



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-070

### **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, Ilana A. Eck, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondent, Lawrence D. Weinberg, Esq., of counsel<sup>1</sup>

### **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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be sustained.

#### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, 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

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<sup>1</sup> Although the due process complaint notice and answer refer interchangeably to the student's "parent" and "parents," it appears that the student's mother was the parent directly involved in this case inasmuch as she attended each day of the impartial hearing (Tr. pp. 1, 9, 80, 165) and verified the answer; accordingly, for purposes of this decision I refer to the student's mother alone as respondent.

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 has a history of speech-language, motor, and adaptive skill delays and received services through the Early Intervention Program (EIP) and Committee on Preschool Special

Education (CPSE) (Parent Ex. G at pp. 1-2).<sup>2</sup> The student has attended the Rebecca School since September 2009 (Tr. p. 185).

On February 14, 2011, the CSE convened to conduct the student's annual review and develop the student's IEP for the 2011-12 school year (second grade) (Dist. Ex. 4 at p. 2). The CSE recommended that the student be placed in a 6:1+1 special class in a specialized school and receive related services of speech-language therapy, occupational therapy (OT), and counseling; the support of a 1:1 crisis management paraprofessional; adapted physical education; and a 12-month school year program (*id.* at pp. 1, 5, 17).<sup>3</sup>

Subsequent to the CSE meeting, the parent sent two letters to the district (Parent Ex. C at pp. 1-2). In the first letter, dated February 15, 2011, the parent indicated that she was in receipt of a "Notice of Recommended Deferred Placement" dated February 14, 2011, and would provide consent to defer the student's placement if she could visit the "actual" recommended placement by June 15, 2011, as opposed to a "sample" placement offered by the district (*id.* at p. 1).<sup>4</sup> In the second letter, dated June 7, 2011, she informed the district that the Rebecca School was "requiring" her to sign a contract and provide a deposit to the school for the 2011-12 school year in order to reserve a seat for the student (*id.* at p. 2). The parent stated that if the district did not offer the student an appropriate placement in a timely manner, it was her intention to send the student to the Rebecca School and seek tuition reimbursement at public expense (*id.*).

By final notice of recommendation (FNR) dated June 13, 2011, the district notified the parent of the school to which the student was assigned and at which his IEP would be implemented for the 2011-12 school year (Dist. Ex. 7).<sup>5</sup> In a letter dated June 27, 2011, the parent indicated that she had visited the particular public school identified by the district in the FNR and concluded that it was not appropriate for the student because, among other things, the program was not sufficiently

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (Tr. p. 4; *see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>3</sup> I remind the district that "IEPs developed for the 2011-12 school year, and thereafter, shall be on a form prescribed by the Commissioner" (8 NYCRR 200.4[d][2]; *see* "Model Forms: Student Information Summary and Individualized Education Program (IEP)," Office of Special Educ. Mem. [Jan. 2010], [available at](http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm) <http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm>; *see also* "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents: Miscellaneous Questions," Question 2, Office of Special Educ. [April 2011], [available at](http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-misc.htm) <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-misc.htm>).

<sup>4</sup> The notice of recommended deferred placement referenced in the parent's February 15, 2011 letter is not part of the hearing record.

<sup>5</sup> The hearing record contains no indication that the district provided the parent with written notice a reasonable time prior to proposing to or refusing to initiate or change the identification, evaluation, or educational placement of the student that met the regulatory requirements by containing a description of the action the CSE planned to take, an explanation for the action, a description of the evaluations relied on by the CSE, a description of other placements considered by the CSE and the reasons those options were rejected, and a description of other factors that were relevant to the planned action (*see* 34 CFR 300.503; 8 NYCRR 200.5[a]; *see also* [Letter to Chandler](#), 112 LRP 27623 [OSEP 2012]). I remind the district that "[p]rior written notices issued during the 2011-12 school year, and thereafter, shall be on a form prescribed by the commissioner" (8 NYCRR 200.5[a][1]; *see* "New York State Model Forms: Prior Written Notice (Notice of Recommendation) Relating to Special Education," VESID Mem. [Jan. 2010], [available at](http://www.p12.nysed.gov/specialed/formsnotices/PWN/memo-jan10.htm) <http://www.p12.nysed.gov/specialed/formsnotices/PWN/memo-jan10.htm>).

structured to meet the student's needs, the program was too restrictive and would prevent the student from advancing, the curriculum was based on instructional models that had been unsuccessful with the student in the past, the program did not provide all the related services that the student required, and the school was too large and disorganized (Parent Ex. C at pp. 3-4). The parent advised the district that she rejected the recommended placement and reiterated her intention to send the student to the Rebecca School and seek "prospective reimbursement" of the student's tuition if an appropriate district placement was not found in timely manner (id. at p. 4).

### **A. Due Process Complaint Notice**

By due process complaint notice dated June 27, 2011, the parent requested an impartial hearing (Parent Ex. A). The parent asserted that by holding the student's annual review in February 2011, the CSE was precluded from considering any progress the student made during the second half of the 2010-11 school year in developing his program for the 2011-12 school year (id. at p. 2). The parent also asserted that the February 2011 IEP did not contain annual goals and short-term objectives to address all of the student's needs (id.). Furthermore, she contended that the CSE was improperly constituted; the CSE's recommendation did not comport with that of the student's Rebecca School teachers; and the recommended program's student-to-teacher ratio, level of related services, and methodology were all inappropriate for the student (id. at pp. 2-3). With regard to the assigned school, the parent asserted that the school building was too large, the methodology used was not language based and not appropriate for the student, there was insufficient opportunity for "1:1 attention," and the school did not have an occupational therapist (id. at p. 3). For relief, the parent requested, among other things, district funding for the student's Rebecca School tuition (id. at pp. 4-5).

### **B. Impartial Hearing Officer Decision**

An impartial hearing was convened on November 28, 2011 and continued on two additional hearing dates before concluding on January 19, 2012 (Tr. pp. 9-316).<sup>6</sup> In a decision dated February 28, 2012, the IHO found that the district had failed to offer the student a free appropriate public education (FAPE), the Rebecca School was an appropriate placement for the student, equitable considerations did not weigh against the parent's claim for relief, and the parent had established her entitlement to direct funding of the student's placement (IHO Decision). Specifically, the IHO found that the February 2011 IEP was deficient because: (1) certain goals in the IEP could not be implemented by the district because they relied on use of the DIR/Floortime method used at the Rebecca School; (2) the CSE did not conduct a functional behavioral assessment (FBA) and the behavioral intervention plan (BIP) included in the IEP did not accurately describe the student's interfering behaviors, provide a complete list of strategies and supports, or provide how such strategies and supports were to be implemented; and (3) there was not an available seat for the student in the assigned public school at the beginning of the 2011-12 school year (IHO Decision at pp. 15-16).

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<sup>6</sup> A hearing to determine the student's placement during the pendency of the impartial hearing was convened on September 27, 2011 (Tr. pp. 1-8). On the basis of a prior unappealed IHO decision regarding the 2010-11 school year, the IHO found that the Rebecca School constituted the student's pendency (stay put) placement (IHO Interim Decision at pp. 2-4; Tr. pp. 5-6; see Parent Ex. B).

#### **IV. Appeal for State-Level Review**

The district appeals and requests that the IHO's decision be reversed, asserting that the February 2011 IEP met the student's needs. Specifically, the district argues that the absence of a formal FBA did not render the IEP deficient, as the IEP contained goals and strategies designed to address the student's behavioral issues, as well as a BIP developed in conjunction with the parent and the student's Rebecca School teacher. With regard to the CSE's utilization of goals contained in the December 2010 Rebecca School progress report, the district contends that the hearing record does not support the IHO's determination that certain of the goals could not have been implemented in the assigned school. Furthermore, the district contends that the goals, viewed as a whole, sufficiently addressed the student's needs and deficits. Additionally, the district asserts that the IHO erred in finding that the assigned school did not have a place for the student at the beginning of the 2011-12 school year, as the parents rejected the placement prior to the time at which the district would have been required to implement the student's IEP.

The district next contends that the Rebecca School was not an appropriate placement for the student because the student did not receive all the related services specified on his IEP, the Rebecca School provided insufficient structure, and the Rebecca School did not represent the least restrictive environment (LRE) in which the student could be educated. Specifically, the district asserts that the Rebecca School provided the student with insufficient counseling and the instructors at the Rebecca School did not restrict the student's aggressive behaviors to enable him to learn. Finally, the district asserts that equitable considerations do not support the parent's request for relief because she did not intend to place the student in a district school and did not raise issues at the CSE meeting that she later contended made the district's recommended program inappropriate for the student.

The parent answers, denying the district's assertions and requesting that the IHO's determinations be affirmed. The parent also asserts additional reasons, not relied upon by the IHO, that the offered February 2011 IEP did not provide the student with a FAPE.

#### **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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

## **VI. Discussion**

### **A. Scope of the Impartial Hearing**

Initially, I note that in determining that the district failed to offer the student a FAPE, the IHO addressed issues that were not raised by the parent's due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (*Application of a Student with a Disability*, Appeal No. 09-141; *Application of the Dep't of Educ.*, Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; *B.P. v. New York City Dep't of Educ.*, 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; *M.R. v. South Orangetown Cent. Sch. Dist.*, 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; *C.F. v. New York City Dep't of Educ.*, 2011 WL 5130101, at \*11-\*12 [Oct. 28, 2011]; *C.D. v. Bedford Cent. Sch. Dist.*, 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; *R.B. v. Dep't of Educ.*, 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; *M.P.G. v. New York City Dep't of Educ.*, 2010 WL 3398256, at \*8 [S.D.N.Y. Aug. 27, 2010]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (*Application of a Child with a Handicapping Condition*, Appeal No. 91-40; see *John M. v. Bd. of Educ.*, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see *Dep't of Educ. v. C.B.*, 2012 WL 220517, at \*6-\*7 [D. Hawaii Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).<sup>7</sup>

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<sup>7</sup> To the extent that the Second Circuit recently held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (*M.H. v. New York City Dep't of Educ.*, 2012 WL 2477649, at \*28-\*29 [2d Cir. June 29, 2012]), I note that the issue of whether the goals contained in the February 2011 IEP could be implemented in the district's recommended placement (Tr. pp. 68-72) was first raised by counsel for the parent on cross examination of district witnesses. Although the district initially raised the issue of the development of the BIP contained in the IEP (Tr. pp. 60-61), such questioning was in the context of the development of the IEP and the procedures used by the CSE (Tr. pp. 47-62). The issue as addressed by the IHO went well beyond the procedures for developing the student's IEP and addressed the substantive adequacy of the BIP (IHO Decision at p. 15), a matter first testified to by the student's Rebecca School teacher on questioning by counsel for the parent (Tr. pp. 236-39). The district did not argue that the FBA and BIP were specifically appropriate to meet the student's needs in response to a claim in the parent's due process

In this case, the claims raised in the due process complaint notice cannot reasonably be read to correlate with the issues addressed by the IHO in his decision (compare IHO Decision at pp. 15-16, with Parent Ex. A at pp. 2-4) and there is no indication in the hearing record that the parent sought to amend the due process complaint notice or that the district consented to having the scope of the impartial hearing expanded; accordingly, none of these issues is properly before me.<sup>8</sup> Furthermore, although the parent set out arguments in her due process complaint notice that were not ruled on by the IHO, she does not cross-appeal the IHO's failure to rule on any of those claims. However, although I reverse that portion of the IHO's decision that the district failed to offer the student a FAPE on grounds not raised in the due process complaint notice, I will briefly review those issues that the parent raised in her due process complaint notice and now asserts on appeal as additional grounds on which to uphold the IHO's determination.<sup>9</sup>

## **B. February 2011 IEP**

### **1. Adequacy of Evaluative Information and Present Levels of Performance**

Regarding the parent's assertion that it was not appropriate to conduct the CSE meeting in February 2011 because that date was too remote in time to the next school year and prevented the CSE from considering subsequent changes in the student's performance levels, I find that the timing of the February 2011 CSE meeting did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]). Under the IDEA, a CSE is required to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR

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complaint notice and, therefore, I find that the district did not "open the door" to this issue under the holding of M.H. Finally, with respect to the IHO's finding that there was no seat available for the student in the assigned school at the beginning of the 2011-12 school year, to the extent that the district could be considered to have opened the door to the issue by eliciting testimony from a teacher at the assigned school, I note that the parents rejected the recommended placement by letter dated June 27, 2011 (Parent Ex. C at pp. 3-4) and simultaneously initiated an impartial hearing seeking tuition reimbursement (Parent Ex. A), prior to the time the district became obligated to implement the February 2011 IEP (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), and the IDEA does not require districts to maintain classroom openings for students enrolled in private schools (see Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 11-008; see also R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]).

<sup>8</sup> I encourage the parties and the IHO to make use of the provisions in State regulations for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]).

<sup>9</sup> Although the parent asserted additional challenges to the February 2011 IEP in her due process complaint notice, I consider those claims not addressed in her answer to be abandoned. Blanket statements such as the one in the answer that the parent "did not waive any issues at hearing and do not waive any issues on appeal" are insufficient to bring these issues before me where they have not been properly interposed in a cross-appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.4), which cross-appeal the district would then be permitted an opportunity to answer pursuant to 8 NYCRR 279.5.

200.4[f]).<sup>10</sup> Additionally, at the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194) and there is no indication that the timing in the instant case resulted in a loss of educational opportunity for the student. I also note that the hearing record does not reflect that at the time of the CSE meeting the parent objected to the timing of the CSE meeting, requested to meet later in the school year, that the district thereafter denied a request by the parent for another CSE meeting, or that the parent subsequently requested another CSE meeting to update the student's performance levels. Accordingly, I decline to find under the circumstances of this case a denial of a FAPE on the basis that the CSE lacked sufficient evaluative information or that the IEP did not adequately reflect the student's present levels of performance.

In developing the student's program for the 2011-12 school year, the February 2011 CSE considered a July 2009 neuropsychological consultation report, a November 2010 classroom observation, a December 2010 Rebecca School interdisciplinary report of progress, and the student's IEP from the previous school year (Tr. pp. 30-31; Dist. Exs. 5; 6 at p. 1).<sup>11</sup>

The psychologist who evaluated the student in May and June 2009 reported that the student had significant language delays, which precluded him from assimilating concepts and articulating his inner experiences (Parent Ex. G at p. 9). He opined that the student's receptive and expressive language impairments both contributed to and were a byproduct of the student's significant attending difficulties (*id.*). The psychologist reported that the student presented with symptoms and concerns—such as language delays, echolalic speech, repetitive behaviors, socialization difficulties, limited relatedness, and behavioral dyscontrol—that were characteristic of children with an autistic disorder, and found that the student met diagnostic criteria for autistic disorder and mental retardation: moderate (*id.* at pp. 1, 10).

Administration of the Stanford Binet Intelligence Scales-Fifth Edition (SB-5) yielded a full scale IQ score of 43, within the "Moderately Delayed" range of intellectual functioning (Parent Ex. G at p. 5). The psychologist found that the student displayed commensurate verbal (SS 43) and nonverbal (SS 48) abilities (*id.*). He cautioned that although the findings indicated that the student was functioning below expected levels relative to same-aged peers, the student's limited relatedness, language deficiencies, and dysregulation impinged upon the assessment of the student's intellectual and neurocognitive abilities, and as such it was difficult to accurately gauge the student's competence (*id.* at p. 8). According to the psychologist, in addition to cognitive challenges, the student exhibited significant behavioral dysregulation coupled with impairments in executive functioning (*id.* at p. 9). Additionally, based on responses from multiple informants

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<sup>10</sup> This obligation continues during the pendency of a challenge to a prior IEP (see *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 794 [1st Cir. 1984], aff'd 471 U.S. 359 [1985] ["pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law"]; Lopez v. District of Columbia, 355 F. Supp. 2d 392, 400-01 [D.D.C. 2005]; Grant v. Indep. Sch. Dist. No. 11, 2005 WL 1539805, at \*8 [D. Minn. June 30, 2005]; Norma P. v. Pelham Sch. Dist., 19 IDELR 938 [D.N.H. Mar. 15, 1993]; Letter to Watson, 48 IDELR 284 [OSEP 2007]).

<sup>11</sup> The July 2009 neuropsychological consultation report indicated that the evaluation of the student took place in May and June 2009 (Parent Ex. G at p. 1).

the student had been slow to acquire age appropriate skills in a number of adaptive domains, including socialization/communication, personal care skills, and community living (id.).

The psychologist made numerous recommendations for promoting the student's development of compensatory skills and fostering his academic success, including that the student be placed in a small, structured class (8:1+1 maximum) and receive related services of speech-language therapy and OT (Parent Ex. G at p. 10). Due to the student's significant behavioral difficulties within the school environment, the psychologist recommended that the student's teacher or classroom aide implement behavioral interventions to address specific behavioral challenges and allow for enhanced monitoring of the student's school behavior (id. at p. 11). The psychologist further opined that the student would likely benefit from an individual paraprofessional (id.). In addition to scholastic interventions, the psychologist recommended that the student receive intensive applied behavior analysis (ABA) and speech-language therapy after school to augment and reinforce concepts introduced at school, and further suggested that the student may be a candidate for psychopharmacological interventions to address difficulties with sustained attention, distractibility, and affective dysregulation (id.). The psychologist also recommended that the student's parents participate in a parent training program to aid them in developing techniques to modify and manage the student's behavior and provide a forum for the discussion of issues and conflicts that interfered with the student's development at home and in school (id.).

The February 2011 CSE also considered a December 2010 Rebecca School interdisciplinary report of progress that described the student's program at school, as well as his performance with regard to academics, emotional development, motor skills and communication (Parent Ex. F). As part of the December 2010 progress report, the student's Rebecca School teacher commented on the student's functional emotional development, beginning with his ability to regulate his attention and behavior (id. at p. 1). The student's teacher reported that the student was generally very tired when he arrived at school and would sometimes sleep after getting off the bus (id.). However, she also stated that the student would engage in physical play and movement as soon as he arrived, in order to help activate and regulate his body (id.). She noted that modulation and pacing were very important because the student could easily become "up-regulated" and overly excited (id.). The teacher reported that the student benefited from the use of visual supports during transitions and that with these supports the student was able to join the class for group activities for short periods of time (id.). The teacher indicated that the student also had periods of dysregulation which occurred when staff set limits, a peer tried to take a toy, or the student could not engage in certain activities (id.). According to the teacher, when the student was dysregulated he would often vocalize loudly, bang or throw his toys, climb onto furniture, and act out toward staff by biting, scratching, or hitting (id. at pp. 1-2). The teacher explained that the student was able to re-regulate with the help of sensory supports such as deep pressure, compression vests, and jumping on a trampoline, and that the student benefited from slow and quiet affect, taking breaks from the classroom, being redirected to another preferred activity, or turning the interaction into a game (id. at p. 1). According to the teacher, the student also demonstrated a limited repertoire of self-regulating strategies that included hyper-focusing on toys and engaging in repetitive movements (id. at pp. 1-2). The teacher suggested that the student's aggression stemmed from his difficulty understanding and predicting his environment (id. at p. 2). She reported an increase in the student's ability to engage in shared attention, noting that the student would watch as a staff member or peer played with a toy and smile to show that he liked what they were doing (id.).

With respect to engagement and relating, the teacher reported that the student was most successful when engaging in physical play and that during such play he was very intentional and would seek purposeful moments of interaction (Parent Ex. F at p. 2). She noted that the student related best while experiencing feelings of excitement, happiness, and silliness (id.). The teacher reported a change in the student's willingness to be part of a group, noting that while the student initially preferred to do most activities alone, he now allowed adults to enter his space to make small changes to his play and joined classmates for snack, lunch, and a portion of group activities (id.). The teacher indicated that the student was also referencing his peers more and showed interest in them by following them around, touching them very gently, or looking at their faces very closely (id.). With respect to two-way purposeful emotional interaction, the teacher reported that the student opened and closed circles of communication to express his wants or needs by using vocal approximations, facial expressions, gestures, signs, and pictures (id.). She reported that the student most often initiated with staff by taking their hand or gaining eye contact and smiling (id.). She noted, however, that the student's two-way interactions remained on his terms and that he could become frustrated if an adult attempted to re-initiate interaction after he pushed them away (id.).

The teacher also noted an increase in the student's ability to enter into two-way problem solving and stay in a continuous flow (Parent Ex. F at p. 3). She described how staff had been able to use the student's motivation for physical games, such as chase, to expand and lengthen his interactions (id.). The teacher noted, however, that the student's ability to remain in a continuous flow decreased when the demand was raised or a challenge was added to the interaction (id.). The teacher reported that the student demonstrated emerging capacities with respect to creating symbols and ideas (id.). She stated that while in the past the student would line up animal figurines in a very routine manner, he had begun to alter the way in which he arranged the figurines and added a movement component to his play (id.). According to the teacher, while the student's play sequences were repetitive, at times he would engage in short, pretend play interactions initiated by adults (id.).

The Rebecca School teacher also provided an overview of the student's academic curriculum, as well as detailing his academic skills (Parent Ex. F at pp. 3-6). The teacher reported that at the beginning of the school year the student would not join the class literacy group, whereas by December 2010 he would sit and listen to an entire story and participate in the group by placing story props on a Velcro board and approximating words from the story (id. at p. 4). According to the teacher, the student was able to read his own name and to demonstrate emerging reading comprehension through anticipation of upcoming events in familiar stories (id.). The teacher reported that the student's word recognition program focused on sight words that were emotionally relevant and meaningful to him, such as favorite toys or activities and the names of peers, teachers, and family (id.). The teacher stated that the student demonstrated auditory comprehension by following familiar one-step directions and demonstrated understanding of pictorial representation by walking to the door or taking a teacher's hand in response to being shown a picture of the gym (id.). The teacher reported that the student's math program focused on number sense, 1:1 correspondence, measurement, and concepts of time and space (id.). She explained that visual spatial activities were used to supplement the student's math program and address sequencing, visual tracking, and body awareness (id.). According to the student's teacher, the student was able to count to three when staff initiated the sequence, showed an emerging understanding of 1:1 correspondence, inconsistently used the word "more" to request an activity or object, understood

and sequenced two activities using visual supports, and visually tracked objects and used eye-hand coordination to complete an activity (id. at p. 5).

With respect to social studies, the teacher indicated that the student had shown an increased interest in peers and although he was not yet allowing peers to join in his play, he would tolerate it for a few minutes with adult support (Parent Ex. F at p. 5). The teacher reported that the student was able to navigate the school building and enjoyed community outings, but he also showed limited safety awareness and would run out of the classroom, climb on furniture, and hang on classroom pipes (id.). The teacher noted; however, that the student demonstrated an understanding of basic classroom rules in the sense that he knew the unsafe behaviors were not allowed and that he would gain attention by engaging in them (id.). According to the teacher, the student was able to perform some activities of daily living skills (ADLs), such as independently using the bathroom and dressing himself, although he required adult support to brush his teeth (id.). The teacher reported that in science class, the student gravitated toward water and sand play, as well as play dough, and that he liked mixing textures (id. at p. 6).

The student's occupational therapist at the Rebecca School reported improvements in the student's ability to transition and greater flexibility in the student's play schemes (Parent Ex. F at p. 6). She reported that the student demonstrated the ability to self-regulate when he was in a familiar setting and was able to participate in routine solitary play but that when the student was upset or his space was invaded, he often became aggressive and hit, scratched, and spit at others (id.). According to the occupational therapist, the student benefited from proprioceptive input, which allowed him to understand where his body was in space but noted that when the student was upset it was difficult to provide him with that type of input (id.). The occupational therapist indicated that the student responded well to "squeezes," massage, and joint compression (id.). The occupational therapist suggested that the student sought vestibular input through his visual system and reported that he moved preferred toys through his visual field in a particular horizontal or vertical direction (id. at p. 7). She noted that when the student received vestibular input he often demonstrated a calm demeanor and an increase in attention (id. at p. 6). The occupational therapist reported that the student demonstrated the ability to initiate, organize, and execute familiar and routine gross motor activities (id.). She indicated that the student demonstrated interest in fine motor activities, such as coloring and writing, but demonstrated inconsistent use of a static tripod grasp (id. at p. 7). According to the occupational therapist, the student relied primarily on his visual system to "take in the world" and hyper-focused on figurines or activities within a close visual distance when his environment became challenging for him (id.).

The student's speech-language pathologist at the Rebecca School reported that the focus of the student's speech-language therapy was on increasing and improving the student's overall oral motor skills, engagement, shared attention, ability to maintain a continuous flow of communication, and use of functional forms of communication such as signs and pictures (Parent Ex. F at p. 7). She described the student as primarily a nonverbal communicator who used gestures, vocalizations, verbal approximations/repetitions signs, a communication book, and facial expressions to express his wants and needs (id.). The speech-language pathologist's description of the student was similar to that of the teacher and occupational therapist with respect to the student's play skills, behavior, and communication skills (id.). In terms of receptive language, the speech-language pathologist reported that the student responded to his name and the names of others and that he was able to follow one-step related directions in context, but required more gestural support

for novel directives (id. at p. 8). The speech-language therapist stated that the student had difficulty identifying attributes but responded to gestural support to categorize (id.). With respect to expressive language, the speech-language pathologist reported that the student exhibited many characteristics of speech apraxia (id.). She noted that the student showed the ability to comprehend symbols, used a communication book to aid in transition and to independently and spontaneously request places, and responded to Prompts for Restructuring Oral-Muscular Phonetic Targets (PROMPT) (id.). According to the speech-language pathologist, the student's oral mechanism appeared to be structurally intact but the student exhibited decreased range of motion, strength, and coordination (id.).

The December 2010 Rebecca School progress report indicated that the student received counseling one time per week using the DIR/Floortime model (Parent Ex. F at p. 8). The report included goals related to functional emotional development, academics, sensory processing, motor planning, visual spatial skills, pragmatic language, receptive and expressive language, oral motor skills, and socialization (id. at pp. 10-12).

Review of the February 2011 IEP and the minutes of the February 2011 CSE meeting in conjunction with the July 2009 neuropsychological consultation report, the November 2011 classroom observation, and the December 2010 Rebecca School progress report reflects that the February 2011 CSE appropriately described the student based on the available reports, identified the student's needs, and developed adequate goals and short-term objectives for the student that were sufficiently aligned to his needs (see Dist. Exs. 2; 4-6; Parent Exs. F-G).

Minutes from the February 14, 2011 CSE meeting reflected the participation of the student's mother and Rebecca School staff in the development of the student's IEP for the 2011-12 school year (Dist. Ex. 6). In addition, the resultant IEP reflected the documentary information reviewed by the CSE, as well as the discussion that took place at the CSE meeting (compare Dist. Ex. 4, with Dist. Exs. 2; 6, and Parent Exs. F-G). To address the student's global delays and need for significant support throughout the school day, the CSE recommended that he be placed in a 6:1+1 special class in a specialized school (Tr. pp. 32-33; Dist. Ex. 4 at pp. 1, 17). In addition, the CSE recommended environmental modifications and human/material resources to address the student's academic management needs, including the use of visual and verbal supports, gestural support, sensory breaks, and visual and verbal warnings for class activities and transition (Dist. Ex. 4 at p. 3). The recommended IEP included goals related to pre-academic readiness skills, ADLs, and participation in unfamiliar and group activities (id. at pp. 6-7, 14).

To address the student's social/emotional needs, the CSE recommended that the student receive individual counseling one time per week (Dist. Ex. 4 at p. 17). The CSE also recommended environmental modifications and human/material resources to address the student's social/emotional management needs including the use of visual supports during transitions, co-regulation strategies, sensory supports such as deep pressure and vestibular and proprioceptive input, engagement with preferred adults, classroom breaks, slow and quiet affect, and redirection to a preferred activity (id. at p. 4). The recommended IEP included counseling goals related to increasing periods of regulation, increasing the frequency and duration of circles of communication, and engaging with peers (id. at pp. 11-12). The IEP indicated that the student's behavior seriously interfered with instruction and that he required additional adult support and in response, the CSE recommended that the student be provided with a 1:1 crisis management

paraprofessional (id. at pp. 16-17). The CSE also developed a BIP for the student, which outlined his interfering behaviors and proposed intervention strategies, and attached it to the student's IEP (id. at p. 18). To the extent that the student's behavior problems were caused, in part, by sensory processing difficulties and difficulty communicating, the CSE recommended that the student receive related services of OT and speech-language therapy (id. at p. 17). With respect to OT, the CSE recommended that the student receive individual therapy for four 30-minute sessions per week and one 30-minute session per week in a dyad (id.).

The CSE also recommended environmental modifications and human/material resources to address the student's health and physical management needs including the provision of occupational therapy and the use of joint compression, support to increase the student's food repertoire, and use of a communication book (Dist. Ex. 4 at p. 5). The proposed IEP included goals related to processing and integrating sensory information, motor planning and sequencing, and visual spatial skills (id. at pp. 8-9). The CSE also recommended the student for adapted physical education (id. at p. 5). To address the student's speech-language needs the CSE recommended that the student receive individual speech-language therapy for four 30-minute sessions per week and one 30-minute session per week in a dyad (id. at p. 17). The proposed IEP included goals related to engagement/pragmatic language, receptive and expressive language, and oral motor skills (id. at pp. 9-10).

Accordingly, based on the foregoing, I find that the February 2011 CSE had sufficient information relative to the student's present levels of academic achievement and functional performance at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of the Dep't of Educ., Appeal No. 12-010; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).<sup>12</sup>

## **2. IEP Goals**

The student's February 2011 IEP included 16 annual goals and 40 short-term objectives (Dist. Ex. 4 at pp. 6-14). Of the 40 short-term objectives contained in the IEP, nine were reported as having been met in the May 2011 Rebecca School interdisciplinary report of progress that was not available at the time of the CSE meeting (compare Dist. Ex. 4 at pp. 6-14, with Parent Ex. H at pp. 6-12). In her post hearing memorandum, the parent argued that the development of the student's IEP in February was inappropriate because certain of the short-term objectives contained therein were met by the student prior to the time that the district would have been required to implement the IEP (IHO Ex. I at pp. 3-5). While the parent places much emphasis on this fact, the thrust of the parent's argument leads less to the question of whether the February 2011 IEP was inappropriate at the time it was developed, and instead leads more to the questions of whether the IDEA required the district to develop the IEP on a schedule preferred by the parents and whether the district acted reasonably with respect to the procedures called for by the IDEA and State

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<sup>12</sup> I also note that the district's school psychologist testified that because the Rebecca School issued progress reports in December and May, the CSE would not have been in possession of a subsequent progress report unless the CSE meeting was held in late May or early June (Tr. pp. 35-36).

regulation in light of the circumstances in this case.<sup>13, 14</sup> It is undisputed that the May 2011 Rebecca School interdisciplinary progress report had not yet been prepared at the time of the February 2011 CSE meeting; however, it does not follow that the district was required to delay scheduling the meeting until the end of the school year because while the IDEA and State Regulations require the CSE to meet "at least annually" (see 20 U.S.C. § 1414[d][4][A] [emphasis added]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), they do not preclude additional CSE meetings, prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). Additionally State procedures contemplate changes to an IEP insofar as parents, teachers and administrators are all empowered to refer the student to the CSE if any of those individuals has reason to believe that the IEP is no longer appropriate (8 NYCRR 200.4[e][4]). Consequently, I am not convinced that the district violated any procedures by deciding to conduct the student's annual review in February 2011.

The inquiry does not, however, end there, since the parent's concern—the amount of time, or delay, between the February 2011 CSE meeting and the proposed implementation of the IEP in July 2011—still remains unanswered. The IDEA and state regulations provide that "as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP" (34 CFR 300.323 [c][2]; see 8 NYCRR 200.4[e][3], [7]). As the Second Circuit has explained, "'[a]s soon as possible' is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay" (*D.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 514 [2d. Cir. 2006]).<sup>15</sup>

In this case, the evidence shows that after the CSE meeting was conducted, the district almost immediately attempted to obtain the parent's consent to delay implementation of the IEP by sending a "Notice of Recommended Deferred Placement" dated February 14, 2011 (see Parent Ex. C at p. 1). On February 15, 2011 the parent indicated that she was amenable to some delay and noted her understanding that the recommendations had been designed for the 2011-12 school year; however, she wanted to see the precise public school site that the student would attend no later than June 15, 2011 (Parent Ex. C at p. 1). Neither party nor the IHO specifically elicited any information that appears in the hearing record regarding why the parties were willing to delay implementation of the IEP.<sup>16</sup> The answer, however, may be inferred from other evidence in the hearing record and is fairly obvious: the parent had already taken the position that the district's

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<sup>13</sup> In this case, the hearing record shows that the district was, in fact, running out of time to ensure timely review of the student's IEP insofar as the prior annual review for the 2010-11 school year had been conducted on February 24, 2010 (Parent Ex. B at p. 3).

<sup>14</sup> I note however, that the district must remain flexible enough to schedule CSE meetings at a mutually agreeable time and place (34 CFR 300.322 [a][2]; 8 NYCRR 200.5[d][1][ii]).

<sup>15</sup> The Second Circuit also carefully cautioned that the flexibility in the requirement should not be interpreted to mean it lacks a breaking point (*D.D.*, 465 F.3d at 514).

<sup>16</sup> Not even the Notice of Recommended Deferred Placement, which was clearly available prior to the time of the impartial hearing, was submitted into evidence.

recommendations for the 2010-11 school year were inappropriate and had exercised her option to unilaterally placed the student at the Rebecca School for the 2010-11 school year and seek funding at public expense in another impartial hearing and, consequently, the student was attending the Rebecca School at the time of the CSE meeting and issuance of the Notice of Recommended Deferred Placement (see Parent Ex. B). I find that neither party seriously contemplated that the student would be removed from the Rebecca School and reenrolled in the public school during the 2010-11 school year in order to take services under the February 2011 IEP. Under these circumstances, it was not unreasonable for the district to delay implementation of the IEP, and I find no authority to support the conclusion that a parent could unilaterally remove a student from the public school and then demand that the district implement the student's IEP in the public school without delay. If, however, there is an excusable delay and a parent ultimately elects to enroll the student in the placement offered by the public school, I would expect that, upon implementing the student's IEP and monitoring the student's progress, the student's teachers, service providers, and district administrators would in good faith adhere to the IDEA procedures and propose necessary modifications to the IEP if the annual goals or short term objectives had become outdated due to the delay (8 NYCRR 200.4[e][4]).

Even assuming for the sake of argument that the district violated the procedures for conducting the CSE meeting, as discussed in greater detail below, I find that the remaining goals and short-term objectives in the February 2011 IEP were sufficient to address the student's demonstrated needs and were designed to enable him to make progress.<sup>17</sup>

As an initial matter, I note that the parent and the Rebecca School staff participated in the development of the IEP goals and that the goals were modified in accordance with their input (Tr. pp. 53-57; Dist. 6 at p. 1). In addition, a representative from the office of the parent's counsel was present during the CSE meeting and there is no indication in the hearing record that the parent, the Rebecca School staff, or the parent's representative objected to the IEP goals at the time they were developed.

I understand the parent's concern and what may be her preference that the district schedule her son's annual review meeting as close as possible to the beginning of the 2011-12 school year. However, in light of the evidence presented regarding the facts in this case, there is insufficient basis to hold that the February 2011 IEP was inappropriate to address the student's needs because he had completed certain of the short-term objectives contained therein prior to the time in which

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<sup>17</sup> The parent's argument neither incorporates nor rejects a particular vantage point from which the February 2011 IEP should be viewed or whether evidence postdating the IEP should be considered retrospectively. To date, the Second Circuit has not adopted a bright line test on this issue (D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 599 [2d Cir. 2005]), and district courts have adopted several approaches depending on the particular case (see C.F. v. Dep't of Educ., 2011 WL 5130101, at \*8 [collecting cases]; see also J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 636 n.26 [S.D.N.Y. 2011] [noting the Second Circuit's use of retrospective evidence in Frank G. v. Board of Educ., 459 F.3d 356, 366 (2d Cir. 2006) but opting to use a prospective approach in the case before the court]; Antonaccio v. Bd. of Educ. of Arlington Cent. Sch. Dist., 281 F.Supp.2d 710, 724 [S.D.N.Y. 2003]). The district's description of a bright line test for retrospective evidence regarding an IEP overstates the Second Circuit's agreement with the First Circuit's approach in Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir.1990), at least at the time D.F. was decided (see Pet. ¶ 39). The quotation referenced by the district in its petition represents not the Second Circuit's holding but its recitation of the holding in Roland M., and its decision not to adopt that standard in the absence of further development of the record in that case (D.F., 430 F.3d at 599-600).

it was scheduled to be implemented. In particular, I note that the parent raised no specific challenges to any of the goals included on the IEP, and that short-term objectives are intended to consist of "measurable intermediate steps between the student's present level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]).<sup>18</sup> Although the May 2011 Rebecca School interdisciplinary report of progress indicated that approximately nine of the forty short-term objectives had been met (Parent Exs. H at pp. 6-7, 9, 11-12; K at pp. 6, 8, 10-14), there is no argument that the remaining goals and short-term objectives were insufficient to address the student's needs, except insofar as the parent asserts that the February 2011 IEP did not contain visual spatial, social studies, or science goals as found in the Rebecca School's December 2010 progress report (see Answer ¶ X). A review of that December 2010 progress report shows that it included visual spatial goals in two sections (Parent Ex. F). The academic section of the progress report included visual spatial goals related to improving the student's ability to participate in activities that focused on body awareness and visual tracking (Parent Ex. F at p. 11). The progress report also included visual spatial goals in the OT section related to scanning a large environment to locate a hidden yet familiar requested object, identifying own body parts when verbally requested, and putting away an activity with minimal verbal and gestural cues (*id.*). In addition, the December 2010 progress report included social studies goals, requiring the student to clean up his snack with no more than two verbal prompts and develop greater independence with tooth brushing, and a science goal, requiring the student to explore new sensory materials of varying textures for a minimum of three minutes (*id.*).

Despite the parent's assertions to the contrary, the February 2011 IEP included visual spatial goals and a social studies goal similar to those found in the December 2010 Rebecca School progress report. With respect to the visual spatial goals, the February 2011 IEP included short-term objectives related to scanning a large environment to locate a familiar yet hidden toy and having the student identify his own body parts when verbally requested (Dist. Ex. 4 at p. 9). In addition, the IEP included a short-term objective related to tooth brushing, similar to the Rebecca School report's social studies goal (*id.* at p. 14). With respect to the science goal, the December 2010 progress report indicated that the student gravitated toward water and sand play and play-dough, and that he was interested in mixing different textures (Parent Ex. F at p. 6). However, as noted above, the progress report included a science goal targeting the student's exploration of sensory materials of varying textures (*id.* at p. 11). While this science goal does not appear in the student's IEP, the IEP does provide for sensory exploration. Specifically, the proposed IEP included a short-term objective requiring the student to participate in a sensory diet, twice daily, consisting of tactile and proprioceptive input (Dist. Ex. 4 at p. 8). In addition, the IEP included a goal requiring the student to tolerate oral motor exercises to decrease tactile defensiveness and tolerate and taste new foods of various tastes and textures (*id.* at p. 11). I find that these short-term objectives addressed, among other things, the student's weaknesses in sensory integration and sensory processing and allowed for sensory exploration.

Viewing the IEP as a whole, I cannot conclude that the IEP was not reasonably calculated to enable the student to receive educational benefits (*Karl v. Bd. of Educ.*, 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a

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<sup>18</sup> I remind the parent that should she desire amendment of the student's IEP, she may refer the student for review by the CSE to consider updated information about the student's present levels of functional performance (8 NYCRR 200.4[e][4]; see 34 CFR 300.324[b][1][ii]; 8 NYCRR 200.4[f][2]).

FAPE, "the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole"); see also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 30 [1st Cir. 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; Bell v. Bd. of Educ., 2008 WL 5991062, at \*34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]). In light of the evidence above, I find that the district offered the student an appropriate placement that was reasonably calculated to enable the student to receive educational benefits.

### **C. Pendency**

As a final matter, I note that the even though the district offered the student a FAPE, the district has been required to fund the student's placement at the Rebecca School for the entirety of the 2011-12 school year as a result of its obligation to provide the student with his pendency (stay-put) placement for the duration of these proceedings, the basis for which the IHO adeptly described in his September 28, 2011 interim decision (IHO Interim Decision at pp. 2-4). As the reimbursement relief sought by the parent has been achieved by virtue of pendency, the challenged February 2011 IEP has expired by its own terms, and planning for the 2012-13 school year should already be underway or completed, I find that the parties' dispute regarding the 2011-12 school year has been rendered moot and that the discussion of the parties' arguments above has been rendered entirely academic.

### **VII. Conclusion**

Having found that the district did not fail to offer the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and I need not determine the appropriateness of the student's unilateral placement or whether equitable considerations support the parent's request for public funding of the student's tuition (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at \*12; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]).<sup>19</sup> Notwithstanding this determination, the district is obligated to pay for the student's Rebecca School tuition for the 2011-12 school year pursuant to pendency principles. I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

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<sup>19</sup> While not necessary to address whether equitable considerations would support the parent's request for tuition reimbursement, I note my disagreement with the IHO's finding that the parent "produced clear evidence" that she was unable to pay the student's Rebecca School tuition (IHO Decision at p. 18). While one possibility was that she lacked the financial resources herself, the hearing record lacked sufficient evidence in this particular case. The parent's federal Form 1040 for 2010 was the only evidence submitted on this issue and it was incomplete (Parent Ex. J). There is no information regarding the availability of resources from student's father in the hearing record. Without any supporting testimony or other additional evidence, I believe the evidence was insufficient to establish her entitlement to direct funding of the student's tuition costs at the Rebecca School for the 2011-12 school year (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 427-30 [S.D.N.Y. 2011]; Application of a Student with a Disability, Appeal No. 12-004; see also Connors v. Mills, 34 F. Supp. 2d 795, 806 n.6 [N.D.N.Y. 1998]).

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated February 28, 2012 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year; and

**IT IS FURTHER ORDERED** that the district, if it has not already done so, is directed to pay for the student's tuition costs at the Rebecca School for the 2011-12 school year pursuant to pendency.

**Dated:**           **Albany, New York**  
                      **July 25, 2012**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**