The University of the State of New York

The State Education Department
State Review Officer
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No. 12-107

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, 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') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2011-12 school year. The parents' cross-appeal from the IHO's determination which reduced their award of tuition reimbursement to 90 percent of the amount sought. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this appeal has been given the following diagnoses: cerebral palsy, autism, a pervasive developmental disorder (PDD), and has significant delays, and is nonverbal, communicating through vocalization and gestures (Parent Exs. A at p. 2; B at pp. 3, 5). The student also has deficits in receptive language, fine motor skills, visual motor coordination, attention, sensory modulation, behavioral organization and motor planning, and has difficulty with regulation and interactions within the social/emotional area (Parent Ex. B at pp. 3-5). The student has been attending the Rebecca School since July 2010 (Tr. pp. 262, 501-02). The Rebecca School

is a nonpublic school which 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).[1]

On May 21, 2011, the parents signed an "Addendum" to the payment schedule for the 2011-12 school year at the Rebecca School (Parent Ex. J at pp. 5-6).

On May 24, 2011, the CSE met to review the student's eligibility for special education services and to create his IEP for the 2011-12 school year (Parent Ex. B). The May 2011 CSE developed an IEP that included annual goals and related short-term objectives for the student (id. at pp. 6-13). With regard to educational placement options, the CSE considered a variety of settings, including a general education setting, placement in a 10-month school year program, a special classes with 12:1+1 and 8:1+ 1 student-to-teacher ratios, and a 6:1+1 special class in a special school without a full-time paraprofessional, and rejected those options as either lacking in sufficient support for the student, or because they would result in significant regression on the part of the student (id. at pp. 14-15). The CSE recommended that the student be placed in a 12-month, 6:1+1 special class in a specialized school (id. at p. 1). The CSE further recommended that the student receive adapted physical education, assistive technology, and special education transportation in a wheelchair accessible bus (id.). The CSE determined that due to the student's behavioral needs, it would terminate the use of a "health" paraprofessional and initiate the use of a full-time "crisis management" paraprofessional (id. at pp. 2, 4, 16, 17). The CSE also recommended the student receive three individual 30-minute sessions each of occupational therapy (OT), physical therapy (PT), and speech-language therapy per week; two small group (2:1) 30-minute sessions of speech-language therapy per week; and one 30-minute group small group (3:1) session of OT per week (id. at p. 16). The CSE also attached a behavioral intervention plan (BIP) to the IEP, which contained strategies for addressing the student's sensory regulation and difficulties including, among other things, the use of a compression vest (id. at p. 18).

Also on May 24, 2011, the district provided the parents with a "12 month School Year Consent Form" reiterating the May 2011 CSE's recommendations for the student for the 2011-12 school year (Dist. Ex. 8).[2]

On June 1, 2011, the parents signed an enrollment contract with the Rebecca School to place the student there for the 2011-12 school year, commencing on July 5, 2011 and ending June 22, 2012 (Parent Ex. J at pp. 1-4).

In a final notice of recommendation (FNR) to the parents dated June 8, 2011, the district summarized the recommendations of the May 2011 CSE and notified the parents of the particular public school site to which the student had been assigned for the 2011-12 school year (Dist. Ex. 4).

[1] The student's eligibility for special education programs and services as a student with autism is not in dispute in this proceeding (34 CFR. 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The 12-month consent form included in the hearing record is unsigned by the parents (see Dist. Ex. 8).

In a letter to the CSE dated June 27, 2011, the parents advised that on June 21, 2011 they had visited the assigned public school site identified in the FNR with their advocate (Parent Ex. E). The parents asserted that, for several reasons, they were rejecting the public school site as an inappropriate setting for the student (i.e., the student had not made progress, the school building was too large, there was overcrowding in the therapy rooms, there was an inappropriate grouping of students, the program did not provide the services required by the student, and there was a lack of parent training) (id.). The parents indicated that if another option was not found for the student in a timely manner, they would send the student to the Rebecca School for the 2011-12 school year and seek tuition reimbursement from the district (id.). The hearing record reflects that the student remained at the Rebecca School for the 2011-12 school year (see Tr. pp. 262, 501-02).

A. Due Process Complaint Notice and Response

In a due process complaint notice dated October 5, 2011 the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) and requested an impartial hearing (Parent Ex. A). The parents asserted that the May 2011 CSE was improperly composed because the individual who attended the meeting from the district as a special education teacher was not someone who was or could have been responsible for implementing the student's IEP, and the district's special education teacher lacked personal knowledge of the student and had only general knowledge of the program recommended by the CSE (id. at p. 3). The parents also asserted that the CSE failed to develop all of the goals and objectives at the CSE meeting, thereby denying the parents input into the development of the IEP (id. at p. 2). The parents alleged that not all of the goals contained evaluative criteria, procedures, or schedules to measure the student's progress and that the goals and objectives did not address all of the student's unique educational and social/emotional needs (id. at pp. 2-3). The parents also contended that the CSE failed to discuss inclusion of parent counseling and training on the IEP (id. at p. 3). The parents asserted that the recommended program was inappropriate because the CSE failed to make recommendations that comported with the suggestions and recommendations of the professionals who worked directly with the student, the recommended student-to-teacher ratio was inappropriate for the student, the CSE was unable to provide the parents with information about the proposed program, and the level of related services set forth in the IEP was inappropriate (id.).

As for the district's public school site and assigned classroom, the parents asserted that the school and classroom were both inappropriate because the student had not made progress in a similar program, the school was too large and noisy, the classroom size was inappropriate, the students were not appropriately grouped by age or development, the school building lacked the appropriate services the student needed (i.e., a lack of sensory equipment or a quiet area), and the OT and PT rooms were overcrowded with up to seven to eight students, while the student is mandated for 1:1 therapy (Parent Ex. A at p. 3). The parents further asserted that the Rebecca School was appropriate for the student and that they cooperated with the CSE (id. at p. 4). The parents sought funding for the student's tuition at the Rebecca School, the cost of related services or related services authorizations (RSAs), the cost of transportation, and door-to-door special education bussing (id. at pp. 4-5).

B. Impartial Hearing Officer's Decision

An impartial hearing convened on January 3, 2012 and was concluded on February 27, 2012, after five days of hearing (Tr. pp. 1, 31, 105, 236, 339). In a decision dated April 13, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, the Rebecca School was an appropriate placement, and that equitable considerations favored an award of tuition reimbursement (IHO Decision at p. 13). The IHO ordered the district to fund the cost of tuition at the Rebecca School for the 12-month period of July 1, 2011 to June 30, 2012 at a cost not to exceed $85,000 (id. at p. 14). The IHO also ordered the district to provide the parents with the cost of transportation services in a wheelchair accessible bus for the same period upon the parents' submission of proof of payment (id.).

With respect to the district's compliance with the IDEA, the IHO determined that the CSE was properly composed and the parents had the opportunity to, and actively participated at, the CSE meeting (IHO Decision at p. 12). The IHO also found that although parent counseling and training was not included in the IEP, the district would have "automatically" included this service as part of its program and therefore, was not required to place it on the IEP (id.). The IHO also found that the issue of parent counseling and training was not raised at the impartial hearing (id.). Furthermore, the IHO determined that the evaluations relied upon by the CSE were provided by the staff at the Rebecca School, and there was no evidence that they were inadequate or that the parents had requested new evaluations (id.). Based on this rationale, the IHO determined that any procedural deficiencies surrounding the May 2011 IEP did not result in a denial of a FAPE to the student (id.).

The IHO further determined that the goals and objectives in the student's IEP were appropriate as they incorporated the Rebecca School's goals and objectives (IHO Decision at p. 12). The IHO found, however, that the district's assigned public school site was inappropriate because it included the applied behavior analysis (ABA) teaching methodology, which the IHO determined was not appropriate for the student because it would not enable the student to make educational progress (id.). While noting that a parent's particular preference in teaching methodologies is not necessarily a basis for granting reimbursement, in this case, the IHO reasoned that ABA was shown by numerous witnesses with first hand knowledge of the student to be detrimental to his educational, social, and emotional needs (id. at pp. 12-13). The IHO further noted that although the district's classroom teacher at the public school site testified that she does not use any one method, and that she was not familiar with the Developmental Individual-Difference Relationship-Based (DIR) methodology employed at the Rebecca School (id. at p. 13). He further noted that the paraprofessionals in the classroom used ABA, and the teacher used a reward system and positive reinforcements that are components of ABA (id.). The IHO also found that it was undisputed the student had made progress while at the Rebecca School utilizing the DIR methodology (id.).

With regard to whether the Rebecca School was appropriate, in addition to the student's progress at the Rebecca School, the IHO found that the parents had observed "dramatic" changes in the student, the student had begun to initiate relationships, had begun to learn and to communicate in ways he had never done before (IHO Decision at p. 13). The IHO further found that the equities supported an award of tuition reimbursement; however, since the Rebecca School did not have full school days on Fridays, the IHO reduced the tuition award by ten percent (id.).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate placement, and that equitable considerations favor an award of tuition. Specifically, the district asserts that the IHO improperly based her determination that the district failed to offer a FAPE solely on the issue of the methodology used at the assigned public school site. The district claims that the parents failed to raise the issue of methodology in their due process complaint notice; therefore, the IHO erred in considering that issue. The district further asserts that the IHO reached this issue in error because the parents' claim in their due process complaint notice that the student failed to make progress in a similar program cannot be read as raising a challenge to the methodology that might have been employed by the district's school. Further, the district objected to the parents raising the issue of methodology at the impartial hearing, and the IHO restricted the admission of testimony related to the issue of methodology. Accordingly the district contends that the IHO's decision should be overturned because the issue of methodology was outside the scope of the impartial hearing.

In the alternative, the district contends that even if the issue of methodology was properly before the IHO, the evidence demonstrates that the teacher of the proposed classroom selected methods of teaching based on each student's need. Moreover, there is nothing in the hearing record that demonstrates that the methods for instructing the student would have been limited to ABA, and that the selection of methodology is usually left to the classroom teacher's discretion. The district further alleges that the evidence was insufficient to show that the use of ABA was inappropriate for the student.

With respect to the IHO's determination that the Rebecca School was an appropriate placement for the student, the district argues that the IHO erred because the hearing record does not demonstrate that the program was specifically designed to meet the unique needs of the student supported by such services necessary to permit the student to benefit from instruction. The district asserts that the Rebecca School did not address the student's academic needs as demonstrated by the testimony of the Rebecca School witnesses who conceded that the goals related to "Floor Time" methodology were not academic goals, and further, there was no evidence of a math or English language arts (ELA) curriculum utilized in the student's classroom. The district also contends that the Rebecca School does not formally assess students to determine their levels of functioning. The district further asserts that the hearing record does not demonstrate that the Rebecca School met the student's need for related services insofar as the parents, Rebecca School staff, and the district all agreed on the level of speech-language therapy that the student required during the CSE meeting and that the student received less than the agreed-upon level while attending the Rebecca School. Finally, the district asserts that the Rebecca School did not adequately address the student's behavioral issues because the evidence shows that, although the student's behavior interfered with his ability to learn, the Rebecca School did not conduct "functional behavior assessments," and it did not develop a behavior intervention plan for the student.

With regard to equitable considerations, the district asserts that should the issue be decided in the parents favor, then the IHO's decision to reduce the tuition award by ten percent should be upheld. The district also asserts that the equities do not favor an award because the cost at the Rebecca School is unreasonable, and the parents never intended to place the student at a public

school. Further, the district asserts that the parents have not demonstrated that they are entitled to direct funding for tuition costs.

In their answer, the parents assert that other than her decision to limit reimbursement, the IHO's decision was well reasoned and should be upheld. The parents assert, however, that the IHO improperly granted the district's request for an adjournment of the first day of the impartial hearing because the district's witnesses were not available, and then improperly allowed those witnesses to testify at a later hearing date. The parents request that the testimony of those district witnesses be stricken from the hearing record. The parents also request that a negative inference be taken against the district for failure to produce subpoenaed documents. The parents further assert that (1) the CSE improperly did not rely on any psychoeducational or neuropsychological evaluation; (2) the Rebecca School progress report goals relied on by the CSE in developing IEP goals were outdated; (3) a paraprofessional would not have been helpful to the student; (4) no formal functional behavioral assessment (FBA) was conducted by the district; (5) the student's related services mandates should not have been changed; (6) the student would not have been functionally grouped in the assigned class; and (7) it was inappropriate to place the student in a 6:1+1 class. With respect to the parents' claim regarding the use of ABA with the student, the parents assert that in their due process complaint notice they contended the student '"has not made progress in a similar program"' and that the student's mother testified she was referring to the use of ABA by this statement. Thus, the parents argue, the district was provided with sufficient notice that methodology was at issue.

The parents also cross-appeal the IHO's reduction of the amount of tuition reimbursement by ten percent based on the Rebecca School not having classes on Friday afternoons.[3] The parents assert that the testimony shows that the Rebecca School provides 30 hours per week of instruction and that the school closes early on Fridays for professional development, which does not increase the tuition costs. For relief, the parents request that the IHO's decision be upheld, except for her determination to reduce the tuition award by ten percent and that full tuition be awarded.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits

[3] A review of the parents' answer and cross-appeal reveals that the IHO's adverse findings that the CSE was properly composed and that the district was not required to place parent training and counseling on the IEP were not raised therein, and, as such those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see J.F. v New York City Dept. of Educ., 2012 WL 5984915, at *6 [SDNY Nov. 27, 2012]).

(Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing and Review

As an initial matter, the district asserts that the IHO exceeded the scope of the impartial hearing by finding that the district did not offer the student a FAPE because the assigned public school site would have utilized ABA, which was an inappropriate methodology for the student. The district asserts that this issue was not raised in the due process complaint notice and that counsel for the district objected to testimony regarding this issue.[4] A party requesting an impartial

[4] I note that the hearing record does not indicate that a prehearing conference occurred in this case. I remind the IHO that State regulations contain a provision 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]) to assist the IHO in determining which issues need to be addressed in her decision.

hearing may not raise issues at the impartial hearing that were not raised in its original 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]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 611 [E.D.N.Y. 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *11-*12 [S.D.N.Y. 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.). Additionally, 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]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised sua sponte.

In this case, the parents' due process complaint notice cannot be reasonably read to challenge the appropriateness of ABA as utilized in the particular public school site assigned to the student (see Parent Ex. A). In fact, the parents' due process complaint notice makes no mention of methodology at all – either ABA or DIR/Floortime (id.).[5] Further, the hearing record does not reflect that they requested, or that the IHO authorized a further amendment to the due process complaint notice to include these additional issues. 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 file an amended due process complaint notice, the IHO should not have considered such matters and I decline to review them. 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., 841 F. Supp. 2d at 611 [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., 2011 WL 6307563, at *13). "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., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at *13 [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]). Nor can it be said that the district opened the door to such claims by raising evidence as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 249-50). Consequently, the IHO's determination that the district did not offer the student a FAPE based on the issue of the methodology that a teacher may or may not have selected at the assigned school must be reversed.

[5] I find that the parents testimony interpreting the due process complaint near the conclusion of the hearing was not sufficient to overcome the need to state the claim in the complaint (Tr. pp. 506-07).

Finally, neither party appeals the IHO's lack of determinations concerning the parents' other allegations contained in the due process complaint notice regarding the October 5, 2011 IEP (see Parent Ex. A). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). Therefore, those issues are not properly before me and I decline to address them.

Despite the above findings, I have in the alternative conducted a review of the evidence in the hearing record and the IHO's decision that the district did not offer the student a FAPE for the 2011-12 school year, and as set forth below, I disagree with the IHO's determinations.

B. May 24, 2011 IEP

1. Evaluative Data

The parents argue that the CSE did not "rely" on a psychoeducational or neuropsychological evaluation. The IHO found that there was no evidence showing that the evaluations were inappropriate or that the parent requested new evaluations (IHO Decision at p. 12). Consistent with testimony by the district's school psychologist that participated in the May 2011 CSE meeting, the May 2011 IEP shows that the CSE meeting was conducted as an annual review (Tr. p. 47; Dist. Ex. 7; Parent Ex. B at pp. 1-2). The hearing record does not indicate that the parents requested additional psychological testing at the CSE meeting, or that the CSE believed that additional psychoeducational or neuropsychological testing was necessary in order to conduct the student's annual review. Consistent with the school psychologist's testimony, the minutes of the May 2011 CSE meeting indicated that the CSE reviewed and relied on current information in the January 2011 classroom observation report and the May 2011 Rebecca School progress report (Tr. pp. 50, 52, 72; Dist. Exs. 2 at p. 1; 5 at pp. 1-2; 6 at pp. 1-13; 7). In addition, the school psychologist testified that the May 2011 CSE considered the student's IEP from the previous school year (Tr. pp. 50, 72). Minutes of the May 2011 CSE noted that the parent indicated at the meeting that she had not received a copy of the classroom observation report that was mailed to her in January 2011, but that the CSE provided her with a copy of the report at the CSE and the time to read it prior to the start of the meeting (Dist. Ex. 2 at p. 1). The minutes of the May 2011 CSE meeting reflected that the parent had "no issues" regarding the classroom observation report (id.). In addition, the minutes of the May 2011 CSE meeting reflected the Rebecca School teacher's and the parent's participation in the CSE discussions (id. at pp. 1-2). The minutes of the CSE meeting also demonstrated the district's responsiveness to input from the Rebecca School teacher and the parent in developing the student's present levels of performance, in identifying his needs, and in developing the goals that were included in the 2011-12 IEP (id.). The minutes of the May 2011 CSE meeting indicated the parent was in agreement with the student's identified "pre-k" instructional levels in listening comprehension and problem solving on the May 2011 IEP (Dist. Ex. 2 at p. 1; Parent Ex. B at p. 3). The minutes also noted that after offering input about the wording of a particular math goal included in the IEP, the parent had nothing more to add or change regarding the reading and math goals that the CSE developed for the student (Dist. Ex. 2 at p. 1). Furthermore, the hearing record indicates that as part of the CSE proceedings, a draft of the May 2011 IEP was read aloud at the meeting "word by word," emphasizing that each goal was read aloud and discussed individually (Tr. pp. 51, 53; Dist. Ex. 2 at pp. 1-2). The CSE modified the student's academic, social/emotional, and health/physical present levels of performance, management needs, sensory needs, and goals based on the Rebecca School teacher's and the

parent's input (Tr. pp. 55-57; Dist. Ex. 2 at pp. 1-2; Parent Ex. B at pp. 3-13). The hearing record does not show that at the time of the May 2011 CSE meeting the parents or any other CSE participant indicated dissatisfaction with the CSE process or the resultant IEP respective to the evaluative information and identification of the student's needs, goals and objectives, and management strategies that flowed from the evaluative information. Therefore, I find that the hearing record does not support the parent's allegation regarding the lack of a psychoeducational or neuropsychological evaluation.

2. 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. Bd. 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., 454 F. Supp. 2d at 149-50; 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., 569 F. Supp. 2d at 380; 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.). 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]).

State regulations call for the procedure of using an FBA when developing a BIP, and the Second Circuit has explained that when required "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all (R.E., 694 F3d at 190). However, the failure to comply with this procedure does not automatically render a BIP deficient (R.E., 694 F.3d at 190; A.C., 553 F.3d at 172; A.H., 2010 WL 3242234, at *4; see F.L., 2012 WL 4891748, at *8; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *11 [S.D.N.Y. Aug. 23, 2012]; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796, at *9 [S.D.N.Y. Sept. 26, 2012]; M.W., 869 F. Supp. 2d at 333; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8-*9 [S.D.N.Y. Dec. 8, 2011]; C.F., 2011 WL 5130101, at *9).

In this case, the parents contend that the district improperly formulated a BIP without first conducting a FBA. Testimony by the school psychologist indicated that during the May 2011 CSE meeting, she "informally" conducted an FBA, whereby she asked the student's teacher from Rebecca School if she was aware of the function of the student's behaviors that interfered with instruction (Tr. p. 79). Consistent with testimony by the school psychologist and information included in the minutes of the May 2011 CSE meeting, the IEP included a BIP (Tr. p. 57; Dist. Ex. 2 at p. 2; Parent Ex. B at p. 18). Consistent with discussion with the Rebecca School teacher and the parent, the BIP contained a description of the student's behaviors that interfered with his learning and a hypothesis as to the function of those behaviors (Tr. pp.79-80; Dist. Ex. 2 at p. 2; Parent Ex. B at p. 18). The BIP indicated the student tended to display periods of dysregulation that may become intense, especially when transitioning away from a preferred activity or when a preferred adult leaves (Parent Ex. B at p. 18). The BIP further noted that the student may drop to the ground, emit loud vocalizations, and cry (Tr. p. 58; Parent Ex. B at p. 18). Also consistent with the school psychologist's testimony and the minutes of the May 2011 CSE meeting, the BIP indicated that "The function of these behaviors are due to [the student's] limited communication skills, especially not being able to communicate his wants and needs as well as sensory concerns and simply a function of his disability (autism)" (Parent Ex. B at p. 18). Furthermore, the BIP included information about the frequency and duration of the student's display of these behaviors, goals addressing projected change in the student's interfering behaviors, and strategies and supports to change the identified behaviors (Tr. pp.58, 82-83; Dist. Ex. 2 at p. 2; Parent Ex. B at p. 18). The minutes of the May 2011 CSE indicated that the parent was in agreement with the Rebecca School teacher's input regarding the student's behavior, and when asked during the CSE meeting if she was comfortable with the BIP, the parent responded, "Yes" (Dist. Ex. 2 at p. 2).

Therefore, based on the above, even if the district's BIP was formulated without a formal written FBA, the evidence shows that the CSE had accurate information regarding the student's behavior and formulated an appropriate BIP to address those behaviors. Therefore, the procedural violation in this instance does not rise to the level of a denial of a FAPE. However, I caution the district to adhere to the procedural requirements and ensure that a BIP for the student is based upon the results of a properly conducted FBA (8 NYCRR 200.1[mmm]; see 8 NYCRR 200.22[a][2]-[3]), and that in addition to the IEP, the student's BIP is reviewed at least annually by the CSE (8 NYCRR 200.22[b][2]).

3. Related Services and Annual Goals

Turning to the parents' contention that there was no evidence presented to support changes made to related services in the May 2011 IEP, the evidence shows that the school psychologist testified that the May 2011 CSE recommended related services of OT to address the student's sensory and fine motor needs, speech-language therapy because the student was primarily nonverbal, and PT to address the student's gross motor needs (Tr. pp. 59-60). The school psychologist also noted that the CSE modified related services mandates from the prior school year by initiating OT one time per week in a small group for 30 minutes to promote socialization, while continuing his previous mandate for individual OT three times per week for 30 minutes (Tr. p. 61; Dist. Ex. 2 at p. 2; Parent Ex. B at pp. 2, 16). The May 2011 CSE's recommendation for individual PT three times per week for 30 minutes remained the same as the previous school year (id.). The May 2011 CSE modified its speech-language therapy recommendation for the student from the previous school year, so that in addition to continuing the related service in a small group (2:1) two times per week for 30 minutes, the student would receive individual speech-language therapy three times per week for 30 minutes (id.).

The May 2011 CSE also terminated a recommendation from the previous school year for a 1:1 health services paraprofessional (Tr. p. 89; Dist. Ex. 2 at p. 2; Parent Ex. B at pp. 2, 17). Instead, the CSE initiated a recommendation for a 1:1 crisis management paraprofessional based upon its discussion about the student's behavior specific to the instructional process, the possibility of his behavior impeding his learning and functioning, and the possibility that behavior such as leaving the classroom without permission may have led to a safety hazard (Tr. pp. 62-63, 89; Dist. Exs. 2 at p. 2; 3; Parent Ex. B at pp. 2, 16). According to the school psychologist's testimony, the May 2011 CSE reached a consensus that the student required 1:1 support in consideration of his behavior and safety (Tr. p. 63; Dist. Ex. 2 at p. 2). Furthermore, she noted that the intent of the CSE's recommendation for the crisis paraprofessional was for the paraprofessional to participate in the implementation of the BIP (Tr. p. 65). Therefore, I do not agree with the parents' assertions and find that the evidence in the hearing record provides support for the modifications made in related service recommendations listed in the May 2011 IEP.

The IHO found that the goals and objectives in the May 2011 IEP were appropriate (IHO Decision at p. 12). The May 2011 IEP included two goals specific to the student's effective transition to a new school environment and incorporated the support of a 1:1 transitional paraprofessional (Parent Ex. B at p. 13). The annual goals and short-term objectives addressed the student's needs to increase the length of his interactions with adults and peers, as well as his need to expand his use of self-regulation strategies and his ability to maintain his emotional regulation during transition times in the classroom (id.). Although the hearing record reflects the parent's

concern that the student might become dependent on the crisis paraprofessional (Tr. p. 502), the hearing record does not indicate the student would be limited to interact only with his assigned paraprofessional, or that the recommended program would not work with the student to prevent potential learned dependency on one particular person.

4. 6:1+1 Special Class Placement

The parents also argue that a 6:1+1 special class was not appropriate for the student. State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with State regulation regarding students with intensive needs, the May 2011 CSE recommended a 6:1+1 special class placement in a specialized school with a 1:1 crisis paraprofessional for the student for the 2011-12 school year (Parent Ex. B at pp. 1, 16). Testimony by the district's school psychologist who observed the student in his classroom at the Rebecca School indicated that she had visited many of the district's 6:1+1 programs (Tr. p. 63). She testified that the district's 6:1+1 special classes tended to be structured and small in class size (id.). She further noted that based on the student's functioning level, such a program could address the student's needs (id.). In addition, the school psychologist testified that the May 2011 CSE recommended a 1:1 crisis paraprofessional for the student to address behaviors he displayed at the time that could impede his instructional process and functioning (Tr. pp. 62-63; Parent Ex. B at p. 16). For example, the school psychologist indicated that the CSE reached a consensus about the student's need for support for purposes of avoiding a "significant safety hazard," as there was the possibility that the student might leave the classroom without permission (Tr. p. 61). In consideration of the 6:1+1 special class providing structure and a small class size for students with intensive needs, in conjunction with the additional support offered through a 1:1 crisis paraprofessional, I find the recommended special class placement was appropriate to address the student's needs and was "'likely to produce progress, not regression"' (Cerra, 427 F.3d at 195 [quoting Walczak, 142 F.3d at 132]). While I can sympathize the notion that the parents may have desired an even more intensive level of services for their son, the district is not required to "furnish ... every special service necessary to maximize each handicapped child's potential" (Rowley, 458 U.S. at 199). In view of the forgoing evidence, I find that the IEP was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07).

C. Assigned School

The parents made several additional assertions in their due process complaint notice and on appeal that were based not on the IEP, but with regard their observations of service delivery to other students in the specific classroom and school to which the student had been assigned. With regard to the implementation of a student's IEP, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[6] However, while the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, they do not permit

[6] 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]).

parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in 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 (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In addition, a delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]).

In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement (R.E., 2012 WL 4125833). Thus, in a case such as this one when it became clear that the student was not going to be educated under the proposed IEP, there can be no denial of a FAPE due to the to the speculation that there would be a failure to implement the IEP (see R.E v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

In order to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063).[7] Additionally, the United States Department of Education (USDOE) has also clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the

[7] The Second Circuit has established that "'educational placement' refers to the type of educational program on the continuum—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *11 [S.D.N.Y. Aug. 19, 2011]; R.K., 2011 WL 1131492, at *15-*17, adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 CFR 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 2011 WL 4001074, at *11).

flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).

In this case, the district correctly argues that these issues are speculative insofar as the parents did not accept the IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing. Consequently the district was not required to demonstrate the successful implementation of services in conformity with the student's IEP at the public school site and, therefore, there is no basis for concluding that it failed to do so. "Given the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made" R.C. v. Byram Hills School Dist., 906 F.Supp.2d 256, 273 [S.D.N.Y. 2012]). I find that similarly, the parents' claim in this case that extended beyond the adequacy of the IEP and into alleged inadequate delivery of services by the particular teacher at the public school classroom must be dismissed as it is an speculative basis upon which to predicate a denial of a FAPE. Notwithstanding this determination, I have searched the hearing record and examined the evidence of what might have occurred had the teacher at the public school site been given the opportunity to provide instruction to the student in this case.

1. Teaching Methodology

The parents assert on appeal that, because the student had not had success with the ABA teaching methodology in the past, he would not have received an educational benefit in the particular assigned classroom because ABA was utilized by the teacher. Although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v. New York City Dep't of Educ., 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

Notwithstanding the speculative nature of the IHO's conclusion about the methodology that the teacher of the particular classroom may have employed had the student been presented to her, as discussed below, the evidence does not support the conclusion that ABA would have been the

sole methodology utilized in the classroom, or that the use of ABA in the classroom would have denied the student a FAPE.

Although the special education teacher of a 6:1+1 class at the assigned public school who likely would have been the student's teacher had he attended the recommended placement indicated she that she was familiar with ABA, and that she used it in her classroom, she also testified that she did not adhere to a particular methodology with the students in her class (Tr. pp. 126-27, 155-56). Instead, the teacher testified that instruction was multisensory and "individualized" for each student in the class because each student was different and received programming according to their individual needs (id.). The teacher also testified that instruction was "differentiated" for each student for any kind of lesson, and she could not "generalize" instruction because "it's just specific for each child" (Tr. pp. 126-27, 129, 153, 170). In her description of a typical day in the 6:1+1 class, the teacher did not mention ABA (see Tr. pp. 130-32). When asked questions about her students' 1:1 work portion of a typical school day, the teacher testified that 1:1 referred to a student being assigned to a paraprofessional or the teacher to work on the goals in the students' IEPs (Tr. p. 134). The teacher's testimony reflected a full schedule that involved whole group instruction, small group instruction, and individual instruction in the classroom, in other areas of the school, and in the community, with the teacher, paraprofessional, related service providers, and cluster teachers (social studies, science, and gym) (Tr. pp. 133-40).

Consistent with the student's academic, social/emotional, and sensory needs and the BIP attached to the May 2011 IEP, the teacher's testimony revealed she had experience working with students with sensory needs including students on a sensory diet (Tr. p. 141; Parent Ex. B at pp. 3-5, 18). Furthermore, the teacher indicated she integrated social skills, communication skills, and turn taking skills into the classroom throughout the day, and that she managed her students' tantrum behaviors with strategies such as social stories she created (Tr. pp. 140-41, 175).[8] The teacher also noted she addressed tantrum behaviors with time out for students to have "some space for themselves," and sensory inputs such as brushing and deep pressure (Tr. p. 175). The teacher's testimony also indicated that she reviewed the student's May 2011 IEP (Tr. pp. 141-42). She added that if he had been enrolled in her class, such placement would have been appropriate for him, and that she would have been able to work toward his goals with him because she would have made accommodations for him to meet his individual goals in the IEP (id.).

Turning to the use ABA in particular, when asked for a theoretical example of how she would use ABA in the classroom "with a student," the teacher indicted she would break IEP goals into smaller parts, work on the goal during 1:1 time, and take data on the goal to determine progress (id.). While both the student's former private occupational therapist[9] and the program director at the Rebecca School testified that ABA was not appropriate for the student, I note that they specifically equated ABA to discrete trial training (Tr. pp. 201, 218, 224, 250, 277). The hearing

[8] Testimony by the teacher of the 6:1+1 special class indicated that social stories were simple stories geared toward a specific behavior or concern a student might have that allows the student to "rehearse what an appropriate response might be" (Tr. p. 175).

[9] Although the student's former private occupational therapist testified she had a working expertise in using ABA and that it was important to establish rapport with a student before starting to work with that student, she also testified during questioning involving ABA terminology, that she did not know what "pairing and manding" meant (Tr. p. 206).

record does not reflect that the teacher of the recommended 6:1+1 special class placement performed discrete trials with any of her students during the 2011-12 school year, or that she would have used discrete trials with the student in the instant case if he had actually attended her class. In addition, testimony by the student's mother indicated that when she visited the assigned public school in June 2011, she was given a tour by a parent coordinator (Tr. p. 520). The parent testified she did not voice her concerns to the parent coordinator (or the teacher when she entered the classroom) about possible use of ABA in the classroom or how her concerns about the use of ABA with the student might have been accommodated had the student attended the public school placement (see Tr. pp. 521-23). In light of the evidence, I find that the parents would not prevail on their classroom methodology claim had the student attended the assigned public school site.

VII. Conclusion

In summary, the evidence above shows that the special education services the district offered in the May 2011 IEP were reasonably calculated to enable the student to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). Furthermore, the evidence also supports the conclusion that the district was prepared to implement the student's IEP and, had the student enrolled in the public school, would not have deviated from his IEP in a material way (S.H., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]). Additionally, there is no evidence in the hearing record that some use of ABA techniques with the student in the proposed classroom would have led to a denial of a FAPE. Consequently, I find that the hearing record does not support the IHO's conclusion that the district failed offered the student a FAPE for the 2011-12 school year and therefore it must be reversed. Because the district prevails upon the claims related to a FAPE, it is not necessary to reach the issue of whether the Rebecca School was an appropriate unilateral placement for the student or whether equitable considerations supported the IHO's determination to reduce the award tuition reimbursement award, and the necessary inquiry is at an end (M.C. v. Voluntown., 226 F.3d at 66; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *10 [S.D.N.Y Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13 [E.D.N.Y. Sep. 2, 2011]; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038). I have considered the parties' remaining contentions and find that they need not be addressed in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that those portions of the IHO's decision dated April 13, 2012 which determined that the district failed to offer the student a FAPE for the 2011-12 school year and awarded the parents tuition funding for the 2011-12 school year at the Rebecca School are reversed.

Dated: **Albany, New York**
July 19, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER