The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-184

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

Thivierge & Rothberg, P.C., attorneys for respondents, Christina D. Thivierge, 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 parent for the student's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the U.S. District Court for the Southern District of New York (see Y.S. v. New York City Dep't of Educ., 2013 WL 5722793 [S.D.N.Y. Sept. 24, 2013]). The factual background, including the student's educational history, was discussed in the prior decision relative to this appeal and, as such, need not be repeated again in detail, as the parties' familiarity with the facts therein is presumed (Application of the Dep't of Educ., Appeal No. 11-156). Briefly, the student demonstrates difficulties in the areas of language processing, communication, social/emotional functioning, behavior, daily living skills, attention, and sensory regulation as well as fine and gross motor skills (Tr. pp. 244, 265, 293, 374-75, 548-52, 633-638, 695-700; Dist. Exs. 3-10; Parent Ex. Z). After evaluating the student, the CSE convened in April 2010 and determined that the student was eligible for a special education program and related

services as a student with autism, and recommended a 12-month special education program consisting of a 6:1+1 special class in a specialized school with related services consisting of speech-language therapy, twice per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 2:1 setting; counseling services, once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 2:1 setting; OT, three times per week for 30 minutes per session in a 1:1 setting; and PT, twice per week for 30 minutes per session in a 1:1 setting (Dist. Ex. 12 at p. 24). The CSE further recommended program modifications to address health and physical management needs consisting of limited auditory and visual distractions and movement breaks as needed (id. at p. 9). The student's IEP also contained annual goals and short-term objectives addressing the areas of drawing, classroom participation, handwriting, attention, spatial relations, receptive language, expressive language, impulsivity, classification, math, and gross motor skills (id. at pp. 11-21). In June 2010, the parents rejected the April 2010 IEP, indicated they had attended an information session at the public school site to which the student had been assigned, and stated that they had enrolled their daughter at the Aaron School and would seek tuition reimbursement from the district (Parent Exs. D; F). In September 2010 the parents filed a due process complaint notice and requested an impartial hearing (Dist. Ex. 1). At the time of the impartial hearing, the student was attending the Aaron School (Tr. pp. 12-13, 30-31; Dist. Ex. 1 at pp. 4-5).

As described previously, the IHO concluded in a decision dated October 18, 2011, that the district failed to offer the student a FAPE, that the Aaron School was appropriate, and that no equitable considerations barred reimbursement (IHO Decision; see Application of the Dep't of Educ., Appeal No. 11-156). In an appeal from the IHO's decision, this SRO annulled the portion of the IHO's decision which determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year and ordered the district to reimburse the parents for the costs of the student's attendance at the Aaron School and out-of-school related services. As relevant to the remaining FAPE issues in this case, I concluded that the parents were required to cross-appeal from the annual goal issue in the due process complaint notice that the IHO failed to address but had not, and that the IHO had impermissibly decided the assigned public school site was inappropriate because it used the TEACCH methodology because that issue was not raised in the due process complaint (Application of the Dep't of Educ., Appeal No. 11-156).

The parents sought judicial review of the SRO decision in the United States District Court for the Southern District of New York (Y.S., 2013 WL 5722793). The Court considered and rejected several challenges argued by the parents; however, in view of M.H. v. New York City Dep't of Educ. (685 F.3d 217 [2d Cir. 2012]), the Court concluded that the issue of the assigned public school site's use of the TEACCH methodology could be permissibly reached because the district had "opened the door" to that challenge, despite it not being raised in the due process complaint (see Y.S., 2013 WL 5722793, at *6-*7). Additionally, noting a split in authority on the issue of whether a party must cross-appeal from the failure of an IHO to decide a claim (compare C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011] [holding that plaintiffs who did not cross-appeal issue not reached by IHO waived right to challenge it in federal court], with D.N. v. New York City Dep't of Educ., 905 F.Supp.2d 582, 587–88 [S.D.N.Y. 2012] [finding that plaintiffs only needed to cross-appeal issues not reached by IHO if they were aggrieved by the decision]), the Court determined that it was permissible to raise the issue in an answer without alleging in a cross-appeal that the IHO had erred in failing to address the claim (see Y.S., 2013 WL 5722793 at *7-*8).

Accordingly the District Court remanded the case to the undersigned with directions to consider the parents' arguments regarding 1) use of the TEACCH methodology; 2) the sufficiency of the goals in the student's April 2010 IEP; and 3) whether the district's failure to perform a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP)[1] amounted to a denial of a FAPE for the student (Y.S., 2013 WL 5722793 at *10). The parties were granted leave to file amended/supplemental pleadings in light of the District Court's determinations in the case, and both the district and the parents submitted memoranda presenting arguments related to the remaining issues as remanded by the Court.

IV. Arguments on Remand

In its supplemental petition, the district sets forth its arguments that it offered the student a FAPE during the 2010-11 school year because: (1) The goals on the student's April 2010 IEP were sufficient; (2) the lack of an FBA and BIP did not result in a denial of FAPE; and (3) the use of the TEACCH methodology would have been appropriate. As relief, the district requests that the IHO's decision granting tuition reimbursement be overturned.

In their supplemental answer, the parents similarly set forth their arguments to the contrary contending that the district failed to offer the student a FAPE because: (1) the goals in the student's April 2010 IEP were inappropriate and insufficient for the student; (2) the district's failure to conduct an FBA and develop a BIP denied the student a FAPE; and (3) the use of the TEACCH methodology would have been inappropriate for the student. The parents request that the district's arguments should be rejected and that the parents should be granted tuition reimbursement, among other things, for the cost of the student's attendance at the Aaron School during the 2010-11 school year.

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

[1] The issue of the FBA was addressed previously; however, the Court directed the SRO to redecide the matter after considering the issue of the annual goals (Y.S., 2013 WL 5722793 at *8).

districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 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, 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. April 2010 IEP

1. Annual Goals

The parents contend that some of the April 15, 2010 IEP goals were too challenging for the student, some were based upon outdated information and were already mastered by the student, some were too vague, and that many were inappropriate or could not be implemented by a teacher. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

Initially, I note that, under the IDEA and State and federal regulations discussed above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a particular classroom setting or student-teacher ratio, but rather whether the goals and objectives are consistent with and relate to the 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]).

In this case, I find that the goals in the April 2010 IEP were appropriate. To address the student's academic, social/emotional, language, and motor needs set forth in the present levels of performance in the April 2010 IEP and in the evaluative materials, the April 2010 CSE developed 20 annual goals and 63 short-term objectives in the areas of academics, attention, behavior, language skills, social/emotional functioning, and motor skills (see Parent Ex. B at pp. 3-8, 11-21). . Specifically, the student's April 2010 IEP incorporated annual goals and short-term objectives to address the student's identified needs in the areas of sensory regulation, attention, handwriting, fine motor, gross motor, taking turns, verbal expression, spatial relations, interpersonal skills, eye contact, personal space, receptive language, expressive language, answering questions, vocabulary, impulsivity, following directions, task persistence, classification, math, and pragmatic language (Parent Ex. B at pp. 11-21). The April 2010 IEP indicated that the district would report the student's progress regarding the annual goals and short-term objectives to the parents twice per year (id.).

As a demonstration of the appropriateness and measurability of the annual goals, there were two annual goals related to physical therapy (PT) and gross motor skills contained in the IEP (Parent Ex. B at p. 21). The first goal indicated that the student would "demonstrate improved locomotion skills to [a] 40 month age level within a year, for greater independence in the classroom and school environment" (id.). The annual goal contained five corresponding short-term objectives related to jumping, walking up and down stairs, and running all of which were specific and included evaluative criteria (id.). The methods of measurement were teacher and provider observations (Dist. Ex. 12 at p. 21). The second goal indicated that the student would "demonstrate improved stationary and object manipulation skills to [a] 42 month age level within a year, for greater independence in the classroom and school environment" (id.). The annual goal contained four corresponding short-term objectives related to standing, standing on tiptoes, and throwing (id.). The other annual goals and short-term objectives contained in the IEP were designed similarly to the goals and objectives described above in that the goals and objectives were specific and measurable and targeted the student's areas of need (Dist. Ex. 12 at pp. 11-21). However, I note that four of the annual goals did not indicate the method by which the student's progress would be measured (Dist. Ex. 12 at pp. 11-12), which is a violation of State procedures (8 NYCRR 200.4[d][2][iii][b]).

The district school psychologist who attended the April 2010 CSE meeting testified that the CSE carried over many of the annual goals from the February 2010 IEP to the April 2010 IEP because the goals remained appropriate for the student based upon the evaluative information and parent input (Tr. pp. 33, 94, 105-06).[2] The school psychologist further testified that the annual goals were an individualized "roadmap" to assist the student to make progress (Tr. p. 94). According to the testimony of the parent and the student's private providers, the annual goals and

[2] The February 2010 IEP was not included in the hearing record.

short-term objectives were not appropriate to address the student's needs (Tr. pp. 643-44, 662-63, 799). Additionally, the parent and private providers indicated that the goals and objectives were unattainable and out of sequence in that the prerequisite skills were not mastered by the student, the goals did not target the appropriate skills, and the goals were not "precise enough" and were "outdated" (id.). However, I find that the student's needs in the areas of academics, language, social/emotional, behavior, attention, sensory regulation as well as fine and gross motor skills were addressed by the annual goals and short-term objectives. In addition, based on the information in the present levels of performance of the April 2010 IEP, the April 2010 CSE developed annual goals that were aligned with the student's current functional and instructional levels (see Parent Ex. B at pp. 3-10). Further, as set forth above, the district school psychologist's testimony provided a reasonable explanation as to why the CSE carried over many of the annual goals from the student's previous IEP.

All of the student's annual goals were individualized, specific, and with the exception of the four noted above, contained methods of measurement to allow the teacher to measure the student's progress and guide instruction. I conclude that the evidence contained in the hearing record establishes that the April 2010 CSE aligned the student's annual goals to her needs as identified in the present levels of performance and evaluative data available to the April 2010 CSE. Overall, the annual goals and short-term objectives contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision and did not result in a denial of a FAPE to the student (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; Tarlowe, 2008 WL 2736027, at *9; see Parent Ex. B at pp. 11-21).

2. Special Factors – Interfering Behaviors

The parents contend, among other arguments, that the failure to conduct an FBA and develop a BIP resulted in a failure to offer the student a FAPE in this instance because the district did not otherwise adequately identify the student's behavioral impediments or implement strategies to address those behaviors in the April 2010 IEP.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [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," Office of Special Educ. [Dec. 2010], at p. 22, 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.).[3] 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]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]; A.H., 2010 WL 3242234, at *4). 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 address the student's problem behaviors" (id.).

Having examined the annual goals as directed by the District Court, there is nothing in that analysis that leads me to deviate from the conclusion that the evidence in the hearing record supported the district's contention that the student did not require a BIP, that the CSE properly considered special factors, and that the April 2010 IEP appropriately addressed the student's behavioral needs for the reasons stated in my prior decision (Application of the Dep't of Educ.,

[3] While the student's need for a BIP must be documented in the IEP and, prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student is enrolled at the proposed district public school placement]).

Appeal No. 11-156). I have considered the goals and objectives in the April 2010 IEP and found them to be appropriate as described above. Among the multiple bases for my determination that the April 2010 IEP appropriately addressed the student's behavioral needs, I had concluded that the IEP contained annual goals addressing behavioral needs related to the student's ability to attend and perform as a member of a group in class, to understand personal space, to reduce impulsivity, and to improve independence (see Application of the Dep't of Educ., Appeal No. 11-156; Parent Ex. B at pp. 11-13, 16, 18, 21). Although two of the annual goals relating to behavior did not indicate the method of measurement, five other goals contained appropriate methods of measurement and I find that overall the behavior goals in the April 2010 IEP were appropriate (Parent Ex. B at pp. 11-13, 16, 18, 21). As the IEP has sufficiently addressed the student's behavioral needs, there is no basis found in the evidence in this instance to conclude that the district denied the student a FAPE (see A.C., 553 F.3d at 172; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *17-*18 [S.D.N.Y. Sept. 16, 2013]).

B. TEACCH Methodology in the Assigned School Site

The IHO determined that the "the TEACCH model is not appropriate for [the student's] complex individual needs and would lead to regression and withdrawal" based upon testimony of the private neuropsychologist and found for that reason, and among other reasons, that the particular school site recommended for the student would not be appropriate (IHO Decision at pp. 13-14, see Tr. p. 570).

Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 12, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish

that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[4]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because '[t]he appropriate inquiry is into the nature of the program actually offered in the written plan']). In view of the forgoing, the parents cannot prevail on their claim that the assigned school would not have been appropriate for the student because a retrospective analysis of how the district would have executed the student's April 2010 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

[4] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

In this case, by letter to the district dated June 3, 2010, the student's father acknowledged receipt of a May 25, 2010 notice from the district that summarized the CSE's recommendations for the student and identified the school to which the district assigned the student (Parent Ex. F). By letter dated June 21, 2010, the student's father informed the district that he had attended an information session about the assigned school, that the session was not held at the assigned school, and that as a result of the session, the student's father believed that the recommended program in the assigned school would not be appropriate for the student (Parent Ex. D at pp. 1-2). The student's father further informed the district that the student had been placed in the Aaron School and that the parents would seek reimbursement for the placement and for other services the parents had obtained (id.). Therefore, the district developed the student's 2010-11 IEP and offered the student a placement prior to the beginning of the school year.[5] Consequently, because the parents rejected the proposed IEP and enrolled the student in the Aaron School, the district was not required to show that the student's IEP would have been implemented. However, I have, especially in light of the District Court's directive to consider the issue, reviewed the evidence in the hearing record in order to discuss what other findings could be made, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site and received instruction utilizing the TEACCH methodology. As further explained below, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation, that is, 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 (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2008]; see D.D-S., 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502-03).

A CSE is generally 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 better left to the discretion of the student's teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.D., 2013 WL 1155570, at *12; F.L., 2012 WL 4891748, at *9; K.L., 2012 WL 4017822, at *12; Ganje, 2012 WL 5473491, at *11-*12; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012]; A.S. v. New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

[5] The district offered the student a placement on May 25, 2010 (Parent Ex. F). This date was prior to the start of the 2010-11 school year, and therefore in conformity with State and federal regulations (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]).

In this case the evidence shows that during the impartial hearing, the district special education teacher of the 6:1+1 special class at the assigned school described how she implemented the TEACCH method by first providing 1:1 instruction to the students regarding specific skills, followed by independent engagement of the students at work stations to develop specific skills as well as to learn to better maintain attention (Tr. pp. 146-48). The private neuropsychologist testified that the TEACCH model was not appropriate for the student in that the student would regress and withdraw (Tr. pp. 570-74). However, the neuropsychologist did not provide any explanation as to why the TEACCH methodology would trigger the student's regression and withdrawal. The neuropsychologist only testified that due to the student's "individualized complex needs," use of the TEACCH methodology would not address the student's needs and attending a community school would lead to regression and withdrawal (Tr. p. 570).[6]

In contrast, the district special education teacher of the assigned class described why she would have been able to provide the student with an appropriate education (Tr. pp. 140-46, 171). The special education teacher testified that the TEACCH method allowed for structure and predictability within the 6:1+1 special class (Tr. p. 140). The special education teacher provided differentiated instruction and individual attention to the students (Tr. pp. 140-146). In addition, as stated above, the special education teacher provided reinforcement and modeling as well as targeted goals based on ongoing assessments (Tr. pp. 154, 157, 159, 161, 168). She testified that students in the assigned class receive individualized schedules that address anxiety by assisting the students in predicting their school day (Tr. p. 138). The students also received multiple shortened lessons on a variety of skills to assist the students to better acquire skills and maintain attention (id.). The students received positive reinforcement for completion of assignments (id.). Further, a head teacher was assigned to the 6:1+1 class, who had received TEACCH training, and assisted the special education teacher in the implementation of TEACCH practices within the classroom (Tr. pp. 130-31). The hearing record does not contain any evidence that the student would not have responded to instruction provided using the TEACCH method, and in the absence of such evidence it is inappropriate to confine the instruction provided to the student to one exclusive method of instruction and limit the discretion that is afforded to teachers. Moreover, the hearing record shows that the student responded well to 1:1 instruction, indicating she could have learned skills provided on an individual basis (Parent Ex. Z at p. 5). In addition, the student maintained her attention within a small group for up to 30 minutes, indicating she could have engaged at the work stations described by the district special education teacher (Tr. pp. 134, 294). In light of the above, I find that had the assigned school used the TEACCH methodology in implementing the student's IEP, it would not deprive the student of a FAPE (see F.L., 2012 WL 4891748 at *9 [S.D.N.Y. Oct. 16, 2012]).

VII. Conclusion

In light of my determinations above on the issues remanded by the District Court, there is no reason to disturb the previous conclusion reached in Application of the Dep't of Educ., Appeal No. 11-156, that the parents have not prevailed in their claims that the district failed to offer the student a FAPE during the 2010-11 school year.

[6] I find this to be one of the obvious reasons that the student's IEP indicated the student needed to attend a special class in a specialized school (Dist. Ex. 12 at p. 1).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated October 18, 2011 is modified, by reversing that portion which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to reimburse the parents for the costs of the student's attendance at the Aaron School and out-of-school related services.

Dated: **Albany, New York**
December 26, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER