The University of the State of New York

The State Education Department
State Review Officer
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No. 13-091

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, Francesca J. Perkins, Esq., of counsel

Kule-Korgood, Roff and Associates, PLLC, attorneys for respondent, Tuneria R. Taylor, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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 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]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The Committee on Special Education (CSE) convened on March 28, 2011 to formulate the student's individualized education program (IEP) for the 2011-12 school year (see generally Dist. Ex. 9). Finding the student eligible for special education as a student with autism, the March 2011 CSE recommended a 12-month school year program consisting of placement in a 6:1+1 special class in a specialized school with the support of a 1:1 transitional paraprofessional (id. at pp. 1, 14). The CSE, among other things, also recommended that the student receive the following related services: two 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of speech-language therapy in a group (3:1), two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of OT in a group (2:1) (id. at pp. 1, 2, 16). The parent disagreed with the recommendations contained in the March 2011 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2011-12 school year and, as a result, notified the district of her intent to unilaterally place the student at the Rebecca School (see Parent Exs. C, F). In a due process complaint notice dated April 17, 2012 the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A).

An impartial hearing convened on June 1, 2012 and concluded on March 12, 2013 after ten days of proceedings (Tr. pp. 1-677). In a decision dated April 18, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision at pp. 31-37). As relief, the IHO ordered the district to pay for the costs of the student's tuition at the Rebecca School for the 2011-12 school year (id. at p. 37).

IV. Appeal for State-Level Review

The district asserts that the IHO erred in his determination that the district failed to offer the student a FAPE for the 2011-12 school year. Specifically, the district claims that the IHO erred in finding that (1) there were multiple procedural violations; (2) the CSE team did not have sufficient evaluative data; (3) the IEP was substantively deficient; and (4) the assigned public school site could not implement the IEP.[1] The crux of this appeal is whether the March 2011 IEP accurately reflected the student's educational needs and whether the recommended placement of a 6:1+1 special class with a 1:1 transitional paraprofessional and related services was an appropriate

[1] The IHO indicated that the district's "multiple procedural violations" deprived the student of a FAPE; however, he did not specify to which violations he was referring (IHO Decision at p. 33).

educational placement for the student. In addition, the district argues that the parent's allegations concerning the recommended assigned public school site were speculative, the unilateral placement at the Rebecca School was not appropriate, and the equitable considerations do not weigh in favor of the parent's request for relief.

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]; 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. March 2011 IEP[2]

1. Evaluative Information and Present Levels of Performance

The district contends that the IHO erred in finding that the absence of updated evaluations constituted a denial of FAPE and asserts that the March 2011 IEP sufficiently and accurately described the student's present levels of performance.[3]

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 student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 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 the district 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]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

[2] To the extent that the IHO did not rule on procedural inadequacies in the conduct of the CSE meeting, the parents did not attempt to advance any argument on these points on appeal.

[3] The IHO did not discuss the basis for his finding that the evaluations were inadequate.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, the hearing record shows that the March 2011 CSE considered a January 2011 classroom observation, that described the student's participation in math instruction and a movement group in his Rebecca School classroom; a December 2010 Rebecca School progress report, that described the student's academic abilities, communication skills, social/emotional functioning, motor development, and daily living skills; a February 2009 psychological evaluation, that included the results of standardized intelligence testing and the student's score on an autism rating scale; an October 2008 social history update, and the student's IEP for the 2010-11 school year (Tr. pp. 65-70; Dist. Exs. 12-16). In addition, the student's parent and then-current teacher from Rebecca School participated in the March 2011 CSE meeting and provided information regarding the student's needs (Tr. pp. 62-63, 522-24, 550-51, 600; Dist. Ex. 9 at p. 2). Based on an independent review of the information considered by the March 2011 CSE, I find that the CSE had before it current evaluative information relative to the student, which was sufficient to enable the CSE to develop the student's March 2011 IEP.

The district also asserts that the March 2011 IEP adequately described the student's present levels of academic achievement and functional performance, sensory needs, and the information reflected in the student's December 2010 Rebecca School progress report. The student's then-current teacher from Rebecca School participated in the March 2011 CSE meeting and discussed the student's academic functioning levels, social/emotional functioning, behavior, and physical development (Tr. pp. 84-98). Academic and social/emotional management needs on the IEP were also developed with the student's parent and then-current teacher (Tr. pp. 90-91; 94-95).

Although the parent is correct in asserting that the March 2011 IEP lacks information regarding the student's then-current functioning in the area of speech-language development, I find this omission does not rise to the level of denial of a FAPE as the hearing record reflects that the student's speech-language needs were discussed during the March 2011 CSE meeting, speech-language goals addressing articulation skills and pragmatic, receptive, and expressive language were included in the IEP, and speech-language therapy services were increased for the 2011-12 school year per the parent's request because the student was still exhibiting significant language

delays (Tr. pp. 72, 74-75, 79, 104-08, 112-13; Dist. Ex. 9 at pp. 2, 10-11, 13).[4] Thus, the hearing record does not support a finding that the lack of description of the student's speech-language needs resulted in a denial of a FAPE in this case (see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see also P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 512 [S.D.N.Y. 2013] [holding that an IEP need not specify in detail every deficit arising from a student's disability so long as the CSE develops a program that is "designed to address precisely those issues"]).

Furthermore, a review of the evidence in the hearing record demonstrates that the March 2011 IEP otherwise accurately described the student's present levels of academic achievement, as well as social and physical development, and the description of the student's needs was consistent with the evaluative information available to the March 2011 CSE (compare Dist. Ex. 9 at pp. 3-5, with Dist. Ex. 13 at pp. 1-6). Accordingly, the IHO's finding that there was a denial of a FAPE due to insufficient or inappropriate present levels of performance in the March 2011 IEP must be reversed.

2. Annual Goals

Review of the evidence in the hearing record supports the district's assertion that the IHO erred in determining that the March 2011 IEP goals were vague and inappropriate. The school psychologist who participated in the March 2011 CSE meeting testified that the annual goals and short-term objectives included in the IEP were written based on information provided in large part by teachers and providers who were very familiar with the student's functioning (Tr. p. 137; compare Dist. Ex. 9 at pp. 6-13, with Dist. Ex. 13 at pp. 10-12). Further, a review of the March 2011 IEP annual goals shows that they directly relate to the student's identified needs. For example, to address the student's academic deficits, the CSE recommended goals targeting reading, mathematics, and writing (Dist. Ex. 9 at pp. 6-8). To address the student's communication deficits, the CSE recommended goals targeting pragmatic, expressive, and receptive language, and articulation (id. at pp. 10, 11, 13). To address the student's attention, motor deficits, sensory needs, and daily living skills, the CSE recommended goals that focused on sensory processing, motor planning, visual processing, activities of daily living, and emotional regulation (id. at pp. 9, 10, 12). Finally, to address the student's social/emotional deficits, the CSE recommended goals that focused on social skills, pragmatic language, and emotional regulation (id. at pp. 10, 12, 13).

To the extent the parent disputes the CSE's reliance on the goals proposed by the Rebecca School because such goals were intended to be implemented utilizing a particular methodology, such argument is without merit. The director of the Rebecca School opined as to her viewpoint that it would be very difficult to implement the March 2011 IEP without utilizing Developmental

[4] The school psychologist testified that she made a typographical error on the March 2011 IEP, typing "occupational therapy" instead of "speech therapy" on several of the speech-language annual goals (Tr. pp. 104-107; see Dist. Ex. 9 at pp. 10, 11, 13). Although the student's then-current speech therapist indicated that "it could be very confusing to an outsider reading the report," I find that the content of the relevant annual goals targeted needs related to speech-language and were written such that reasonable professionals would interpret the typographical error as a mistake (Tr. p. 586). As such, the errors do not rise to a procedural violation; to find otherwise, would be to "exalt form over substance" (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011]).

Individual-difference Relationship-based (DIR) methodology because some of the terms used in the IEP annual goals were directly taken out of DIR and because the goals were written with the intention that they be implemented "utilizing DIR methodology in an 8:1:3 ratio" and were "not written for a 6:1:1 ratio" (Tr. pp. 377, 379-80). However, under the IDEA and State and federal regulations, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability for a particular methodology, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). There is nothing in the hearing record that persuasively indicates that the March 2011 IEP annual goals could not be implemented in another setting aside from the Rebecca School or that they could not be employed with a methodology other than DIR (cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570 [S.D.N.Y. Mar. 19, 2013] [affirming the SRO's rejection of the parents' contention that the assigned TEACH classroom could not implement the annual goals in the IEP, which contention noted that they were also related to the DIR methodology]).

3. 6:1+1 Special Class Placement with 1:1 Transitional Paraprofessional

With regard to the appropriateness of the 6:1+1 special class placement, the parent argues that the student required a more structured and individualized setting, such as the 8:1+3 special class setting recommended by his then-current teacher at the Rebecca School (Tr. pp. 625-26; Parent Ex. A at p. 2). 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]).

The hearing record reflects that the student demonstrated needs in the areas of academics, motor skills, sensory regulation, and social/emotional functioning (Tr. pp. 369-71, 501-04; Dist. Ex. 9 at pp. 3-5). According to the March 2011 IEP, the CSE considered and rejected special classes in specialized schools with 12:1+1 and 8:1+1 ratios because they would not be sufficiently supportive (Dist. Ex. 9 at p. 15). In addition, a 6:1+1 special class in a specialized school without the additional support of a transitional paraprofessional was considered and rejected as insufficiently supportive (id.).

According to the March 2011 CSE meeting minutes, the CSE discussed all aspects of the IEP including input from the parent and Rebecca School staff (Dist. Ex. 10). The parent and the student's teacher expressed reservations during the March 2011 CSE meeting regarding whether a 6:1+1 special class placement would be supportive enough to address the student's needs (Tr. pp. 550-51, 625). The student's teacher indicated that he required a lot of one-to-one instruction (Tr. p. 551). In response to the parent's concern, the CSE recommended the addition of a 1:1 transitional paraprofessional to increase the level of support for the student, which resulted in a similar student-to-adult ratio as his then-current Rebecca School placement (Tr. pp. 119-21). The parent indicated that she expressed concerns to the CSE regarding the 1:1 paraprofessional, stating that she wanted the student to be "able to handle it on his own" and did not want the student to become attached to someone during the transition (Tr. p. 600). However, the parent also testified that the student's "main issue" was his "inability to take in change or things that did not go his way" and that if the student did not "have people to help him individually," he would "shut out"

(Tr. p. 608). The school psychologist testified that the role of the transitional paraprofessional was to help support the student as he changed from one school environment to another and to facilitate the change to make it smooth (Tr. p. 131). To further address the parent's concerns regarding the transitional paraprofessional, the CSE created goals specifying skills the paraprofessional would work on with the student (Tr. pp. 132-33; see Dist. Ex. 9 at p. 12-13).

Next, the parent alleges that the IEP failed to provide sufficient sensory support for the student to remain regulated throughout the school day.[5] The student was described as "sensory seeking" but "able to maintain a calm and regulated state for the majority of the school day" (Dist. Ex 9 at pp. 4-5). The record reflects that the IEP described the student's sensory needs, identified academic and social/emotional management needs, included OT as a related service with goals to address sensory processing, and included a 1:1 transitional paraprofessional to offer additional support and help the student expand his interactions with adults and peers and deal with novel situations (Tr. pp. 101-02, 108-10, 134-35, 160-62; Dist. Ex. 9 at pp. 3-5, 9-10, 12-14). The March 2011 IEP identified supports to address the student's management needs, including his sensory needs, including repetition, visual cues, verbal prompts, sensory input and breaks, access to a quiet space, and movement during activities (id. at p. 3). Based on the foregoing, the hearing record supports a finding that the March 2011 sufficiently described the student's sensory needs and recommended sufficient supports and services to address those needs.

Here, consistent with the student's needs and State regulations, the March 2011 CSE appropriately recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with a 1:1 transitional paraprofessional together with related services to address the student's needs in the area of academics, language, sensory regulation, social/emotional functioning, and motor skills (Dist. Ex. 9 at pp. 1-5, 14).

4. Parent Counseling and Training

The parent correctly asserts that the March 2011 IEP should have but did not include parent counseling and training (see 8 NYCRR 200.4[d][2][v][b][5], 200.13[d]; see also 34 CFR 300.34[c][8]; 8 NYCRR 200.1[kk]). However, the presence or absence of parent counseling and training in an IEP does not necessarily have a direct effect on the substantive adequacy of the plan (see R.E., 694 F.3d at 191). Moreover, districts are required to provide parent counseling and training pursuant to State regulations and, therefore, "remain accountable for their failure to do so no matter the contents of the IEP" (id.; see 8 NYCRR 200.13[d]; see also R.B. v. New York City Dept. of Educ., 15 F. Supp. 3d 421, 431-32 [S.D.N.Y. 2014]; A.D., 2013 WL 1155570, at *11-*12).

Here, the hearing record reflects that the CSE discussed parent counseling and training as a standard part of the 6:1+1 special class placement offered to the student and the parent made no objections at the March 2011 CSE meeting (Tr. pp. 117-18, 133-34; Dist. Ex. 10). Thus, although

[5] The IHO addressed the parent's allegation relating to supports for the student's sensory needs only in the context of the ability of the assigned public school site to address such needs (see IHO Decision at p. 35). However, the parent also alleged in her due process complaint notice and argues on appeal that the March 2012 IEP lacked the necessary supports to address the student's sensory needs (see Parent Ex. A at p. 2).

parent counseling and training was not included on the March 2011 IEP, the hearing record reflects the matter was discussed during the CSE meeting in order to make the parent aware this service would be available. Based on the foregoing, while the district's failure to provide parent counseling and training in the March 2011 IEP in this instance constituted a procedural violation of State regulations, there is no evidence in the hearing record that this violation, by itself, resulted in a denial of a FAPE.

B. Challenges to the Assigned Public School Site

In his decision, the IHO also addressed some of the parent's concerns regarding the particular public school site to which the district assigned the student to attend during the 2011-12 school year (IHO Decision p. 35). On appeal, the district contends that the IHO erred in reaching the parent's contentions about the assigned school since the student did not attend it and, alternatively, asserts that, even if the IHO properly addressed these issues, the hearing record does not support his conclusions. Neither the law nor the facts of this case support the IHO's conclusions.

Initially, for the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I agree with the district. Specifically, the parent's claims regarding functional grouping, the methodology utilized, and the physical environment at the assigned public school site turn on how the March 2011 IEP would or would not have been implemented. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. C; G), the parent cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and 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"]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

However, even assuming for the sake of argument that the student had attended the district's recommended program at the assigned school, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (e.g., Tr. pp. 186, 203-04, 210, 239, 244-45, 267-69; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

Regarding the parents' claim that the assigned school would use an inappropriate methodology, generally, while an IEP must provide for specialized instruction in a student's areas of need, 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; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct.16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; see also K.L. v New York City Dep't of Educ., 2012 WL 4017822 at *12 [S.D.N.Y. Aug. 23, 2012] [noting that it is "well established that once an IEP satisfies the requirements of the [IDEA], questions of educational methodology may be left to the state to resolve"], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 2014 WL 5463084, at *4; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also R.B., 2014 WL 5463084, at *4; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

Here, there is no evidence in the hearing record suggesting that there was a clear consensus that the student's IEP should be limited to one particular methodology to the exclusion of other approaches and it does not appear that a particular methodology was contemplated by the March 2011 CSE (see Dist. Ex. 9). Consequently, the parent's claim that the assigned public school site utilized an inappropriate methodology is without merit.[6] The school psychologist testified that methodology was not brought up or discussed at the March 2011 CSE meeting and it was up to the teacher and individual providers to determine how best to work with a student at a particular time (Tr. pp. 156-57, 173-74). Although the director of the Rebecca School indicated that it would be difficult to implement the IEP without utilizing DIR methodology, she agreed that methods other than DIR could be used to implement the student's management needs (Tr. pp. 377, 407-13). However, in her opinion, methodologies such as applied behavioral analysis (ABA) and Treatment and Education of Autistic and Related Communication-Handicapped Children (TEACCH) would not be appropriate for the student (Tr. pp. 434-36).

The student's then-current teacher from Rebecca also indicated that the IEP goals were based off of DIR methodology (Tr. pp. 525-26). She went on to say that she felt the strategy was successful with the student and "that is what our school does", but she did not recall informing the CSE about a particular methodology (Tr. p. 526). The student's mother testified that ABA and

[6] While the parent raised the question of methodology in the due process complaint notice as it related to the assigned public school site (Parent Ex. A at p. 2), in her answer to the district's petition, she has shifted approaches and now attempts to argue for the first time on appeal that the IEP should have identified a particular methodology.

TEACCH methodologies were utilized with the student in preschool and TEACCH helped him with regulation (Tr. pp. 596-97).[7] She also noticed a difference in him when she started doing DIR at home (Tr. p. 598). Based upon the foregoing, a review of the evidence in the hearing record does not demonstrate that the student was only able to learn using one methodology. Furthermore, absent evidence in the hearing record that the CSE had information regarding a particular methodology that the student required, the parent's claim that the assigned public school site utilized an inappropriate methodology is without merit.

Next, the district asserts that the IHO erred in finding that the assigned school could not address the student's sensory needs because it did not have the required equipment (IHO Decision at p. 35). Contrary to the IHO's conclusion that the assigned school did not have required equipment to meet the student's sensory needs, the curriculum support teacher from the assigned school testified that there was sensory equipment in the building (Tr. pp. 268-70). Furthermore, although, as the IHO noted, a swing was used with the student at the Rebecca School (see IHO Decision at p. 35), the district was not required to furnish "every special service necessary to maximize each handicapped child's potential," provide the optimal level of services, or even provide a level of services that would confer additional benefits (Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012] [finding the parent's claim that the district public school was not appropriate because it lacked a therapeutic swing speculative and approving of the SRO's finding that the district was not required to provide such a support, notwithstanding that the student utilized a swing at the private school], rev'd on other grounds, 760 F.3d 211 [2d Cir. 2014]; see A.H., 394 Fed. App'x at 721; Cerra, 427 F.3d at 195; D.B. v. New York City Dep't. of Educ., 2011 WL 4916435, at *12 [S.D.N.Y. Oct. 12, 2011] [although IEP did not provide student with all of the services her parents would have liked and which were available to the student at a private school, the IEP did provide the student with a FAPE in the LRE]; see also Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]).

VII. Conclusion

In summary, having determined the IHO erred in concluding that the district failed to offer the student a FAPE for the 2011-12 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

[7] This evidence of the student's actual experience with ABA cuts against the general opinion evidence offered by the director of the Rebecca School at the time of the hearing suggesting reasons why ABA and TEACCH would not be appropriate for the student (Tr. pp. 434-36). This opinion evidence would have been no more persuasive even if it had been offered directly to the CSE. A student's recent negative experience with a particular educational methodology may, in some circumstances, suggest that the student's IEP should note such methodological difficulties or, if necessary, even exclude a particular methodology from being employed. If a parent seeks a particular methodology on the IEP, the district should provide a prior written notice district that describe why it acted or declined to act on parent's request together with a description of each evaluation procedure, assessment, record, or report that was used as a basis for the district's proposed action (see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, on facts such as those present in this case, in which the student had some success with ABA in the past, the district need not immediately jump to the opposite end of the spectrum by limiting the IEP to a single methodology, which should be the rare exception and in some cases may be educationally unsound. The facts of this case demonstrate one of the reasons that methodological questions are generally left to a teacher's professional judgment in the course of working with a student on a daily basis and why methodology is not ordinarily required on an IEP by either federal or State law.

an appropriate placement or whether equitable considerations supported the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED.

Dated: **Albany, New York**
December 8, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER