The University of the State of New York

The State Education Department
State Review Officer
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No. 12-068

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Neha Dewan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse them for their daughter's tuition costs at the Rebecca School for the 2010-11 school year. The parents cross-appeal the IHO's decision to the extent that he did not reach or dismissed certain determinations on issues raised in the due process complaint notice. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a 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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student demonstrates difficulties with respect to sensory regulation, language processing, cognition, academics, activities of daily living (ADL), and social/emotional functioning (Tr. pp. 37-42, 735, 806, 819; Dist. Exs. 1-2; 4). Her eligibility for special education programs and related services as a student with autism is not in dispute (Dist. Ex. 1 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student experienced normal development until approximately three years of age, at which time she began to "'stagnate"' (Dist. Ex. 2 at pp. 1, 3; Parent Ex. M at p. 2). According to the parents, subsequent to an immunization and/or a viral infection, the student exhibited a significant decline in her speech and behavior (Tr. pp. 797-98; Dist. Ex. 2 at pp. 1, 3; Parent Ex. M at p. 2). As a result of this decline, the student received speech therapy and occupational therapy (OT) (Tr. p. 800). In addition, the student's mother provided her with "playroom" experiences at home, based in part on the "Sunrise" program and the mother's experience working with children

(Tr. pp. 800-02). The student began attending the Rebecca School in July 2009 and remained at the school through June 2011 (Tr. pp. 457, 804).[1]

On April 2, 2010, the student's father entered into an enrollment agreement with the Rebecca School for the 2010-11 school year (Tr. p. 839; Parent Ex. H). On May 7, 2010, the CSE convened for the student's annual review and to develop her IEP for the 2010-11 school year (Dist. Exs. 6; 7). For the 2010-11 school year, the May 2010 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school, together with the following related services: four 30-minute sessions per week of individual OT; one 30-minute session per week of OT in a small group (2:1); two 30-minute sessions per week of individual counseling; one 30-minute session per week of counseling in a small group (2:1); three 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of speech-language therapy in a small group (2:1) (Dist. Ex. 7 at pp. 1-2, 19). In addition, the CSE recommended adapted physical education in a 6:1+1 setting (id. at pp. 1, 7). The CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher (id. at p. 5). To address the student's academic, social/emotional, and physical needs, the CSE recommended several accommodations and supports for the student, including visual/verbal prompts, redirection, use of preferred objects when teaching, gestures, use of high affect and facial cues to assist with engagement, manipulatives, sensory tools to assist with regulation, sensory breaks, scaffolding, and positive reinforcement, among others (id. at pp. 3-7). The CSE also developed 14 annual goals and 40 corresponding short-term objectives to target the student's needs in the following areas: reading, math, adaptive behavior, sensory regulation, social/emotional functioning, and language processing (id. at pp. 8-12).

In a letter to the parents dated June 14, 2010, the district summarized the May 2010 CSE's recommendations and notified them of the particular public school site to which the student was assigned for the 2010-11 school year (Dist. Ex. 10). In a subsequent letter dated June 21, 2010, the district notified the parents that the student would be assigned to a different public school site for summer 2010, due to construction at the initial site (Tr. pp. 561-62; Parent Ex. P at p. 12; see Tr. p. 593).

On July 9, 2010, the student's mother visited the assigned public school site designated for summer 2010, during which time the mother also participated in an information session regarding the assigned school designated for the remainder of the school year (Tr. p. 817; Parent Ex. E). In a letter to the district dated July 24, 2010, the student's mother rejected both assigned public schools and outlined her concerns regarding them (Parent Ex. E at pp. 3-4). She further advised that she planned to continue the student's enrollment at the Rebecca School and of her intent to request tuition reimbursement from the district (id. at p. 4).

A. Due Process Complaint Notice and District Response

By due process complaint notice dated March 23, 2011, the parents asserted that the district failed to offer the student a FAPE for the 2010-11 school year, alleging both procedural and substantive violations (Parent Ex. A at pp. 1-5). Specifically, the parents alleged: (1) the May 2010 CSE was not properly composed; (2) the May 2010 CSE developed the student's IEP without sufficient and appropriate evaluative material; (3) the present levels of academic and social/emotional performance contained in the May 2010 IEP failed to accurately reflect the

[1] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

student's needs; (4) the May 2010 IEP did not contain enough annual goals, and the goals that were included in the IEP were too generic to appropriately address the student's needs and failed to provide appropriate benchmarks upon which to gauge the student's progress; (5) the May 2010 CSE failed to conduct a functional behavioral assessment (FBA) despite the student's significant behavioral difficulties; (6) the May 2010 CSE failed to develop a behavioral intervention plan (BIP); and (7) the May 2010 IEP lacked sufficient academic management needs or social/emotional management needs for the student (id. at pp. 1-2). The parents further asserted that there was no transition plan, either on the IEP or at the assigned schools, for transferring the student to a new school and that the student had difficulty with transitions and would have to transfer to a new school twice (id. at p. 3). Regarding the appropriateness of each of the assigned schools, the parents asserted (1) that the assigned schools were too large; (2) that the assigned schools lacked the individualized attention and support that the student required; (3) that the classroom used methodologies that would not allow the student to make progress; (4) that the classroom lacked necessary sensory equipment; and (5) that the student's functional level was significantly below the other students in the class (id. at pp. 3-4). In addition, the parents maintained that the Rebecca School was an appropriate placement for the 2010-11 school year, and that equitable considerations favored their request for relief (id. at p. 4). Among other things, the parents requested that the IHO award them reimbursement for the costs of the student's tuition at the Rebecca School for the 2010-11 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

On May 23, 2011, the parties proceeded to an impartial hearing, and following six days of testimony, concluded on December 15, 2011 (Tr. pp. 1-845). On the first day of the impartial hearing, counsel for the parents requested that the IHO issue a ruling regarding which assigned school the district had to defend (Tr. pp. 15-19; see Parent Ex. P; IHO Ex. III). In an interim order dated June 9, 2011, the IHO held that the district had "the burden of defending" the appropriateness of both assigned schools – the assigned school designated for summer 2010 as well as the assigned school designated for the remainder of the school year (Interim IHO Decision at p. 3).

By decision dated February 27, 2012, the IHO found that the district failed to offer the student a FAPE, the Rebecca School was appropriate to meet the student's needs, equitable considerations favored the parents' claim, and the parents were entitled to an award of tuition reimbursement (IHO Decision at pp. 6-14). In his decision, the IHO declined to consider the parents' contentions regarding the district's failure to recommend a 1:1 paraprofessional because the parents did not raise this issue in their due process complaint notice (id. at pp. 9-10). Regarding the provision of a FAPE, although the IHO found that the May 2010 CSE was properly composed, and that the CSE's failure to obtain a social history and medical assessment of the student did not rise to the level of a denial of a FAPE, the IHO ultimately concluded that the district failed to meet its burden of demonstrating that it offered the student a FAPE for the 2010-11 school year (id. at pp. 7-8, 10).

According to the IHO, the May 2010 CSE denied the student a FAPE because it had insufficient information upon which to base the IEP as it failed to conduct a classroom observation or an FBA (IHO Decision at pp. 7-10). While the IHO praised the May 2010 CSE's efforts to incorporate information from the Rebecca School in the student's IEP, he also criticized the CSE for its sole reliance on information provided by the parents' unilateral placement, noting that the CSE had an independent duty to make its recommendation for the student (id. at p. 8). According to the IHO, the CSE improperly relied on teacher assessments from the Rebecca School to determine the student's current functional levels (id.). The IHO also found that the CSE should

not have taken "wholesale the description" of the student from the Rebecca School progress report and instead should have conducted a classroom observation of the student to better understand the progress report (id.). Next, the IHO found that an FBA was warranted because the student exhibited significant behaviors that interfered with her education (id. at p. 9). He further found that an FBA and BIP were warranted because the student had difficulty with transitions and the district was recommending a less restrictive program (id.). By failing to discuss the student's need for an FBA and a BIP at the CSE meeting, the IHO also found that the district deprived the parents of an opportunity to meaningfully contribute to that topic (id.). As a result, the IHO concluded that the district's failure to recommend an FBA and develop a BIP denied the student a FAPE (id.). Based on the foregoing, the IHO concluded that the IEP did not contain an adequate description of the student's present levels of performance due to the district's failure to conduct a classroom observation and an FBA, and thereby the district denied the student a FAPE (id. at p. 10). In light of his determination that the district failed to demonstrate that it offered the student a FAPE, the IHO declined to address the parties' claims regarding the assigned schools (id.).

Next, the IHO proceeded to find that the Rebecca School was an appropriate placement for the student because it addressed her unique needs and the student had made progress at the Rebecca School (IHO Decision at pp. 10-13). The IHO further concluded that equitable considerations supported the parents' request for relief because they cooperated with the district and the IHO rejected the district's contention that the parents did not intend to place the student in a public school program (id. at p. 14). Accordingly, the IHO ordered the district to reimburse the parents for the student's tuition at the Rebecca School for the 2010-11 school year and also directed the CSE to reconvene to consider whether to conduct an FBA and develop a BIP in the student's current school setting (id.).[2]

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that it failed to offer the student a FAPE, that the Rebecca School was appropriate, and that the equities favored the parents. Initially, the district requests affirmance of the IHO's decision to the extent that he determined that the CSE was validly constituted, and that the absence of a social history and medical assessment did not amount to a denial of a FAPE. The district also asserts that the IHO properly declined to consider whether the district's failure to provide the student with 1:1 paraprofessional services rendered the May 2010 IEP inappropriate, because the parents failed to raise that issue in their due process complaint notice.

Regarding the IHO's finding that the district failed to offer the student a FAPE, the district contends that the IHO erred in concluding that the May 2010 CSE had insufficient information to develop the IEP. According to the district, the student's then-current Rebecca School teacher actively participated at the May 2010 CSE meeting, and the information derived from the teacher estimates was supplemented by input provided by the student's teacher and the parents at the CSE meeting. As a result, the district maintains that the May 2010 CSE had sufficient evaluative data upon which to formulate the IEP, and the lack of a classroom observation did not result in a denial of a FAPE. The district also alleges that the present levels of performance contained in the May 2010 IEP were accurate. The district also contends that the IHO erred in concluding that its failure to conduct an FBA and develop a BIP resulted in a denial of a FAPE to the student. Specifically, the district asserts that a BIP was not necessary for the student, because the student was not much of a "flight risk," and her teacher indicated that the student's behavior did not interfere with

[2] For the 2011-12 school year, the student was enrolled in a district program (Tr. pp. 826-27).

instruction. The district further contends that the May 2010 CSE built specific management needs into the IEP designed to address the student's behavioral needs. As an alternative argument, the district asserts that even if it erred procedurally by not conducting an FBA or developing a BIP, the procedural violation did not rise to the level of a denial of a FAPE, especially given that the IEP provided strategies to address the student's behaviors.

The district further maintains that the Rebecca School was not an appropriate unilateral placement because it did not provide the student with sufficient levels of related services. Lastly, the district contends that equitable considerations should preclude the parents' request for relief because the evidence reflects that the parents did not truly consider the district's recommended program as they had already decided to send the student to the Rebecca School. As relief, the district seeks to reverse the IHO's decision.

The district also appeals the Interim IHO Decision. The district maintains that the IHO erred by directing it to establish the appropriateness of both assigned schools. Specifically, the district maintains that it offered the student a FAPE, because there was an IEP in effect and a seat was available in an assigned school prior to the commencement of the school year. Regardless of whether the district was required to demonstrate the appropriateness of both assigned schools, the district submits that both assigned schools could appropriately address the student's educational needs.

In an answer, the parents argue that the IHO properly determined that the district had to demonstrate the appropriateness of both assigned schools during the impartial hearing. The parents assert that the district denied the student a FAPE, in part, because the May 2010 CSE relied solely on information from the student's teacher to develop the student's present levels of performance. They also allege that the May 2010 IEP was developed without sufficient evaluative data. The parents further contend that the IHO properly found that the student exhibited behaviors that interfered with her education and that the CSE failed to consider the student's behaviors when developing the IEP. They maintain that the district's failure to conduct an FBA and prepare a BIP denied the student a FAPE. Additionally, the parents allege that the Rebecca School was an appropriate unilateral placement for the student for the 2010-11 school year, and that the equities favor their claim.

In addition, the parents cross-appeal the IHO's decision to the extent that he did not make any findings regarding the appropriateness of the assigned schools. The parents allege that neither assigned school was appropriate for the student. In addition, the parents cross-appeal the IHO's determination that the May 2010 CSE was validly composed. Finally, the parents cross-appeal the IHO's decision that the CSE's failure to obtain a social history and a medical assessment of the student did not amount to a denial of a FAPE.

The district submitted an answer to the parents' cross-appeal, in which it refuted all of the parents' claims. Although the district maintains that it was not required to establish the appropriateness of the assigned schools, because the parents rejected the IEP, the district asserts that both assigned schools were appropriate for the student. The district also contends that there is no showing in the hearing record that the lack of a social history and medical assessment resulted in a denial of a FAPE to the student. Lastly, regarding the parents' claims surrounding the composition of the May 2010 CSE, the district notes that despite the parents' failure to plead this issue with particularity, the May 2010 CSE was validly constituted.

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., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008] aff'd, 2009 WL 3326627 [2d Cir. 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; 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 T.P., 554 F.3d

at 254; 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; 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. May 2010 IEP

1. CSE Composition

The parents argue that the May 2010 CSE was improperly composed, but do not specify how the May 2010 CSE failed to meet CSE composition requirements. A review of the hearing record reflects that the May 2010 CSE consisted of all the legally mandated members as required by federal and State regulations (see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Participants at the May 2010 CSE meeting included the student's parents, a special education teacher who also served as the district representative, a district school psychologist, a district social worker, an additional parent member, a Rebecca School social worker, and the student's Rebecca School teacher, who participated in the meeting by telephone (Tr. p. 31; Dist. Exs. 6; 7 at p. 2).[3] Therefore, I concur with the IHO that the May 2010 CSE was validly composed.

2. Special Factors and Interfering Behaviors

An independent review of the entire hearing record supports the parents' contentions that the student had behaviors that impeded her learning, and therefore, I find that the district erred by not considering the special factors related to the student's behaviors and the recommendations contained in the May 2010 IEP did not appropriately address the student's behaviors that impeded her learning. Accordingly, I will uphold the IHO's decision that the May 2010 CSE's failure to conduct an FBA and develop a BIP denied the student a FAPE.

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

[3] It should be noted that the parents placed the student in a nonpublic school and did not seek to place the student in a general education setting (Parent Ex. A at pp. 1-5). The IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; see also 8 NYCRR 200.3[a][1][ii]). Therefore, a regular education teacher was not a required member of the May 2010 CSE because the evidence does not support the conclusion that there was a reasonable likelihood that the student would have been assigned to such a teacher (34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see J.G. v. Kiryas Joel U.F.S.D., 777 F. Supp. 2d 606, 644-45 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 365-66 [S.D.N.Y. 2010]).

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 Cent. Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[4] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulations define an FBA 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

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

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

Here, the May 2010 IEP was based upon a 2009 psychoeducational evaluation, a 2009 psychiatric evaluation, and a December 2009 Rebecca School progress report and input from the student's then-current Rebecca School teacher (Tr. p. 32; Dist. Exs. 1-2; 4). As further discussed below, the evaluative data before the May 2010 CSE indicates that the student engaged in avoidant behavior such as "running," and also describes the student's difficulties with sensory processing, overactive behavior, attention, impulsivity, and social/emotional functioning. Accordingly, I find there is significant evidence in the hearing record to indicate that the student's behavior impeded her learning and, therefore under the circumstances, the hearing record does not support a finding that the district complied with the procedures for considering the special factors of behavior that impeded the student's learning.

The April 2009 psychoeducational evaluation indicated that the district school psychologist attempted to administer standardized assessments in the areas of cognition and academic achievement to the student, but she was unresponsive to both the verbal and visual portions of the assessments (Dist. Ex. 1 at p. 2). The school psychologist further noted that during the assessment, the student "left the testing room of her own accord and began to gleefully run up and down the empty halls" (id.). The school psychologist noted that the student exhibited language delays, including communication that was limited to short phrases with much jargon and delayed echolalia (id.). According to the school psychologist, the student demonstrated speech that appeared to be self-stimulatory rather than communicative, and she did not engage in spontaneous conversation with him or respond to his attempts to communicate (id.).

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

As part of the April 2009 psychoeducational evaluation, the school psychologist administered the Vineland II Adaptive Behavior Scales (Vineland II), with the student's mother serving as informant (Dist. Ex. 1 at p. 2). Based on the parent's responses, the student exhibited significant delays in the areas of communication, daily living skills, socialization, and motor skills (id. at pp. 2-3). The school psychologist reported that the student inconsistently followed one-step directions, lacked attention when others spoke, and required supervision/assistance regarding eating and dressing (id. at p. 3). The school psychologist described the student's fine and gross motor skills as areas of relative strength for the student (id.). The school psychologist also completed the Childhood Autism Rating Scale (CARS) based on the school psychologist's behavioral observations of the student during the evaluation and input from the student's mother (id.). The student's score of 45 indicated a mild to moderate level of autism (id.). According to the school psychologist, the student did not engage in self-injurious behavior, but instead engaged in mild self-stimulatory behavior (id.). Overall, the school psychologist reported that the student was excessively active, exhibited minimal verbal skills, demonstrated self-directed behavior, and related to others in an atypical manner (id. at p. 2).

