



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-057

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:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

The Law Firm of Tamara Roff, PC, attorneys for respondents, Tuneria R. Taylor, Esq., of counsel

DECISION

I. Introduction

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see T.C. v. New York City Dep't of Educ., 2016 WL 4449791 [S.D.N.Y. Aug. 24, 2016]). This proceeding initially arose 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) previously appealed from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2011-12 school year.¹ The appeal must be sustained.

¹ In the initial proceeding the due process complaint notice and petition referenced only one of the student's parents (see Application of the Dep't of Educ., Appeal No. 13-091). However, the caption in the matter remanded by the District Court and the submissions submitted by the parents after remand indicate that both parents are a part of this proceeding (see T.C., 2016 WL 4449791). Accordingly, both parents are described as respondents in this appeal.

II. Overview—Administrative Procedures

In a due process proceeding conducted pursuant to the IDEA, the decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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 (see Application of the Dep't of Educ., Appeal No. 13-091); however, the facts pertinent to the remand are briefly set forth below.

The CSE convened on March 28, 2011 to formulate the student's 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 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 parents 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 their intent to unilaterally place the student at the Rebecca School (see Parent Exs. C-D; F). In a due process complaint notice dated April 17, 2012 the parents 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 parents' 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).²

² Although the IHO recounted the parents' claims that the March 2011 IEP was inappropriate because the CSE refused to formally consider or recommend DIR/Floortime methodology, that the March 2011 IEP inappropriately

In an appeal from the IHO's decision, the undersigned SRO reversed those portions of the IHO's decision determining that the district failed to offer the student a FAPE for the 2011-12 school year and directing the district to directly fund the student's tuition at the Rebecca School (Application of the Dep't of Educ., Appeal No. 13-091). The parents similarly challenged the district's proposed program for the 2012-13 school year and again sought tuition reimbursement at the Rebecca School, but that school year was addressed in a separate proceeding not at issue here (Application of the Dep't of Educ., Appeal No. 14-083).

The parents sought judicial review of the SRO decision rendered in Application of the Dep't of Educ., Appeal No. 13-091 and the District Court upheld most of the decision, finding that the district sufficiently complied with the procedural requirements of the IDEA with respect to the parents' meaningful participation in the IEP development process to avoid a finding of a denial of a FAPE (T.C. v. New York City Dep't of Educ., 2016 WL 4449791, at *14-*17 [S.D.N.Y. Aug. 24, 2016]).³ The District Court then analyzed a number of the parents' remaining arguments and found that they did not warrant reversal of the SRO's decision, but the Court also determined that a limited remand was warranted (*id.* at *16-27). Specifically, the District Court held that the hearing record supported the SRO's findings that the CSE considered sufficient current evaluative information to enable it to develop the IEP, as well as that the parents' challenge to the speech and language portions of the IEP were insufficient to result in a denial of a FAPE (*id.* at *17-*20). The District Court also held that the SRO correctly rejected the parents' challenge to the sensory portions of the IEP and their challenge to the CSE's recommendation of a 6:1+1 program with a 1:1 transitional paraprofessional (*id.* at *20-*23). In addition, the District Court affirmed the SRO's finding that although the CSE's failure to provide parent counseling and training in the IEP constituted a procedural violation, that violation, by itself, did not result in a denial of a FAPE (*id.* at *22-*24).

Next, the District Court addressed the parents' challenges to the appropriateness of the student's assigned school, and determined that the parents' claims that the assigned school lacked the capacity to provide related services and appropriate sensory tools for the student were unsustainable (T.C., 2016 WL 4449791, at *23-*25]). However, with respect to the parents' challenge to the assigned school on the ground that it would not utilize "DIR methodology," the District Court reached a different conclusion (*id.* at *25-*27). On this question, the District Court rejected the district's argument that the March 2011 IEP did not implicitly adopt DIR methodology and determined that the SRO failed to adequately consider "whether the IEP as a whole — and in particular, the goals incorporating DIR-related terminology — was likely to produce progress for [the student] absent the use of DIR methodology" (*id.* at *26). For those reasons, the District Court remanded the matter to the SRO "for a limited determination as to whether the IEP was reasonably

adopted DIR terminology from the Rebecca School progress reports without recommending DIR as a methodology, and that the assigned public school could not implement the March 2011 IEP because it did not utilize DIR methodology (IHO Decision at pp. 20-22), the IHO did not specifically address these claims in finding that the district did not offer the student a FAPE for the 2011-12 school year (*id.* at pp. 31-36).

³ In a decision, dated March 30, 2016, another District Court Judge determined that the student was offered a FAPE for the 2012-13 school year, specifically finding that although the annual goals for the 2012-13 school year contained "DIR jargon," they were generally methodologically neutral and the CSE was not required to recommend DIR methodology because there was no evidence the student could only benefit from the use of that methodology (T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *14 [S.D.N.Y. March 30, 2016]).

calculated to enable [the student] to make educational progress in light of its implicit adoption of DIR methodology as to some goals" (*id.*).

Upon remand, I reviewed the record of the impartial hearing proceedings, prior state-level submissions and administrative decisions, as well as the District Court's order of remand. As part of the review process, the parties were directed in a letter dated September 2, 2016 to notify the Office of State Review of their respective positions regarding whether there was an adequate hearing record to address the remanded issue. Both parties responded asserting that there was sufficient evidence in the hearing record to address the remanded issue.

The September 2, 2016 letter from the Office of State Review also directed the parties to brief several issues related to the remand instructions, including: (1) whether the evaluative information before the CSE discussed or recommended a particular methodology for the student; (2) whether the participants at the CSE considered limiting the student to a particular methodology; (3) whether the parents specifically raised limiting the student to the "DIR/Floortime" methodology during the CSE meeting; (4) whether and when the parents identified methodologies that were previously tried and not successful for the student and whether the CSE was aware or should have been aware of that information; (5) the specific language in the goals or short-term objectives the parties believe incorporated DIR-related terminology and whether such language was unique to DIR/Floortime methodology; (6) whether district personnel would be capable of implementing goals and short-term objectives with the student that implicitly incorporate DIR-related terminology; and (7) the extent to which the use of DIR-related terminology in the goals or short-term objectives would affect the student's ability to receive educational benefits under the IEP. The parties were also explicitly directed to confer and identify which annual goals and short-term objectives included DIR-related terminology.

The parties used examples, but did not clearly specify the particular DIR terms in each of the annual goals and short-term objectives in their initial submissions upon remand. Before District Court, the parents indicated that six short-term objectives were at issue in which DIR terminology was used (*T.C.*, 2016 WL 4449791, at *25). The parents' submission upon remand indicated that "[s]even short-term objectives include DIR related terms (and one long-term goal)" (Parent Supplemental Brief at p. 6). On the other hand, the district indicated that "one goal and 11 short-term objectives utilized terms also used in the DIR/Floortime methodology," but again, without specifying the particular DIR/Floortime terms as they appeared in each of the goals and objectives (District Supplemental Brief at p. 7). In light of the parties' failure to identify the DIR-related terms with specificity in each goal and/or objective and the discrepancy in numbers, the undersigned sent an additional directive, by letter dated October 18, 2016, which resulted in additional submissions from both parties addressing the question of which annual goals and short-term objectives contained DIR/Floortime terminology with greater specificity. The letter included a copy of the goals section of the student's March 2011 IEP with each annual goal and short-term objective numbered for reference, and I directed the parties to reference this numbering scheme in their additional submission (SRO Ex. 1; *see* Dist. Ex. 9 at pp. 6-13). Both parties complied with the directive by filing Second Supplemental Submissions, explicitly identifying the terms in

dispute, the particular goal and/or objective at issue, and their positions with respect to each DIR/Floortime-related term.⁴

IV. Arguments upon Remand

In its submissions upon remand, the district argues that the hearing record demonstrates that the student did not require a specific methodology in order to achieve meaningful educational progress, that the student also benefited from the utilization of teaching methods and strategies other than DIR/Floortime, that the CSE participants did not object to the annual goals as written or offer an opinion that the student required a specific methodology in order to receive a FAPE, that the annual goals and short-term objectives are appropriate in this case because they address the student's needs regardless of methodology, and that the annual goals and short-term objectives contained terms that were not unique to the DIR/Floortime methodology, could be easily interpreted by a special education teacher, and could be implemented in a program that used methods other than DIR.

In their submission on remand, the parents specifically addressed each of the questions raised in the letter to the parties dated September 2, 2016. The parents assert that the evaluative information before the March 2011 CSE discussed and recommended continuation of DIR for the student, and that the CSE should have been aware that other methodologies had previously been tried with the student, but were not successful. The parents also identified the specific language for each annual goal and short-term objective which incorporated DIR-related terminology and whether those terms were unique to the DIR/Floortime method. Next, the parents asserted that district personnel at the assigned school would not be able to implement the annual goals and short-term objectives incorporating DIR-related terminology because the school staff was not trained in DIR and the school did not utilize DIR. More specifically, the parents assert that the IEP does not provide sufficient detail to guide an instructor unfamiliar with the student, because it fails to sufficiently identify the student's strengths and interests, and that there is no evidence in the hearing record suggesting that the student would benefit from any method of teaching that is not "child-centered, such as DIR/Floortime." Lastly, the parents assert that because the CSE "intrinsicly adopted the DIR approach, failed to adequately describe [the student's] needs and interests on the IEP, and recommended a placement which cannot implement DIR-based goals, the [d]istrict denied [the student] with educational benefits for the 2011-12 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]).

⁴ If methodological terms in an IEP are in dispute, the parties have the responsibility to identify each disputed term and each goal and/or objective that uses the term at the impartial hearing level in the first instance so that the IHO is clear about the matters that need to be decided.

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. DIR/Floortime Methodology and the March 2011 IEP Goals

As set forth in detail above, the District Court remanded this matter to the SRO "for a limited determination as to whether the IEP was reasonably calculated to enable [the student] to make educational progress in light of its implicit adoption of DIR methodology as to some goals"

(T.C., 2016 WL 4449791, at *23-*25).⁵ Following a comprehensive review of the hearing record and the supplemental submissions of the parties on remand, I find that the district did not deny the student a FAPE.

As background on the methodology at issue, the Rebecca School program director testified that DIR stands for "Developmental, Individual-Difference, Relationship-Based" (Tr. pp. 364-65; see Tr. p. 447).⁶ According to the director's testimony, DIR/Floortime is a developmental model based on a belief that children with neuro-developmental delays in relating and communicating do not progress through the six basic developmental phases that all children go through "at the same rate or in the same way as typical children, which created their core deficits in relating and communicating" as well as learning difficulties, sensory difficulties, and gross and fine motor difficulties (Tr. p. 365).

The Rebecca School program director also referenced Dr. Stanley Greenspan (Tr. p. 365), the researcher who advanced the emotional/developmental model with specific levels that became DIR/Floortime (see also Tr. p. 520). According to evidence in the hearing record, the six basic developmental levels upon which the DIR/Floortime methodology is based include the following: Level 1—Shared Attention and Regulation which relates to the student's "ability to regulate his attention and behavior while being interested in a full array of surrounding sensations" as well as the student's ability "to enter into a state of shared attention with another person"; Level 2—Engagement and Relating which relates to the student's "ability to engage in relationships and experience, tolerate or appreciate the feelings and emotions of both himself and others"; Level 3—Two-Way Purposeful Emotional Interaction which deals with the student's "ability to enter into two-way, purposeful communication" and which "[a]t its most basic level. . ." involves helping him open and close circles of communication, as evidenced by [the student] showing interest in or otherwise reacting to something another person initiated"; Level 4—Shared Social Problem Solving which "involves stringing together more and more complex circles of communication in order to accomplish a task"; Level 5—Creating Symbols and Ideas which relates to the student's "ability to create ideas or symbols, to imagine mental representations of emotions" and is "observed in [the student's] ability to engage in pretend play, or use words, phrases, or sentences to convey emotional intent"; and Level 6—Building Logical Bridges Between Ideas which "has to do with [the student's] ability to make connections between ideas" noting that "[I]logical thinking, multi-causal thinking, the ability to perceive gray areas, and reflective thinking are all dependent on making connections between ideas" (Dist. Ex. 13 at pp. 1-3).

The Rebecca School program director indicated that staff meets students at their developmental level and moves them up the developmental ladder (Tr. p. 366; see p. 520). She

⁵ This matter is related to, but distinct from, the appeal addressed in T.C. v. New York City Dep't of Educ., 2016 WL 1261137 (S.D.N.Y. Mar. 30, 2016). That matter also addressed, among other things, the specific teaching methodology that this student required, but concerned the student's program for a subsequent school year (T.C., 2016 WL 1261137 at *14). It is noteworthy, though not controlling in this remand, that the Court in that instance upheld the SRO's finding that the student was offered a FAPE (id.).

⁶ Throughout the hearing, the terms DIR, Floortime, Floortime model, and DIR/Floortime are used by various people to refer to the methodology utilized at the Rebecca School (Tr. pp. 122, 123, 124, 125, 126, 447, 468, 470, 492, 520, 521). For the purposes of this decision the methodology utilized at the Rebecca School is referred to as "DIR/Floortime."

also indicated that an individual plan is developed to meet each student's needs wherein all learning is intrinsically motivating (Tr. pp. 366-67; see Tr. p. 527). The hearing record reflects that the basic premise of DIR/Floortime is that the provider follows a student's lead in terms of his or her interests in order to increase their engagement, communication, and socialization and that the student learns and remembers things that are important to the child, that he/she cares about, and has an emotional connection to (Tr. pp. 123-24, 126, 372-73, 520-21, 527).

In order to address the issue presented on remand—whether those annual goals that "implicitly adopt" DIR/Floortime terms on the March 2011 IEP can be implemented without the use of "DIR/Floortime" methodology—a discussion of the particular terms in question is necessary and follows below.

1. The Goals and Short-Term Objectives that Contain DIR/Floortime Terms

The hearing record shows that several terms or phrases of language common to DIR/Floortime approach appear in the March 2011 IEP goals. While the hearing record demonstrates that the parents did not raise a methodological concern at the CSE (Tr. pp. 156, 173-74, 526; Dist. Ex. 10 at pp. 1-2), the District Court has questioned the terms upon remand, and it is understandable that the parents may be concerned that the DIR/Floortime methodology may be required to implement the IEP's goals and short-term objectives that include such language that is attributable to the student's DIR/Floortime experiences at the Rebecca school.

An analysis of the impact of the DIR/Floortime language contained in the annual goals and short-term objectives in the IEP requires first identifying each of the words or phrases that are potentially related to DIR/Floortime methodology. The parties broadly agree on which annual goals and short-term objectives contain DIR/Floortime terminology and have identified the following terms as DIR/Floortime language using SRO Exhibit 1 as a reference to identify each goal and/or objective: (1) circles of communication (short-term objectives 36-38, 41); (2) opening and closing circles of communication (short-term objectives 29-30); (3) logical and continuous flow of communication (short-term objective 29); (4) shared social problem solving sequence (short-term objective 22); (5) preferred activities (short-term objectives 36-37); and (6) regulate, dysregulate, or co-regulate (annual goal 13; short-term objectives 21, 41-43) (SRO Ex. 1 at pp. 4-5, 7-8; Dist. Ex. 9 at pp. 9-10, 12-13).^{7 8}

To address the District Court's question whether the use or inclusion of the DIR/Floortime language in the goals and objectives in the student's IEP was likely to produce progress for the student "absent use of DIR methodology," one must determine and consider the meaning of this language (T.C., 2016 WL 4449791, at *26). As discussed below, an analysis of the meaning of the DIR/Floortime terms in question reveals that—contrary to Rebecca School staff testimony—

⁷ As described above, SRO Exhibit 1 is a copy of the annual goals and short-term objectives from the March 2011 IEP with each annual goal and short-term objective separately numbered by the undersigned to facilitate clear, common references to each of the goals and short-term objectives.

⁸ The parents identified the phrase "shared social problem solving"—as it appears in short-term objective 22—as containing DIR/Floortime terminology in their supplemental brief, and the hearing record reflects that this term refers to the Level 4 DIR/Floortime language "Shared Social Problem Solving" (SRO Ex. 1 at p. 4; Dist. Exs. 9 at p. 9; 13 at p. 2).

the concepts and techniques presented in these goals and objectives can be understood and implemented without relying on the DIR/Floortime methodology.

2. Circles of Communication and Opening and Closing Circles of Communication

The program director at the Rebecca School explained that a "circle of communication" is the act of one person asking a question followed by another person answering that question (Tr. p. 381). Specifically, she testified that "asking [her] a question and [her] answering it, is opening and closing a circle" (*id.*). The December 2010 Rebecca School Interdisciplinary Progress Report (Rebecca School Progress Report) similarly described "opening and closing a circle of communication" as the most basic level of entering into two-way, purposeful communication, noting that this is "evidenced by [the student] showing interest in or otherwise reacting to something another person initiated" (Dist. Ex. 13 at p. 2).⁹ The report also indicated that the student is a "verbal child who communicates in mostly full sentences, using gestures and affect" and the IEP indicated the student was able to interact verbally with adults and to a lesser extent, with peers (Dist. Exs. 9 at pp. 3-4; 13 at p. 2).

While the term "circle of communication" is used specifically in DIR/Floortime, the concept behind the term—reciprocal or two-way communication—is hardly unique to the DIR/Floortime approach. On the contrary, it is a basic tenant of social and language development that is addressed by many educational methodologies. Although the program director at Rebecca School may have opined that the term was "right out of the DIR methodology," she did not assert that the concept behind the term is exclusive to the DIR/Floortime methodology (see Tr. pp. 380-81).

One of the district's witnesses, a special education curriculum support teacher at the assigned school, testified at length during the impartial hearing regarding how the annual goals and short-term objectives set forth in the March 2011 IEP may have been implemented had the student attended public school during the 2011-12 school year (see Tr. pp. 184-85, 219-34).¹⁰ With respect to annual goal number 10, which contained short-term objectives 36 through 38 incorporating the term "circles of communication" (SRO Ex. 1 at p. 7; Dist. Ex. 9 at p. 12), the teacher testified that the purpose of the annual goal was to help the student "expand his ability to

⁹ The CSE is charged with assessing a student's progress when reviewing an IEP (even if attending a private school selected by the parent), and while it is not unreasonable to believe that the student's teacher would have had or been able to attain access to the evaluative information regarding the student, including the Rebecca School Progress Report, it is not a requirement under the IDEA or State regulations and, accordingly, my decision is not based on an assumption that this evaluative information would have been available to the student's teacher. However, the Rebecca School Progress Report is part of the available, relevant evidence in the hearing record and expands upon meaning of the DIR/Floortime methodology utilized at the Rebecca School and is referenced to provide background information (Dist. Ex. 13).

¹⁰ Because this testimony describes how the annual goals and short-term objectives set forth in the student's March 2011 IEP may have been implemented in a district classroom had the student attended the recommended program, it does not constitute after-the-fact testimony used to "rehabilitate a deficient IEP" but instead "explains or justifies the services listed in the IEP" and, thus, may be considered (R.E., 694 F.3d at 186).

remain in longer, more complex interactions with both adults and peers" and that the goal could be implemented in a district classroom (Tr. p. 230). When asked how the short-term objectives in the goal would be "worked on" in the classroom, the teacher stated that the objectives could be addressed in a number of different ways in group and 1:1 instruction and activities (Tr. pp. 230-31). She further explained that the duration of the communication sessions could be gradually increased as the student's abilities improved to avoid undue frustration and that the classroom teacher and paraprofessional could provide prompting or other support and assist the student's interaction with peers until each of the objectives was reached (Tr. p. 231). In light of the above, to the extent the Rebecca School program director opined that the annual goal 10 and its short-term objectives would be "incredibly difficult to implement," I find her statement unconvincing (Tr. pp. 379-80; SRO Ex. 1 at p. 7).

With the above in mind, a review of the short-term objectives which included the term circles of communication (36-38, 41) shows that these objectives simply addressed the student's ability to engage in reciprocal, two-way communication, or in other words, respond to another person verbally, or with gestures or affect, for a specified number of interactions in various situations, thereby completing the back and forth interaction of two-way communication or in DIR terms, opening and closing a circle of communication (Tr. p. 381; SRO Ex. 1 at pp. 7-8; Dist. Exs. 9 at pp. 12-13; 13 at p. 2). Specifically, the student would interact with an adult for 50 circles or two-way interactions, twice a day during preferred activities (short-term objective 36); with a peer for 35 circles or two-way interactions twice a day during preferred activities (short-term objective 37); for 10 circles or two-way interactions when attempting to accept two novel ideas from an adult or peer (short-term objective 38); and for up to 20 circles or two-way interactions when a peer entered his play (short-term objective 41) (SRO Ex. 1 at pp. 7-8; Dist. Ex. 9 at pp. 12-13). Accordingly, the short-term objectives including the term circles of communication could have been implemented in a public school by addressing the concept behind the term without using DIR methodology.

3. Logical and Continuous Flow of Communication, and Shared Problem Solving Sequence

Not surprisingly, the term continuous flow of communication is a corollary of the term circle of communication. The Rebecca School program director testified that, "the idea is to build on" the concept of two-way communication "to get to a logical continuous flow [of communication] at Level 4" which consists of a "back and forth that's more spontaneous, bringing in more ideas" (Tr. p. 381). Similarly, the Rebecca School Progress Report uses "continuous flow" to describe the DIR/Floortime Level 4 concept "Shared Social Problem Solving," or "the ability to engage with others in two-way problem-solving interactions," which "involves stringing together more and more complex circles of communication, in order to accomplish a task" (Dist. Ex. 13 at p. 2).¹¹ A review of short-term objective 30 shows that this objective addressed the student's ability to both open and close an interaction or in more general terms, initiate and respond, in a two-way

¹¹ The parents' supplemental brief reflects that the hearing record is unclear as to whether the phrases "two way shared problem solving" and "shared social problem solving" are DIR specific terms, but notes that they are utilized in the Rebecca School progress reports (Parent Supplemental Brief at p. 6).

interaction (SRO Ex. 1 at p. 5; Dist. Ex. 9 at p. 10). Short-term objective 29, addressed that same skill requiring the student to both initiate and/or respond for 25 to 35 back and forth, two-way interactions with an adult, in what DIR calls a continuous "flow of communication" (Dist. Ex. 9 at p. 10). Thus, while the term "flow of communication," like "circles of communication," is used specifically in DIR/Floortime, the concept behind the term is not unique to the DIR/Floortime approach. Building on two-way communication to adding greater back-and-forth complexity in the communication of ideas is addressed in many educational methodologies.

It is not hard to see how problem solving is one example of how to increase the complexity of communications on a particular topic. The Rebecca School occupational therapist described the term "shared social problem solving" as working with either a peer or an adult to solve a problem, wherein a student must take into account, not only his own abilities to carry out a plan or sequence, but also take into account the other person, using their strengths and weaknesses to work together to solve the problem (Tr. pp. 469-70). The occupational therapist noted that shared social problem solving was "developmental capacity four" in the DIR/Floortime model (Tr. pp. 470). As reported by his teacher, the student had difficulty engaging in a long back and forth continuous flow with a peer because peers have their own ideas and rather than staying in the interaction, the student would just walk away (Tr. p. 371). The IEP's description of the student's social/emotional performance also reflects these difficulties (Dist. Ex. 9 at p. 4). Considering the above, a review of short-term objective 22 shows that the objective was directed at having the student attempt to solve a problem with another person by remaining in a series of two-way interactions for 8-10 minutes without exhibiting behavioral over reactions, such as leaving or walking away, or in DIR/Floortime terms sustain a "shared social problem solving sequence" (SRO Ex. 1 at p. 4; Dist. Ex. 9 at p. 9). The wording of annual goal 4 and the related short-term objectives 21 through 23, taken as a whole, relate to the student's need to improve sensory processing skills with occupational therapy and includes terms such as "vestibular and proprioceptive input" that, while perhaps not apparent in meaning to the average layperson, are common terms for providers such as occupational therapists who are called on to implement the goals in IEPs (*id.*; *see* Tr. p. 229). In light of the above, I find that the meaning of the phrase "shared social problem solving," though related to the DIR/Floortime method, is not unique and is readily understandable to special education teachers and related services providers, and the short-term objective containing the term can be implemented in a setting that does not employ the DIR/Floortime model.

4. Preferred Activities

The hearing record does not contain a specific definition of "preferred activities," that is very likely because the term is not specialized at all and it is reasonable to assume that a "preferred activity" is just one that the student prefers over another.¹² The Rebecca School Progress Report indicated that the student preferred activities such as drawing and looking at books, and that trains were a favorite of his (Dist. Ex. 13 at pp. 1-2). Testimony by the program director of the Rebecca School indicated that the student preferred drawing and anything related to trains such as train

¹² In her supplemental brief, the parents include the term "preferred activities" as one of the "approaches and tools developed by DIR creators for the DIR model" (Parent Supplemental Brief at p. 6). However, according to the Rebecca School program director's testimony, her reference to "preferred activities" was related to the IEP's failure to describe the specific activities the student preferred, and was not related to language that she considered unique to DIR (*see* Tr. p. 377, 79).

tracks, train movement, building and drawing trains, and that he could perform better or "be more engaged during a preferred activity" (Tr. pp. 370-72, 380). She further indicated that at the Rebecca School they included the student's interests in his programming, such as, addressing math skills, by counting trains and using the length of the train tracks to measure distance; handwriting skills by using his interest in drawing; and comprehension skills by having the student draw a picture of what they are talking about (Tr. pp. 372-73).

The term "preferred activities" occurs in the IEP in short-term objectives 36 and 37 where it is used to delineate the context or setting in which the student is expected to demonstrate a specific skill (SRO Ex. 1 at p. 7; Dist. Ex. 9 at p. 12). For example, in short-term objective 36, the student will expand his length of interaction with an adult to 50 circles of communication during "preferred activities" (*id.*).¹³ In other words, this simply means that the student is expected to increase his length of interaction with an adult to 50 reciprocal or two way interactions, during activities that he prefers.

Educators for both disabled and nondisabled students often utilize preferred or favorite activities when instructing their students. Depending on the activity, the teacher's skill at doing so may vary just as a student's preferences themselves may vary and change over time. The technique of using preferred or favorite activities in educational endeavors can be employed without regard to methodology, and consequently it is not surprising that the Rebecca School may use "preferred activities" when implementing the DIR/Floortime model.

The Rebecca School program director's testimony also reflected that she objected to the lack of detail in the IEP identifying the student's preferences and further reflects her belief that one cannot implement such goals or objectives without knowing the student's preferences (Tr. p. 380). However, while it is reasonable to presume that knowing a student's preferences in advance can at times be advantageous to instruction and the student's learning, it is not necessarily required in order to offer a student a FAPE. I think it is more likely a cloaked criticism directed at any district personnel in a public school who would, for obvious reasons, have less personal familiarity with the student due to the fact that the student was not attending the public schools. In fact, relying a student's likes and preferences can be a two-edged sword at times—sometimes helpful, sometimes not. In this regard, the Rebecca School Progress Report reflected that the student struggled to enter into a continuous flow of communication when playing with his favorite toys, such as trains, because he became concerned that somebody was going to take the toy from him, which caused him to have difficulty articulating himself (Dist. Ex. 13 at p. 2). It is also probable that the student's preferences and preferred activities may change over time and providers, regardless of the methodology employed, must be capable of discerning a student's new or changed preferences. In this case, for example, the Rebecca School Progress Report also indicated that the student had recently begun to develop new interests including block building and dancing (*id.* at p. 3).

¹³ The district erroneously suggested that in the March 2011 IEP, the word "familiar" was substituted for the word "preferred" in the student's reading goals and objectives, when in fact both the IEP and the goals in the Rebecca Progress Report use the word "familiar" (Dist. Supplemental Submission at p. 7; *see* Dist. Exs. 9 at p. 6; 13 at p. 10).

5. Regulation/Co-Regulation/Dysregulated

The occupational therapist at Rebecca School testified that the term regulation means "keep[ing] [the student's] body calm," "to feel comfortable in his body, to understand where he is in the classroom, and in the world," so as to be "available for interaction" (Tr. pp. 502-03). The district psychologist also noted in her testimony, the correlation between a regulated, calm, focused state and being able to engage with others (Tr. pp. 92, 96-97). Testimony by the program director at the Rebecca School indicated that for this student dysregulation could be crying, screaming, or shutting down and that co-regulation is using an adults' own emotion and ability to regulate to help a student regulate or stay calm by mirroring that for the student (Tr. pp. 371, 407). Consistent with this, testimony by the district psychologist indicated that co-regulation is the provision of adult support, such as soothing tones and calming strategies, so that the student can continue to engage with another (Tr. p. 113; see Tr. p. 166). Similarly, the Rebecca School Progress Report indicates that the term "regulation" refers to the student's ability to maintain a calm state with regard to attention and behavior while being surrounded by a full array of interesting sensations in his environment (Dist. Ex. 13 at p. 1).

Keeping a student calm and engaged is certainly an important objective in furthering a student's learning and, whether viewed from an emotional/developmental perspective such as the DIR/Floortime model or a behavioral model such as ABA, remaining calm and engaged is often a challenge for students with autism. The parties in this case similarly define the concept of regulation and co-regulation (and its inverse, dysregulation), as DIR-related terms; however, once again, the terms are not unique to DIR/Floortime. Testimony by the Rebecca School program director indicated that the concept is not exclusive to DIR/Floortime and that methodologies other than DIR/Floortime can integrate co-regulation (Tr. pp. 407-08; see Parent Supplemental Brief at p. 6). A State-certified special education teacher is expected accurately interpret and utilize educational terms such as those here, which are not exclusive to a particular methodology, and the teacher must be able to implement annual goals or short-term objectives that utilize these terms. I therefore find that annual goal 13 and short term objectives 21 and 41 through 43, insofar as they included terminology utilized by but not unique or specific to DIR/Floortime, could have been implemented without the inclusion of DIR/Floortime methodology and without staff specifically familiar with that methodology.

B. Implementation of Goals Addressing the Student's Needs

The Rebecca School program director's opined that because there were annual goals in the IEP that were adopted from Rebecca School reports and were "written, utilizing a DIR methodology in an 8:1:3 ratio," it would be very difficult to implement the IEP without utilizing DIR/Floortime methodology (Tr. p. 377), however, that opinion does not carry much weight in this context because 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 on 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]). Fundamentally, goals are directed at addressing a student's needs, and since the selection of a methodology does not alter the student's needs, an analysis of whether goals are appropriate must turn on whether they are designed to address the student's areas of identified need (id.).

Accordingly, to the extent that the parents assert that the goals were designed for implementation in a DIR/Floortime model and therefore could not be implemented in any other setting, the parents' argument is not persuasive.¹⁴

In consideration of the student's special education needs and the discussion above of DIR/Floortime-related language and underlying concepts used in goals the student's March 2011 IEP, I find that the goals are appropriate insofar as they address the student's needs identified in the March 2011 IEP. The IEP indicated the student's overall cognitive functioning was in the low average range, that he was functioning at the kindergarten to first grade level academically, and that he demonstrated needs related to reading comprehension, had difficulty joining in group reading, and with certain math concepts (Dist. Ex. 9 at p. 3). The IEP further described the student's difficulties related to engaging and interacting with others, especially peers, and in joining groups (*id.* at p. 4). The student's sensory processing and regulation deficits were described in the IEP, as well as related needs, including access to tactile, vestibular, and proprioceptive input and a quiet environment when dysregulated, and assistance from an adult to co-regulate (*id.* at pp. 4-5). The IEP also noted the student exhibited immature fine motor skills and identified additional supports that the student required to address his needs, including redirection, repetition, visual cues, verbal prompts, sensory input and breaks, access to a quiet space, and movement during activities (*id.* at pp. 3, 5). This description of the student's needs and abilities is consistent with and relates directly to the goals and objectives outlined above.

Furthermore, despite the inclusion of DIR/Floortime-related language, it is reasonable to expect that a special education teacher would be able to understand how to move the student toward mastery of the short-term objectives and thereby, the annual goals as well. For example, annual goal 10 provides the implementing teacher with the purpose of the goal—to increase the student's ability to stay in longer and more complex interactions with peers and adults—and in the short-term objectives, provides the teacher with both the expectations for the student and the criteria for mastery of the objectives (SRO Ex. 1 at p. 7; Dist. Ex. 9 at p. 12). More specifically, in short-term objective 36, the student is expected to expand his length of interactions with an adult, with the criteria for mastery of 50 two-way interactions (or in DIR terms, circles of communication), twice per day, during preferred activities; in short-term objective 37, the student is expected to expand his length of interactions with a peer, with the criteria for mastery of 35 two-way interactions (or circles of communication), twice per day, during preferred activities; and in short-term objective 38, the student is expected to accept two novel ideas from an adult or peer and continue in the interaction, given adult support, with the criteria for mastery of 10 two-way interactions (or circles of communications) (*id.*). Notably, here, the DIR/Floortime-related language merely reflects the number of two-way interactions the student is required to perform for mastery of the goal.

In another example, annual goal 13 informs a teacher of the student that the purpose of the goal is to increase the student's ability to stay in a co-regulated or calm state with the assistance of an adult while experiencing different emotions in various situations (SRO Ex. 1 at p. 8; Dist. Ex.

¹⁴ I agree with the parents that the district could have avoided some of the dispute by doing a better job of IEP drafting either by using even more methodologically neutral terms or, as the parent suggests "at a minimum, defined the terms utilized in the IEP" (Parent Supplemental Brief at p.4); however, it does not mean that the drafting by the district denied the student a FAPE.

9 at p. 13). Short-term objective 41 indicates what the student is expected to do (tolerate a peer entering his play) and, what the teacher is expected to do (provide co-regulating support to the student and narrate the play) (*id.*). The objective also informs the teacher of the criteria for mastery: up to 20 circles of communication in two out of four opportunities (*id.*). Short term objective 42 provides the teacher with specific regulation strategies, including accepting deep pressure and taking a break from the activity, that the teacher is to offer the student and the student in turn is expected to accept and use when frustrated (*id.*). The objective also provides the criteria that the teacher will look for to determine whether the student has demonstrated mastery (in half of the opportunities) in order to decrease his periods of dysregulation to less than 10 minutes (*id.*). Short-term objective 43 indicates the teacher will set a limit for the student, the student will accept that limit and remain physically regulated during the limit setting situation, and that the student will have met the objective when he is able to do this in two out of three opportunities (*id.*).

In short, the annual goals and short-term objectives also provide a teacher with the information that the teacher would need to understand and implement the goals and objectives. As set forth above the words related to DIR/Floortime should be generally understandable in an educational setting, accordingly, the inclusion of these words has little impact on the ability of a teacher to implement the underlying concepts addressed in the goals and objectives, and as such they can be implemented by a teacher without a specific understanding of DIR/Floortime methodology.

The district psychologist explained in her testimony that the CSE generally does not dictate methodology on an IEP but rather, "leave[s] it up to the teacher and individual providers to determine how best to work with a particular child at a particular time" because different people have different preferred ways of working with individuals, based on what they have found to be most effective, and she believes in "allowing the teacher, the individual who's with [the student] everyday, that flexibility (Tr. pp. 173-74). In accordance with this, testimony by the curriculum support teacher for the district indicated that they use a "toolbox" approach where rather than utilizing only one type of instruction, they look at a variety of programs to determine what is the best way to teach a student and what is appropriate for a student (Tr. pp. 203-04). She stated that their approach is "not set in stone in one particular way" and further indicated that if the student did not respond to the methodology they were using, they would try other methods with him as well as different settings, teachers, and classrooms until they found something that was appropriate for the student based on his assessments and needs and discussions with the parents (Tr. p. 244).

Based on the above, the parents' contentions regarding the necessity for "DIR/Floortime" methodology to be utilized to implement the annual goals and objectives included in the March 2011 IEP are without merit (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *12 [S.D.N.Y. Mar. 19, 2013] [affirming the SRO's rejection of the parents' contention that the assigned classroom could not implement the annual goals in the IEP, which contention noted that they were also related to the DIR methodology]). In this instance, I find that the inclusion of IEP goals and short-term objectives containing language specific to DIR/Floortime methodology, absent recommending a placement for the student that would employ the methodology, did not render the IEP inappropriate.

This is not the first instance where courts have grappled with the question of whether or not terms that are allegedly exclusive or specific to a particular methodology being included in an

IEP required the inclusion of that methodology to provide a FAPE, and at least one court has questioned whether a teacher at a proposed school would have been able to implement annual goals including "DIR" specific methodology given her testimony that she was unfamiliar with the terminology and did not utilize such language in her classroom (F.B. v. New York City Dep't of Educ., 132 F.Supp. 3d 522, 549-52 [S.D.N.Y. 2015]; see G.B. v. New York City Dep't of Educ., 145 F.Supp. 3d 230, 256 [S.D.N.Y. 2015] see also T.Y v. New York City Dep't of Educ., 116 LRP 37325 [E.D.N.Y. Aug. 26, 2016] adopted at 68 IDELR 182, 116 LRP 42402 [E.D.N.Y. Sept. 30, 2016] [reversing the SRO and finding that the hearing record established that the student required DIR or another "relationship based" teaching methodology in order to receive educational benefits]). However in this matter, unlike in F.B., there is no testimony from a teacher at the assigned school suggesting that the school would be unable to implement the annual goals and short-term objectives as written. As discussed above, although the annual goals and short-term objectives included some language specific to DIR/Floortime, overall, the goals and objectives were written in a way that a special education teacher or related services provider would have been able to implement them (see N.B v. New York City Dep't of Educ., 2016 WL 5816925, at *6 [S.D.N.Y. Sept. 29, 2016] [affirming the SRO's rejection of the parents' contention that DIR-specific goals could not be implemented in a school that did not utilize DIR]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *11 [S.D.N.Y. Sept. 19, 2016] [affirming the SRO's rejection of the parents' contention that a particular teaching methodology was required because terms like "circles of communication" have relatively common meaning that would not prevent a teacher or therapist from implementing an IEP's goals]; T.C., 2016 WL 1261137, at *14 [finding that although annual goals contained "DIR jargon," they were generally methodologically neutral]). Additionally, as this case demonstrates, DIR/Floortime may differently emphasize aspects of a student's presentation or differently characterize a particular technique when compared to other educational models, but, to the extent that it was "implicitly adopted" here, it has been used to addressing the same needs and there was substantial overlap in the underlying principles in the goals that were employed in the March 2011 IEP. At best the parties have a pedagogical dispute about the "best" technique for implementing the goals, but it is not one that implicates a FAPE depending on the methodology employed, at least for this student.

Additionally, even if the full inclusion of DIR/Floortime methodology in the student's recommended program and placement was required to effectively implement these goals, this would not necessarily provide a sufficient basis upon which to find that the district denied the student a FAPE (G.B., 145 F.Supp. 3d at 256 [where it was undisputed that a student's assigned school did not utilize "DIR" methodology, and that several of the short-term objectives in the IEP utilized allegedly exclusive "DIR" terms like "circles of communication," the court determined that those short-term objectives "could not be implemented" by the district, but also found that this, standing alone, was insufficient to find a denial of a FAPE], citing F.B., 132 F.Supp. 3d at 549-52). In this case, the March 2011 IEP included 13 annual goals and 43 short-term objectives (SRO Ex. 1; Dist. Ex. 9 at pp. 6-13). Excluding the annual goal and seven short-term objectives (annual goal 13 and short-term objectives 22, 29-30, 36-38, and 41) alleged by the parents to contain terms related to DIR methodology, the remaining goals and short-term objectives adequately addressed the student's needs in the areas of reading and math, pre-writing, motor planning, visual processing, receptive language, expressive language, activities of daily living, and articulation (id.). Therefore, even assuming, for the sake of argument, that the goals that utilized the DIR/Floortime terminology in the March 2011 IEP were unable to be implemented, this would

not, on its own, deprive the student of a FAPE by preventing the student from receiving educational benefits in his areas of need from the IEP in accordance with the Rowley standard.

VII. Conclusion

The instant case presents a situation in which a student received a particular instructional methodology in a private school. The district, drafting an IEP with the goal of providing the student with a FAPE, utilized documentation from that school in order to provide the most up-to-date statement of his present levels of performance and to formulate appropriate goals to allow him to make measurable progress. The parents subsequently asserted that the district erred by failing to assign the student to a school that included this methodology in its instructional plan, despite not having asserted the need for a particular methodology at any point during the CSE process. Even if the student received educational benefits from instruction at the private school using DIR/Floortime methodology, absent any evidence in the hearing record that the student required that methodology to receive educational benefits, the district is not constrained in the choice of methodologies it may implement, much less limited to the specific methodology used by the private school. Following a comprehensive review of the hearing record, detailed above, and specifically addressing the District Court's concern that some of the student's goals and short-term objectives included DIR related terms without requiring that he be provided with instruction using DIR methods, I reiterate my conclusions that the annual goals included in the March 2011 IEP, as written, are not only appropriate overall, but could have been implemented without using DIR/Floortime methodology.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 18, 2013 is modified, by reversing those portions which determined the district failed to offer the student a FAPE for the 2011-12 school year and ordered the district to fund the student's tuition costs at the Rebecca School for the 2011-12 school year.

Dated: Albany, New York
November 25, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER