



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-046

### **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, Neha Dewan, Esq., of counsel

Kule-Korgood, Roff and Associates, PLLC, attorneys for respondent, Michele Kule-Korgood, Esq., and Lauren Goldberg, 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 the 2012-13 school year. The parents cross-appeal from portions of the IHO's decision and the IHO's failure to address certain issues raised in their due process complaint notice. 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 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**

On May 31, 2012, a CSE convened for the student's annual review and to develop her IEP for the 2012-13 school year (Dist. Ex. 2). The May 2012 IEP reflected that the CSE found the student eligible for special education and related services as a student with autism and recommended a 12-month program with placement in a 6:1+1 special class in a specialized school (id. at p. 12).<sup>1</sup> The CSE also recommended related services, including three 30-minute sessions

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<sup>1</sup> The student's classification as a student with autism is not in dispute in this appeal (Tr. pp. 165-66).

per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of two, two 30-minute sessions per week of individual physical therapy (PT), one 30-minute session per week of PT in a group of three, four 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of OT in a group of two, and two 30-minute sessions per week of individual counseling (id.).

On June 18, 2012, the district issued a final notice of recommendation (FNR) summarizing the recommendations made by the May 2012 CSE and identifying the particular school to which the district assigned the student for the 2012-13 school year (Dist. Ex. 3). The parents sent a letter to the district dated June 18, 2012, informing the district that they had not yet received a school placement for the student for the 2012-13 school year and that they had concerns regarding the May 2012 IEP (Parent Ex. D at p. 1). The parents also advised the district that they were going to place the student at the Rebecca School for the 2012-13 school year and commence an impartial hearing to establish the Rebecca School as the student's pendency placement (id.).

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

In a due process complaint notice, dated July 2, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A).<sup>2</sup> The parents asserted that the district did not evaluate the student in all areas of her disability, did not involve the parents in the evaluation process, and did not reevaluate the student within three years from the student's prior evaluation (id. at pp. 2-3). In particular, the parents alleged that the district failed to conduct OT and speech-language evaluations despite the student's deficits in those areas (id. at p. 3). The parents further contended that the district should have conducted a functional behavioral assessment (FBA) due to the student exhibiting behaviors that interfered with her learning (id.). The parents raised a number of challenges to the May 2012 CSE meeting, including that it was untimely because it was not held within one year from the date of the student's prior IEP, the CSE did not provide the parents with notice of the CSE meeting five days in advance, the CSE was not properly composed because it lacked an additional parent member, and the CSE denied the parents the opportunity to participate by ignoring input from the parents and Rebecca School staff and making decisions according to district policy rather than the student's educational needs (id. at p. 2-3). The parents further contended that the May 2012 IEP was insufficient to address the student's needs because the student required more 1:1 support than a 6:1+1 special class could provide, the IEP did not include music therapy or DIR teaching methodologies,<sup>3</sup> and the IEP did not include parent counseling and training (id. at p. 3). The parents also objected to the present levels of performance and goals included in the May 2012 IEP (id.). The parents asserted that the present levels of performance were insufficient to guide the parents and teachers and the annual goals were "insufficient, inappropriate, vague and unmeasurable" (id.). In particular, the parents contended that the May 2012 IEP did not include goals to address daily living skills and in other areas included both goals that the student had mastered and goals that were too difficult for the student to master within one year (id. at pp. 3-4).

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<sup>2</sup> There is a typographical error in the due process complaint notice referencing the 2011-12 school year; however, the parties clarified during the hearing that the only year at issue in this matter is the 2012-13 school year (Tr. pp. 15-16; Parent Ex. A at p. 1).

<sup>3</sup> The hearing record reflects that DIR stands for the "Developmental Individual-difference Relationship-based" model (Tr. p. 674).

Regarding the public school site to which the district assigned the student, the parents asserted that the district delayed in offering a specific school location until just prior to the start of the school year, depriving the parents of the opportunity to consider the school prior to the beginning of the school year (*id.* at p. 4). The parents further contended that after visiting the public school site, it was "insufficient and inappropriate to meet [the student's] needs" and raised various contentions relating to the school environment, the peer grouping, and services and equipment available in the school (*id.*).

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

After a hearing related to pendency on July 16, 2012, and a prehearing conference on August 10, 2012, an impartial hearing convened on the merits on September 14, 2012 and concluded on December 19, 2012, after six hearing dates (Tr. pp. 1-1359).<sup>4</sup> In a decision dated February 15, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that the parents' unilateral placement of the student at the Rebecca School was appropriate, and that equitable considerations weighed in favor of granting the parents' requested relief (IHO Decision at pp. 14-16). Before finding a denial of FAPE, the IHO ruled on a number of the parents' other complaints (*id.* at pp. 11-14). Specifically, the IHO determined that the student was evaluated within the three years prior to the development of the IEP, the evaluations were sufficient, the May 2012 IEP was prepared prior to the start of the 2012-13 school year, the absence of an additional parent member did not result in a denial of FAPE, the lack of parent counseling and training did not result in a denial of FAPE, the district was not required to develop an FBA, and the CSE was not required to recommend use of DIR or music therapy methodologies (*id.*). The IHO then found that the student was denied a FAPE for the 2012-13 school year because the recommendation for placement in a 6:1+1 special class would not have been sufficient "without the additional support of a one-to-one paraprofessional" (*id.* at pp. 14-15). The IHO further found that the Rebecca School was an appropriate placement and that equitable considerations supported the parents' request for relief (*id.* at pp. 15-16). The IHO ordered the district to pay the cost of the student's tuition at the Rebecca School for the 2012-13 school year (*id.* at pp. 16-17).

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

The district appeals from the IHO's determinations that the district failed to offer a FAPE for the 2012-13 school year, that the parents' placement of the student at the Rebecca School was appropriate, and that equitable considerations supported the parents' request for relief. Initially, the district asserts that the IHO's determination that the student required a 1:1 paraprofessional was outside the scope of the due process complaint notice. Additionally, the district asserts that the student did not require 1:1 support. The district contends that the recommendation for placement in a 6:1+1 special class was sufficient because the parents never requested 1:1 support, the student did not exhibit behaviors requiring 1:1 support, and the student was able to attend to small group instruction at the Rebecca School without the support of a 1:1 paraprofessional. The district further contends that the May 2012 CSE had reason to depart from the recommendation for a 1:1 paraprofessional included in the prior IEP developed for the student, arguing that the prior IEP recommended a paraprofessional "due to limited safety awareness and easy distractibility."

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<sup>4</sup> The IHO issued an interim decision, dated August 7, 2012, determining the student's pendency placement was at the Rebecca School (Interim IHO Order at p. 2).

However, the district asserts that as of the May 2012 CSE meeting, the CSE was justified in removing the 1:1 paraprofessional because the student no longer exhibited limited safety awareness within the school setting. Regarding the parents' placement of the student at the Rebecca School, the parent contends that the Rebecca School was not appropriate because the school did not provide all of the related services mandated by the May 2012 IEP and the staff at the Rebecca School was not certified in the DIR methodology used at the school and was otherwise not appropriately trained to provide special education instruction. Additionally, regarding equitable considerations, the district contends that the parents should be denied relief because they did not "truly consider" placing the student in a public school.

The parents answer, denying the district's claims on appeal, and cross-appeal from the IHO's determinations regarding their other allegations that the district denied the student a FAPE. Specifically, the parents contend that the IHO erred in finding that the district's evaluations and the May 2012 IEP were timely, that the evaluations were sufficient, that the absence of an additional parent member at the May 2012 CSE meeting did not deny the student a FAPE, that the parent had a meaningful opportunity to participate in the development of the May 2012 IEP, that the failure to recommend parent counseling and training did not result in a denial of FAPE, that the lack of an FBA did not result in a denial of FAPE, and that the lack of DIR and music therapy on the May 2012 IEP did not result in a denial of FAPE. The parents also allege that the IHO erred in not addressing their arguments related to the lack of prior written notice, the sufficiency of the present levels of performance and annual goals in the May 2012 IEP, and the appropriateness of the assigned public school site.

The district answers the parents' cross-appeal, largely denying the allegations contained therein and asserting that the cross-appealed findings made by the IHO were correct. In addition, the district contends that it was not required to provide prior written notice because there was no change in educational placement, that the present levels of performance and annual goals were sufficient, and that the parents' claims related to the assigned public school site are speculative and should not be considered.

## **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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch.

Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 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, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. 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]).

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. CSE Process**

#### **1. CSE Composition—Additional Parent Member**

The parents assert that they were denied the opportunity to participate in the development of the May 2012 IEP because an additional parent member was not present at the CSE meeting to explain what instructional methodologies were available within the district and whether music therapy and parent counseling and training could be added to the student's IEP. However, this argument misinterprets the role of a parent member.<sup>5</sup> An additional parent member "can provide important support and information" to the parents during a CSE meeting and can participate in "discussions and decision making from the perspective of a parent of a student with a disability" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 7, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]), in some circumstances, New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR

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<sup>5</sup> The parents' complaints relate more to the role of the district representative, who is required to be "knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; 8 NYCRR 200.3[a][1][v]).

200.3[a][1][viii]; see S.W. v. New York City Dep't of Educ., 2015 WL 1097368, at \*8 [S.D.N.Y. Mar. 12, 2015]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA].<sup>6</sup> Participants at the May 2012 CSE meeting included a district school psychologist, who also acted as the district representative, a district social worker, a district special education teacher, a Rebecca School social worker, the student's Rebecca School teacher (via telephone), and the student's father (Dist. Exs. 2 at p. 19; 4 at p. 1; Parent Ex. II at p. 1).

Under certain circumstances, where a parent is alone or unfamiliar with the CSE process, an additional parent member may provide an additional perspective. However, in this instance, the student's father attended the May 2012 CSE meeting along with a Rebecca School social worker and the student's Rebecca School teacher via telephone (Dist. Ex. 2 at p. 19; 4 at p. 1; Parent Ex. II at p. 1). In addition, the student's father and the Rebecca School personnel had an opportunity to participate during the CSE meeting and contributed towards the development of the May 2012 IEP (see Tr. pp. 1222-25, 1251-56, 1286; Dist. Exs. 4 at pp. 2-3; 8 at pp. 1-3; Parent Ex. II at pp. 1-3). Accordingly, although the lack of an additional parent member was a procedural violation, in this instance it did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (S.W., 2015 WL 1097368, at \*8; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; R.E., 694 F.3d at 190).

## **2. Evaluative Information**

The parents assert that the IHO erred in finding that the district's evaluation of the student was timely and that the CSE had sufficient information regarding the student to develop an IEP for the 2012-13 school year. Specifically, the parents contend that despite the student's identified needs with regard to OT, PT, and speech-language therapy, the district failed to conduct evaluations in those areas.

Initially, the parents allege that the district's November 2011 psychoeducational evaluation was untimely because it was not conducted within three years from the district's last evaluation of the student in May 2008. Generally, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Although the district's failure to reevaluate the student within three years from the district's prior evaluation is a procedural error, it did not lead to or contribute to a denial of FAPE as the district completed the November 2011 psychoeducational evaluation prior to the May

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<sup>6</sup> State regulations were updated in January 2013 to reflect an August 1, 2012, amendment to the New York State Education Law providing that an additional parent member need not attend a CSE meeting unless specifically requested in writing at least 72 hours prior to the meeting by the parents or a member of the CSE (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). At the time of the CSE meeting at issue, an additional parent member was required by State statute and regulation.



2012 CSE meeting and, as discussed below, the CSE had sufficient evaluative information available to develop the student's IEP for the 2012-13 school year (see Dist. Exs. 2; 5-7).<sup>7</sup>

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]), and 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]).

While the parents assert that the district failed to evaluate the student's needs in the areas of OT, PT, and speech-language, the hearing record supports a finding that the CSE had sufficient information to identify the student's needs and develop an IEP for the 2012-13 school year. The May 2012 CSE considered and relied upon the following evaluative information in developing the May 2012 IEP: an October 2011 social history update, a November 2011 psychoeducational evaluation report, a December 2011 Rebecca School interdisciplinary report of progress (December 2011 Rebecca School progress report), and a January 2012 classroom observation (Tr. pp. 128-29; Dist. Exs. 5-7; 16). In addition, the CSE also considered information provided by the student's father and Rebecca School teacher (Dist. Ex. 4 at pp. 2-3; Parent Ex. II at pp. 1-3).

The December 2011 Rebecca School progress report, portions of which were incorporated into the May 2012 IEP, comprehensively identified the student's abilities and special education needs (see Dist. Exs. 2 at pp. 2-3; 7). According to the Rebecca School progress report, the student communicated in short sentences of three to four words, was beginning to expand on her language skills by asking questions, was able to follow simple two step directions, and could answer "who" and "what" questions regarding a familiar story with visual support (Dist. Ex. 7 at pp. 1-3). The report described the student as enjoying music, sensory play, and read aloud; indicated the student struggled to initiate interactions unrelated to music; and noted that the student had progressed from spending much of her time on the periphery of the classroom to being more of a participant in classroom activities (id.). The report further indicated that the student was "happy to participate in group activities such as morning meeting and goodbye circle" and was one of first students to join group activities (id. at p. 3). However, the report indicated that the student required support, varying from minimal prompting to maximum verbal cues, in order to engage in most school activities (see id.).

The Rebecca School progress report detailed the student's academic performance (Dist. Ex. 7 at pp. 2-3). Regarding reading and word recognition, the report indicated that the student was interested in group read aloud and maintained "fleeting engagement for about twenty minutes" (id. at p. 2). The report also indicated that the student could "identify ten emotionally meaningful words in a field of two," and could identify song titles in a field of four, but had struggled with focusing on words and identifying pictures due to difficulties with visual scanning, tracking, and visual spatial skills (id.). Regarding math, the report indicated that the student could rote count to 30 and identify numbers up to 10 in a field of two, could identify concepts of "more" or "less" regarding snacks but had not generalized that skill across settings, and could "identify 'fast,' 'slow,'

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<sup>7</sup> The parents assert that the untimeliness of the evaluation process led to the May 2012 CSE meeting being untimely; however, the evaluation was completed in November 2011 and there is no indication in the hearing record that the evaluation process prevented the CSE from meeting earlier than May 2012.

'loud,' or 'quiet' when singing preferred songs" (id. at p. 3). According to the report the student was working on her math skills "in a one to one environment" (id.).

Regarding related services, the Rebecca School progress report provided an overview of the student's performance, detailed goals for the student, and explained the student's progress (Dist. Ex. 7 at pp. 4-6, 9-15).<sup>8</sup> Regarding OT, the report indicated that the student continued to be "hypo-responsive to proprioceptive and vestibular input," requiring sensory input to stay alert (id. at p. 9). The student received a sensory diet at the Rebecca School to "enhance sensory integration, self-regulation, overall organization, body awareness, attention, intention, social skills, and communication," including a therapeutic brushing protocol, joint compressions, a bear hug vest, and "therapeutic listening" activities (id.). Regarding PT, the report indicated that the student was working on motor planning and visual-spatial processing (id. at pp. 4-5). According to the report, the student's speech-language therapy targeted pragmatic, receptive, and expressive language skills (id. at p. 5). Individual sessions involved sensory and music-based activities as well as turn taking games (id.). Group sessions included a lunch group with two other students and a cooking group with three other students (id.). The report indicated that the student transitioned well both to and from her group and individual speech-language therapy sessions (id.).

According to the Rebecca School progress report, the student has attended two 30-minute sessions per week of individual music therapy with the same therapist since September 2007 (Dist. Ex. 7 at p. 5). The student's music therapy sessions were aimed at developing the student's engagement in two-way communications and building her range of emotions and assertiveness (id.). During sessions, the student initiated play on instruments and the therapist supported the student to sustain her engagement in a musical context (id.). The report indicates that the student made progress in sustaining musical interactions, has shown a variety of emotional states, and has increased shared attention and communication while singing songs with peers (id. at pp. 5-6). According to the report, future music therapy sessions were to focus on broadening the student's range of emotions and her ability to sustain engagements (id. at p. 6).

The May 2012 CSE also considered a November 2011 psychoeducational evaluation report (see Dist. Ex. 6). The evaluator noted that the student spoke in short one to four word phrases, exhibited decreased expressive and receptive language skills, was easily distracted, and demonstrated decreased attention and concentration (id. at p. 2). The evaluator further noted that the student required frequent repetition, clarification, and modeling of instructions, and also required frequent redirection and refocusing to tasks (id.). Administration of the Stanford-Binet Intelligence Scales, Fifth Edition (SB-5) to the student yielded a nonverbal IQ of 42, in the moderately delayed range (id. at p. 3).<sup>9</sup> Additionally, the student's scores in all subtests fell within the "significantly below average" range (id.). According to the evaluator, the student was inconsistently able to demonstrate simple matching skills, understanding of the concepts "bigger,"

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<sup>8</sup> According to the Rebecca School progress report, during the 2011-12 school year the student received two sessions per week of individual OT, one session per week of OT in a group, one session per week of individual PT, one session per week of PT in a group, two sessions per week of individual speech-language therapy, two sessions per week of speech-language therapy in a group, and two sessions per week of individual music therapy (Dist. Ex. 7 at pp. 4-5).

<sup>9</sup> The November 2011 psychoeducational evaluation report noted that only the student's nonverbal IQ was obtained because of the student's history of expressive and receptive language delays and the student's inability to "manage a more challenging battery" (Dist. Ex. 6 at p. 2).

"smaller," and "more," and the ability to solve a two-piece puzzle (id. at pp. 3-4). In an informal assessment of the student's academic readiness skills, the student did not recite or identify the first several letters of the alphabet or numbers from one to ten (id. at p. 4). The student was able to identify two colors but did not identify any geometric shapes (id.). The student could point to several body parts with prompting, but had difficulty identifying them verbally (id.). Similarly, the student could identify objects in her vicinity by pointing to them, but had difficulty identifying them verbally (id.). Completion of the Vineland Adaptive Behavior Scales, Second Edition by the parent yielded an adaptive behavior composite score of 49, in the low range, and identified the student's abilities in communication, daily living skills, and socialization (id. at pp. 4-5). The evaluation report further noted that the parents reported that the student exhibited behaviors including difficulty concentrating and sustaining attention (id. at p. 5).

In addition, an October 2011 social history update completed by the student's mother was available to the May 2012 CSE (Tr. pp. 128; Dist. Ex. 16). The social history update identified the student's social and academic skills and needs (Dist. Ex. 16). It indicated that the student was interested in class activities including music and group games, and engaged in math and handwriting tasks with prompts (id.). According to the social history update, the student initiated peer interactions but required adults support to maintain engagement (id.). Although the student readily engaged in preferred activities and sought out peers to interact with, the social history indicated the student needed constant support and encouragement to remain on task (id.).

Based on the foregoing, although the district should have conducted evaluations targeting the student's identified needs with respect to the areas of OT, PT, and speech-language therapy, the hearing record reflects that the evaluative data considered by the May 2012 CSE, particularly the December 2011 Rebecca School progress report and, as discussed in detail below, input from the student's Rebecca School teacher (see Dist. Exs. 4; 8; Parent Ex. II), provided the CSE with sufficient information about the student, including her related services needs, to enable the district to develop an IEP for the 2012-13 school year (see C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 230 [S.D.N.Y. 2014]).

The parents also contend that they were denied an opportunity to participate in the May 2012 CSE meeting because they were not provided with copies of the evaluations relied on by the CSE prior to the meeting. The student's father testified that although the parents requested a copy of the November 2011 psychoeducational evaluation report prior to the CSE meeting, he was not provided with a copy until the meeting (Tr. pp. 1218-19). However, the parents requested a copy of the evaluation from the agency the district contracted with to conduct the evaluation, rather than the district, and the parents were told that they could not be provided with a copy directly (Tr. p. 1219; see Dist. Ex. 6). Additionally, upon learning that the student's father did not have copies of the evaluation reports, the CSE stopped the meeting and made copies for the student's father, which they provided to him (Tr. pp. 1218-19; Parent Ex. II at p. 1). The district school psychologist then reviewed the results of the November 2011 psychoeducational evaluation during the CSE meeting and the student's Rebecca School teacher shared extensive information regarding the student's current functioning with the CSE (Tr. pp. 1222-23, 1251-54; Dist. Exs. 4 at pp. 2-3; 8 at pp. 1-3; Parent Ex. II at pp. 1-3). Under these circumstances, although the district did not provide copies of the evaluations to the parents prior to the May 2012 CSE meeting, the district took appropriate steps to ensure the parents' participation in the CSE meeting and the parents were able to fully participate in the development of the student's IEP for the 2012-13 school year (P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*17 [S.D.N.Y. Feb. 25, 2015]).

### **3. Timing of May 2012 CSE Meeting**

The parents argue that because the district held the student's CSE meeting in May 2012 to develop an IEP for the student's 2012-13 school year, instead of within one year from the student's prior CSE meeting held in March 2011, the parents were denied the opportunity to visit the assigned school and to begin preparations to transition the student to a new program if they found it to be appropriate. However, the parents' argument misconstrues the district's obligations under the IDEA. The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), and a school district must have an IEP in effect at the beginning of each school year for each student with a disability within its jurisdiction (20 U.S.C. § 1414 [d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194). Although the May 2012 CSE meeting was held more than one year after the student's prior annual review in March 2011, any delay in developing the student's IEP did not prejudice the student inasmuch as the March 2011 IEP was designed for implementation from July 2011 through June 2012 (Parent Ex. R at p. 2), the May 2012 IEP was designed for implementation beginning in July 2012 (Dist. Ex. 2 at p. 1), and the hearing record contains no indication that the parent would have removed the student from his unilateral placement at the Rebecca School in the middle of the 2011-12 school year (see Grim, 346 F.3d at 382; E.H., 2008 WL 3930028, at \*10). Accordingly, the hearing record does not support a finding that the failure to convene a CSE within one year of the date the student's prior IEP was developed impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

### **4. Prior Written Notice**

The parents contend that the district was required to provide them with prior written notice of a recommended change from an 8:1+3 class at the Rebecca School to a 6:1+1 special class in a district public school and of the CSE's decision to discontinue the service of a 1:1 paraprofessional from the student's prior IEP. The district contends that prior written notice was not required because there was no change in placement from the student's prior IEP, which also recommended placement in a 6:1+1 special class.

Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a][1]). In this instance, I agree with the district in that neither of the parents' reasons for arguing prior written notice should have been provided amount to a change in educational placement; however, the hearing record reflects that the parents requested during the May 2012 CSE meeting that the student be placed in a class with an 8:1+3 ratio (Tr. pp. 1255-56; Dist. Ex. 4 at p. 4; Parent Ex. II at p. 4). Under the circumstances, it is at least arguable that the district should have provided the parent with prior written notice of its refusal to change the student's educational placement to the placement desired by the parents. However, it is unlikely to have altered the outcome of the case insofar as the parents do not allege that the student experienced a deprivation of educational benefits, that her right to a FAPE was impeded, or the parents' right to participate in the decision-making process was impeded, as a result of the district's failure to provide prior written notice (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

This is especially so, as the parents provided their own copy of minutes from the May 2012 CSE meeting indicating that the district discussed a number of placement options, including 12:1+4, 12:1+1, and 8:1+1 special classes, and the reasons why the CSE rejected them (Parent Ex. II at p. 4; see Dist. Ex. 2 at p. 18).

## **B. May 2012 IEP**

### **1. Present Levels of Performance**

The parents object to the description of the student's present levels of performance contained in the May 2012 IEP as being "insufficient to provide an adequate baseline from which to guide [the student's] teacher and parents, and from which to determine progress" (Parent Ex. A at p. 3). However, a review of the May 2012 IEP indicates that it provided a sufficient description of the student based on the evaluative information available to the CSE, and in particular, the November 2011 psychoeducational evaluation, the December 2011 Rebecca School progress report, and information provided by the student's teachers (see Dist. Ex. 2 at pp. 1-3; 4; 6-8; Parent Ex. II).

State guidance indicates that the present levels of performance section of an IEP acts as the "foundation on which the [CSE] builds to identify goals and services to address the student's individual needs" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 18-22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). Although State guidance does not dictate how much information must be included in the statement of present levels of performance in an IEP, generally, the present levels of performance should provide information regarding the student's unique needs that result from his or her disability and what the student can and cannot do (id. at pp. 20-21; see 8 NYCRR 200.4[d][2][i]).

The May 2012 IEP provided a detailed summary of the testing conducted as part of the November 2011 psychoeducational evaluation (Dist. Ex. 2 at pp. 1-2). The IEP noted the student's score on the SB-5, indicated it fell within the moderately delayed range, and further noted that her scores on all subtests fell within the significantly below average range (id. at p. 1). The IEP also recounted results from some of the subtests, noting that the student inconsistently demonstrated simple matching skills, could solve a two-piece puzzle but not a four-piece puzzle, could identify which of two objects was bigger or smaller, and with greater difficulty could identify which of two pictures contained "more" of an object (id.). The May 2012 IEP also reported the student's performance on an administration of the Comprehensive Test of Nonverbal Intelligence, which yielded a score of 42 falling within the "very poor" range and suggested that the student's cognitive functioning was "significantly below average" (id. at p. 2; Dist. Ex. 6 at p. 4).

Consistent with the December 2011 Rebecca School progress report, the May 2012 IEP described the student as being "extremely musical"; loving music, read aloud, and sensory play; "enjoying books with high anticipation, rhythmic, and sing song pattern"; and being able to learn concepts presented in a musical format (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 7 at pp. 1, 5-6). The May 2012 IEP also included a description of the student's sensory needs taken from the December 2011 progress report, describing the student as "hypo-responsive to her sensory system" and as requiring access to sensory tools and input to help keep her regulated (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 7 at p. 9). Additionally, consistent with the November 2011

psychoeducational evaluation and the December 2011 Rebecca School progress reports, the May 2012 IEP indicated that the student communicated using three to four word utterances and required support to sustain attention (compare Dist. Ex. 2 at pp. 2-3, with Dist. Ex. 6 at pp. 2, 4-5, and Dist. Ex. 7 at pp. 1-2, 6, 12).

In addition to the evaluative information reviewed during the May 2012 CSE meeting, the student's teacher also reported on the student's strengths and weakness and provided current information to the May 2012 CSE as to the student's abilities, much of which was incorporated into the May 2012 IEP (see Dist. Exs. 2 at pp. 2-3; 4 at pp. 2-3; 8 at pp. 1-3; Parent Ex. II at pp. 1-3). Meeting minutes prepared by the district and the student's father both indicate that the student's Rebecca School teacher discussed the student in detail during the May 2012 CSE meeting (see Dist. Ex. 4 at pp. 2-3; Parent Ex. II at pp. 1-3). The student's teacher reported on the student's academic skills, identifying that the student attended to stories, answered comprehension questions, could count up to 50, and was working on 1:1 correspondence (Dist. Ex. 4 at p. 2). She also reported that the student was able to form relationships with peers and had preferred peers, but had difficulty initiating interactions with peers (id.; Parent Ex. II at p. 2). The teacher reported that the student struggled with safety awareness in the community, but not in the classroom (Dist. Ex. 4 at p. 2). She reported that the student was scared of loud noises and may cry if overwhelmed (id.; Parent Ex. II at p. 2). She also reported that the student had a difficult time focusing her eyes and a weakness in visual-spatial processing (Dist. Exs. 4 at pp. 2-3; 8 at p. 2; Parent Ex. II at p. 2). All of this information is reflected in the May 2012 IEP (Dist. Ex. 2 at pp. 2-3). In sum, a review of the information considered by the May 2012 CSE and discussed at the CSE meeting as detailed above shows that the district adequately and accurately reflected the student's present levels of performance on her IEP (P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]).

## **2. Annual Goals**

Next, the parents argue that the annual goals included in the May 2012 IEP were insufficient. The parent contends that the annual goals were taken from the December 2011 Rebecca School progress report, were intended to be completed within six months at the Rebecca School, and that the student had already mastered a number of them by the time of the May 2012 CSE meeting.

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 (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 (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]).

The May 2012 IEP includes approximately 18 annual goals and 48 corresponding short-term objectives aligned to the student's identified needs, including goals in the areas of academics including literacy and math; attention and engagement; social/emotional; activities of daily living; motor planning; visual spatial processing; sensory processing and regulation; and communication, including oral motor skills and expressive, receptive, and pragmatic language (Dist. Ex. 2 at pp.

4-11). Additionally, a review of the annual goals reveals that each annual goal included evaluative criteria embedded within the short-term objectives (i.e., "3 out of 5 opportunities," "across 5 sessions"), an evaluation schedule (i.e., "one time per report period"), and a procedure to evaluate the student's progress toward the goals (i.e., "classroom activities," "teacher/provider observations") (id.).

According to the district special education teacher who participated in the May 2012 CSE meeting, the annual goals were either adapted or copied from the December 2011 Rebecca School progress report (Tr. pp. 547-70).<sup>10</sup> During the May 2012 CSE meeting, each goal contained within the Rebecca School progress report was read aloud and the student's Rebecca School teacher stated whether the goal was met or was still in progress (Tr. pp. 572-73, 1251). The special education teacher marked her copy of the Rebecca School progress report indicating the teacher's responses (Tr. pp. 545-47; Dist. Ex. 7 at pp. 7-9). Despite this process, the May 2012 IEP carried over some short-term objectives from the Rebecca School progress report that the student had already met at the time of the CSE meeting (compare Dist. Ex. 2 at pp. 5, 8-9, with Dist. Ex. 7 at pp. 8, 11). The May 2012 IEP included two short-term objectives regarding performing familiar yoga poses and performing a wheelbarrow walk, which had been met at the time of the CSE meeting (Tr. pp. 599-600, 605-07; compare Dist. Ex. 2 at pp. 8-9, with Dist. Ex. 7 at p. 11). In addition, as pointed out by the parent, the short-term objective for the student to identify "which group has more or less during snack times" was marked by the special education teacher as met on the Rebecca School progress report, but was carried over into the May 2012 IEP (compare Dist. Ex. 2 at p. 5, with Dist. Ex. 7 at p. 8). However, it should also be noted that at the time of the CSE meeting the student was still working on the concepts of "more" and "less," and although she was able to identify "more" and "less" regarding snacks, she had not yet generalized the concept to other areas (Dist. Exs. 6 at p. 3; 7 at p. 3).

Overall, although the May 2012 IEP contained some short-term objectives that the student had already mastered, the annual goals addressed the student's areas of need identified in the present levels of performance and provided sufficient information to guide a teacher in instructing the student and measuring her progress (see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at \*11 [S.D.N.Y. Dec. 3, 2014]; N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359-62 [E.D.N.Y. 2014]; D.A.B. v. New York City Dep't of Educ., 973 F.Supp.2d 344, 359-60 [S.D.N.Y. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*18-19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F.Supp.2d 315, 334-35 [S.D.N.Y. 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]).

### **3. Special Factors—Interfering Behaviors**

The parents appeal from the IHO's determination that the student did not exhibit behaviors that interfered with learning to the extent that the district would have been required to conduct an

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<sup>10</sup> A CSE may incorporate annual goals into a student's IEP that were developed by the student's nonpublic school teachers and/or providers (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013] [noting that the parent cited "no authority for the proposition that drawing goals from a teacher's progress report is a violation of the statute or regulations"]).

FBA or develop a BIP for the student (see IHO Decision at p. 13). Specifically, the parents assert that the district was unaware of the student's behavioral needs because the district did not conduct an FBA or an OT evaluation.

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., 361 Fed. App'x 156, 160-61 [2d Cir. 2009]; A.C., 553 F.3d at 172).

In New York State, policy guidance explains that "[t]he 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 [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, 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, the "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 (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). 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 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

In this instance, the May 2012 CSE discussed the student's maladaptive behavior, which was identified as the student becoming overwhelmed and crying when the classroom becomes too loud (Dist. Exs. 2 at p. 3; 4 at p. 2; Parent Ex. II at p. 2). The district school psychologist testified that the behavior was infrequent, as it was reported as being a response to "excessively loud noise, such as a fire alarm" (Tr. pp. 296-97). This is consistent with the CSE minutes and the May 2012 IEP, which indicated that the student was "scared of fire alarms," cried if the classroom environment was loud and she became overwhelmed, and required sensory input to help her regulate (Dist. Exs. 2 at p. 3; 4 at p. 2). The district school psychologist further testified that student's teacher did not report any "regularly occurring negative behaviors" and that the information available to the CSE did not indicate that the student exhibit behaviors requiring an FBA be conducted or a BIP developed (Tr. pp. 177-78).

The Rebecca School director testified that the student did not require a BIP, but should have been assessed to determine her behaviors and how they affected her (Tr. pp. 781-82). However, the December 2011 Rebecca School progress report provided this information, indicating that the student required sensory input to remain in an organized and alert state, could be easily distracted, and required supports to sustain attention (see Dist. Ex. 7 at pp. 2, 9-10). In addition, the November 2011 psychoeducational evaluation report indicated that the student was



easily distractible and required frequent redirection (Dist. Ex. 6 at p. 1). The May 2012 IEP identified these issues, indicating that the student required "adult support to sustain attention" and "sensory input to help keep her regulated" (Dist. Ex. 2 at p. 2). The IEP also included supports, similar to those identified in the December 2011 Rebecca School progress report, to address the student's sensory needs and distractibility, including visual and verbal prompts, repetition, manipulatives, and access to sensory tools and strategies (see id. at p. 3).

Thus, even if the IHO erred in finding that the student's behaviors did not interfere with learning, the information available to the May 2012 CSE identified the student's behaviors and the May 2012 IEP included supports to address them, such that any procedural deficiency did not rise to the level of a denial of a FAPE (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73).

#### **4. 6:1+1 Special Class**

The district asserts that the IHO's determination that the student required the support of a 1:1 paraprofessional is outside the scope of the impartial hearing because it was not raised in the parents' due process complaint notice. The parents respond, asserting that the IHO's determination is related to the parents' broader argument that the student required more support than would be available in the recommended 6:1+1 special class. While 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 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), in this instance the parents' due process complaint notice included an allegation that the student required more 1:1 support than a 6:1+1 special class could provide (Parent Ex. A at p. 3). Therefore, the district had fair notice that the parents were contesting the level of support available in the recommended 6:1+1 special class and the IHO's determination that the student needed the support of a 1:1 paraprofessional may be considered as a part of that issue (see C.F., 746 F.3d at 78 [noting that "the waiver rule is not to be mechanically applied" and "the IDEA itself contemplates some flexibility"]).

However, upon review, the evidence in the hearing record is contrary to the IHO's conclusion that a 6:1+1 special class did not provide sufficient support to address the student's needs absent a 1:1 paraprofessional. Rather, the May 2012 CSE's recommendation for a 6:1+1 special class with related services was appropriate considering the student's identified needs as reflected in the evaluative information available to the May 2012 CSE.

The student demonstrated intensive needs in the areas of cognition, academics, sensory regulation, attention, social/emotional development, fine and gross motor skills, and receptive, expressive, and pragmatic language (see Dist. Exs. 5-7; 16); however, the student's needs are not inconsistent with the regulatory description of a 6:1+1 special class placement. State regulations provide that a 6:1+1 special class placement is designed for 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]). Management needs, in turn, are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]).

The May 2012 CSE recommended placement in a 12-month 6:1+1 special class in a specialized school after considering and rejecting other special class options available within the district (Dist. Ex. 2 at pp. 12, 18). While the student's father and Rebecca School teacher indicated during the May 2012 CSE meeting that they believed the recommendation for a 6:1+1 special class was insufficiently supportive (Tr. pp. 166-67, 1255-56; Dist. Exs. 4 at p. 4; 8 at p. 3; Parent Ex. II at p. 4), testimony by the district school psychologist indicates that a 6:1+1 special class would have offered the student a very supportive and small group setting (Tr. pp. 164-65). Additionally, as discussed in greater detail above, the May 2012 CSE discussed the student's strengths and weaknesses and the Rebecca School teacher provided input to the CSE regarding the student's functioning (Tr. pp. 538-39; Dist. Exs. 4 at pp. 2-3; 8 at pp. 1-3; Parent Ex. II at pp. 1-3). The May 2012 CSE, including the student's father and Rebecca School teacher, also discussed the student's academic and social abilities as well as her related services needs (Dist. Exs. 4 at pp. 1-4; 8 at pp. 1-3), which align with the recommendation for placement in a 6:1+1 special class.

Although the student's March 2011 IEP for the 2011-12 school year included the support of a 1:1 paraprofessional (Parent Ex. R at p. 18), the hearing record indicates that the reason for the inclusion of the 1:1 paraprofessional was no longer a concern at the time of the May 2012 CSE meeting (see Dist. Exs. 2 at p. 2; 4 at p. 2; Parent Ex. II at p. 2). The March 2011 IEP indicated that the student required "individual support and supervision throughout the school day due to limited safety awareness and easy distractibility" (*id.* at p. 16). The December 2011 Rebecca School progress report indicated the student safely navigated throughout the school setting (Dist. Ex. 7 at p. 10). Moreover, the student's Rebecca School teacher informed the May 2012 CSE that while the student continued to exhibit problems with safety awareness in the community, she did not have safety awareness issues within the classroom environment (Dist. Exs. 2 at p. 2; 4 at p. 2; Parent Ex. II at p. 2). The student's distractibility was also addressed in the May 2012 IEP without the need for a 1:1 paraprofessional (Dist. Ex. 2 at p. 3). The May 2012 IEP identified and addressed the student's attention needs by indicating she required adult support to maintain attention, as well as recommending strategies and accommodations such as verbal and visual prompts and cues as well as adult support and modeling (*id.*).

In finding that the student required additional 1:1 support, the IHO relied on the testimony of the Rebecca School teacher who attended the May 2012 CSE meeting, who indicated that "someone is pretty much with [the student] all day long, otherwise she can become lost" (IHO Decision at p. 14; Tr. p. 1093). However, the hearing record does not indicate that this information was presented to the May 2012 CSE (see Dist. Exs. 4; 8; Parent Ex. II), and according to the December 2011 Rebecca School progress report the student exhibited the ability to participate in group activities (Dist. Ex. 7 at pp. 3-5).<sup>11</sup> For example, the student was described as one of the first students to join in group activities, could remain engaged during her cooking class for up to 20 minutes at a table with seven peers, could participate in group yoga with moderate to maximum verbal support, and was working on engaging in successful interactions within a small group setting (*id.*). The student's Rebecca School teacher also reported that the student could sit for 20-25 minutes during a read aloud, and that the student was flexible in her day-to-day functioning (Dist. Exs. 4 at p. 3; 8 at p. 1). Moreover, the Rebecca School progress report indicated that the student exhibited additional skills within her 8:1+3 class at the Rebecca School demonstrating

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<sup>11</sup> The December 2011 Rebecca School progress report did not indicate that the student received the services of a 1:1 paraprofessional (Dist. Ex. 7).

readiness for placement in a 6:1+1 special class setting (see Dist. Exs. 5-7; 16). According to the December 2011 Rebecca School progress report, the student communicated with adults and peers, managed school materials, followed two-step directions, and interacted with peers with support (Dist. Ex. 7 at pp. 1-3).

Accordingly, as a 6:1+1 special class necessarily implicates the provision of individualized attention and intervention to a high degree (8 NYCRR 200.6[h][4][ii][a]), and as discussed above, the evaluative information available to the May 2012 CSE did not indicate that the student also required the additional support of a 1:1 paraprofessional (Dist. Exs. 5-7; 16), the CSE's recommendation for placement in a 6:1+1 special class was consistent with the student's needs.

## **5. Methodology**

The parents assert that the IHO erred in determining that the May 2012 CSE's decision not to include DIR teaching methodology or music therapy in the student's IEP did not result in a denial of FAPE.

Generally, a CSE is not required to specify methodology on an IEP, and the precise methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. 2014; M.H., 685 F.3d at 257; 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]; see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 67 [2d Cir. 2013]). However, where the use of a specific methodology is required for a student to receive an educational benefit, it should be indicated in the student's IEP (R.E., 694 F.3d at 192-94 [found IEP adequate where there was no evidence that the student would not benefit from another methodology, but inadequate where there was "a clear consensus" that the student required a specific methodology]).

### **a. DIR**

The parents contend that the student required instruction utilizing the DIR teaching methodology in order to receive educational benefits and further assert that the May 2012 CSE's decision not to include DIR in the student's IEP was based on policy considerations rather than the student's needs.

However, the hearing record does not support the parents' contention that the student required instruction utilizing the DIR methodology in order to receive an educational benefit. According to the student's father, the student received instruction utilizing applied behavior analysis (ABA) based methodologies for one semester of school when the student was somewhere between three and five years old (Tr. pp. 1197-1202). The student's father testified that the student did not respond well to ABA, as she became frightened of the bathroom and did not want to go to school (Tr. pp. 1198-99). Conversely, the student's father testified that when the student was exposed to DIR methodologies, the student was "very responsive" (Tr. p. 1201). The parents removed the student from the ABA-based program because they felt "it was not the right approach at that time" (Tr. p. 1199). For the next school year, the student was placed in a district 12:1+1 kindergarten class, which was unable to manage the student's behaviors, leading to the parents and

district agreeing to place the student in a State-approved nonpublic school for the remainder of the year (Tr. pp. 1206-10). The parents ended up placing the student in the same school where she had previously received instruction utilizing ABA based methodologies because they were "familiar with the school" and the student "would have a place to go" (Tr. p. 1210-11). According to a social history update conducted in July 2006, the student's mother believed that the school's teaching methodology was "too rigid" for the student and the student needed "to be taught through a number of modalities in order to succeed" (Parent Ex. J at p. 2). For the next school year the parents placed the student at the Rebecca School, which utilizes the DIR methodology, and the student attended the Rebecca School from September 2006 through the date of the hearing (Tr. pp. 674, 680, 1212).

At the time of the May 2012 CSE meeting, the student's father and Rebecca School teacher expressed their belief that the student required instruction utilizing DIR teaching methodologies (Parent Ex. II at p. 4). However, there is no indication in the hearing record that the parent or teacher provided a reason for their opinion during the meeting, other than the teacher's statement that it "is how [the student] learns" and the parent's statement that the student had made progress (*id.*). While the hearing record supports the father's belief that the student benefitted from and made progress from instruction utilizing the DIR methodology employed by the Rebecca School, and the parent and the student's teacher noted their preference for instruction utilizing DIR during the May 2012 CSE meeting, the evidence does not establish that the student could only receive educational benefits through the exclusive use of DIR methodology. Accordingly, under these circumstances the CSE was not required to limit the professional discretion provided to teachers and providers in the delivery of the student's services to one specific methodology in order for the student to receive a FAPE.<sup>12</sup>

### **b. Music Therapy**

The parents further assert that the IHO erred in determining that the May 2012 CSE's decision not to include music therapy as a methodology for the delivery of counseling was not a denial of FAPE. However, while the parents' desire for the student to receive music therapy is understandable, under the circumstances presented it is not a service that the district was required to include in the May 2012 IEP (*see N.K. v. New York City Dep't of Educ.*, 961 F.Supp.2d 577, 592-93 [S.D.N.Y. 2013]).

The Rebecca School program director and the Rebecca School music therapy coordinator described music therapy as a mental health service, and the program director further categorized it as "a methodology to be able to provide counseling" (Tr. pp. 692-92, 936). The program director also explained that the Rebecca School has a mental health team assess each student to determine which modality would be best suited to deliver counseling services (Tr. p. 694). She testified that music therapy was necessary for the student because the student would have had difficulty with other forms of counseling (Tr. pp. 694-95). The Rebecca School social worker, who attended the May 2012 CSE meeting, testified that the student received music therapy at the Rebecca School instead of counseling because "music is a highly motivating activity" and "[i]t facilitates her

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<sup>12</sup> To the extent the parents raise claims relating to district policies, these claims cannot be considered by an SRO from a systemic perspective, as an SRO's jurisdiction is limited to the review of individual matters relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a FAPE to such child (*see Educ. Law § 4404[2]*).

engagement and ability to relate" (Tr. p. 900). The music therapy coordinator testified that the student responded "very innately and immediately" to music, explaining that while the student had difficulty responding to verbal directions, she responded immediately if directions were presented in a musical format (Tr. pp. 944-45). Nevertheless, according to the December 2011 Rebecca School progress report, the student was able to communicate verbally in a non-musical setting and had improved in her ability to initiate interactions unrelated to music (Dist. Ex. 7 at pp. 1-2, 12-13). Although the student may have benefitted more from music therapy than from other forms of counseling due to her ability to maintain musical interactions longer than other forms of communication, the hearing record does not support a finding that the student would not have benefitted from other forms of counseling such that the failure to provide music therapy constituted a denial of a FAPE (see Walczak, 142 F.3d at 132).<sup>13</sup>

## 6. Parent Counseling and Training

The parents contest the IHO's determination that the district's failure to include parent counseling and training as a related service on the May 2012 IEP did not result in a denial of FAPE. The district school psychologist testified that the district did not include parent counseling and training on the May 2012 IEP because he believed that "[i]t's not a related service" and was "programmatic to the site that the student would be attending" (Tr. pp. 170, 351). However, the district school psychologist was incorrect, as under both State and federal regulations parent counseling and training is a related service (34 CFR 300.34[a]; 8 NYCRR 200.1[qq]), and when appropriate an IEP must indicate the extent to which parent counseling and training will be provided to parents (8 NYCRR 200.4[d][2][v][b][5]). Additionally, as the student was classified as a student with autism (Dist. Ex. 2 at p. 1), the CSE was required to provide parent counseling and training to the parents (8 NYCRR 200.13[d]). Nevertheless, the Second Circuit has explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at \*2 [2d Cir. Mar. 19, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169-70 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 & n.3 [2d Cir. 2014]; M.W., 725 F.3d at 141-42). Accordingly, regardless of the district school psychologist's errors, because the parents' arguments or in the hearing record indicating that the failure to recommend parent counseling and training on the student's IEP might have risen to the level of a denial of a FAPE, such a violation is not sufficient to support a finding that the district failed to offer the student a FAPE (R.B., 2015 WL 1244298, at \*2; T.M., 752 F.3d at 169-70; R.E., 694 F.3d at 191).

## C. Assigned School

To the extent the parents continue to claim that the assigned public school site was inappropriate based on allegations regarding functional grouping, the curriculum used at the school, the availability of sensory equipment, and the school's physical environment, the parents'

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<sup>13</sup> Additionally, to the extent that the student benefitted from music throughout the day or as a motivator, the IEP identified it as such and provided a teacher with sufficient information to incorporate music as a tool to instruct the student (Dist. Ex. 2 at p. 2). Specifically, the May 2012 IEP indicates that the student "loves to sing," enjoyed "books with high anticipation, rhythmic, and sing song pattern," and "learns concepts when they are presented in a musical format" (id.).

claims are without merit. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Ex. D at p. 1), the district was not obligated to present evidence as to how it would have implemented the May 2012 IEP (R.E., 694 F.3d at 186-88; see R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9 [explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3, 195; K.L., 530 Fed. App'x at 87; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]; see also R.B., 2015 WL 1244298, at \*2-\*3; C.F., 746 F.3d at 79; D.N. v. New York City Dep't of Educ., 2015 WL 925968, at \*7 [S.D.N.Y. Mar. 3, 2015]; J.F. v. New York City Dep't of Educ., 2015 WL 892284, at \*5 [S.D.N.Y. Mar. 3, 2015]).

## **VII. Conclusion**

Having determined that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Rebecca School was appropriate or whether equitable considerations weighed in favor of the parents' request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). However, as noted previously, the district was required to pay for the student's placement at the Rebecca School by virtue of the pendency of the due process proceedings, and will be directed to do so for the duration of this appeal. I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated February 15, 2013, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and directed the district to fund the costs of the student's Rebecca School tuition; and

**IT IS FURTHER ORDERED** that, to the extent it has not done so already, the district shall reimburse the parents for the costs of the Rebecca School pursuant to pendency through the date of this decision.

**Dated:** Albany, New York  
April 9, 2015

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