According to the 2009 psychiatric evaluation, the student exhibited difficulties with sensory processing, overactive behavior, attention, impulsivity, and social/emotional functioning, including her limited social relationships and atypical relations with others (Dist. Ex. 2 at p. 2). The psychiatrist reported that the student exhibited self-directed behavior, self-stimulatory behaviors, and echoing as well as "mouth[ed], taste[d], and smell[ed] things" (id.). He further noted that the student exhibited little emotion, inconsistent eye contact, and impulsivity, as well as hyperactive behavior/"constant motion," and hand flapping (id. at pp. 2-3). According to the psychiatrist, the student's speech was "almost non-existent," but she was able to state "yes" and "no" (id. at p. 3). The psychiatrist further indicated that the student "appear[ed] to be in the mentally retarded range but appear[ed] to be learning to some degree" (id.). The psychiatrist's report reflected possible diagnoses of ASD or viral encephalitis with persistent damage (id. at pp. 1, 4).

The May 2010 CSE also considered a December 2009 Rebecca School interdisciplinary progress report of the student, which detailed the student's progress with respect to academics, OT, speech and language, social/emotional needs, art therapy, and drama (Dist. Ex. 4). The progress report reflected that within the classroom, the student benefited from verbal cues, high affect, and gestures (id at p. 1). Rebecca School personnel reported that the student maintained attention and transitioned with support (id.). The Rebecca School progress report further depicted the student's difficulties with distractibility, sensory regulation, attention, frustration tolerance, impulsivity, and social/emotional functioning (id. at pp. 1, 5). According to the progress report, the student presented with an "upregulated state of arousal" and exhibited active movement around the classroom and the need to seek out sensory activities such as jumping, running, and swinging (id. at p. 1). According to the student's head teacher, when the student became dysregulated, the student loudly vocalized and tightened her body (id.). The student's head teacher also noted that during periods of dysregulation, the student looked for food or requested chewing gum, as a regulation strategy (id.). The progress report further indicated that the student engaged in avoidant behaviors such as running "if not provided with support" (id. at p. 7).

Based upon the evaluative data and the input of the Rebecca School personnel, the May 2010 CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher (Dist. Ex. 7 at p. 5; see Tr. pp. 94-95). However, contrary to the May 2010 CSE's determination, I find there is significant evidence in the hearing record to indicate that the student's behavior impeded her learning and therefore, the CSE

erred by failing to conduct an FBA and develop a BIP for the student. The evaluations and progress report considered by the May 2010 CSE consistently note the student's interfering behaviors, including her elopement, self-stimulatory behavior, overactive behavior, and impulsivity (Dist. Exs. 1-2; 4). The May 2010 IEP itself noted the student was "a flight risk," and further indicated that the student's running behavior could present as a safety concern (Dist. Ex. 7 at p. 7). As such, I find that the student's behavior also placed her at risk of harm or injury (see 8 NYCRR 200.22[b][1][ii]). Furthermore, I am not persuaded by the district's contention that an FBA and BIP were not warranted because the parents and teacher did not indicate at the time of the May 2010 CSE meeting that the student's behavior interfered with instruction. According to the May 2010 minutes, the student's father raised concerns at the CSE meeting about the student's safety, including that the student is frenetic and "runs quickly" and sought a 1:1 paraprofessional to address the student's safety needs (Dist. Ex. 6 at p. 2).[6] The minutes reflect that the student's Rebecca School teacher characterized the student's running behavior as a "safety issue," and noted that the student had made progress and had begun to ask for permission to run (id.). It is undisputed by the parties that the student engages in running behavior. Under the circumstances of this case, particularly where the student has running behaviors that were described as a safety concern, I find that the CSE was required to conduct an FBA to determine the factors that interfere with the student's behaviors and erred by concluding that the student's behavior did not seriously interfere with instruction (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; 8 NYCRR 200.4[d][3][i], 200.22[a], [b]; see also Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005] [safety concerns may be considered, where appropriate, in the development and review of an IEP]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *18-*20 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *10-*11 [E.D.N.Y. Aug. 7, 2008]).

As recently noted by the Second Circuit, "failure to conduct an FBA is a particularly serious procedural violation for a student who has significant interfering behaviors" (R.E., 694 F.3d at 194). While the May 2010 IEP provided the student with support and scaffolding, sensory breaks, access to sensory tools, positive reinforcement, self-regulation strategies, access to a quiet space when she felt overwhelmed or anxious, and therapeutic listening, I find these supports do not appropriately address the student's significant interfering behaviors, including her running (Dist. Ex. 7 at pp. 5-6). Accordingly, I find that the CSE's failure to comply with State regulation and conduct an FBA and BIP deprived the student of educational benefits as the CSE failed to consider the special factors related to the student's behavior concerns that impeded her learning.

3. Adequacy of Evaluative Information

I will now briefly address the parties' other contentions regarding the adequacy of the evaluative information before the May 2010 CSE. Regarding the parents' contentions about the absence of a social history and a medical assessment before the May 2010 CSE, I concur with the IHO's findings that the meeting minutes reflect that the CSE considered the parents' concerns regarding the student's health and medical needs, and the May 2010 IEP also indicates the student's dietary needs as well as her gastrointestinal concerns (Dist. Exs. 6 at p. 2; 7 at p. 7; see IHO

[6] The student's Rebecca School speech-language pathologist indicated that the parent requested a 1:1 paraprofessional for the student at the CSE meeting, but that the CSE "dismissed" the request and there was no discussion of it (Tr. pp. 785-86).

Decision at p. 8).[7] Thus, I decline to find under the circumstances of this case, especially when the parents were present at the CSE meeting and had the opportunity to raise their concerns, that the absence of a social history and medical assessment denied the student a FAPE (see Application of a Student with a Disability, Appeal No. 11-021). Although the IHO found that it would have been advantageous for the district to have conducted a classroom observation, I note that since the May 2010 CSE was conducting the student's annual review, a classroom observation was not required under State regulation (IHO Decision at p. 8; see 8 NYCRR 200.4[b][iv],[f]). Moreover, I find that the participation of the student's teacher and providers from the Rebecca School at the May 2010 CSE meeting sufficiently compensated for the lack of a classroom observation by the district and mitigated any potential harm to the student (see Application of the Dep't of Educ., Appeal No. 08-042). Accordingly, the IHO's decision, to the extent that he found the lack of a classroom observation contributed to a denial of a FAPE, must be reversed (see IHO Decision at pp. 8, 10).

Further, notwithstanding my above determination that the May 2010 lacked sufficient information regarding the student's behaviors, I find that the CSE had otherwise sufficient information to formulate the student's present levels of performance in the May 2010 IEP, which contrary to the IHO's finding, consisted of more than merely "teacher assessments" (IHO Decision at p. 8). 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 from where that information must come (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. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]; see also E.A.M. v. New York City Dep't. of Educ., 2012 WL 4571794, at *9-*10 [S.D.N.Y. Sept. 29, 2012]). Accordingly, the IHO's decision must also be reversed to the extent he found a denial of a FAPE based on the May 2010 CSE's consideration of teacher estimates for determining the student's current functional levels (see IHO Decision at p. 8).

B. Assigned School

In his interim decision, the IHO determined that the district must demonstrate the appropriateness of the school to which the student was assigned for summer 2011 as well as the assigned school that the student was designated to attend for the remainder of the school year (Interim IHO Decision at p. 3). However, the IHO did not address the parties' claims relating to the appropriateness of the assigned schools because he had determined that the district failed to offer the student a FAPE (IHO Decision at p. 10). The district appeals the IHO's interim decision, contending that the IHO erred in directing the district to show the appropriateness of both assigned schools as the district asserts that it only had to show that it had a program and seat available to the student at the start of the 2010-11 school year. The parents cross-appeal the IHO's decision, asserting that the IHO failed to address the parents' claims regarding the appropriateness of both assigned schools.

Generally, challenges to an assigned school involve implementation claims, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in

[7] Moreover, given that the May 2010 CSE was conducting the student's annual review, a medical assessment was not necessary (8 NYCRR 200.4[f][1]).

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]),[8] and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L., 2012 WL 4891748, at *15-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; c.f. E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Therefore, 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 the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

In this case, it is undisputed by the parties that the parents rejected the IEP and enrolled the student at the Rebecca School for the 2010-11 school year (Parent Exs. E; H). Thus, the district was not required to establish that the assigned school was appropriate, and I concur with the district's contentions that a meaningful analysis of the parents' claims with regard to the student's particular public school assignments would require the IHO—and an SRO—to speculate to determine what might have happened had the district been required to implement the student's IEP. Under the circumstances of this case, particularly where both the IHO and I have found that the district failed to offer the student a FAPE, I find no reason to disturb the IHO's determination not to make alternative findings about whether the district would have deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE had the student attended the district's recommended program. Accordingly, I will dismiss the parents' cross-appeal.

Moreover, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6). The IDEA and State regulations also 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 at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in

[8] 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. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

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).

In order to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063).[9] Additionally, the United States Department of Education (USDOE) has also clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).[10]

Here, the hearing record indicates that the district had a program available to the student at the start of the school year and the parents rejected the district's program and enrolled the student at the Rebecca School for the 2010-11 school year (Tr. p. 565; Parent Exs. E; H). Notwithstanding the parents' assertions that the hearing record weighs against a finding that the district offered the student a FAPE, because of the possible change in location of the delivery of the student's IEP, the parents have not submitted any legal authority to show that a future change in school buildings amounts to an actionable claim pursuant to the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *16 [S.D.N.Y. Aug. 23, 2012]). Accordingly, the IHO erred in directing the district to defend both assigned public school sites at the impartial hearing, and the interim order must be reversed.

C. Unilateral Parental Placement

Next, regarding the appropriateness of the parents' unilateral placement of the student at the Rebecca School for the 2010-11 school year, although the district argues that the Rebecca School did not constitute an appropriate placement for the student because it did not address the student's significant sensory needs, the evidence contained in the hearing record favors a conclusion to the contrary. As discussed in greater detail below, I find that the district's assertion

[9] The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504).

[10] Additionally, neither the IDEA nor State regulations require a district to maintain a particular classroom opening for a student while the student is enrolled elsewhere in a private school (Application of a Student with a Disability, Appeal No. 11-008 [noting that districts may modify class assignments in light of changing circumstances]).

is unpersuasive, and uphold the IHO's determination that the Rebecca School served as an appropriate placement for the student for the 2010-11 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement" (Gagliardo, 489 F.3d at 112 [quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 (2d Cir. 2006)]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112 [quoting Frank G., 459 F.3d at 364-65]).

According to the Rebecca School program director (program director), the Rebecca School provides instruction to students, ages 4-21, who exhibit neurodevelopmental delays in relating and communicating, with a number of students having received diagnoses of autism spectrum disorders (Tr. pp. 445, 447). The hearing record reflects that the Rebecca School primarily utilizes a

developmental individual difference relationship-based model for instruction (Tr. p. 447). The student attended the Rebecca School during the period of July 2009 through June 2011, and the hearing record indicates that she was in a classroom comprised of nine students, one head teacher, three teaching assistants, and one paraprofessional assigned to another student (Tr. pp. 460-61; Parent Ex. C at p. 1). During the 2010-11 school year, the student received three weekly 30-minute sessions of OT, two weekly 1:1 sessions of speech-language therapy, and one weekly speech-language therapy session in a cooking group in a dyad, in addition to music therapy (Tr. pp. 412, 743; Parent Exs. C at pp. 1, 4-5; D at pp. 1, 5-6).

Although the district claims that the Rebecca School did not constitute an appropriate unilateral placement, because the school did not provide the student with OT in accordance with her IEP mandates, a review of the hearing record favors a conclusion that the Rebecca School provided the student with a number of supports specially designed to meet the student's sensory needs. Specifically, the student received three 30-minute sessions of OT per week, which primarily took place in the sensory gym (Tr. p. 412). The student's occupational therapist also testified that he worked with the student in the classroom to aid in transitions, and that he trained his colleagues at the Rebecca School to take the student to the sensory gym on a regular basis (Tr. pp. 413-14). According to the student's occupational therapist, the student exhibited a "sensory seeking profile," and required sensory seeking input throughout the day (Tr. p. 416). He further noted that in order to maintain self-regulation, sensory input was very important to the student, and with the proper sensory input, the student was better able to engage with peers and staff and self-regulate (id.). Accordingly, the student's occupational therapist explained that he worked with Rebecca School personnel to develop an understanding of which sensory equipment was best suited to provide the student with the necessary sensory support throughout the day (Tr. pp. 414, 701). Similarly, Rebecca School personnel implemented a sensory diet for the student, which included protocol such as twice daily brushing, the use of weighted vest, and the provision of number of sensory breaks throughout the school day (Tr. pp. 414-15, 701). The Rebecca School also provided the student with other sensory materials in the classroom to address her sensory needs, such as a trampoline and a "foof chair" (Tr. pp. 459-60; 701). Additionally, the Rebecca School educational supervisor (educational supervisor) testified that to further address the student's sensory needs, the student used a "body sock," which the educational supervisor described as a lycra sack, in which the student would climb (Tr. p. 702). The hearing record also reflects that as an additional tool to address the student's sensory needs, the Rebecca School provided the student with frequent access to the sensory gym, where the student utilized equipment such as the swings, and a small playhouse (Tr. pp. 412, 460, 702, 734).

In addition, to address the student's academic needs, the program director from the Rebecca School testified that for reading, Rebecca School personnel employed a "balanced literacy" approach (Tr. p. 468; see Tr. p. 704). Similarly, Rebecca School personnel indicated that in order to build the student's sight word vocabulary, the student's teacher used emotionally relevant words, such as the student's name, her peers' names, and the student's favorite foods (Tr. pp. 468; 702). According to the educational supervisor, keeping the student regulated and engaged throughout the lesson was a primary goal in reading for the student, and, therefore, the student's teacher chose read-aloud books for the student, which the educational supervisor described as having a "sing-song" quality to them, that effectively enticed the student in staying engaged (Tr. p. 703). For math, the educational supervisor testified that during the 2010-11 school year, the student worked on concepts such as 1:1 correspondence, rote counting, identifying numbers, in addition to understanding her daily schedule (Tr. p. 704). The student frequently received math instruction in a 1:1 setting, and in light of the student's difficulties with attention and regulation, Rebecca School personnel broke down lessons into very small increments of time, with repetition throughout the

day (Tr. p. 705). Furthermore, due to the student's difficulties with attention and regulation, Rebecca School personnel presented math concepts to the student around "highly motivating" activities, such as snack (id.). The educational supervisor further noted that the student experienced difficulty attending to "super-structured" activities, unless they involved one of her passions (id.).

Lastly, although the district correctly notes that a finding of progress is not dispostive of a determination of appropriateness, the hearing record favors the IHO's determination that the student progressed in areas of need during the 2010-11 school year at the Rebecca School (IHO Decision at p. 13; see Frank G., 459 F. 3d at 364). According to the May 2011 Rebecca School Interdisciplinary Report of Progress Update, the student had improved her ability to relate and engage with others, with less adult support (Parent Ex. C at p. 1). The student had also increased her ability to remain in longer interactions with adults and peers across a wider range of games and activities (id.). Moreover, the student's teacher noted that improving the student's initiation was a major focus for the student, and according to the May 2011 report, the student could initiate with a wider range of adults across a broader range of topics (id. at p. 2). With respect to reading, in May 2011, the student could attend group read alouds for up to ten minutes, and required less verbal cueing (id.). The report further indicated that since December 2010, the student had shown gains in her ability to be an active member of the classroom community, and consistently joined group activities and participated in morning meeting with decreased adult support (id. at p. 4).

Based upon the foregoing, I find no reason to disturb the IHO's determination that the Rebecca School constituted an appropriate unilateral placement for the student for the 2010-11 school year.

D. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they

were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

In this case, on April 2, 2010, the student's father signed a contract with the Rebecca School for the 2010-11 school year and paid a nonrefundable deposit of $2500 (Tr. p. 839; Parent Ex. H). According to the May 2010 CSE meeting minutes, the student's father advised the May 2010 CSE that he entered into an enrollment agreement with the Rebecca School in order to hold a seat for the student for the upcoming school year; however, he was willing to look at a public school placement (Dist. Ex. 6 at p. 2). Likewise, at the impartial hearing, the student's father testified that he would have accepted a public school placement he believed to be appropriate for the student despite having signed the contract with the Rebecca School (Tr. p. 839). Accordingly, I find that the hearing record does not support a conclusion that the parents never intended to enroll the student in a public school. The hearing record further indicates that the parents utilized the CSE process and were forthcoming about their concerns surrounding the IEP during the May 2010 CSE meeting (Tr. pp. 46, 64, 66; 785; Dist. Ex. 6). Under the circumstances, I decline to find that equitable considerations do not support the parents' request for relief.

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE for the 2010-11 school year due to its failure to consider the special factors related to the student's behavior that impede her learning, and its failure to conduct an FBA and develop a BIP for the student in accordance with State regulations. I have also concluded that the parents' unilateral placement was reasonably calculated to meet the student's educational needs and that equitable considerations favor an award of reimbursement to the parents. Accordingly, although I will modify the IHO's decision to the extent that he determined that the CSE erred in considering teacher estimates and by not conducting a classroom observation, the IHO's orders awarding the parents tuition reimbursement at the Rebecca School for the 2010-11 school year and directing the CSE to reconvene to consider whether to conduct an FBA and develop a BIP in the student's current school setting are affirmed.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision dated February 27, 2012 is modified by reversing those portions which determined that the May 2010 CSE's consideration of

teacher estimates and failure to conduct a classroom observation contributed to a denial of a FAPE; and

IT IS ORDERED that the impartial hearing officer's interim order dated June 9, 2011 is reversed.

Dated: **Albany, New York**
January 23, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER