



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-096

### **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

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Lauren A. Baum, 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 the parents for their daughter's tuition costs at the Rebecca School for July and August 2010. The parents cross-appeal from the IHO's failure to consider certain claims. The appeal must be sustained. The cross-appeal must be dismissed.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The student received special education and related services through the Early Intervention Program, as a preschool student with a disability, and as a student with autism while living out of State (Tr. pp. 640-45, 650-54; Dist. Ex. 9 at p. 1).<sup>1</sup>

In January 2009, the student and her mother moved to the district and in February 2009,

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

the parents enrolled the student at the Rebecca School (Tr. pp. 506, 656).<sup>2</sup> Beginning in April 2009, the student received private home-based services using a DIR/Floortime method (Tr. pp. 747-48).

The student continued to attend the Rebecca School during the 2009-10 school year (Tr. p. 506). On March 11, 2010, the CSE convened to conduct the student's annual review and to develop her IEP for the 2010-11 school year (Dist. Exs. 4; 8). For the 2010-11 school year, the CSE recommended placement of the student in a 6:1+1 special class in a specialized school with the services of a full-time 1:1 paraprofessional, as well as speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling services (Dist. Ex. 4 at p. 17).

By letter dated June 14, 2010, the district summarized the recommendations made by the March 11, 2010 CSE and identified the particular school to which the district assigned the student (Dist. Ex. 13). The letter listed an address for the assigned school, as well as the name, address, and telephone number of the individual to contact if the parents wanted to discuss the recommendation or arrange another meeting (id.).

On June 18, 2010, the student's mother visited the public school site identified by the district and the student's father wrote a letter to the CSE dated June 23, 2010 asserting that the particular public school site was not appropriate for the student "at least for the summer" and described reasons why the parents found the assigned school to be inappropriate for the student (Parent Ex. H at pp. 1, 3). The student's father ended the letter by indicating that they would continue to send the student to the Rebecca School for the summer and intended to seek tuition reimbursement (id. at p. 3). He also indicated that the parents were "looking forward to considering any appropriate schools" the district offered (id.).

The student attended the Rebecca School through August 2010 and continued to receive private home-based services using a DIR/Floortime method, and instruction using the Fast ForWord program provided at a facility (Tr. pp. 745-48, 506; Parent Ex. R). In letters to the district dated August 30 and September 10, 2010, the parents indicated that in September 2010 they would "reassess" the appropriateness of the assigned school for the student (Parent Exs. F; G).<sup>3</sup>

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<sup>2</sup> The Rebecca School is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>3</sup> In the letter dated August 30, 2010 from the student's mother to the CSE, the parent wrote that "[w]e advised you in June that we did not find the placement offered for [the student] at [the assigned school] to be appropriate, at least for the [f]all, and that we would review the program again in September" (Parent Ex. G). The student's mother indicated that she had not received an answer to the previous letter and that she would contact the assigned school in September to reassess the appropriateness of the placement (id.). She added that "[i]n the interim, we will also be assessing the feasibility of sending [the student] to the Rebecca School or instituting a home program" (id.). The parent indicated that she would notify the district of the parents' decision "as soon as possible," and may seek funding for the Rebecca School or home program (id.). The student's mother indicated that the parents were still willing to consider any program or class offered by the CSE for summer or fall (id.). In the letter dated September 10, 2010, the student's mother advised that the August 30, 2010 letter contained a "typo" and she sent a corrected letter indicating that the reference to the fall in the beginning of the letter and reference at the end of the letter to summer were errors (Parent Ex. F at pp. 1-2).

In a letter signed September 28, 2010, from the student's mother to the CSE, the mother wrote that the parents visited the assigned school on September 20, 2010 (Parent Ex. E). In the letter the parent reiterated many of the same concerns indicated in the June 23, 2010 letter (id.). The parents indicated that they did not find the assigned school to be appropriate and they would provide a home program and seek reimbursement for the costs of that program (id.). They also indicated that they were "looking forward to considering any appropriate schools/programs offered [by] the district" (id.).

In a letter to the district's "Central Office of Home Schooling" dated September 28, 2010, the parents indicated they did not believe that the district had offered the student a FAPE for the 2010-11 school year, and informed the district of their intention to provide her with a "home program of education and service" (Parent Ex. D; see Parent Ex. C).

Commencing in fall 2010, the parents provided the student with a home program consisting of services using primarily the Son-Rise, but also DIR/Floortime, applied behavior analysis (ABA), and Structured Teaching methods (Tr. pp. 687, 693-94, 705; Parent Exs. DD; JJ at pp. 1, 7, 14; AAA).<sup>4</sup> The student also continued to receive instruction at a facility using the Fast ForWord program (Tr. pp. 744-46; Parent Ex. JJ at pp. 2, 8).<sup>5</sup> In fall 2010, the parents requested that the district provide the student's PT, OT, speech-language, and counseling services (Tr. p. 833; Parent Ex. JJ at p. 1).

On December 17, 2010, upon a request from the parents through their counsel, the CSE convened to develop an individualized education service program (IESP) for the student (Tr. pp. 75-76; Dist. Ex. 16; see Educ. Law § 3602-c[2][b][1]). At the time of the meeting, the CSE considered the student to be "home-schooled" and subsequently recommended continuing counseling, OT, and PT services pursuant to the March 2010 IEP, modifying the student's speech-language therapy to five individual sessions per week, and terminating the 1:1 paraprofessional services (Dist. Exs. 14; 16 at p. 3; compare Dist. Ex. 4 at p. 17, with Dist. Ex. 16 at p. 15).<sup>6</sup>

### **A. Due Process Complaint Notices**

On December 22, 2010, the parents filed a due process complaint notice (Parent Ex. B). On February 7, 2011 the parents filed an amended due process complaint notice (Parent Ex. A). In a second amended due process complaint notice dated April 22, 2011, the parents asserted that the March 2010 CSE failed to consider sufficient appropriate evaluative and documentary information, and that the student's IEP was not reasonably calculated to provide meaningful

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<sup>4</sup> The student's mother stated that "Structured Teaching" is also known as the "TEACCH" model of instruction (Tr. p. 803).

<sup>5</sup> The student's instruction using Fast ForWord, which had been funded by insurance, ended in December 2010 (Tr. pp. 745-46).

<sup>6</sup> At the outset of the impartial hearing, the parents asserted that they only requested the December 2010 IESP meeting to obtain related services from the district, and the district acknowledged that a FAPE was at issue for both summer 2010 and the 2010-11 school year (see Tr. pp. 29, 47-48). I note that although the student began residing in the district in January 2009, the deadline for requesting dual enrollment and an IESP for the 2010-11 school year elapsed on June 1, 2010 (see Educ. Law § 3602-c). The matter is not relevant to the disposition of this appeal and, therefore, I do not address it further.

educational benefits and avoid regression (Dist. Ex. 1 at pp. 1-2). The parents asserted that the March 2010 IEP did not accurately reflect the student's current levels of performance (id.). The parents further asserted that the IEP had an insufficient number of appropriate, measurable goals to adequately address the student's needs and allow the student to make measurable academic and social progress and avoid regression (id.). The parents asserted that many of the goals lacked objectively measurable benchmarks by which to assess the student's progress (id.). In addition, the parents asserted that a functional behavioral assessment (FBA) was not conducted or used in developing the student's behavioral intervention plan (BIP)(id.). The parents also asserted that the IEP did not include an appropriate transition plan for the student to support her transition from her current educational setting to that recommended in the IEP, and to support the student's transition from a summer school class to a new class and teachers in September 2010 (id.).

Regarding the assigned school, the parents asserted that at a visit in June 2010, they were told that it was "unclear" if there would be a space for the student at the school and that the parents were subsequently informed that there was a space at the school (Dist. Ex. 1 at pp. 1-2). The parents asserted that the available seat was in an all-boy class, which, according to the parents, was inappropriate for the student (id.). In addition, the parents asserted that the school was inappropriate because it was in a large building and the student was easily overwhelmed in such environments due to sensory issues and tended to withdraw (id.). Such an environment, it was asserted, would be disruptive for the student and exacerbate her difficulty remaining regulated and engaged throughout the day (id.). In addition, the parents asserted that the classrooms shown during the visit were not appropriate given the student's sensory and attentional difficulties as they were visually distracting and had little sensory equipment (id.). In addition, the parents contended that both lunch time and recess were not appropriate as they were too large for the student (id. at p. 3). Regarding related services, the parents asserted that the room used for OT and PT was not appropriate (id.). The parents further asserted that they notified the CSE that the placement was not appropriate for the student and a response was not received (id.). Regarding a subsequent visit to the assigned school in September 2010, the parents asserted that the classroom was small, cluttered, with little room for the students to move around, visually distracting, and did not have a sensory corner or sensory regulation equipment and therefore was not appropriate for the student because of her sensory issues, impulsivity, tendency to withdraw or act out and difficulty remaining regulated and engaged (id.). In addition, the parents again asserted that the PT/OT and speech-language therapy treatment rooms were not adequate (id. at pp. 3-4). The parents again asserted that they notified CSE that the assigned school was not appropriate for the student, that the parents received no response and then notified the CSE of their decision to provide a home program of education and services for the student for which they would be seeking reimbursement, and that they requested related services authorizations (RSAs) be issued for the speech-language therapy, OT, PT and counseling specified on the student's March 2010 IEP (id. at p. 4).<sup>7</sup>

As relief, the parents sought the cost of provision of the related services of speech-language, counseling and OT, and compensatory services for the failure to provide such services from September 2010 through January 2011 (Dist. Ex. 1 at p. 6). The parents also sought the cost of tuition for the student's attendance at Rebecca for summer 2010, as well as the costs of the home

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<sup>7</sup> Regarding the December 17, 2010 IESP, the parents asserted, among other things that it was not reasonably calculated to provide meaningful educational benefits and avoid regression and that RSAs were not received for the related services in the IESP (id. at pp. 4-5).

program including up to 40 hours per week of individual instruction, current evaluation of the student's developmental levels, autism consultant services, parent/staff training, Fast ForWord, appropriate classroom supplies, equipment and the related services of speech-language therapy, counseling and OT (*id.*).

## **B. IHO Decision**

An impartial hearing convened on April 25, 2011 and concluded after 11 non-consecutive days of proceedings on February 2, 2012. In a decision dated March 27, 2012, the IHO found that the district did not offer the student a FAPE (IHO Decision at p. 27).<sup>8</sup> After reaching this conclusion, the IHO indicated that "[t]he parents determined the placement to be inappropriate based on the location of the program in a large building" and the student's tendency to be overwhelmed by large noisy environments (*id.*). The IHO referenced that lunch was with a large number of students, and that such was also a negative due to her sensory issues and auditory sensitivity (*id.*). In addition, the IHO indicated that the student would be placed in a 6:1+1 class that was full, although she noted that only four students appeared on the first day of class in July 2010 (*id.*). The IHO also noted information that at the parent's visit in July 2010, the parents were advised that the only seat for the student for the summer was in a class with all boys (*id.*). The IHO further indicated that it was unclear if the school would be able to meet the related service mandates of the student's IEP without issuing RSAs (*id.*). Regarding the substantive adequacy of the March 2010 IEP, the IHO found that the IEP was developed without a social history, and according to the parent, the student's most recent psychoeducational evaluation report or classroom observation was not discussed (*id.*). The IHO also noted the parent's testimony that the CSE did not discuss the results of speech-language, OT, and PT assessments or standardized testing (*id.*). In addition, the IHO indicated that related service goals were developed by the CSE without benefit

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<sup>8</sup> While I note that the hearing record includes a timeline with notations as to reasons for extensions (*see* IHO Ex. I), numerous extensions were granted throughout the course of the ten-month hearing (*see* Tr. pp. 33-34, 49, 132, 269, 416-417, 570, 706, 856, 919, 950-51, 1008-1009; IHO Ex. I), and the hearing record does not reflect that the IHO sufficiently documented her reasons for granting all of the extensions, fully considered the cumulative impact of the factors relevant to granting all of the extensions, or responded adequately in writing to the extension requests, as required by State regulations and there is nothing in the hearing record that indicates a satisfactory reason for the inordinate delay between the filing of the second amended due process complaint notice on April 22, 2011 and the record close date of March 9, 2012 (8 NYCRR 200.5[j][5][i], [ii], [iv]). In addition, I remind the IHO that State regulations set forth that each party shall have up to one day to present its case and that additional hearing dates, if required, should be scheduled on consecutive days, when practicable (8 NYCRR 200.5[j][3][xiii]). While the parties may not complain or may even agree that an extension of time is warranted, such agreements are not a basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in federal and State regulations (*see* 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]). Moreover, regulatory provisions dictate that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5]). The IHO is reminded that it is her obligation, regardless of the parties' positions, to ensure compliance with the 45-day timeline for issuing a decision (*see* Application of the Dep't of Educ., Appeal No. 11-037; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-064). Additionally, State regulations require that in cases where extensions of time to render a decision have been granted, the decision must be rendered no later than 14 days from the date of the record closure (8 NYCRR 200.5[j][5]; *see* Office of Special Education guidance memorandum dated August 2011 titled "Changes in the Impartial Hearing Reporting System" available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf>).

of consultation with the student's related service providers and without adequate discussion with the parents and participants from Rebecca (id.).<sup>9</sup>

Regarding the placement of the student at the Rebecca School for July and August 2010, the IHO found that the Rebecca School appropriately addressed the student's special education needs (IHO Decision at p. 28). Specifically, she found that the Rebecca School addressed the student's special education needs, using the research-based DIR approach, Floortime, and related and support services (id.). Regarding the home program developed by the parents for the remainder of the 2010-11 school year (September 2010 through June 2011), the IHO found that it was reasonably calculated to provide meaningful and appropriate academic, social, and emotional benefits for the student (id. at p. 30). The IHO further found that the student was instructed in a 1:1 setting with "substantial collaboration" between the providers and "meaningful supervision;" that the parents were trained in a program created for the student and approved by the district, using licensed providers; that the program was not overly restrictive; and that it met the student's special education needs (id. at pp. 28-30).

Regarding equitable considerations, the IHO found, among other things, that the parents cooperated "fully" with the district (IHO Decision at p. 30). The IHO further found that the parents demonstrated their willingness to consider a public placement for the student, attended CSE meetings, visited the recommended placement two times, and advised the CSE in writing of their rejection of the placement and their reasons for the rejection, and that they would enroll the student at the Rebecca School for summer 2010 (id. at pp. 30-31). The IHO also found that the parents demonstrated their continued willingness to consider appropriate public school placements (id. at p. 31). Regarding the home program, the IHO found that the parents began a home program for the student in fall 2010 after visiting the district's recommended placement a second time and giving notice of their rejection. (id.). The IHO disagreed with the district's position that the parents did not show an intention to consider the public placement, noting that the parents created the home program after they determined that they could not afford the Rebecca School tuition, decided that the public school was inappropriate, and gave the district notice (id.).

As relief, the IHO ordered that the district reimburse the parents for the cost of tuition at the Rebecca School for July and August 2010; that the district reimburse the parents for a sum representing the cost of the home program; and that the district reimburse the parents for the cost of OT and art therapy at specified rates (IHO Decision at pp. 32-34).

The IHO subsequently issued an "amended" decision dated March 29, 2012, maintaining her finding that the district did not offer the student a FAPE for the 2010-11 school year, and that the Rebecca School appropriately addressed the student's special education needs for July and August 2010, but reversing her determination regarding the home program and finding that the

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<sup>9</sup>As to the district's assertion that the parents waived their right to seek reimbursement for the home program when the student's mother signed a parentally placed FNR and a letter of intent at the IESP meeting in December 2010, the IHO found that the parent made it clear at the CSE meeting that she was seeking tuition reimbursement for the home program, that it was not her intention to waive the right to seek reimbursement and that her intent was to seek related services because the student was in a home-based program (IHO Decision at pp.27- 28). Moreover, the IHO found that the district never provided RSAs to the parent, thereby rendering any contract null and void (id. at p. 28). The IHO further found that any possible agreement to forego an application for reimbursement at the IESP meeting was rendered null and void by the district's failure to provide RSAs as agreed (id. at p. 32).

hearing record did not support a finding that the home program was reasonably calculated to provide meaningful and appropriate academic, social and emotional benefits for the student, and that it was overly restrictive and did not meet the student's special education needs (Amended IHO Decision at pp. 28, 30). The IHO then ordered the district to reimburse the parents for the cost of tuition at the Rebecca School for July and August 2010; the cost of OT provided during the 2010-11 school year; and the cost of art therapy during the 2010-11 school year (*id.* at p. 17).

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

The district appeals, asserting that the IHO properly found in the amended March 29, 2012 decision that the parents' home program was inappropriate, but requesting that the remainder of the decision be overturned. The district asserts that the CSE relied upon sufficient evaluative information, the recommended placement was appropriate, and the assigned school could have accommodated the student's related service needs. The district also asserts that the Rebecca School was inappropriate for the student and that the equities favored the district. Regarding evaluative information, the district asserts that the CSE used a variety of assessment tools and strategies and that information was provided from various sources including the parent, the student's teacher from the Rebecca School, a 2009 classroom observation, 2009 psychoeducational report, 2009 Rebecca School progress report and the student's IEP from the previous year. In addition, the district asserts that although a social history was not discussed, at the CSE meeting, the parent was present during the meeting and provided input. The district further contends that the IHO erroneously credited the mother's testimony that no classroom observation or psychoeducational evaluation report was discussed at the CSE meeting. Regarding the IHO's finding that related service goals were developed by the CSE without benefit of consultation with the student's related service providers and adequate discussion, the district asserts that the Rebecca School progress report provided the CSE with specific information regarding the related services, that the goals were initially provided by the related service providers working with the student and were included in the progress report, and that during the CSE meeting the CSE discussed the goals with the student's teacher and the parents and received an affirmation that they reflected the student's current needs and should be included in the IEP. Moreover, the district contends that all of the CSE meeting participants had an adequate opportunity to participate. Next, the district asserts that since the parents did not send the student to the assigned school, the IHO's findings regarding the related services at the school were speculative, but that in any event, the assigned school could have accommodated the student's related services needs, and that if a student was unable to receive related services, the school issued RSAs. The district also asserts that the IHO erroneously concluded that the assigned school was inappropriate based upon the findings that it was too large and noisy.

In an answer and cross-appeal, the parents assert that the IHO improperly failed to consider their claims related to the CSE's exclusive reliance upon the student's Rebecca School progress reports when developing the IEP, the CSE's failure to conduct an FBA, the CSE's failure to ensure that the Rebecca School participants had access to all materials considered at the CSE meeting so that they could fully participate and that the IEP was created without sufficient consultation with the Rebecca School participants. The parents further allege that the IHO failed to consider their claims pertaining to whether an appropriate class was available for the student at the assigned school, the assigned class would have provided the student with an appropriate and similarly functioning peer group, the assigned class would have been appropriate for the student, the assigned class would have provided appropriate academic and individual instruction, the assigned school would have been able to appropriately transition the student, and whether the student would

have received sufficient sensory support at the school. The parents also assert that the IEP was inappropriate because it failed to describe the student's current levels of performance, and failed to include an appropriate BIP, a sufficient number of appropriate objectively measurable goals and short-term objectives, and a transition plan. In addition, the parents assert that the district failed to appeal that portion of the IHO's initial decision which determined that the home program was appropriate. The parents request that the district's appeal be denied, and a finding that the IHO improperly amended her original decision without jurisdiction. The parents also assert that the amended decision was null and void, that the IHO's original decision that the district failed to offer the student a FAPE be upheld, that the Rebecca School appropriately addressed the student's needs for summer 2010, and that the home program appropriately addressed the student's needs and that a weighing of the equities supported the parents' claim for reimbursement for the costs of the Rebecca School and the costs of the student's home program.

In an answer to the cross-appeal, the district asserts that the IEP adequately described the student's current levels of performance, that the IEP included a sufficient number of appropriate, objectively measurable goals and short-term objectives, that a transition plan was not necessary, that an FBA was not necessary, that the IEP included an adequate BIP, that an appropriate class was available for the student, that the assigned class would have provided an appropriate peer group, that the assigned class would have been appropriate for the student, that the assigned school would have adequately transitioned the student, and that the student would have received sufficient sensory support at the school. The district further asserts that the SRO should decline to consider the parents' claims that the CSE exclusively relied upon the student's progress reports when developing the IEP, failed to ensure that the Rebecca School participants had access to all materials, and created an IEP without sufficient consultation with the Rebecca School participants, as these claims were not alleged in the due process complaint notice and are raised for the first time on appeal.

Regarding the parents' assertion that the district failed to appeal the initial IHO decision regarding the appropriateness of the home program, the district asserts that this argument should be disregarded because the district specifically requested in its petition that this portion of the IHO's decision be upheld, and therefore, the parents were aware of the district's position that the home program was inappropriate.

## **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 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).

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. Amended Decision — Retaining Jurisdiction**

As an initial matter, I will first address the parents' contention that the IHO did not have authority to issue the March 29, 2012 amended decision. I find that the parents' contention is correct and the IHO lacked the authority to issue the March 29, 2012 decision in this matter, especially when it was in essence a new decision that contained substantive changes altering the outcome of the case as opposed to a clarification of a minor error that was merely typographical or clerical in nature. IHOs are appointed by a board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[e][1], 200.5[j][3][i]). An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also Application of the Dep't of Educ., Appeal No. 08-041). Conversely, the IDEA and state regulation provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Here, the IHO was appointed, presided at an impartial hearing, and issued a final written decision on March 27, 2012, which ended her jurisdiction over the matter. The IHO erred when she rendered a second decision reversing her finding regarding the appropriateness of the home program in the original decision. Allowing issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray, resulting in multiple appeals from multiple final decisions. Accordingly, because the IHO lacked authority to issue the second decision, the March 29, 2012 decision is annulled (see Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of the Dep't of Educ., Appeal No. 08-041; Application of the Dep't of Educ., Appeal No. 08-024).

### **B. Scope of Impartial Hearing and Review**

Turning to the IHO's March 27, 2012 decision, prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's finding that the December 2010 IESP and the parent's signature of the letter of intent did not preclude the parents from seeking reimbursement for the cost of the home program. Accordingly, this determination is final and binding on the

parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see IHO Decision at pp. 27-28).

Turning next to the parents' cross-appeal, and their assertion that the IHO erred in not addressing the parents' claims that the CSE exclusively relied upon the student's Rebecca School progress reports when developing the IEP, failed to ensure that the Rebecca School participants had access to all materials during the CSE meeting, and created an IEP without sufficient consultation with the Rebecca school participants, 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 300.507[d][3][i], 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 IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[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. S. 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 \*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., 2010 WL 3398256, at \*8). 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 [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 \*7-\*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's April 22, 2011 due process complaint notice, which asserted that the CSE did not consider sufficient evaluative information in developing the March 2010 IEP (Dist. Ex. 1 at p. 1), can be reasonably read to have raised the issue as to whether the CSE exclusively relied upon the student's Rebecca School progress reports when developing the IEP, and therefore that issue will be addressed below. As to access to materials and consultation with the Rebecca school participants, I find that the parents did not raise these issues in the April 22, 2011 amended due process complaint notice and it cannot be reasonably read to include such claims (see Dist. Ex. 1). In addition, these issues were not properly before the IHO for resolution at the impartial hearing, and the parents cannot, now, raise these issues for the first time on appeal. A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, and that although the parents amended their due process complaint notice two times, they did not include these issues (see Dist. Ex. 1; Parent Exs. A-B).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or include these issues in an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of

the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at \*4-\*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoefl v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Moreover, because they were raised for the first time on appeal, it is not surprising that the IHO properly did not reach these issues in her decision; accordingly, I find that the parents' allegations that the CSE failed to ensure that the Rebecca School participants had access to all materials and created an IEP without sufficient consultation with the Rebecca school participants are, therefore, outside the scope of my review and I decline to consider them (see M.P.G., 2010 WL 3398256, at \*8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; see also IHO Decision at pp. 26-27; Application of the Dep't of Educ., Appeal No. 12-091; Application of a Student with a Disability, Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).<sup>10</sup>

In addition, on appeal the parents allege that the student would not have received appropriate academic instruction or sufficient individual attention in the assigned class, in part due to the special education teacher's use of the TEACCH and ABA instructional methods at the public school site. I find that the parents' due process complaint notice cannot be reasonably read to include a claim regarding the specific methodology utilized at the public school to which the student had been assigned (Dist. Ex. 1). 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]), a review of the hearing record shows that the district elicited testimony from the special education teacher of the assigned school about her instructional methods as part of a general overview of the assigned school classroom, and not in response to a specific claim contained within the due process complaint notice (Tr. pp. 375-76; see Tr. pp. 371-

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<sup>10</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]).

74, 377; Dist. Ex. 1). Additionally, I note that the IHO did not make a finding in her decision with regard to a need to limit the student's instruction to precise teaching methodologies or strategies (Tr. pp. 662-63; see IHO Decision at p. 27). For these reasons, I find that the issue also is not properly before me on appeal.<sup>11</sup>

### **C. March 11, 2010 IEP**

#### **1. Evaluative Information**

Under the IDEA and State regulations, the CSE must review each student's IEP at least once each year to determine its adequacy and recommend an educational program for the next school year (34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see 20 U.S.C. § 1414[d][4][A][i]; Educ. Law § 4402[1][b][2]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation,<sup>12</sup> the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general

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<sup>11</sup> I have nevertheless reviewed the hearing record and, had I considered this issue, I would not be persuaded that the assigned school's teaching methodology or availability of individualized support would have been inappropriate for the student or resulted in a material or substantial deviation from the student's IEP in the event the student had been enrolled in the district. The special education teacher of the assigned class testified that she used ABA instructional methods informally, and that her classroom was "set up" according to the TEACCH model including individual work stations (Tr. pp. 375-76). When providing instruction, the special education teacher indicated that she began the lesson "together," then usually divided the students by ability into two smaller groups led by herself and the classroom paraprofessional (Tr. pp. 451-52). The special education teacher stated that the instructional methods used in the assigned class were "individualized" and included use of PECS, sight word lists, the Everyday Math program, teacher made activities, and manipulatives (Tr. pp. 375, 450-51, 453). The special education teacher testified about how she would differentiate the student's instruction to meet her specific learning needs that differed from the other students in the assigned classroom (Tr. pp. 489-93). I further note that prior to her placement at the Rebecca School, the student was exposed to a variety of methodologies including Floortime, TEACCH, ABA, and verbal behavior, and while the parents may have desired a public school placement that employed their preferred method of instruction, the hearing record did not establish that the DIR/Floortime methodology was the only appropriate instructional method for the student, and the hearing record shows that the assigned school would have provided appropriate instruction differentiated to meet her special education needs (Tr. pp. 645-48). Additionally, the March 2010 IEP provided the student with 1:1 paraprofessional services, in part to help the student remain engaged and available for instruction (Tr. pp. 150, 157; Dist. Ex. 4 at p. 17). The paraprofessional services, in conjunction with the availability of 1:1 instruction from the special education teacher in the assigned classroom, do not support the parents' position that the student would not have received sufficient "individual attention and support" in the assigned classroom (Tr. p. 388; Dist. Ex. 4 at p. 17).

<sup>12</sup> Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In reviewing the parties' dispute regarding the sufficiency of the evaluative data upon which the March 2010 IEP was based, I note that hearing record reflects that the March 2010 CSE (composed of the parents, a district special education teacher who also participated as the district representative, a district school psychologist, an additional parent member, a Rebecca School social worker, and a Rebecca School special education teacher)—contrary to the parents' assertion— used a March 2009 district psychoeducational evaluation report, the student's June 2009 IEP, a November 2009 observation report of the student at the Rebecca School, a December 2009 Rebecca School progress report, and information obtained at the meeting from the parent and the Rebecca School participants to develop the student's IEP for the 2010-11 school year (Tr. pp. 138-40, 168-69, 658-61; Dist. Exs. 3; 4 at p. 2; 9-11; Parent Ex. N).

According to the March 2009 psychoeducational evaluation report, the student had received a nonverbal cognitive evaluation in May 2007 while living out of State, which suggested that the student was of average overall cognitive ability and exhibited impairments in adaptive, behavioral, social and academic skills (Dist. Ex. 9 at p. 1). During the March 2009 evaluation, the evaluator reported that the student was cooperative, but displayed significant distractibility evidenced by singing and vocalizing, and required redirection on "virtually every" test item (*id.* at pp. 1-2). An administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) to the student yielded the following subtest standard scores: letter-word identification (118), passage comprehension (91), calculation (65), applied problems (75), and writing samples (95) (*id.* at p. 4). These results suggested to the evaluator that the student's overall level of academic achievement, as indicated by the student's Pre-Academic cluster score of 106; and her ability to acquire academic skills, as indicated by her Academic Skills cluster score of 105, fell within the average range (*id.* at pp. 2, 4). The student's ability to apply what she had learned, as evidenced by her Academic Applications cluster score of 85, was within the low average range (*id.* at p. 2). The evaluator reported that the student's reading decoding and spelling skills were areas of strength, her reading comprehension and writing skills were average, and that mathematics was an area of need (*id.* at pp. 2-3).

Results of an administration of the Gilliam Autism Rating Scale-Second Edition to the parent suggested that the student had a "very likely" probability of autism, consistent with the results from a previous evaluation (Dist. Ex. 9 at p. 2). The parent identified the student's communication delays, avoidance of eye contact, emotional dysregulation, lack of awareness of social nuances, and difficulty with sensory processing and motor planning as contributing factors toward an autism diagnosis (*id.*). The parent also reported that her daughter exhibited tactile, visual, and auditory sensitivities (*id.*). Frequently observed behavior the student exhibited at the time of the March 2009 evaluation included avoidance of establishing eye contact, staring, rapid/darting movements, echolalia, repeating words out of context/over and over, and behaving in an unreasonably fearful, frightened manner (*id.* at p. 3). The evaluator concluded that the student continued to demonstrate behaviors consistent with a diagnosis of autism (*id.*).

According to the November 2009 classroom observation report, the district's school psychologist observed the student during snack time at the Rebecca School in an 8:1+3 setting (Dist. Ex. 10 at p. 1). The school psychologist reported that the student sat at the table eating her snack with an assistant teacher, who engaged the student in a verbal exchange about her music

teacher (id.). During the interaction, the student was observed using phrases to describe the music teacher, verbally select a desired item when given a choice of two, and dictating phrases to the teacher to be written on the board (id.). The school psychologist reported that although the student spoke in phrases, it was difficult for her to understand clearly what the student was saying (id.). The student selected a book and brought it back to the table where the assistant teacher began reading it to her (id. at p. 2). The student and the assistant teacher engaged in a verbal interaction about the book and beanbag animals in the gym (id.). The student was observed to answer questions posed by adults and follow through with clean-up routines with prompting (id.).

In the December 2009 Rebecca School progress report, staff indicated that the student shared a classroom with seven other children, one teacher, and three teacher assistants (Dist. Ex. 11 at p. 1). The student's Rebecca School program consisted of sessions using the Floortime approach, as well as language arts, math, science, and social studies instruction, and visual-spatial and regulatory-sensory processing activities (id.). Also, part of the student's program were sessions of counseling, OT, PT, music therapy, speech-language therapy, art therapy and adapted physical education (id.). The report indicated that generally throughout the day, the student presented with "a calm, quiet, and content demeanor" (id.). Her attention to people and activities was dependent upon her readiness to engage, the incorporation of her interests (favorite Disney characters, reading, drawing, painting, coloring, music), and the affect (high, silly, exaggerated; big gestures) of personnel working with her (id.). Although the student reportedly preferred solitary activities such as reading books or drawing, she responded well to adults using high affect and nonverbal communication to facilitate shared interactions (id.). Gross motor and physical play activities reportedly increased the student's engagement (id.). In loud, busy environments, the student tended to seek out a quiet/isolated space and withdraw into books or drawing activities; when overwhelmed by a loud noise or unexpected touch, she may respond by screaming, crying, or seeking another location (id.). During these times, the student required 1:1 adult support to help her regain regulation and shared attention (id. at pp. 1-2). In quieter environments, the student was more likely to initiate interactions using short sentences to convey interest and intent (id. at p. 1). According to the report, the student benefitted from moderate 1:1 adult support, which maximized her ability to focus and attend, convey intent, and sustain engagement and interactions with others (id.). She also benefitted from the use of a visual schedule and verbal prompting to facilitate her ability to predict events and activities, anticipate change, and understand expectations (id.). The report indicated that with these supports, the student was able to transition between activities inside and outside of the classroom with minimal adult support (id.).

The Rebecca School progress report reflected that within a 30-minute period, the student was able to regulate her behavior and attend to play/tasks in a shared attention situation with an adult for approximately 15 minutes (Dist. Ex. 11 at p. 1). In desired or highly motivating situations, the student opened and closed 20-30 circles of communication (id. at p. 2). The student initiated interactions to satisfy wants and needs, or to share in a desired activity (id.). She also demonstrated the ability to enter into two-way, purposeful communication with an adult in response to an initiation or reaction from others, sustain interactions with adults, use motor planning to solve multistep problems involving a desired object or activity, and persist in interactions involving "stringing together more complex circles [of] communication in order to accomplish a task" (id.). The report indicated that social problem solving with peers was more challenging for the student (id.). The student engaged in and initiated pretend and fantasy play scenarios, although her ideas within those interactions were often restricted to scripts typical of the characters and story (id. at p. 3). According to the progress report the student answered some "w" questions and at times

could give reasons behind her emotions, but she often required verbal choices or guiding questions to express and connect her ideas (id.).

Academically, the Rebecca School progress report indicated that the student exhibited a relative strength in reading, demonstrating grade level abilities in decoding and sight word recognition (Dist. Ex. 11 at pp. 3-4). She often independently picked up and read a book near or on her grade level (id. at p. 3). The student demonstrated grade level word recognition when motivated or prompted to read something that was meaningful to her, and exhibited some challenges displaying a range of emotions while she read (id. at p. 4). In the area of comprehension, the student understood instructions and followed simple 2-3 step directions (id.). Her ability to express her understanding of situations was limited, and she required choices and adult support to answer more abstract questions (id.). In mathematics, the student exhibited emerging 1:1 correspondence skills for values greater than 10, or over \$.75, and number skills for values greater than 10 (id. at p. 5). The student was able to identify all coins, but inconsistently identified their correct value (id.). She exhibited understanding of the concepts of more and less; short, medium and long; and hot and cold, but required cues to comprehend more complex measurements (id.). The student demonstrated understanding of "first/then" in a task series within a daily schedule, and differentiated between something occurring during morning/evening and daytime/nighttime (id.). She also showed understanding of spatial concepts such as under, on top of, inside, next to, up high, and down low (id.). In social studies, the student exhibited understanding of and the ability to follow classroom and community rules with moderate adult support, including putting away her things, cleaning up after herself, helping others, and waiting for the signal before crossing the street (id. at p. 6). Her awareness and understanding of herself in relation to others (e.g. turn taking, sharing) had increased, as had her ability to recognize and understand simple emotions (id.). In science, the student exhibited the ability to observe and predict what will happen when provided with choices, and explore materials (id.).

According to the Rebecca School progress report, under the auspices of mental health services, the student received twice weekly sessions of individual music therapy and art therapy twice weekly in a dyad, and once per week individually (Dist. Ex. 11 at pp. 9-10). Sessions focused on improving the student's ability to self-regulate, share attention, engage, and participate in reciprocal interactions (id.).

Regarding the IHO's finding that the March 2010 CSE did not have before it a social history (see IHO Decision at p. 27), the March 2010 CSE meeting was an annual review and State regulations do not require that a social history be performed for a student's annual review (Dist. Ex. 4 at p. 2; compare 8 NYCRR 200.4[b][iii], with 8 NYCRR 200.4[f]). Moreover, the hearing record shows that the parents attended the March 2010 CSE meeting, and that in particular, the student's mother was provided the opportunity to participate in "every aspect" of developing the IEP, which could have included updating the CSE on any interpersonal, familial, and environmental variables (Tr. pp. 163-64, 765; Dist. Ex. 4 at p. 2). I note that the background information contained in the psychoeducational evaluation report pertaining to the student's prior educational experiences while living out of State, then-current educational placement, and diagnosis of autism were included in the March 2010 IEP (compare Dist. Ex. 4 at p. 3, with Dist. Ex. 9 at p. 1). The hearing record shows that the district provided the parents with the classroom observation report prior to the March 2010 CSE meeting, and the student's mother testified that she did not have any concerns about its contents (Tr. pp. 169-70, 766; Dist. Ex. 3). The district's school psychologist who participated at the March 2010 CSE meeting stated that although the CSE

considered the information contained in the psychoeducational evaluation and classroom observation reports when developing the IEP, it primarily relied upon information contained in the June 2009 IEP and the most recent Rebecca School progress report (Tr. pp. 139-40, 171; Dist. Ex. 3). Accordingly, upon review of the hearing record, I find that the March 2010 CSE had before it an extensive amount of information about the student, obtained from a variety of sources (Tr. pp. 139-40, 168-69; Dist. Exs. 3; 9-11; Parent Ex. N).

Regarding the IHO's finding that the March 2010 CSE did not discuss speech-language, OT or PT assessments, as described below, I conclude that the information contained in the December 2009 Rebecca School progress report adequately described the student's strengths and needs in order for the CSE to develop an appropriate special education program.

Within the December 2009 Rebecca School progress report, the student's occupational therapist reported that the student received three 30-minute individual OT sessions per week outside of the classroom to address sensory integration and motor coordination needs (Dist. Ex. 11 at p. 6). The occupational therapist indicated that the student transitioned easily to OT sessions (id.). Although the student often sought out familiar tasks, she was willing to try novel activities and participated in therapist initiated activities with moderate supports (id.). The report noted that without the therapist's initiation, the student did not seek out sensory input and often found a quiet area to play with bean bag animals or puppets (id.). According to the occupational therapist, the student attended to table-top activities in the therapist's office and participated in various sensory activities in the sensory gym, demonstrating increased engagement during vestibular and proprioceptive activities (id.). The occupational therapist indicated that the student was under responsive to sensory input and did not appear to be tactilely defensive, but was frequently overwhelmed by loud noises (id.). Often the student appeared to "go into her own world," as evidenced by laughing to herself and scripting language from Disney movies, and when dysregulated, she often smelled items, put her fingers in her mouth, or withdrew to the corner of the room to look at a book (id. at pp. 6-7). Regarding the student's motor planning and sequencing skills, the occupational therapist reported that the student completed many familiar tasks independently, navigated through an obstacle course with minimal support to stay on task, built with different types of construction toys, took her shoes on and off, and tied her shoelaces independently (id. at p. 7). The occupational therapist reported that the student navigated throughout the school with minimal assistance, drew a detailed picture of a person and herself, cut on the line of complex shapes, and located items in a cluttered room/cabinet (id.). The student produced legible handwriting, traced the letters of her name with minimal verbal cues, and independently wrote all letters in large print, but exhibited difficulty orienting letters on the line (id.).

The student's physical therapist reported that the student received one 30-minute session of PT per week and did not exhibit any difficulty transitioning from the classroom to the sensory gym (Dist. Ex. 11 at p. 7). The student frequently sought out desired activities upon entering the gym, but participated in activities with the physical therapist when asked to (id.). According to the physical therapist, the student exhibited good static and fair (+) dynamic balance skills, and was able to maintain her balance on even surfaces with increased speed (id.). On soft/uneven surfaces, the student occasionally tripped and "crash[ed]" into obstacles (id.). The report indicated that the student tended to move her body very fast and impulsively, but walked on a balance beam with supervision without loss of balance (id.). The student demonstrated decreased muscle tone throughout her body, and decreased strength in her core/trunk muscles (id.). She ascended stairs

with an alternating pattern and descended stairs in an alternating pattern using the hand rail (id.). While descending without the use of the handrail, the student's speed reduced and she occasionally lost her balance (id.). Regarding motor planning skills, the student carried out easy, routine and familiar tasks, and required verbal and physical assistance with sequencing and executing novel movements (id. at p. 8).

The student's Rebecca School speech-language therapist reported that the student received twice weekly individual sessions and one group session per week (Dist. Ex. 11 at p. 8). The therapist indicated that the student transitioned easily to and from the classroom for speech-language therapy, which focused on improving the student's ability to initiate purposeful interactions, create her own play schemas, and expand upon her ability to express and comprehend language (id.). The progress report indicated that within speech-language therapy sessions, the student exhibited skills similar to those observed in the classroom regarding the need for minimal to moderate adult prompting to facilitate circles of communication and novel play scenarios (compare Dist. Ex. 11 at pp. 1-3, with Dist. Ex. 11 at p. 8). Expressively, the student communicated by using complex utterances to request, protest, comment, direct, and engage in problem solving (Dist. Ex. 11 at p. 8). The student used a variety of locatives and grammatical morphemes, and occasionally omitted function words or auxiliary verbs from her speech (id. at p. 9). When provided with verbal support, the student exhibited the ability to expand on her utterances to improve listener understanding, increase the complexity of her utterances, and use language to describe new book topics (id. at p. 9). The student demonstrated strong receptive vocabulary skills, carried out two step directives in a highly motivating activity, showed understanding of a variety of prepositions and locatives, and answered "who," "what," and "where" questions independently (id.). With support, the student responded to "when" and "why" questions (id.).

Given the specificity of information detailed above pertaining to the student's related service needs that was before the March 2010 CSE, I find that the alleged procedural defect of failing to discuss other speech-language, OT, and PT reports beyond what was contained in the Rebecca School progress report did not result in a procedural violation that denied the student of a FAPE, and that the CSE had sufficient evaluative information when developing the March 2010 IEP.

## **2. Present Levels of Performance**

While 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]), I note that the parents alleged in the due process complaint notice that the March 2010 IEP did not accurately reflect the student's current levels of performance (see Dist. Ex. 1). I have reviewed the March 2010 IEP, and as discussed below, I find that the hearing record demonstrates that the CSE carefully and accurately described the student's present levels of academic achievement, social development, physical development, and management needs and that the description is consistent with the evaluative information that was available to the CSE (see Dist. Exs. 3; 4; 9-11).

The March 2010 IEP present levels of performance indicated that the student had received a diagnosis of autism and had been attending an ungraded special education school since her move into the district in January 2009 (Dist. Ex. 4 at p. 3). The IEP described the student as exhibiting

attentional difficulties such as sitting and attending to tasks, and needing continuous prompting to stay on task (id.). The IEP further reflected that at times, the student could become visually "hyper-focus[ed]," which led to distraction (id.). When motivated, the student demonstrated the ability to attend to a task for a few minutes (id.). According to the IEP, the student benefitted from gross-motor activities, tactile input, visual schedules, and having information written out for her (id.). The student exhibited difficulty with engagement, which, along with her sensory needs, affected her learning (id.). The IEP indicated that at times transitions were difficult for her (id.). Academically, the student exhibited strong, fluent decoding skills, which her teachers estimated to be at a third grade level, and reading comprehension skills observed to be at a mid-first grade level (id.). The IEP indicated that the student had made progress in writing and that with teacher support, she demonstrated the ability to write a sentence at a beginning to mid-first grade level, noting that the student had difficulty with appropriate spacing (id.). The student's math computation skills were observed to be at an early to mid-first grade level (id.).

The social/emotional present levels of performance in the March 2010 IEP reflected Rebecca School teacher reports that the student generally presented with a calm, quiet demeanor (Dist. Ex. 4 at p. 4; see Dist. Ex. 11 at p. 1). The IEP indicated that when in loud and busy environments, the student may seek out quiet and isolated spaces and enter a "withdrawn state" (id.). If the student were to become quickly overwhelmed by a loud noise, a sudden demand, or an unexpected touch/feeling, she may respond by screaming and crying (id.). According to the IEP, when angry, the student may exhibit scripting behavior or become unwilling to interact with others (Dist. Ex. 4 at p. 4). The IEP indicated that the student was becoming more assertive, and protesting more often (id.). The student demonstrated the ability to engage in shared attention with an adult for approximately 15 minutes in quiet 1:1 environments (Dist. Ex. 4 at p. 4; see Dist. Ex. 11 at p. 1). The IEP indicated that although the student engaged and related to adults, she preferred solitary play, and most often initiated an interaction to satisfy and want or need (Dist. Ex. 4 at p. 4; see Dist. Ex. 11 at p. 2). When engaged in highly motivating activities, the student demonstrated the ability to open and close 20-30 circles of communication, although she did not often engage in or exhibit "emotionally connected" two-way conversations (id.). The IEP indicated that the student sustained interactions with adults and persisted during interactions that involved stringing together complex circles of communication to accomplish a task (id.). Engaging a peer in problem solving situations was more challenging for the student (id.). According to the IEP, although the student engaged in pretend and fantasy play, her ideas were often restricted to scripts (Dist. Ex. 4 at p. 4; see Dist. Ex. 11 at p. 3). At times, the student provided reasons for her emotions, but often required choices or guiding questions to facilitate the expression and connection of her ideas (id.). The IEP indicated that at home, the student engaged in continuous play for up to 45 minutes in reciprocal exchanges (Dist. Ex. 4 at p. 4).

The health and physical development present levels of performance contained in the March 2010 IEP reflected the CSE's discussion that the student received a gluten and casein free diet, including dietary restrictions of low sugar, low starch, and low oxalates (limiting nuts and colorful fruits and vegetables) (Dist. Exs. 3; 4 at p. 5). The IEP cautioned that the student may try to take food from other students, and that her diet needed close monitoring (Dist. Ex. 4 at p. 5). The IEP indicated that due to the student's metabolic concerns, the food she ate affected her ability to maintain regulation (id.). According to the IEP, the student had reflux and seasonal allergies (id.). She exhibited under-responsiveness to sensory input, was frequently overwhelmed by loud noises, and presented with decreased muscle tone throughout her body (id.). The IEP indicated that the

student appropriately used the bathroom, but may need assistance (id.). The March 2010 CSE recommended that the student participate in adapted physical education in a 6:1+1 setting (id.).

According to the district's school psychologist, the March 2010 CSE discussed the student's academic present levels of performance; specifically that her decoding skills were on grade level but her reading comprehension skills were at a mid-first grade level, her writing skills were delayed, and her computation skills were at an early to mid-first grade level (Tr. pp. 144-45, 262; Dist. Ex. 3). The school psychologist testified that the CSE discussed that the student exhibited difficulty staying attentive and focusing on tasks, that she was sensitive to noise, that at times she became "hyperfocus[ed]" on items, and that her significant sensory needs affected her learning (Tr. p. 145; Dist. Ex. 3). The student's Rebecca School classroom teacher provided the CSE with the student's then-current instructional levels that were subsequently included in the March 2010 IEP (Tr. p. 146; see Dist. Exs. 3; 4 at p. 3).

To address the student's academic needs, the March 2010 CSE recommended that the student receive frequent sensory breaks, sensory tools, gross-motor based activities, manipulatives for math instruction, and 1:1 support (Dist. Ex. 4 at p. 3). According to the school psychologist, at the meeting the CSE used the student's prior year IEP as the basis for the discussion about the student's management needs, and asked the Rebecca School personnel whether those strategies continued to be appropriate, if additional strategies were needed, and what strategies should be changed (Tr. pp. 190-91). A review of the December 2009 Rebecca School progress report indicates that the academic management needs included in the March 2010 IEP were also strategies used with the student at the Rebecca School (compare Dist. Ex. 4 at p. 3, with Dist. Ex. 11 at pp. 1, 5-7).

The school psychologist testified that the March 2010 CSE discussed the student's social/emotional needs, specifically that she could become withdrawn, overwhelmed by loud noise, and at times, cried and screamed (Tr. pp. 148-49; Dist. Ex. 3). According to the school psychologist, the CSE discussed the student's tendency to script while interacting with others, and that she had some difficulty persisting in longer interactions (Tr. pp. 148-49). The CSE discussed the student's ability to communicate to get her wants and needs met, and the parent's report that the student continuously played at home for 45 minutes (Tr. p. 149). Following the discussion of the student's social/emotional needs, the CSE recommended providing the student with access to sensory materials, frequent sensory breaks, counseling services, 1:1 support to help the student engage with others and sustain regulation, and a BIP (Tr. p. 149; Dist. Exs. 3; 4 at p. 4).

Regarding the assertion by the parents in the due process complaint notice that the March 2010 IEP did not fully and accurately reflect the student's then-current levels of performance and needs and to the extent that the parents' assertion is based upon the CSE's reliance on the Rebecca School progress report and the student's Rebecca School teacher who participated at the CSE meeting for student's academic functional levels, rather than the results of standardized testing, although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see 8 NYCRR 200.4[d][2][i]; Application of a Student with a Disability, Appeal No. 11-043). Nor is there any support for the proposition that "teacher estimates" or "teacher observations" are an improper source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at \*10).

As the hearing record reflects that the most recent standardized assessment of the student's academic skills occurred one year prior to the March 2010 CSE meeting (Dist. Ex. 9 at p. 1), it is therefore unclear why the parents would prefer to base the student's present levels of academic performance on the results of the March 2009 achievement testing procured, as they acknowledge, in a 1:1 environment, rather than on the then-current Rebecca School teacher's assessment of the student's academic skills within the classroom. Regardless, a review of the information considered by the March 2010 CSE and discussed at the CSE meeting as detailed above, shows that the district had sufficient information relative to the student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—at the time of the CSE meeting to develop an IEP that reflects the student's special education needs with sufficient accuracy to formulate a program designed to help the student progress (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dept. of Educ., Appeal No. 11-025; Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).

### **3. Annual Goals and Short-Term Objectives**

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

The student's March 2010 IEP included 16 annual goals and, consistent with the CSE's determination that the student participate in the alternate assessment, 38 short-term objectives targeting the student's deficits in reading comprehension, math, and writing skills; ability to share attention; engagement and pragmatic language skills; expressive and receptive language skills; social skills; motor planning and sequencing skills; core strength and endurance; and sensory processing skills (Dist. Ex. 4 at pp. 6-14, 17).<sup>13</sup> To develop the academic goals, the school psychologist testified that the CSE used the student's prior year IEP as the basis for discussion, and asked the student's Rebecca School teacher if the student had achieved the goals or whether

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<sup>13</sup> The parents' due process complaint notice alleged that the March 2010 IEP lacked a sufficient number of appropriate goals to address the student's needs and specific methods of measurement (see Dist. Ex. 1); however, even at the time of their cross-appeal, they do not identify which goals they believe are inappropriate. Moreover, the parents did not indicate in their due process complaint notice what area(s) of the student's needs the goals failed to address, and a review of the student's needs and the March 2010 IEP annual goals and short-term objectives shows that the CSE developed goals in the student's deficit areas as identified in the information reviewed and considered by the CSE (compare Dist. Exs. 9-11, with Dist. Ex. 4 at pp. 6-14). Although the parents are correct that the annual goals and short-term objectives do not indicate the evaluation procedure to be used to measure the student's progress, for the reasons discussed in this decision, I do not find that this defect renders them inappropriate such that the student was denied a FAPE. I remind the district of its responsibility to ensure that annual goals and short-term objectives, if appropriate, are developed in accordance with State regulations (see 8 NYCRR 200.4[d][2][iii], 200.4[d][2][iv]).

the goals needed modification (Tr. p. 154). She further testified that the Rebecca School teacher and the parents provided input regarding the student's current levels of academic functioning and needs, and that the goals were formulated collectively as a group based upon that information (Tr. pp. 154, 202-03; Dist. Ex. 3; see Tr. p. 766).

According to the school psychologist, the speech-language, OT, PT, and counseling IEP goals were developed from the information and goals contained in the December 2009 Rebecca School progress report (Tr. pp. 155-56; Dist. Ex. 11 at pp. 13-15). She stated that at the March 2010 CSE meeting, the CSE discussed the related service goals contained in the progress report and asked the student's mother if she believed the goals continued to reflect the student's needs and were appropriate to be included in the IEP (Tr. p. 156). The school psychologist testified that the student's mother indicated that the related services goals were appropriate, and those goals were subsequently made part of the March 2010 IEP (Tr. pp. 156-61). In the area of counseling, the parent requested that a goal be added addressing the student's social functioning, to which the CSE agreed and included in the IEP (Tr. pp. 157-58; Dist. Ex. 4 at p. 12). The school psychologist indicated that no one expressed disagreement or concerns with the goals during the CSE meeting (Tr. pp. 154-55).

The parents alleged that the annual goals and short-term objectives were not measurable in part because the March 2010 IEP lacked "baseline data" about the student's functioning in several areas. I note that the IEP specified the student's academic instructional levels in reading, mathematics, and writing, and provided annual goals and short-term objectives to address her needs in these areas (Dist. Ex. 4 at pp. 3, 6-7). The IEP present levels of performance, as described in detail above, provided specific information about the student's ability to share attention and her social, language, and pragmatic needs; areas addressed in part by the Rebecca School's counseling and speech-language therapy services, and areas the March 2010 IEP addressed via annual goals and short-term objectives (Dist. Exs. 4 at pp. 4, 8-12; Dist. Ex. 11 at pp. 14-15). Although the IEP did not provide much information about the student's gross-motor needs, it did indicate that she liked jumping and gross-motor activities, she presented with decreased muscle tone throughout her body, and she did not have mobility limitations; and all of the student's December 2009 Rebecca School PT goals were included in the March 2010 IEP (Dist. Ex. 4 at pp. 3, 5; compare Dist. Ex. 4 at pp. 8, 13, with Dist. Ex. 11 at p. 14). The IEP also indicated that the student exhibited difficulty with letter spacing during writing tasks and with sensory integration, which were areas of need addressed by OT services at the Rebecca School and by the March 2010 IEP annual goals and short-term objectives (Dist. Exs. 4 at pp. 3-4; 11 at pp. 6-7, 13).

While I agree with the parents' contention that the annual goals contained in the March 2010 IEP lacked measurability, the hearing record does not demonstrate that the goals' lack of specificity resulted in a denial of a FAPE because, as explained below, all of the goals contained specific short-term objectives related to the student's needs from which the student's progress could be measured (Dist. Ex. 4 at pp. 6-14).<sup>14</sup> Moreover, the lack of methods of measurement in an IEP does not constitute a deprivation of FAPE where there are evaluative measures for student

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<sup>14</sup> One of the short-term objectives relating to the student's reading comprehension annual goal does not include evaluation criteria (Dist. Ex. 4 at p. 6).

assessment (K.L. v. New York City Dep't of Educ., 11 Civ. 3733 at \*26-27 [S.D.N.Y. Aug. 23, 2012]).

The district's school psychologist opined that the goals provided in the December 2009 Rebecca School progress report were not measurable, and when developing the March 2010 IEP goals, she asked the student's Rebecca School teacher to what degree the student should be able to complete the goal by the following year (Tr. pp. 207-08). The accuracy levels included within the IEP related to the short-term objectives, and included evaluation criteria such as that the student would show mastery of the short-term objective, for example, with 70 percent accuracy, 80 percent of the time, after 10 consecutive throws or repetitions, or three out of five times within a session (Dist. Ex. 4 at pp. 6-14). The March 2010 IEP indicated that three reports of progress toward the annual goals would be prepared throughout the 2010-11 school year (*id.*). I find that overall the annual goals and short-term objectives contained on the student's March 2010 IEP, when read together, targeted the student's identified areas of need and provide information sufficient to guide a teacher in instructing the student and measuring her progress (see Tarlowe, 2008 WL 2736027, at \*9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).

#### **4. Consideration of Special Factors—Interfering Behaviors**

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

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an

intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (*id.*).<sup>15</sup> State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (*A.H.*, 2010 WL 3242234, at \*2).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide

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<sup>15</sup> 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]).

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]).<sup>16</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

The parents allege that the March 2010 CSE failed to conduct or review an FBA to better understand the student's interfering behaviors prior to developing the BIP. I note at the outset of this discussion that the student was attending the Rebecca School at the time of the March 2010 CSE meeting and conducting an FBA to determine how the student's behavior related to that environment has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at the Rebecca School and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]). As explained more fully below, I find that the district had obtained and considered information sufficient to identify the student's interfering behaviors and the strategies/goals the Rebecca School used to address the behaviors, which were reflected in the March 2010 IEP.

As discussed previously, the March 2010 CSE had before it a November 2009 classroom observation report and the December 2009 Rebecca School progress report, which described the student's interfering behaviors in the classroom and during related service sessions; information incorporated into the March 2010 IEP present levels of performance (Dist. Exs. 4 at p. 4; 10; 11). The district's school psychologist testified that the CSE did not conduct an FBA of the student, but the CSE discussed the nature of and the conditions that elicited the student's behaviors that interfered with learning and had an understanding of the function of her behaviors (Tr. pp. 152, 249-50; Dist. Ex. 3).

The school psychologist stated that the BIP contained in the March 2010 IEP was discussed during the March 2010 CSE meeting (Tr. p. 150). The BIP described the behaviors that interfere with the student's learning as her disengagement and withdrawal from others absent 1:1 support; attempts to leave the classroom without permission; difficulty focusing on academic tasks and activities; and a tendency to hyperfocus visually, scream and cry in uncomfortable and unfamiliar environments, seek tactile/sensory input, and become dysregulated by excessive noise (Dist. Ex. 4 at p. 18). The student's interfering behaviors included in the BIP were commensurate with those described within the December 2009 Rebecca School progress report and discussed during the March 2010 CSE meeting (Tr. pp. 150-51; Dist. Ex. 3; compare Dist. Ex. 4 at p. 18, with Dist. Ex.

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<sup>16</sup> 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]).

11 at pp. 1-3, 6-11). Although the parents assert in their cross-appeal that the BIP is inadequate because it fails to describe the conditions that served as a "catalyst" for the student's behaviors, the hearing record shows that the CSE discussed the conditions under which the student exhibited interfering behaviors, and the IEP shows that the student's interfering behaviors occurred in the absence of 1:1 support, when she was in loud or busy environments, or when she became overwhelmed by a loud noise, sudden demand, or unexpected touch/feeling (Tr. pp. 250-58; Dist. Ex. 4 at pp. 4, 18). The situations and conditions that elicited the student's interfering behaviors included in the March 2010 IEP were consistent with those described in the December 2009 Rebecca School progress report (compare Dist. Ex. 4 at pp. 4, 18, with Dist. Ex. 11 at pp. 1-3, 6-11).

To address the behaviors that interfered with the student's learning, the March 2010 CSE recommended that personnel working with the student write out her schedule to prepare her for any changes/transitions; use books and written materials to help her process events and interactions; use movement based activities to help her engage in academic tasks; engage her continuously to avoid hyperfocusing on materials/objects; provide her with access to a quiet space when needed to facilitate self-regulation and problem solving; speak to her in a slow, soft, quiet voice; allow extended time for processing; and use limited language (Dist. Ex. 4 at p. 18). According to the school psychologist, during the CSE meeting the student's Rebecca School teacher indicated that the student benefitted from the use of these strategies, and others such as gross motor movement breaks and sensory supports, which the IEP also provided for (Tr. p. 151; Dist. Ex. 4 at pp. 3-4). The school psychologist testified that no one voiced disagreement about the BIP at the CSE meeting (Tr. pp. 151-52).

Additionally, the IEP provided annual goals and short-term objectives to improve the student's ability to share attention with peers and adults across a wider range of contexts and emotions, increase her ability to engage and relate during play, increase her ability to communicate emotions, initiate interactions with others and maintain eye contact, and request sensory input when dysregulated (Dist. Ex. 4 at pp. 8, 10-12, 14). The school psychologist testified that the CSE recommended the student receive 1:1 paraprofessional services to help implement the student's BIP, and also counseling services to implement the IEP goals and short-term objectives related to the student's social skill and engagement difficulties (Tr. pp. 150, 157). Thus, the hearing record reflects that in conjunction with the BIP, the IEP provided additional supports to improve the student's behavior.

In light of the circumstances of this case, particularly where there is agreement between the information before the March 2010 CSE and the resultant IEP as to the function of the student's behaviors, where the IEP identifies the student's major interfering behaviors and provides services and supports to address them, and where it was not possible to conduct an FBA in the setting in which the BIP would have been implemented due to the then-current placement of the student, I find that the lack of an FBA does not compel a finding that the district failed to offer the student a FAPE (see Cabouli, 2006 WL 3102463, at \*\*3; A.C., 553 F.3d at 172-73; see also Application of the Dep't of Educ., Appeal No. 11-156; Application of a Student with a Disability, Appeal No. 11-110). I further note that, as set forth above, State regulations require in pertinent part that a CSE consider developing a BIP when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1]). Here, because the student has not attended the district's recommended program, there has been no opportunity to determine if the student's

impeding behaviors would have persisted despite consistently implemented general school-wide or class-wide interventions, yet the CSE proceeded to develop a BIP for the student anyway.<sup>17</sup>

## **D. Assigned School**

### **1. Availability of Classroom**

I will next address the parties' argument as to whether the district was capable of providing the student with a classroom for the beginning of the 12-month school year in July 2010, and whether the district was required to demonstrate that the assigned school had space for the student in an appropriate class as of September 2010. 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 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September'"]) Where, as here, the student is recommended for a 12-month school year, it is relevant to note that in New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]), and the IDEA only requires that a district have an IEP in effect for the beginning of the applicable school year (see 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; K.L. v. New York City Dep't of Educ., 11 Civ. 3733 at \*38-39 [where student recommended for 12-month school year and parent rejected placement, district not required to defend placement from fall to end of school year]).

Regarding the parents' assertion that the district was required to show the appropriateness of the assigned class for the full 12-month school year because of evidence in the hearing record that the assigned class would have been different in the fall, the above analysis applies, and moreover, the assignment of a particular class or 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. March 30, 2010]; T.Y. v. Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; 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; 584 F.3d 412 [2d Cir. 2009]; Application of a Student with a Disability, 09-082; Application of a Student with a Disability, 09-074; Application of a Student with a Disability, 09-063; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of

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<sup>17</sup> While the IDEA does not preclude a CSE from initially formulating a BIP, it is not unusual for a classroom teacher or other special education provider to formulate or modify a BIP over the course of a school year when a BIP is called for in the implementation of the student's IEP (see, e.g., Application of a Child with a Disability, Appeal No. 05-107). As noted above, if the district creates a BIP for the student, the CSE is thereafter required to review the BIP at least annually (8 NYCRR 200.22[b][2]).

placement options available for a child with a disability,<sup>18</sup> and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).<sup>19</sup> This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

In this case, the district developed an IEP for the student prior to the beginning of the 2010-11 school year (Dist. Ex. 4). Prior to the beginning of the school year, the district also notified the parents of the school with a recommended 6:1+1 special class to which the district assigned the student (Dist. Ex. 13). Although the hearing record reflects that for the beginning of the school year in July 2010 there were six students assigned to the class (Tr. pp. 326, 366-67), the hearing record also reflects that in a letter dated June 23, 2010, from the student's father to the CSE, the parents rejected the assigned school and advised that the student was going to continue to attend the Rebecca School for the summer and that the parents would seek tuition reimbursement (Parent Ex. H at p. 3). Accordingly, the hearing record reflects that the parents rejected the assigned school prior to the time the district became obligated to implement the March 2010 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>20</sup>

In addition, the evidence in the hearing record does not support the conclusion that, had the parents enrolled the student in the public school, the district would have denied the student a FAPE by deviating from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

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<sup>18</sup> See 8 NYCRR 200.6 for New York State's continuum of services.

<sup>19</sup> The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room? (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

<sup>20</sup> Although the parents indicated in a letter dated June 2010 that the public school site was not appropriate for the student "at least for the summer" (see Parent Ex. H), and subsequent letters to the district dated August 30 and September 10, 2010 indicated that in September 2010 the parents would "reassess" the appropriateness of the assigned school for the student (see Parent Exs. F; G), the hearing record reflects that the parents never rescinded their June 2010 rejection of the assigned school and did not thereafter indicate an intent to send the student to the assigned school. In a letter signed September 28, 2010, from the student's mother to the CSE she indicated again that the parents did not find the assigned school to be appropriate (Parent Ex. E).

## 2. Failure to Implement the IEP

The parents assert that the district would not have been able to properly implement the student's IEP based upon claims of improper grouping, environment and inability to meet sensory needs, provision of related services, and transitional support services. In this case, however, a meaningful analysis of the parent's claims would require me to determine what might have happened had the district been required to actually implement the student's IEP – an event that did not occur in this case because the parents unilaterally removed the student from the public school before the IEP was to be implemented. Parents are not required to "try out" the school district's proposed program (Forest Grove, 129 S. Ct. at 2496). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir.2009]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at \*11 [N.D.N.Y. Aug. 21, 2008], aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]).

The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

In this case, as discussed above, the parents expressed their intent to unilaterally place the student at the Rebecca School in a letter to the district dated June 23, 2010—prior to the time that the district was required to implement the student's IEP on July 1, 2010 (compare Parent Ex. H at pp. 1, 3, with Dist. Ex. 4 at pp. 1-2). Thus, while the district was required to establish that the IEP was appropriate during the impartial hearing, the district was not required to establish that the IEP was actually implemented in accordance with State and Federal law in the proposed classrooms.<sup>21</sup> Even assuming for the sake of argument that the student had attended the district's recommended programs, as further discussed below, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial

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<sup>21</sup> In New York State, policy guidance offers an explanation of the steps that must be taken to ensure the implementation of an IEP ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 60-61, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at \*3 [S.D.Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

### **3. Assigned Class — Grouping**

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

In this case, assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 6:1+1 special class at the assigned school was prepared to provide the student with suitable grouping for instructional purposes that was designed to meet her needs. The special education teacher of the assigned classroom testified that there were six special education students "[on the] autism spectrum" in her second and third grade 6:1+1 classroom, who ranged in age from seven years to nine years old (Tr. pp. 279-80, 358-59, 362, 371, 374-75). A July 20, 2010 class profile created by the special education teacher indicated that the students in the assigned classroom exhibited the

following instructional levels in reading and math: two students were within a 1.6-2.5 grade level range, and four students were within a .5-1.5 grade level range (Tr. p. 426; Parent Ex. HH at p. 1).<sup>22</sup> Notably, the evidence indicates that at the time of the March 2010 CSE meeting, while the student's reading decoding skills were at a third grade level or within 18 months of two of the students in the assigned class, her reading comprehension skills were at a mid-first grade level, which fell within the range of reading abilities of all six students in the class (Dist. Ex. 4 at p. 3; Parent Ex. HH at p. 1). In March 2010, the student's math computation skills were at an early to mid-first grade level, which was within the range of math abilities of four of the students in the assigned class (id.).

Following her review of the IEP, the special education teacher of the assigned class stated that with the exception of decoding, the student's academic skills were similar to those students in the assigned class (Tr. pp. 388-89). Three of the students in the assigned class were able to play independently, and one engaged in pretend play activities for approximately 10 minutes (Tr. p. 468). Like the student in the instant case, all six students in the assigned classroom received OT and speech-language therapy services, five of the students in the assigned class received PT, one student received counseling services, and one student required the assistance of a 1:1 paraprofessional (Dist. Ex. 4 at p. 17; Parent Ex. HH at p. 2).<sup>23</sup> Accordingly, upon review of the hearing record, I find that the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned district school for the beginning of the student's 12-month school year in July 2010.

#### **4. Assigned School Environment and Sensory Needs**

The hearing record shows that the building that housed the assigned school also provided space to two other schools, and the school to which the student was assigned was located on one side of the first floor of the building (Tr. pp. 274-75, 300). Although the lunchroom, auditorium and gym were considered shared spaces, each school was assigned specific times to use the areas, and each school had its own entrances/exits (Tr. pp. 301-02, 378). According to the special education teacher of the assigned class, in July 2010 her classroom was located third in from the main door, and students in her class rarely interacted with students from other schools (Tr. pp. 381-82). Students who became dysregulated in larger environments such as the cafeteria were provided with accommodations including a "quick break," the option to stay in the classroom, take a walk, or get a drink (Tr. pp. 382-83). The special education teacher stated that the assigned classroom was set up using a TEACCH model that attempted to "minimize distractions" (Tr. p. 376). She testified that she did her "best" to maintain a quiet classroom (id.). The assigned

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<sup>22</sup> The special education teacher of the assigned class testifying on September 20, 2011, stated that she would have changed the functional levels of one of the students reflected on the July 2010 class profile because she had the opportunity to know the student better over time (Tr. pp. 438-39). Her testimony does not affect my determination as stated above.

<sup>23</sup> To the extent that the parents assert that the student's average cognitive abilities were dissimilar to the students in the assigned class who according to the July 20, 2010 class profile, possessed below average learning characteristics and intellectual functioning based upon the special education teacher's observations of their completion of classroom activities, I note that cognitive skills are not a necessary component of determining the similarity of individual needs for placement within a special class, and as described above, the students' academic achievement and related service needs were globally commensurate with the students in the assigned class (Tr. pp. 439-40; see 8 NYCRR 200.6[h]).

classroom had an exercise ball, shaving cream, Play Doh, and "squeegee" balls for sensory activities (Tr. p. 445).

Following a review of the student's March 2010 IEP, the special education teacher testified that because there were three adults in her classroom, someone would have been available to assist the student when she became sensitive to noise by helping her find a quieter place in the classroom or taking her out of the room for a quick break (Tr. pp. 385-86). To address the student's difficulty sitting and attending to tasks, the special education teacher stated that she provided the students with breaks, and hands-on activities that included movement (Tr. pp. 386-87). The special education teacher stated that she could have provided the sensory breaks, sensory tools, gross-motor activities, 1:1 support and manipulatives for math recommended in the March 2010 IEP, that these strategies were normally used in her class, and that she found them to be effective for her students (Tr. pp. 387-88).

Based on the above, I do not find evidence sufficient to support the conclusion that, had the student enrolled in the public school, that the district would have failed to implement the student's IEP by deviating from it in a material or substantial way regarding the environment of the assigned school and the ability of the school to meet the student's sensory needs.

## **5. Transitional Support Services**

The parents also assert that the district failed to develop a transition plan for the student with respect to the student's transition from the Rebecca School program to the district's program. Although the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another,<sup>24</sup> in the instant case, a review of the hearing record reflects that had the student attended the district placement, the district would nevertheless have offered the student specialized services to assist her in transitioning from the Rebecca School to the district recommended class (see A.L., 812 F. Supp. 2d at 505; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; see also M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]). In this case I note that the March 2010 CSE provided the student with a 1:1 crisis paraprofessional (see Dist. Ex. 4 at pp. 17-18). In addition, the teacher of the assigned class testified that she had strategies to help new students transition, including providing visual cues and a quiet environment, and communicating with the student's parents (Tr.

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<sup>24</sup> Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student had not attained the age of 15 at the time of the CSE meeting (see Dist. Ex. 1 at p. 1).

p. 376). Accordingly, the hearing record reflects that the district would have provided transition support in order to facilitate the student's placement in the assigned school.<sup>25, 26</sup>

## 6. Provision of Related Service Mandates

The IHO found that it was unclear if the school would be able to meet the related service mandates of the student's IEP without issuing RSAs (IHO Decision at p. 27). The parents assert that the district's assigned school would not have been able to provide the student with all of her mandated related services on the IEP. Upon review, I find that the hearing record does not support a finding that the student would not have received all of the related services on her IEP if she had attended the assigned school. According to the hearing record, related services were provided at the assigned school and if a student at the assigned school could not receive related services due to scheduling or the provider's schedule, the student would receive an RSA, enabling the student to receive the service outside of school at no cost (Tr. p. 288).

A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of

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<sup>25</sup> I note that the parents do not assert that the district failed to recommend "transitional support services" pursuant to State regulations governing the provision of educational services to students with autism (see 8 NYCRR 200.13[a][6]). The parents assert in the April 22, 2011 due process complaint notice that the IEP did not include an "appropriate transition plan" for the student regarding her transition from her current educational setting to the assigned school and to support the student's transition from the district assigned summer school class to the assigned class in September (see Dist. Ex. 1 at p. 2). In the cross-appeal, the parents assert that the IHO failed to consider the claim that the IEP failed to include a transition plan or supports to aid the student's transition to the assigned school (see Cross-Appeal ¶¶ 56, 60, 64). The particular State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]), but no written plan is expressly required.

<sup>26</sup> In April 2011, the Office of Special Education issued an updated guidance document entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," which describes transitional support services for teachers and how they relate to a student's IEP (see <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]) (<http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; see <http://www.emsc.nysed.gov/resources/contractsforinstruction/>).

Moreover, case law supports a finding that it is permissible for the district to offer parents vouchers to obtain related services outside of school in response to a recognized shortage of service providers (see A.L., 812 F. Supp. 2d at 503). In addition, case law supports a finding that data indicating that a school has not always delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding (see A.L., 812 F. Supp. 2d at 503; M.S., 734 F. Supp. 2d 271 at 278-79). Therefore, even if the district had needed to provide the student with an RSA for related services, this would not have denied the student a FAPE.

## VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. As described above, the hearing record contains evidence showing that the March 2010 IEP recommending placement of the student in a 6:1+1 special class in a specialized school with the services of a full time 1:1 paraprofessional, speech-language therapy, OT, PT, and counseling services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at \*12; D.D-S., 2011 WL 3919040, at \*13; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).<sup>27</sup>

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<sup>27</sup> Although not dispositive in this case, if the hearing record had showed that the district did not offer the student a FAPE, I have reviewed the hearing record and find that the parents' home program was not appropriate because it was unduly restrictive. Although the parents appear to have given considerable thought in exercising their right to provide their daughter a private education of their own choosing and have prioritized the benefits that they believe are most important, they have elected an option that is very different from the objectives of the IDEA in terms of providing disabled student's with access to special education services in public schools and the mandate that IDEA eligible students be educated in the least restrictive environment. U.S. District Courts in New York have upheld denials of tuition reimbursement when the parents' chosen unilateral placement was too restrictive (D.D-S., 2011 WL 3919040, at \* 14, citing M.S., 231 F.3d at 104-05 [concluding that the parents' unilateral placement was not appropriate, in part, because it was not "consistent with the IDEA's requirement that children with disabilities be educated in the least restrictive appropriate educational environment"]; S.H. v. New York City Dept of Educ., 2011 WL 609885, at \*9-\*10 [S.D.N.Y. Feb. 18, 2011] [denying tuition reimbursement when the parents failed to demonstrate that the student required a residential program "solely for learning disabled students in order to obtain educational benefits"]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 551 [S.D.N.Y.2010] [finding that a "private placement can be appropriately rejected" when a student's opportunities to "participate in the mainstream curriculum were too limited"]; Pinn, 473 F.Supp.2d at 482-83 [concluding that the unilateral placement was not appropriate because "[m]uch of [the student's] education consisted of one-on-

I have considered the parties' remaining contentions and find that the contentions are either without merit or that I need not consider them in light of my determinations herein.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated March 27, 2012 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered reimbursement for the cost of the Rebecca School program for July and August 2010, the cost of the home program, and the cost of OT and art therapy.

**IT IS FURTHER ORDERED** that the IHO's decision dated March 29, 2012 is annulled in its entirety.

**Dated:** Albany, New York  
September 10, 2012

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

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one tutoring, and he did not have the opportunity for taking classes in mainstream settings"). Although I understand the IHO's desire to revisit this issue as she did in amending her final decision dated March 29, 2012, as discussed above, such reopening and redetermination of the case is unfortunately inconsistent with the administrative due process system envisioned by Congress.