates a BIP for the student, the CSE is thereafter required to review the BIP at least annually (8 NYCRR 200.22[b][2]).

⁹ I note that despite the parents alleging in their due process complaint notice that the student's March 2011 IEP goals were inappropriate, the IHO did not make any findings on this issue (compare Parent Ex. A at p. 4, with IHO Decision).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

The hearing record reflects that the March 2011 CSE developed the student's annual goals based on the Rebecca School reports and input from the student's mother and Rebecca School teacher (Tr. pp. 49, 55-56, 58-63; Dist. Ex. 5 at p. 1). The school psychologist acknowledged during testimony that some of the IEP goals did not include targeted grade level (Tr. pp. 91, 95). The school psychologist testified that the CSE worked with the information that the Rebecca School gave it, and asked specific questions of the Rebecca School staff (Tr. pp. 123-24). She reported that the Rebecca School staff was generally cooperative in providing requested information (Tr. p. 124). According to the school psychologist, since the Rebecca School teacher was uncomfortable providing instructional levels, the CSE asked the teacher for more specific details what the student could and could not do in various settings (Tr. p. 46).

A review of the student's March 2011 IEP shows that it contained annual goals and short-term objectives related to reading comprehension and fluency; computation and functional math skills; written expression; pragmatic language; feeding and articulation skills; motor planning and sequencing; muscle strength and coordination; core strength and cardiovascular endurance; dynamic balance and postural control; emotional modulation and self-regulation; visual spatial processing; peer interaction; understanding of emotions; anger management/coping skills; receptive language; expressive language; activities of daily living (ADLs); and representational play (Dist. Ex. 3 at p. 6-15).

I note that there are two particular weakness in the IEP. The writing goal is vague and lacks short term objectives, and the present levels of performance do not provide information regarding the student's then-current functioning with respect to writing. Additionally, the short-term reading objective contained in the IEP indicating that the student will pick two new books to read per month does not specify the difficulty or the content of the books. However, I find that overall the annual goals and short-term objectives contained on the student's March 2011 IEP, when read together, target the student's identified areas of need and provide information sufficient to guide a teacher in instructing the student and measuring her progress (see Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). This case is unlike another case relied heavily upon by the parents in which substantial areas of deficit went unaddressed in that student's IEP (see Application of the Bd. of Educ., Appeal No. 126). With respect to the goals in this case, I find that the content of the goals contained in this student's IEP did not deny her a FAPE. In summary, I

find that there is no reason to disturb the IHO's rejection of the parents' claims regarding the sufficiency of the student's IEP.

D. Assigned School

The parents also allege numerous errors regarding the class and school to which the student had been assigned. In this case, a meaningful analysis of the parents' claim with regard to the student's particular public school assignment would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008], aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 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]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at the 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 the student had been grouped appropriately upon the implementation of her IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

1. Assigned Class – Grouping

With regard to the parents' claim related to grouping the student at the public school site, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, the hearing record indicates that the student would have been appropriately grouped for instruction and socialization. The teacher of the assigned class reported that on July 6, 2011, she had five students in her class, three students who were six turning seven, and two students who were seven turning eight (Tr. pp. 145, 198-99). The student was nine years old at the time (Tr. p. 199). The student's academic skills fell at the first and second grade levels, as did the academic skills of the other students in the class (Tr. pp. 145, 200-02; Dist. Ex. 3 at p. 3; 5 at p.1). All of the students in the assigned class were classified as having autism (Tr. p. 145). The teacher testified that the student's IEP goals were similar to those of the other students (Tr. p. 173). Further, she noted that all of the students in the assigned class were verbal (Tr. p. 199). Accordingly, upon review of the hearing record, I find that the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional and socialization purposes in the 6:1+1 special class at the assigned district school.

2. Teaching Methodology

The parents allege that the IHO erred in determining that the teaching methodologies used in the district's 6:1+1 special class are appropriate for the student. The parents allege that the

teacher of the assigned class has extensive training in ABA techniques and uses both TEACCH¹⁰ and discrete trial training in her classroom, as well as a token board. They assert that the student has experienced tremendous success learning in a program whose methodology is the polar opposite of ABA, and that the student's mother expressed concern regarding the use of ABA with the student. The parents assert that their concerns are corroborated by evidence including the psychologist's observation that the student was averse to certain forms of positive reinforcement and the district's observation that certain behavior management strategies actually triggered the student's problem behaviors. The parents note that, assuming the teacher of the assigned class employed an eclectic approach to learning, this would also not be appropriate for the student as the student requires that her teachers utilize the same techniques across the classroom. The parents state that it is unclear how this could be achieved in a classroom where each child might be taught using a different methodology and reinforced in different ways.

Although an IEP must provide for specialized instruction in a student's areas of need, 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. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

I find the parents' assertions regarding classroom techniques unpersuasive. The student's mother reported that the student had received ABA instruction in a preschool setting and that she "did well" but was also "robotic" (Tr. p. 501). She further testified that the student attended a second preschool program that employed ABA and verbal behavior, and the student also "did well" in that program (Tr. pp. 501-02). The student's mother testified that although ABA had worked well for the student in preschool, at the time of the CSE meeting, she did not think that it was appropriate for the student at that point in the student's life and development (Tr. p. 524).

Notably, there is no evidence in the hearing record that the assigned class utilized solely ABA instruction. To the contrary, the teacher of the assigned class testified that her classroom followed the TEACCH model, that the students used picture schedules, and that the goal of TEACCH was to have students become "controllers" of their own learning environment (Tr. pp. 149-50). The teacher testified that she differentiated instruction and worked off each student's IEP goals (Tr. pp. 146-47). She explained that the classroom was set up into individualized stations

¹⁰ Treatment and Education of Autistic and Related Communication Handicapped Children

and that the students rotated through the stations based on their individual needs (Tr. pp. 151-52). The teacher also employed behavioral techniques, reporting that she used token boards in her classroom and that students were able to earn tokens for being on task or completing their work, which tokens could be exchanged for chosen reinforcers (Tr. pp. 162-63). In addition to token boards, the classroom teacher testified that she utilizes visual cues, sensory breaks, TEACCH, some discrete trials, running logs for reading, and an antecedent-behavior-consequence (ABC) model to analyze behavior (Tr. pp. 162-65, 183, 185-86, 214-15, 219, 243, 245). Although the parents assert that the student reacts negatively to one particular statement of verbal praise, the hearing record does not support that overall these techniques are not appropriate to use with the student. Accordingly, I find that the hearing record does not support a conclusion that the teaching methodologies utilized in the classroom were not appropriate for the student.

3. Safety

The parents also allege that the assigned school was unsafe for the student, and that the IHO erred in determining to the contrary. While an analysis of this issue would require me to determine what might have happened had the parents consented to the district's provision of special education services and the district been required to implement the student's IEP (see 20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320), I note that the hearing record supports the findings made by the IHO with respect to safety of the school. Specifically, the hearing record supports the IHO's finding regarding the entrance and exits to the school building and the presence and location security (see Tr. pp. 156-57, 239-41, 251). The hearing record also supports the IHO's recitation of testimony by the special education teacher at the assigned school that she was unaware of any incidents of intruders in the school and that the school has lockdown procedures in place in case there was a situation like that (Tr. p. 241). Specifically, the special education teacher testified that there is a code utilized over the loudspeaker, and that doors would be closed and students would be kept in the classrooms (id.). Based on the foregoing, I find that the hearing record supports the IHO's determination that the student was not denied a FAPE based on safety concerns at the assigned school. Overall, with respect to the public school to which the district assigned the student, I am not persuaded that the district would have deviated from the IEP in a material or substantial way in the event that the student enrolled in the public school and triggered the district's obligation to provide the student with the services in conformity with his IEP (A.P., 2010 WL 1049297 at *2; Van Duyn, 502 F.3d at 822; Houston Indep. Sch. Dist., 200 F.3d at 349; see 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., 2011 WL 4001074, at *9; see 20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see also 20 U.S.C. § 1414[d]; 34 CFR 300.320).

VII. Conclusion

In summary, I find that after a thorough review of the hearing record and due consideration, there is no reason to disturb the finding of the IHO that the district met its burden to show that it offered the student a FAPE for the 2011-12 school year. I have also considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

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

JUSTYN P. BATES
STATE REVIEW OFFICER