The University of the State of New York

The State Education Department
State Review Officer
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No. 16-078

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2016-17 school year was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has been the subject of two prior administrative appeals related to the 2009-10 school year, and as a result, the parties' familiarity with his earlier educational history and the prior due process proceedings is presumed and they will not be recited here in detail (Application of a Student with a Disability, Appeal No. 09-129; Application of a Student with a Disability, Appeal No. 09-070).

Briefly, pursuant to an April 2015 IEP, the student was recommended to attend a district public school and receive integrated co-teaching (ICT) services in math, English language arts (ELA), social studies, and science, and special education teacher support services (SETSS) in the

area of executive functioning (Dist. Ex. 14 at pp. 17, 21-22).[1] The student was also recommended to receive group counseling services 40 minutes per week, individual speech-language therapy 90 minutes per week, group speech-language therapy 40 minutes per week, individual applied behavior analysis (ABA) services in the classroom four hours per month, and five hours per week of home-based tutoring (id. at pp. 17-18). Specific providers were named to implement the ABA services and home-based tutoring mandates (id. at p. 18). The IEP also called for the use of a "[b]ehavior management/support plan" and for the student to receive the full-time support of an individual crisis management paraprofessional (id.). The CSE also recommended that the student receive 12-month services in the form of 90 minutes per week of individual speech-language therapy (id. at pp. 18-19).[2]

Over a three-day period in May 2015, the district conducted a functional behavioral assessment (FBA) of the student (Dist. Exs. 11; 13). Subsequently, on May 11, 2015, the district created a behavioral intervention plan (BIP) for the student (Dist. Ex. 10). On March 17, 2016, the district began to conduct an updated FBA for the student (Parent Ex. D).

On April 11, 2016, a CSE convened for an annual review of the student's program and to develop his IEP for the 2016-17 school year (Dist. Ex. 19). The April 2016 CSE recommended that the student receive five periods per week of ICT services in a general education class for math, ELA, social studies, and science, in addition to five periods per week of direct SETSS in a group special education classroom setting to address executive functioning (id. at p. 12).[3] The April 2016 CSE also recommended that the student receive the following related services: one weekly 40-minute session of group counseling, one weekly 90-minute session of individual speech-language therapy, and one weekly 45-minute session of group speech-language therapy (id. at pp. 12-13). Additionally, the April 2016 CSE recommended the following supplementary aids and services: a behavior management support plan, an individual full-time crisis management paraprofessional, four 60-minute sessions per month of individual ABA services to be delivered in the classroom, and five 60-minute sessions per week of individual home-based tutoring (id. at p. 13). Lastly, the April 2016 CSE recommended that the student receive one 90-minute session per week of individual speech-language therapy during July and August (id. at pp. 13-14).

A. Due Process Complaint Notices

By due process complaint notice dated April 25, 2016, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year (see Parent Ex. A). More specifically, and as relevant to the issues on appeal, the parents claimed

[1] The hearing record contains a copy of the April 2015 IEP after it was amended to include an additional testing accommodation (Dist. Ex. 9; see Dist. Ex. 7); the IEPs are otherwise substantially the same but for the reports of the student's progress toward his annual goals and the prior version indicating the student required special transportation services (compare Dist. Ex. 9, with Dist. Ex. 14).

[2] The parents challenged the implementation of the April 2015 IEP in a separate proceeding (Dist. Ex. 2). The hearing officer in that proceeding declined to consolidate it with the current proceeding (May 20, 2016 Interim IHO Decision at pp. 1-2).

[3] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

that the April 2016 CSE "clearly" predetermined the student's IEP, denying the parents the opportunity "to be full participants in the development of the IEP" (id. at p. 1). The parents also alleged that the district advised them that it could not write the names of the student's ABA provider and home-based tutor into the IEP, despite the district previously having done so (id. at pp. 2-3). Next, the parents alleged that the district conducted an FBA without their consent and subsequently developed a BIP without their "input, approval or permission," and in contravention of their directive to the district not to evaluate the student (id. at pp. 1-2). For a remedy, and as relevant to this proceeding, the parents requested the names of the ABA provider and home-based tutor be added to the April 2016 IEP (Parent Ex. A at p. 6).

As partial resolution of the issues raised in the parents' due process complaint notice, the district offered to conduct psychoeducational and speech-language evaluations and reconvene the CSE "to consider the new evaluations and make appropriate program and service recommendations" (Dist. Ex. 3 at p. 1). In a letter dated June 6, 2016, the district advised the parents that it was requesting a reevaluation of the student (Dist. Ex. 18). By e-mail dated June 6, 2016, the student's mother indicated that the parents would not consent to a reevaluation of the student (Parent Ex. G).

By due process complaint notice dated July 8, 2016, the district commenced an impartial hearing seeking to obtain authorization to conduct evaluations of the student without the parents' consent (Dist. Ex. 20).

B. Impartial Hearing Officer Decisions

By order dated July 26, 2016, the IHO consolidated the parents' and district's due process complaint notices (July 26, 2016 Interim IHO Decision at pp. 1-2). On August 8, 2016, the parties convened an impartial hearing, which concluded on September 30, 2016, after two days of proceedings (Tr. pp. 1-273).

In an interim order on pendency, dated August 10, 2016, the IHO determined that the program set forth in the April 2015 IEP constituted the student's pendency placement (Aug. 10, 2016 Interim IHO Decision at pp. 4-6).[4] By decision on the merits dated November 10, 2016, the IHO denied the parents' request for relief (IHO Decision at pp. 5-9). More specifically, the IHO concluded that the district did not predetermine the student's IEP (id. at p. 5). Next, the IHO concluded that the district was not required to include the names of the student's providers on his IEP (id. at p. 6). As to the parents' claims pertaining to the student's FBA, the IHO concluded that

[4] Although not challenged by either party, it is unclear under controlling Second Circuit precedent whether the IHO properly determined that the student's pendency placement included the specific providers named in the April 2015 IEP (Aug. 10, 2016 Interim IHO Decision at pp. 4-6). The Second Circuit has held that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services" (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 171 [2d Cir. 2014]). The Court in T.M. further opined that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (id.). However, the Court did not directly address a situation in which service providers were specifically named on a student's IEP.

while the district's failure to obtain the parents' consent constituted a procedural error, the district's failure to do so did not amount to a failure to offer the student a FAPE (id. at pp. 5-6).

With respect to the district's due process complaint notice, the IHO concluded that in order to develop an IEP sufficient to address the student's needs, it was necessary for the district to ascertain the student's needs (IHO Decision at pp. 8-9). While the IHO opined that the parents' refusal to provide consent emanated from their "frustration with [the student's] continuing deficits" and acknowledged their opinion that the testing of the student was "dehumanizing," he declined to find that this constituted a basis to deny the district's request to assess and evaluate the student (id.). Accordingly, he issued an order authorizing the district to evaluate the student without parental consent (id.).

IV. Appeal for State-Level Review

The parents appeal and request that the IHO's decision be reversed in its entirety. Initially, the parents submit a November 7, 2016 e-mail from the IHO to the parties as additional evidence to support their allegation that the district improperly submitted evidence to the IHO after the IHO closed the record.

Regarding the merits of this proceeding, the parents argue that the district impermissibly predetermined the student's April 2016 IEP, impeding their ability to participate in the CSE meeting, by refusing to include the names of his ABA provider or home-based tutor on the IEP. Next, they allege that the district's failure to secure their consent prior to performing the March 2016 FBA supports a finding that the district failed to offer the student a FAPE. As relief, the parents request that the names of the student's providers be memorialized in his IEP.

In an answer, the district generally denies the parents' allegations and requests that the decision be upheld in its entirety. The district submits a November 7, 2016 e-mail response to the IHO as additional evidence.

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]). 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).

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]). 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).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR

200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing

The parents allege the IHO deprived them of their due process rights when he requested that the district forward documentary evidence to him after he closed the record.[5] As a result, the parents argue that they had "no way of knowing what evidence was given to [the] IHO," nor do they know the authenticity of the additional evidence that the IHO requested, and they maintain that the IHO should have reopened the case. As explained more fully below, the evidence in the hearing record does not support the parents' claims.

In this instance, via e-mail on which the parents were copied, the IHO asked the district to provide him with District Exhibits 5-8, because he did not have copies of these documents in his file (Pet. Ex. 1). To the extent that the parents submit that the IHO engaged in some form of improper ex parte communication with the district, their assertion is unfounded because the parents were copied on the IHO's e-mail to the district and the district copied the parents on its response.

[5] The parents submit a November 6, 2016 e-mail from the IHO to the district in which he requested the exhibits missing from his file (Pet. Ex. 1). The district submits its November 7, 2016 e-mail in response to the IHO, along with the exhibits that it forwarded to him and the parents (Answer Ex. A). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In my discretion, I will accept the additional evidence, because it was created after the impartial hearing took place, and it is relevant to a decision in this matter.

The district also included with its answer the exhibits that it submitted to the IHO (see Answer Ex. A). The district also correctly asserts that the parents could have objected to the authenticity of the exhibits at the time they received the e-mail; however, they raised no objections at that time. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability; Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097). An independent review of the hearing record demonstrates that the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g][2]; Educ. Law § 4404[2]; 34 CFR 300.514[b][2]; 8 NYCRR 200.5[j]). Furthermore, a review of the IHO decision shows that he did not rely on these exhibits in rendering his decision. As the exhibits are not dispositive of my resolution of the issues raised on appeal, even if the IHO's request was improper, no harm has accrued to the parents or the student as a result. Accordingly, the parents' claims are without merit.

2. Scope of Review—Unappealed Determinations

Before reaching the merits of the instant case, it is worth noting which matters are properly before me. In this instance, neither party appeals the findings and conclusions reached by the IHO other than as discussed above. (see IHO Decision at pp. 5, 7-9). As neither party appeals these findings, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]).

B. April 2016 IEP

1. Predetermination

The parents allege that the IHO erred in finding that the district did not predetermine the student's April 2016 IEP when it refused to include the names of the student's providers on the IEP. As explained more fully below, the evidence in the hearing record does not support the parents' claims.

The consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Here, the evidence in the hearing record supports a finding that the parents were not impeded in their ability to participate in the development of the April 2016 IEP (see Tr. p. 197). According to the evidence in the hearing record, the student's mother and paraprofessional attended the April 2016 CSE meeting (Dist. Ex. 19 at p. 20). The student's ABA provider also participated by telephone (id.). The student's mother testified that the April 2016 CSE discussed the student's needs, behaviors, and accommodations with his ABA provider (Tr. p. 219). Moreover, the April 2016 IEP reflects the parents' concerns, particularly their desire that the student receive appropriate services and their request to have the names of the student's providers recorded on the IEP (Dist. Ex. 19 at p. 18).

Furthermore, notwithstanding the parents' allegations that the district's failure to share the draft IEP with them prior to the April 2016 CSE constituted impermissible predetermination, districts are permitted to develop draft IEPs prior to a CSE meeting '"[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process"' (Dirocco., 2013 WL 25959, at *18, quoting M.M., 583 F. Supp. 2d at 506). In this instance, the April 2016 CSE created a draft IEP (Tr. p. 168). The district school psychologist explained that a draft IEP was not the "final copy" (Tr. p. 186). The school psychologist described the draft IEP as a "working document. Something to work from," and further testified that it would not be possible to compose the entire IEP at the CSE meeting (id.). Lastly, regardless of the parents' testimony that the district failed to provide them with a copy of the draft IEP, there is no legal requirement that a district provide them with a copy prior to the CSE meeting (Tr. p. 194). In view of the foregoing, the parents' allegations that the CSE improperly prepared a draft IEP and failed to share it with them does not rise to the level of impermissible predetermination.

Finally, with respect to the parents' allegation that the district committed a procedural violation, by predetermining not to include the names of the student's ABA provider and home-based tutor on the April 2016 IEP, the parents provide "no authority supporting the position that an IEP must identify the designated [service provider] by name for a student to receive a FAPE," so long as the provider chosen to implement the IEP has the appropriate experience, training, and credentials to implement the IEP (Swanson v. Yuba City Unified Sch. Dist., 2016 WL 6039024, at *8 [E.D. Cal. Oct. 14, 2016]; see Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012] [holding that so long as service providers are appropriately certified and capable of implementing the IEP, they are not required to have any additional qualifications]). Similarly, "[t]he prospective nature of the IEP also forecloses the school district from relying on evidence that a child would have had a specific teacher or specific aide . . . [and] the [district] cannot guarantee that a particular teacher or aide will not quit or become otherwise unavailable for the upcoming school year" (R.E., 694 F.3d at 187; see R.B. v. New York City Dep't. of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]). Here, while the district concedes that it was district policy not to write a specific individual's name on an IEP, the district's reason for its refusal is persuasive, because the policy

ensures against a disruption in services (Tr. pp. 175, 178-79).[6] The school psychologist explained that "personnel change all the time," and a specific name on the IEP would mean that no other individual could provide that service, causing the district to be unable to implement the IEP (Tr. pp. 178-79).

2. Consent to Conduct FBA

Next, the parents allege that the district's failure to obtain their consent prior to conducting two FBA's resulted in a denial of a FAPE to the student.[7] As discussed more fully below, the parents' claims are without merit.

Subject to certain exceptions, a school district must obtain informed parental consent in writing prior to conducting an initial evaluation or reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]). Federal and State regulations also require the district to document in "a detailed record" its "reasonable efforts" to obtain the parent's consent (8 NYCRR 200.5[b][1]; see 34 CFR 300.300[a][1][iii]; [d][5]). The district need not obtain informed parental consent to conduct a reevaluation of a student if it can demonstrate that it made reasonable efforts to obtain consent and the parents did not respond (34 CFR 300.300[c][2]; 8 NYCRR 200.5[b][1][i][b]).

Here, the parents refused to consent to the district's request to evaluate the student due to their concerns that the student would be stigmatized (Tr. pp. 233-34). Similarly, the student's mother testified that it was unnecessary to reevaluate the student, because the district and the parents knew what his needs were, and the student was "acutely aware as a child of what his differences [we]re" (Tr. pp. 209-10). The district concedes that it began to develop the FBA for the student; however, the parents' unwillingness to consent to the evaluations or allow for the student's ABA provider to offer her input stymied its efforts to proceed (see Tr. pp. 70-75). Based on the foregoing, and given that the parents are not challenging any aspect of the April 2016 IEP, while the district's failure to secure the parents' consent to proceed with the FBA constituted a procedural violation of the IDEA, such an error did not in this particular instance (a) impede the

[6] Although not present in this case, there may be special instances when strict adherence to a general policy–such as the district's representations that providers' names cannot be memorialized on a student's IEP—is unwarranted because of specific information about a student's deficits before a CSE that dictates against such adherence. Therefore, the district is cautioned that taking positions solely based on general policies that lack any exceptions may, in some instances, ultimately lead to a failure to address unique needs of a student (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

[7] Since the parents allege for the first time on appeal that the district conducted an FBA of the student without their permission in May 2015, this allegation is outside the scope of review and will not be considered (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see, e.g., T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).

student's right to a FAPE, (b) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) cause a deprivation of educational benefits.

VII. Conclusion

For the reasons stated above, the evidence in the hearing record does not support the parents' request for relief.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 11, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER