The University of the State of New York

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

No. 14-062

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, Alexander M. Fong, Esq., of counsel

Thivierge & Rothberg, PC, attorneys for respondents, Randi M. Rothberg, Esq. and Katharine Guidice, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at Reach for the Stars Learning Center (RFTS) for the 2013-14 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

I was appointed to conduct this review on December 1, 2014. The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited at length. A CSE convened on January 11, 2013, to develop the student's IEP for the 2013-14 school year (Dist. Ex. 1). The January 2013 IEP reflected that the CSE deemed the student eligible for special education programs and services as a student with autism and recommended placement in a 12-month school year program in a 6:1+1 special class in a specialized school (id.

at pp. 1, 19-20).[1] With regard to related services, the CSE recommended the student receive five 45-minute sessions of individual occupational therapy (OT) per week, four 60-minute sessions of individual speech-language therapy per week, and one 60-minute session of speech-language therapy per week in a group (id. at p. 19).[2] The CSE also recommended that the student receive the service of a full-time 1:1 paraprofessional (id.).

By letter dated June 11, 2013, the district summarized the recommendations made by the January 2013 CSE and notified the parents of the public school site to which the student was assigned for the 2013-14 school year (Dist. Ex. 3). After visiting the school the parents sent the district a letter, dated June 24, 2013, indicating that they had determined that the assigned school was not appropriate for the student (Parent Ex. D at pp. 1-2). The parents rejected the assigned school and notified the district that if the district did not offer another school site the parents would continue the student's enrollment at RFTS, along with additional services outside of school, and would seek public funding from the district (id. at p. 2). The parents entered into an enrollment contract with RFTS on July 1, 2013 and the student attended RFTS for the 2013-14 school year beginning in July 2013 (Parent Exs. S; U).

A. Due Process Complaint Notice

Pursuant to a due process complaint notice dated July 1, 2013, the parents requested an impartial hearing seeking tuition reimbursement or direct funding for their placement of the student at RFTS for the 2013-14 school year along with additional individual speech-language therapy, OT, and applied behavior analysis (ABA) therapy sessions outside of school (Parent Ex. A). The parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year for various reasons, including: that the student's mother was not treated "as a full and equal" member of the January 2013 CSE; that the CSE did not include a member who could interpret the results of evaluations or an additional parent member; that the CSE predetermined the recommended program by refusing to consider placing the student in a 1:1 setting; that the CSE did not consider services outside of school; that a 6:1+1 class was not "intensive enough" for the student and would not have included 1:1 instruction; that the IEP did not include "any degree of 1:1 instruction;" that a 1:1 paraprofessional was not an appropriate support for the student; that the annual goals included in the IEP were not developed during the CSE meeting, were not appropriate, and could not be implemented in a 6:1+1 class; that the district did not conduct a functional behavior assessment (FBA) or develop a behavioral intervention plan (BIP); that the IEP incorrectly indicated the student did not need an assistive technology device or service; that the IEP did not include any services to assist the student in transitioning into a new program; and that the IEP did not include parent counseling and training (id. at pp. 3-5). The parents also asserted that they were not given the opportunity to participate in the selection of a public school site and the assigned public school recommended by the district would not have been appropriate for the student (id. at pp. 5-6).

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

[2] The January 2013 IEP indicated that all of the student's related services were to be provided in a separate location (Dist. Ex. 1 at p. 19).

B. Impartial Hearing Officer Decision

After two prehearing conferences, an impartial hearing convened on December 3, 2013, and concluded on February 19, 2014, after four days of proceedings (Tr. pp. 1-590). In a decision dated March 27, 2014, the IHO determined that the district did not offer the student a FAPE for the 2013-14 school year, that the parents' unilateral placement of the student at RFTS was appropriate, and that equitable considerations weighed in favor of granting the parents' request for direct funding of the student's tuition at RFTS for the 2013-14 school year (IHO Decision at pp. 11-16). The IHO found that a 6:1+1 class was not reasonably calculated to provide the student with an educational benefit because the student "could not readily acquire new skills in a group setting" (id. at p. 12). The IHO also found that the district's classroom observation did not provide a sufficient basis to justify placement in a 6:1+1 classroom and that the inclusion of a goal in the January 2013 IEP targeting the student's ability to attend to group instruction indicated that the CSE did not believe the student was ready for group instruction (id. at pp. 12-13). The IHO then determined that RFTS was an appropriate placement for a number of reasons, including that RFTS provided 1:1 ABA instruction by qualified staff, that the student made progress at RFTS during the 2013-14 school year, that RFTS tracked the student's progress, and that RFTS provided opportunities for parent training (id. at pp. 14-15). The IHO further determined that equitable considerations weighed in favor of granting the parents' requested relief because there was no evidence indicating that the parents would not have sent the student to public school if an appropriate program were offered (id. at pp. 15-16). The IHO directed that the district pay the student's tuition for the 2013-14 school year directly to RFTS (id. at p. 16).

IV. Appeal for State-Level Review

The district appeals from the IHO's determinations that the district did not offer the student a FAPE for the 2013-14 school year, that RFTS was an appropriate placement for the student, and that equitable considerations weighed in favor of granting the parents' requested relief. The parents answer, denying the district's allegations and indicating that the IHO did not address their allegations related to procedural violations, such as predetermination, the development of an FBA and BIP, assistive technology, and parent counseling and training, or the parents' visit to the assigned school.[3] The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer is presumed and the parties' arguments will not be fully recited herein. However, upon review of the pleadings, the following issues must be resolved on appeal:

> 1. Did the IHO err in finding that a 6:1+1 special class was not reasonably calculated to provide the student with educational benefits;

[3] The parents' due process complaint notice included a number of allegations that the parents have not raised in their answer, including that the CSE did not include a member who could interpret the results of evaluations or an additional parent member, that the CSE did not consider services outside of school, that the annual goals included in the IEP were not developed during the CSE meeting, were not appropriate, and could not be implemented in a 6:1+1 class, and that the IEP did not include any services to assist the student in transitioning into a new program (Parent Ex. A at pp. 3-5). As those issues were not raised on appeal, they will not be addressed herein.

2. If the IHO erred in finding that a 6:1+1 class was not reasonably calculated to provide the student with an educational benefit, then was there a denial of FAPE based on the other reasons raised in the parents' answer.

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. 6:1+1 Placement

The district asserts that the IHO erred in finding that the January 2013 CSE's decision to place the student in a 6:1+1 special class in a specialized school was not reasonably calculated to provide the student with an educational benefit in light of the information available to the CSE at the time of the January 2013 CSE meeting.

As an initial matter, much of the information in the hearing record regarding the student's ability to participate in and attend to group instruction was not available to the January 2013 CSE or was based on the student's functioning as it was observed at RFTS during the 2013-14 school year (see Tr. pp. 234-35, 251-53, 548-49; Parent Exs. P at p. 2; Q at pp. 29, 32-24; R at pp. 16-18).[4] Information that was not available to the January 2013 CSE cannot be used to determine the adequacy of the January 2013 IEP (see R.E., 694 F.3d at 187 ["In determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision"]). In reviewing the program offered to the student, the focus of the inquiry is on the information that was available to the January 2013 CSE at the time of the development of the January 2013 IEP (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [an IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE]; D.A.B. v New York City Dep't of Educ., 973 F. Supp. 2d 344, 361-62 [S.D.N.Y. 2013] [same]). This is especially so considering the RFTS educational director's testimony that the student's abilities to participate in group instruction changed significantly between the time of the January 2013 CSE meeting and the 2013-14 school year (see Tr. pp. 548-49).

However, the district asserts that the January 2013 CSE's recommendation for a 6:1+1 special class with the support of a 1:1 paraprofessional was reasonable based on the information available to the CSE, which included a December 2012 classroom observation at RFTS, a December 2012 RFTS speech-language progress report, a December 2012 RFTS educational progress report, and a December 2012 district psychoeducational evaluation (Dist. Exs. 6-9). Regarding the student's ability to participate in group instruction, the December 2012 RFTS educational progress report indicated that the student "has improved in group exercise," was able to attend and sustain eye contact in small groups, and was able to participate in interactive games such as musical chairs with prompting (Dist. Ex. 8 at p. 3). Despite this description of the student's

[4] The RFTS incomplete items report (Parent Ex. Q) and complete items report (Parent Ex. R) are both dated September 23, 2013; however, the reports were printed in September and report data that was collected by RFTS as part of an annual Assessment of Basic Language and Learning Skills (ABLLS) conducted in June 2013 and prior (Tr. pp. 362-66; see Parent Ex. P). In addition, it should be noted that although the ABLLS report is color coded, only a black and white copy was provided as part of the hearing record (Tr. pp. 363-64; Parent Ex. P).

abilities, the RFTS progress report included a recommendation that the student remain in a 1:1 educational setting utilizing ABA (id. at p. 4).

Although the December 2012 classroom observation report indicated the student was accompanied by a 1:1 teacher throughout the day, the report also indicated the student was able to complete a number of tasks without assistance (Dist. Ex. 6 at p. 1). The district special education teacher who conducted the classroom observation testified that the student was in a group setting for approximately 15-minutes out of the observation and that the student's performance was "fantastic" during that time (Tr. pp. 113-14). She also testified that for a portion of the observation the students went on a field trip and that, although the student was accompanied by a 1:1 teacher, the student did not require any support from his 1:1 teacher during that portion of the observation (Tr. pp. 123-25). She explained that the student received instructions from the lead teacher prior to leaving the classroom and was able to comprehend, remember, and carry out those instructions without support (id.).

The IHO devalued the December 2012 classroom observation, finding that a 15-minute classroom observation and 45-minute observation during a field trip were insufficient to warrant a change in the student's program and that the observation report conflicted with the Assessment of Basic Language and Learning Skills (ABLLS) conducted by RFTS (IHO Decision at pp. 12-13).[5] As discussed above, the CSE did not have reports from the ABLLS at the time of the January 2013 CSE meeting and therefore they cannot be used to challenge the adequacy of the IEP (see C.L.K., 2013 WL 6818376, at *13). However, even if the ABLLS is considered it does not contradict the classroom observation as both indicate that the student had some ability to participate in group instruction (see Dist. Ex. 6 at p. 1; Parent Exs. P at p. 2, Q at pp. 32-33; R at p. 17). The ABLLS indicated that the student could acquire "some skills with repetitive exposure to the material" in group instruction, was able to attend to a teacher in a group of three 75 percent of the time, and was able to sit in a group teaching situation without disrupting others for 15 minutes (Tr. pp. 553-55; compare Parent Ex. P at p. 2, with Parent Exs. Q at pp. 32-33, and R at p. 17).

Additionally, upon review of the RFTS educational director's testimony, while the student had a 1:1 teacher at RFTS for both instructional and behavioral purposes, the focus of the 1:1 teacher was on behavioral issues (Tr. pp. 376, 414-15, 479-80, 424-25, 548-49, 553-54). Specifically, the RFTS director testified that the student's behaviors in January 2013 prevented him from participating in group instruction and that learning in a group was something that happened during the 2013-14 school year (Tr. pp. 548-49). She explained that 1:1 instruction was "the only way to . . . reduce [the student's] maladaptive behaviors so he can learn" (Tr. p. 376).[6]

[5] It should be noted that the student was not in a 1:1 setting at RFTS, but was in a group setting with other students who all had a 1:1 teacher assigned to them (Tr. pp. 370-73). For example, the student's class during summer 2013 contained five students, one lead teacher, four assistant teachers, and a speech-language pathologist (Tr. pp. 370-71).

[6] The RFTS educational director's testimony was inconsistent regarding the student's ability to learn in a group (Tr. pp. 553-54). Although the RFTS director acknowledged that the report from the ABLLS indicated the student could acquire some skills in a group with repetitive exposure to the material, she also testified that the student was still not learning new skills in a group at the time of the hearing and that RFTS had not yet been able to teach the student new skills without 1:1 instruction (Tr. pp. 424-25, 553-54).

She further explained that the student required 1:1 support in order to break down tasks, provide reinforcement, and to provide and appropriately fade out prompting (Tr. pp. 376, 414-15, 479-80).

Based on the above information regarding the student's ability to attend during group instruction and the testimony indicating that the student's need for 1:1 support is related more to his behavioral needs (Tr. pp. 376, 414-15, 479-80; Dist. Exs. 6 at p. 1; 8 at p. 3), the January 2013 CSE's recommendation for a 6:1+1 special class with the support of a 1:1 paraprofessional was not unreasonable. 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]). In addition, to the extent that the student required 1:1 instructional support, in this instance, a paraprofessional would have been able to provide the student with sufficient support to enable him to receive an educational benefit in a group setting (see 34 CFR 200.58, 200.59; 8 NYCRR 80-5.6[a]).[7] Further, the January 2013 IEP is not devoid of 1:1 instruction, as in addition to the recommendations for a 6:1+1 special class and a 1:1 paraprofessional, the IEP also includes recommendations for individual OT and speech-language therapy sessions in excess of seven hours per week (Dist. Ex. 1 at p. 19). Accordingly, the IHO's decision on this point must be reversed (see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85-86 [2d Cir. 2013]).

B. Development of the January 2013 IEP

Having found that the IHO erred in finding a denial of FAPE based on the appropriateness of the district's recommendation of a 6:1+1 special class with the support of a 1:1 paraprofessional and related services, I next address the parents' claims regarding the development of the January 2013 IEP.

The parents assert that the district predetermined the student's program by refusing to consider placing the student in a 1:1 program. The district special education teacher testified that the district does not have 1:1 programs and cannot recommended 1:1 instruction on an IEP (Tr. pp. 87-88, 118). The IHO found that the district was in error in this regard and that a district is not prohibited from recommending a 1:1 program if it is required to meet the student's needs (IHO Decision at p. 14), which is in accord with the concept that placement decisions must be based on a student's unique needs as reflected in the IEP, rather than on the existing availability of services in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014]). However, once the district determined that the 6:1+1 special class placement was appropriate, it was under no obligation to consider 1:1 instruction or placement in a nonpublic school (B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *9 [E.D.N.Y. Mar. 31, 2014]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y.

[7] It is not clear the extent to which the IHO considered the support of the 1:1 paraprofessional in reaching her decision, as the IHO found "a 6:1+1 setting was not reasonably calculated to allow [the student] to acquire new skills" (IHO Decision at p. 12). The IHO was also not entirely clear as to the level of educational benefits she expected the district to provide, as despite finding that the program was not calculated to allow the student to acquire new skills, the IHO also indicated that the student could acquire "some academic skills" in a group setting and could not "readily" acquire new skills in a group setting (IHO Decision at pp. 12-13).

Aug. 19, 2013]). Accordingly, the parents' allegation that the district predetermined the student's program is unavailing. Additionally, the hearing record indicates that the parents had an opportunity to participate in the January 2013 CSE meeting, as the CSE received input from the RFTS educational director, the student's RFTS teacher, and the student's speech-language provider, and discussed the role of the 1:1 paraprofessional ultimately recommended by the CSE (Tr. pp. 431-32, 478; Dist. Exs. 1 at pp. 1-3, 26; 2).

The parents also assert that the district did not conduct an appropriate FBA or develop an appropriate BIP. Specifically, the parents assert that the FBA did not indicate that the student engaged in "self-injurious behaviors, bolting, and flopping," the FBA did not identify the functions of these behaviors other than escape, and the BIP did not match strategies with specific behaviors. However, upon review of the FBA the targeted behaviors are sufficiently accurate. For example, the FBA included pinching as one of the student's targeted behaviors and it was also one of the student's self-injurious behaviors (Tr. pp. 223-24, 385; Dist. Ex. 4 at p. 1). The FBA also identified the student's non-compliant behaviors as muscle tensing, flopping to the floor, and bolting (Dist. Ex. 4 at p. 2).[8] Although the FBA did not indicate that the function of the student's behaviors included attention as well as escape, the BIP included an intervention—better communicating requests—which addressed the student's attention-seeking behaviors (Tr. pp. 455-56; Dist. Exs. 4 at p. 1; 5). Additionally, although the BIP did not include specific strategies to be used to achieve the expected changes in behavior, the FBA identified proposed interventions such as preparation for transitions, token boards, reinforcement, and a paraprofessional and the IEP indicated a number of strategies which were used with the student at RFTS, including the use of a Dynavox for communication,[9] the use of prompting, and the use of a sensory diet, and also included the support of a 1:1 paraprofessional and individual speech-language therapy and OT as management needs for the student (Dist. Ex. 1 at pp. 1-3). Although a failure to match strategies to particular behaviors within a BIP is a procedural violation (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]), where the student's behavioral problems are adequately addressed in the BIP and the IEP as a whole, as they were in this instance, it is a technical deficiency which does not contribute to the denial of a FAPE (see N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *8 [S.D.N.Y. June 16, 2014]). Accordingly, any deficiencies in the FBA and BIP did not rise to the level of a denial of FAPE as when read together with the January 2013 IEP, the FBA, BIP, and IEP provided an adequate description of the student's interfering behaviors and indicated appropriate strategies and supports to address the student's behaviors (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]; A.C., 553 F.3d at 172-73).

The parents' last contention regarding the January 2013 IEP is that it failed to include parent counseling and training. Pursuant to State regulations, a district is required to provide parent

[8] The January 2013 BIP also included pinching, bolting, and flopping to the floor as targeted behaviors (Dist. Ex. 5).

[9] The parents assert that the January 2013 IEP was inappropriate because the responses following the questions "Does the student need a particular device or service to address his communication needs?" and "Does the student need an assistive technology device and/or service?" were checked "No" (Dist. Ex. 1 at p. 4). However, the IEP did indicate that the student was provided with a Dynavox through Medicaid in order to assist with his expressive language (id. at p. 1). Accordingly any failure on the part of the CSE to answer the assistive technology questions included in the January 2013 IEP in the affirmative did not result in a denial of FAPE as the IEP indicated the student's needs.

counseling and training to the parents of students with autism (8 NYCRR 200.13[d]). The January 2013 IEP did not include parent counseling and training (Dist. Ex. 1). However, because districts are required to provide parent counseling and training pursuant to State regulations, "they remain accountable for their failure to do so no matter the contents of the IEP" (R.E., 694 F.3d at 191). Therefore, while the January 2013 CSE's failure to include parent counseling and training in the January 2013 IEP constitutes a procedural violation, it does not by itself result in a denial of a FAPE.

C. Challenges to the Assigned Public School Site

Similar to the reasons set forth in other decisions issued by the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of a Student with a Disability, Appeal No.: 12-217; Application of the Dep't of Educ., 12-171), the parents' allegations relating to the assigned public school site, which the IHO did not address and which the parents' continue to argue on appeal, are without merit. Specifically, the parents' claims regarding the availability of 1:1 instruction and ABA therapy at the assigned public school site and whether the assigned public school site could provide the student with appropriate behavioral supports and the related services recommended in the January 2013 IEP (see Answer ¶¶ 43-46) turn on how the January 2013 IEP would or would not have been implemented, and as it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. D; S; U; Z), the parents cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L., 553 Fed. App'x at 9 [2d Cir. 2014]; K.L., 530 Fed. App'x at 87 [2d Cir. 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; C.L.K., at *13; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

Having found that the IHO erred in finding that a 6:1+1 class was not reasonably calculated to provide the student with an educational benefit and that the parents' remaining contentions did not provide an alternative basis for finding that the student was not offered a FAPE for the 2013-14 school year, it is unnecessary to address the appropriateness of RFTS, or whether equitable considerations weigh in favor of granting the parents' requested relief (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 parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 27, 2014, is modified, by reversing the portion of the decision finding that the district did not offer the student a FAPE for the 2013-14 school year.

Dated: **Albany, New York**
December 30, 2014

STEVEN KROLAK
STATE REVIEW OFFICER