



The University of the State of New York

The State Education Department
State Review Officer
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No. 11-086

**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:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

The Law Offices of Steven L. Goldstein, attorneys for respondent, Steven L. Goldstein, Esq. and H. Jeffrey Marcus, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to, among other relief, reimburse the parent for her son's tuition costs at the Rebecca School for the 2010-11 school year. The appeal must be sustained.

Background

At the time of the impartial hearing, the student was attending an ungraded class at the Rebecca School pursuant to an interim decision dated November 19, 2010 (IHO Interim Decision at p. 2). The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (Tr. p. 519; see 8 NYCRR 200.1[d], 200.7).¹ The student presents with global developmental delays and he is "primarily" nonverbal; however, he communicates using verbal approximations, pictures, gestures, and an augmentative and alternative communication (AAC) device (Tr. pp. 117, 392; Dist. Exs. 6; 10; 11). Academically the student is working at a prekindergarten level and he exhibits delays in expressive, receptive, and pragmatic language, as well as decreased oral motor awareness (Tr. p.

¹ The transcript of the impartial hearing provided to the Office of State Review by the district in the present matter contains numerous errors wherein it is apparent that individuals speaking at the impartial hearing are incorrectly identified (see, e.g., Tr. pp. 626, 647, 711, 746, 749).

675; see Dist. Ex. 10 at pp. 3-5, 7-8). The student presents with deficits in sensory processing, motor planning, strength, sequencing and tone, and he engages in aggressive and self-injurious behavior (Dist. Exs. 10 at pp. 5-7; 11-12). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Dist. Ex. 5 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student was evaluated through the Early Intervention Program (EIP) at age two and reportedly received a diagnosis of an autism spectrum disorder (Dist. Ex. 11 at p. 1). Subsequently the student received home-based applied behavior analysis (ABA), speech-language therapy, and occupational therapy (OT) (id.). The student later received center-based services through the committee on preschool special education (CPSE) (id.). The student entered the Rebecca School in kindergarten and has remained at the school since that time (Tr. p. 757; Dist. Ex. 11 at p. 1).

For the 2009-10 school year at the Rebecca School, the student attended an 8:1+3 class composed of student's ranging in age from 8 to 12 years old (Dist. Exs. 10 at p. 1; 11 at p. 2). The student received speech-language therapy, OT, physical therapy (PT), music therapy, and adapted physical education as part of his weekly program (Dist. Ex. 10 at p. 1).

On January 12, 2010, the committee on special education (CSE) convened for the student's annual review (Dist. Ex. 5 at pp. 1, 2). In a "Notice of Recommended Deferred Placement" dated January 12, 2010, the district suggested that the parent consider deferring the student's placement in the recommended program until July 1, 2010, as the January 2010 IEP was developed for the 2010-11 school year (Dist. Ex. 8 at p. 1).²

In a January 14, 2010 letter to the district, the parent acknowledged receipt of the Notice of Recommended Deferred Placement, but stated that she could neither agree nor disagree with its recommendations for the student as she wanted more information to make a decision (Parent Ex. I at p. 1). The parent sought information regarding schools at which she might be able to observe the district's recommended program, as well as information regarding the "teaching techniques and methodologies" employed in the schools and programs (id.). Additionally, the parent requested the learning profiles and behavior characteristics of the other students with whom the district intended to place the student, and information regarding the qualifications and training requirements of the teachers, teaching aids, and related services providers assigned to work in the schools and programs (id.). Lastly, the parent asked for appointments to view various classrooms in which the IEP would be implemented (id.).

By letter dated June 15, 2010, the district summarized the recommendations made by the January 2010 CSE and advised the parent of the school to which it had assigned the student for the 2010-11 school year (Dist. Ex. 9).

In a June 16, 2010 letter to the CSE, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. H at p. 1). The parent claimed that the district had committed "procedural errors" in developing the student's IEP including "failing to conduct, provide, and/or consider appropriate evaluations" that resulted in a denial of the parent's right to meaningfully participate in planning for the student's

² The CSE recommended that the student receive the program for a 12-month school year, beginning July 1, 2010 (Dist. Ex. 5 at pp. 1, 2).

education for the 2010-11 school year (id.). The parent further asserted that, regardless of procedural mistakes, the district also failed to develop a substantively appropriate plan and offer a placement to the student that was adequate to address his individual educational needs (id.). The parent stated that as a result, she would be placing the student at the Rebecca School as of July 2010 and seeking to have the district "reimburse and/or pay" for the student's tuition (id.). The parent noted that she intended to retain counsel and initiate an impartial hearing, and requested that the district arrange for transportation between the student's home and the Rebecca School beginning on the first day of school in July 2010 (id.).

In a second letter to the district dated June 17, 2010, the parent confirmed receipt of the district's June 15, 2010 letter and requested assistance in setting up an appointment to view the assigned school and discuss her son with the school's faculty and administration (Parent Ex. G at p. 1). In addition, the parent requested a wide variety of information regarding the assigned class and school (id.).

On June 22, 2010, the parent visited the school identified in the June 15, 2010 letter, where she met with the assistant principal (Tr. pp. 727-28; see Tr. pp. 766, 772). The parent was accompanied by the social worker from the Rebecca School who had attended the January 2010 CSE meeting and who took notes during the visit, which she used to create a written summary of the visit (Tr. pp. 727-38; Parent Ex. CC). The social worker's summary indicated that the assigned school building housed three schools that shared the building including the cafeteria, gym, and outdoor space, but had separate classrooms (Parent Ex. CC). The social worker indicated that the assigned school included two classrooms designed as 6:1+1 special class placements, one for kindergarteners and another for second and third graders, and the student would be assigned to the latter class (id.). According to the social worker's summary, the recommended classroom was "very small" and did not have any sensory equipment readily available (id.). The social worker reported that when she and the parent asked about sensory equipment they were told that the students do yoga, but that there were no swings (id.). She indicated that the sensory room was being used as a classroom (id.). The social worker further reported that she was told the class was made up of four students, all of whom were "very verbal" (id.). According to the social worker's notes, the school employed the TEACCH methodology and all teachers were trained (id.).³ The social worker indicated that there was a "quiet corner" in the classroom, but no place for the student to go when he "needs his space" and that "it is handled in the classroom" (id.). The social worker's notes also indicated that there were both full-time and part-time therapists who provide related services at the school (id.; see Tr. p. 731).

The parent signed, but did not date, a contract enrolling the student in the Rebecca School for the 2010-11 school year, to begin on July 6, 2010 (Parent Ex. S).

In an August 16, 2010 letter to the CSE, the parent, alleged additional procedural errors committed by the CSE in the development of the student's 2010-11 IEP and reiterated that regardless of any procedural errors, the district failed to develop a substantively appropriate IEP and offer a placement that was appropriate to address the student's individual educational needs (Parent Ex. F). The parent further advised the district of her intention to place the student at the

³ A district special education teacher testified at the impartial hearing that TEACCH is an acronym standing for "Treatment and Education of Autistic and Communication Handicapped Children" (Tr. p. 287).

Rebecca School for the 2010-11 school year and indicated that she would be seeking "tuition reimbursement and/or payment" for the student's private school placement from the district and that a "formal request" for an impartial hearing would follow (id. at p. 2).

Due Process Complaint Notice

In a due process complaint notice dated September 13, 2010, the parent requested an impartial hearing alleging that the district failed to offer the student a FAPE because the January 2010 IEP was inadequate and would not have met the student's needs (Parent Ex. A at pp. 4-11). The parent also asserted that the school to which the district assigned the student was not appropriate (id. at p. 12). The allegations in the due process complaint notice included claims that: (1) the district refused to consider placing the student in a nonpublic school; (2) the CSE was not properly constituted; (3) the IEP was based on insufficient and unreliable information; (4) the IEP goals were insufficient; (5) the CSE failed to conduct a functional behavioral assessment (FBA) resulting in an improper behavior intervention plan for the student; (6) the IEP did not include a plan for the student's transition from a private school to a public school; (7) the parent was denied an opportunity to meaningfully participate in the development of the student's IEP; (8) the IEP failed to recommend sufficient related services or provide appropriate sensory accommodations; (9) the CSE's program recommendation was predetermined; and (10) the assigned school would not have been appropriate for the student (id. at pp. 5-14).

The parent also asserted that the Rebecca School was appropriate for the student and that equitable considerations supported the parent's claims (Parent Ex. A at p 14). Lastly, the parent requested a determination of the student's pendency placement (id. at pp. 15-16). For relief, the parent sought reimbursement/funding for the cost of tuition at the Rebecca school for the 2010-11 school year (id. at pp. 15-17).

On September 22, 2010, the district responded to the parent's due process complaint notice; and on November 12, 2010, the district updated its response arguing, among other things, that the January 2010 CSE was properly constituted, that a discussion of the student's needs took place at the January 2010 CSE meeting, that it had offered the student a FAPE, and that the student's IEP contained appropriate goals and objectives (Dist. Exs. 1; 2).

Impartial Hearing Officer's Decisions

An impartial hearing convened on November 9, 2010 (Tr. pp. 1, 4-5). In an interim decision dated November 19, 2010, the impartial hearing officer determined that the student's pendency placement was at the Rebecca School and that it commenced on September 13, 2010 (IHO Interim Decision at p. 2).⁴ The impartial hearing reconvened on November 17, 2010 and concluded on April 28, 2011, after six additional hearing dates (Tr. pp. 10, 64, 204, 380, 591, 832).

⁴ The parties agreed that during the pendency of the proceedings, the student would remain at the Rebecca School pursuant to an unappealed hearing officer's decision dated July 30, 2010 (Tr. pp. 5-6; see Parent Ex. B). The parties further agreed that the pendency placement would be retroactive to the parent's due process complaint notice, dated September 13, 2010, which was also the first day of the ten-month school year at the Rebecca School (Tr. pp. 5-6, 650-51). The impartial hearing officer adopted this agreement in her order on pendency (IHO Interim Decision at p. 2). The student's July 2010 tuition for the Rebecca School was also paid for by the district (Parent Ex. U).

On June 10, 2011, the impartial hearing officer issued a decision in which she determined that the district failed to offer the student a FAPE during the 2010-11 school year, and ordered the district to reimburse the parent for tuition payments made to the Rebecca School and to continue funding the remaining tuition balance for the 2010-11 school year (IHO Decision at pp. 22, 23). The impartial hearing officer found that district failed to offer the student a FAPE because the parent was denied the opportunity to meaningfully participate in the decision making process at the January 2010 CSE meeting because the CSE convened with the "expressed intent" of placing the student in a 6:1+1 program and in so doing, failed to give "due consideration" to the opinions of the parent and the CSE members from the Rebecca School regarding the inappropriateness of the ABA and TEACCH methodologies for the student (*id.* at pp. 21-22). Additionally, the impartial hearing officer found that the classroom to which the district assigned the student would not have adequately addressed the student's sensory needs due to the absence of swings and appropriate sensory equipment (*id.* at p. 21). The impartial hearing officer next found that the parent's unilateral placement at the Rebecca School was appropriate, and that equitable considerations supported the parent's claims and reimbursement and direct payment was appropriate (*id.* at pp. 22-23).

Appeal for State-Level Review

This appeal by the district ensued. In its petition, the district argues that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE because the recommended placement would have sufficiently addressed the student's sensory needs. The district further contends that the CSE did not predetermine its program recommendation for the student as it considered other placements before concluding that a 6:1+1 class was appropriate for the student. The district also contends that the parent had an opportunity to meaningfully participate in the January 2010 CSE meeting and that no specific concerns related to teaching methodologies were raised by the parent or the CSE members from the Rebecca School at the meeting. The district also argues that the impartial hearing officer erred in finding that the parent's unilateral placement was appropriate and that the equities favored the parent. Lastly, the district argues that tuition reimbursement and funding to the Rebecca School are not appropriate because the school is a for-profit business entity.

In her answer, the parent initially contends that the district's petition should be dismissed because the verification affixed to the petition does not state that the petition was verified pursuant to a resolution of the district's Board of Education authorizing the commencement of the appeal. Next, the parent contends that the district did not raise allegations concerning the appropriateness of the Rebecca School or the for-profit status of the school in its responses to the parent's due process complaint notice, and therefore, any portions of the petition relating to those issues should be dismissed.⁵ Lastly, the parent contends that the unilateral placement at the Rebecca School was appropriate and that equitable considerations support the parent's claims.

⁵ Although the parent sets forth in her answer additional bases upon which she alleges the district failed to offer the student a FAPE, she does not cross-appeal any of the impartial hearing officer's determinations or the fact that the impartial hearing officer did not address some of the allegations raised in her due process complaint notice. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, I will not address those allegations that are raised by the parent in her answer, but were not addressed in the impartial hearing officer's decision.

In a reply to the parent's answer, the district contends that the petition was properly verified and that a State Review Officer may properly consider the allegations in a petition that were not raised in a party's response to a due process complaint notice.

Applicable Standards

Two purposes of the Individuals with Disabilities Education Act (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 v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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 C.F.R. §§ 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; 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 accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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]). 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; 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 C.F.R. § 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Preliminary Matters - Verification of Petition

The parent contends that the verification affixed to the district's petition is improper because it does not specifically state that the petition was verified pursuant to a resolution of the district's Board of Education authorizing the commencement of the appeal (see 8 NYCRR 279.7). The district has demonstrated compliance with the practice regulations before State Review Officers, by providing documentation showing that this appeal was duly authorized in accordance with State law and, therefore I decline to dismiss the district's appeal on this basis (Reply Ex. A; see Educ. Law § 2590-h[19]).

January 2010 CSE Process – Predetermination and Meaningful Participation

Turning next to the parties' dispute regarding whether the January 2010 CSE engaged in impermissible predetermination when formulating the student's IEP and whether the district significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, as set forth below, I find that the impartial hearing officer's finding that the district failed to offer the student a FAPE due to the alleged predetermination and lack of parent participation is not supported by the hearing record. 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 (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's January 2010 IEP and a willingness among the CSE members to consider different program options for the student. The parent attended the January 2010 CSE meeting accompanied by the student's teacher and a social worker from the Rebecca School; the parent also testified that she was familiar with the CSE process (Tr. pp. 761, 812, 814; Dist. Ex. 5 at p. 2). Testimony from the parent and the district school psychologist, as well as the January 2010 CSE meeting minutes reflect that the IEP goals were discussed and developed at the CSE meeting with the parent and the teacher from the Rebecca School fully participating (Tr. pp. 126-28, 812-14; Dist. Ex. 6). Moreover, the hearing record does not reflect that the parent was denied an opportunity to ask questions or offer input regarding the student's proposed program during the January 2010 CSE meeting (Tr. pp. 761-65, 812-16; Dist. Ex. 6). Rather, the hearing record reveals that the parent and the Rebecca School representatives were able to communicate their concerns about the proposed program (id.).

The hearing record also indicates that some of the goals listed in the resultant IEP were provided to the CSE by the Rebecca School; however, the district's school psychologist and the parent testified that at the request of the parent, several of the goals were modified to better reflect the student's capabilities (Tr. pp. 129-30, 812-14). The CSE meeting minutes further reflect that the counseling goals were developed at the CSE meeting by the Rebecca School social worker and classroom teacher and the parent agreed to them (Dist. Ex. 6). Moreover, the behavior plan was revised with the teacher's and the parent's input (id.). Additionally, the hearing record reveals that the January 2010 CSE discussed other program options for the student (Tr. pp. 147-49; Dist. Ex. 5 at p. 16). Accordingly, although the impartial hearing officer found that the CSE held the January

meeting "with the expressed intent" of placing the student in a 6:1+1 program, the evidence does not support this determination (IHO Decision at p. 21).

Likewise, there is insufficient support in the hearing record for the impartial hearing officer's determination that the CSE ignored the opinions of the parent and the CSE members from the Rebecca School regarding the appropriate methodology for the student because there is no evidence in the hearing record showing that any opinions were voiced at the CSE meeting (IHO Decision at pp. 21-22).⁶ I note also that the impartial hearing officer did not cite to evidence to support this determination (*see id.*).⁷ The parent testified at the impartial hearing that the concerns she expressed to the CSE were for a 12-month program and a program that would provide more support for the student than a 6:1+1 program (Tr. pp. 762-63, 764, 815-16). Notably, the CSE recommended a 12-month program and included a 1:1 paraprofessional as additional support for the student (Dist Ex. 5 at pp. 1, 4, 16). Based on the foregoing, I find that the evidence in the hearing record does not support a finding that the district predetermined the student's program for the 2010-11 school year, but instead shows that the parent meaningfully participated and contributed to the development of the student's IEP during the January 2010 CSE meeting.

Assigned School – Sensory Needs

In determining that the district had failed to offer the student a FAPE, the impartial hearing officer noted that it was "abundantly clear that the student has severe problems pertaining to his vestibular system which requires a significant amount of sensory integration therapy" (IHO Decision at p. 21). The impartial hearing officer concluded that swings were a major component in addressing the student's sensory needs, that the district's proposed placement had a "makeshift sensory gym" that alternated as a classroom, and that there were no swings available to address the student's sensory needs (*id.*). For this reason alone, the impartial hearing officer concluded that the program offered by the district contained a "fatal flaw" attributable to the proposed classroom (*id.*).

⁶ The hearing officer determined that the January 2010 CSE did not give due consideration to the parent and Rebecca School team members who stated that ABA and TEACCH methodologies were not appropriate for the student (IHO Decision at p. 21). It appears that the impartial hearing officer presumed that the matters raised during testimony at the impartial hearing had already been raised during the CSE meeting as well. However, I note that neither the Rebecca School program director nor the student's Rebecca School teacher who testified during the impartial hearing were participants at the January 2010 CSE meeting (*see* Dist. Ex. 5 at p. 2). In addition, the student's mother does not testify that she raised the issue of methodology during the January 2010 CSE meeting and the CSE failed to give due consideration to this issue (*see* Tr. pp. 761-65). Minutes from the January 2010 CSE meeting do not indicate that the issue of methodology was either raised or discussed (Dist. Ex. 6).

⁷ In any event, generally a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

Upon review of the evidence in this case regarding the district's proposed program and after careful consideration of the impartial hearing officer's rationale for concluding that the district failed to offer the student a FAPE, I note that the impartial hearing officer relied solely on the lack of a swing and appropriate sensory equipment in the assigned classroom to conclude that the proposed program was deficient and that the student was denied a FAPE. Although the parents alleged that the January 2010 IEP was inappropriate insofar as it failed to adequately address the student's sensory needs, the impartial hearing officer did not conclude that the content of the student's January 2010 IEP was inappropriate and, as noted previously the parent has not appealed this determination. Accordingly, there is little basis upon which to predicate a determination that the district was required, among various sensory integration techniques, to use a swing upon implementing his IEP or that the district lacked any appropriate sensory equipment to address the student needs and the issue is in large part speculative based upon the events in this case.⁸ The parent did not accept the recommendations of the CSE or the programs offered by the district and the student therefore did not attend the public school classroom and the district was not required to implement the student's IEP. The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). Accordingly the district's appeal must be sustained. Even assuming, for the sake of argument that the parents had properly cross-appealed the impartial hearing officer's decision and argued that the January 2010 IEP failed to adequately address the student's sensory needs, as further described below, these concerns are not adequately supported by the evidence in the hearing record.

January 2010 IEP and Recommended Special Class Placement

Although unaddressed by the impartial hearing officer, unappealed by the parent, and unnecessary to reach a decision in this case, I have nevertheless considered in the alternative

⁸ Although the student's BIP called for the use of a sequence of sensory input with a swing listed among the examples, the district correctly points out that although a swing is used at Rebecca, the district was not required to furnish "every special service necessary to maximize each handicapped child's potential," provide the optimal level of services, or even a provide level of services that would confer additional benefits (Cerra, 427 F.3d at 195; see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]).

whether the student's January 2010 IEP appropriately addressed the student's sensory needs and recommended an appropriate placement.

According to the hearing record, present for the January 2010 CSE meeting were the district representative who also served as a special education teacher for the district, a district school psychologist, an additional parent member, the student's social worker from the Rebecca School, the parent, and a friend of the parent (Tr. p. 105; Dist. Ex. 5 at p. 2). Additionally, the student's Rebecca School teacher participated in the CSE meeting via telephone (Tr. p. 105; Dist. Ex. 5 at p. 2). The CSE considered the following documents in its review: the district's October 2009 classroom observation of the student at the Rebecca School, a psychological evaluation of the student conducted over three days in November and December 2009 by a Rebecca School psychologist, and the student's December 2009 interdisciplinary report of progress from the Rebecca School (Tr. pp. 106-07; Dist. Exs. 7; 10-12). According to the district's school psychologist who attended the meeting, the CSE relied on the student's IEP from the previous year as a frame of reference to determine progress (Tr. p. 107; see Dist. Ex. 6).

The classroom observation of the student was conducted by the district's school psychologist who participated in the January 2010 CSE meeting (Tr. pp. 110-11; Dist. Ex. 12). In her October 28, 2009 observation report, the school psychologist detailed the student's behavior during morning meeting at the Rebecca School (Dist. Ex. 12). She noted that when she arrived at the student's classroom she found him outside the classroom, lying on the floor with his teacher next to him (id. at p. 1). The school psychologist stated that based on teacher report, the student had been removed from the classroom because he had been spitting and throwing objects (id.). According to the school psychologist, the student's teacher mentioned that the student engaged in the spitting behavior "often" and hypothesized that it might be sensory seeking behavior (id.). The school psychologist detailed the teacher's attempt to meet the student's sensory needs in another way, specifically by offering the student the use of a spray bottle, as well as a straw (id.). She noted that the student sprayed water in his mouth, threw the spray bottle, and spit in response to the teacher's prompts to pick up the spray bottle (id.).

The school psychologist noted that when the student returned to the classroom, he grabbed a microphone from another student and ignored teacher requests to return it (Dist. Ex. 12 at p. 2). The student sat down on a trampoline and as he was seated, morning meeting began (id.). The school psychologist observed that as peers were being greeted the student looked out the window and began a self-stimulating hand/finger movement; and that he subsequently grabbed a stuffed animal from the toy area (id.). The psychologist opined that the student did not appear attentive to the activity of the classroom (id.).

According to the school psychologist, when the class rode the elevator as part of the morning activity, the student did not return with the class, and when he did return he was lying on the floor of the elevator while an assistant teacher prompted him to get up (Dist. Ex. 12 at p. 3). The student spit, got up, and ran to a different classroom (id.). The school psychologist observed that when the student returned to his classroom he engaged in self-stimulatory behaviors and spitting (id.). She noted that the student also hit the assistant teacher (id.). The assistant teacher responded by providing the student with a communication book and inquiring if he wanted something (id.). According to the school psychologist, the student indicated that he wanted a snack (id.). When the assistant teacher asked the student where the cereal was kept, the student initially responded by pointing to the picture of snack, but then grabbed a key from the teacher's key chain

and brought the teacher and the key to the cabinet where food was stored (id.). The school psychologist reported that the student was then given a snack and sat down to eat (id.).

The psychological evaluation reviewed by the January 2010 CSE took place in November and December 2009 and was conducted by a psychologist from the Rebecca School, based on a referral from the student's parent (Dist. Ex. 11 at p. 1). According to the psychologist, the student's teachers reported that the student typically presented with a pleasant and calm demeanor when regulated (id. at p. 2). The student also displayed "OCD-like" tendencies with respect to ordering his environment, such as making sure doors were closed and objects were in their designated places (id.). According to the psychologist's report, when dysregulated the student would resort to biting himself, spitting, and throwing objects (id.). The psychologist reported that often the behaviors did not seem directed at anyone, but occasionally they appeared to be deliberately targeted toward a peer or staff member (id.). The psychologist noted that in quieter moments, the student appeared to enjoy laying on his back and spitting straight up in the air in a manner that allowed his own spittle to fall back on him (id.). The psychologist stated that the student verbal skills were emerging, although his primary means of expression was nonverbal and achieved through the use of word approximations and the student's electronic communication device (id.). According to the psychologist, the parent provided a consistent description of the student (id.).

Due to the student's tendency to tire easily and inability to sustain attention, the Rebecca School psychologist reported that she conducted her assessment over the course of three sessions, each lasting an average of 20-30 minutes (Dist. Ex. 11 at p. 2). She noted that during the evaluation the student remained generally calm, aside from occasional attempts to hit the examiner or teacher assistants (id.). The psychologist further reported that the student did not engage in direct eye contact with her, nor was he able to sustain his attention long enough to completed the standard battery of subtests required to render a valid full scale IQ (id. at p. 3). The psychologist stated that the student was easily distracted and seemed intent on handling the testing materials more often to throw them away or close them up, than to participate in the presented tasks (id.).

The psychologist reported that while leading the student to the examining room the student wandered away to explore other rooms, but was easily redirected by taking his hand and leading him or with verbal prompts, which resulted in a generally smooth transition (Dist. Ex. 11 at p. 3). The psychologist reported that once in the examination room the student explored his surrounding, aligning toys in a manner consistent with the "OCD-like" behavior described by the student's teacher and parent (id.). At the same time, the student vocalized softly using short and high-pitched monosyllabic sounds, but no recognizable words (id.). According to the psychologist, it took several attempts by her and a teacher assistant to get the student to sit down and direct his attention to the first subtest (id.). The student appeared to grasp the object of the task and responded correctly to practice tasks, but was not able to attend for more than a few moments (id.). The psychologist discontinued testing and noted that further attempts to engage the student on subsequent sessions met with minimal responses or were completely unsuccessful, despite changing the venue and manner in which test materials were presented, and providing repeated learning trials (id.). According to the psychologist, the student tired easily and responded by closing and rubbing his eyes as he reclined in his seat, spiting and hitting the psychologist and teacher assistant, throwing test materials, and walking away (id.). The psychologist noted that the student's resistance to the challenges posed and his inability to remain engaged precluded him from completing all of the tasks presented (id.). She further noted that the tasks the student was able to complete were not administered in a standardized fashion and should be interpreted with great

caution (id.). Administration of the Leiter International Performance Scale-Revised (Leiter-R) yielded a full scale IQ of 36, which the psychologist indicated for the reasons detailed above, should not be considered a valid representation of the student's cognitive ability (Dist. Ex. 11 at pp. 3, 6, 8).

Completion of the Vineland Adaptive Behavior Scales, Second Edition, Survey Interview Form (VABS-II) by the parent yielded an adaptive behavior composite score of 56, which was in the "[l]ow" range (Dist. Ex. 11 at pp. 4, 9). According to the psychologist, the student's overall score represented consistently "[l]ow" range functioning across all domains including communication, daily living skills, socialization, and motor skills (id. at pp. 7, 9). The psychologist reported that the student's functioning in the area of domestic skills revealed a relative personal strength compared with the other daily living skills subdomains (id. at pp. 4, 7). She noted that according to the parent, the student demonstrated clinically significant maladaptive internalizing behaviors, indicating emotional distress; further, she noted that the student's tendency toward externalization of emotional distress was at the "elevated" level, as indicated by the parent's endorsement of items describing impulsive behaviors and aggression (id. at pp. 7, 9).

Based on her evaluation, the psychologist opined that the student would "continue to benefit from participation in an individually designed and developmentally focused learning environment" with a low student-to-teacher ratio in order to improve his ability to relate to others and to support his language, motor, and cognitive development (Dist. Ex. 11 at p. 7). She recommended that the student continue to receive OT, PT, and physical education sessions to support his motor development and self-regulation while building his strength (id.). In addition, she also recommended that the student continue to receive speech-language therapy to support the further development of the student's receptive and expressive language capabilities, oral motor/articulation, and pragmatic language production (id.). The psychologist also recommended that the student continue to receive music therapy and that the family receive support to aid them in nurturing, working with, and understanding their child (id.).

The December 2009 interdisciplinary report of progress from the Rebecca School, reviewed by the January 2010 CSE, included a description of the student's program at the school, as well as information regarding the student's education and functional emotional developmental levels, and speech-language and motor abilities (Dist. Ex. 10). According to the progress report, the student participated in a classroom with seven other students supported by one head teacher and three assistant teachers (8:1+3) (Tr. p. 116; Dist. Ex. 10 at p. 1). The student's daily program included Floortime sessions, English language arts (ELA), math, science, social studies, visual-spatial and regulatory-sensory processing activities (Dist. Ex. 10 at p. 1). As part of the student's weekly program he received OT, speech-language therapy, PT, musical therapy, and adapted physical education (id.).

As part of the Rebecca School progress report, the student's teacher described the student's education and functional emotional development with respect to four levels: (1) shared attention and regulation; (2) engagement and relating; (3) two-way purposeful emotional interaction; and (4) shared social problem solving (Dist. Ex. 10 at p. 2). With respect to shared attention and regulation, the teacher reported that the student had demonstrated the ability to regulate his attention and attend to play or tasks in order to enter into a state of shared attention with adults most of the time (id. at p. 1). She indicated that the student could also share attention with his peers with maximum adult support to help him communicate his needs and wants effectively (id.).

According to the teacher, the student was most engaged during interactive proprioceptive/physical activities with adults and with appropriate supports, could remain engaged for at least 30 minutes at a time (id.). The teacher reported that during group activities, the student might become dysregulated while waiting for his turn to participate or for a desired object (id.). She further reported that the student often sought sensory input and might become dysregulated when his needs were not immediately met and as a result, the student might spit and/or suddenly grab and throw an object (id.). The teacher also reported that when dysregulated, the student would cry or suddenly become aggressive toward himself (biting his knees) or others (hitting, spitting, kicking) (id. at p. 2). According to the teacher, during these times the student required 1:1 support to help him regulate by providing him with deep pressure, using very little language, a low soothing affect, and giving the student adequate processing time (id.).

With respect to engagement and relating, the teacher reported that the student had demonstrated the ability to engage and relate, mostly with adults, through sensory or gross motor play (Dist. Ex. 10 at p. 2). The teacher reported that the student had demonstrated an understanding of other's feelings; specifically that when emotions were expressed with high exaggerated affect paired with words he would respond to by matching the other person's affect (id.). According to the teacher, the student showed interest in adult reactions, looking to a nearby adult and awaiting their response to something he had just done (id.). The teacher reported that the student would also predict and respond in advance to an anticipated reaction— for example, wiping up a spill before being asked (id.). The teacher reported that engaging and relating with peers presented more of a challenge for the student and noted that when a peer tried to initiate a "joyful" interaction with the student, he might respond by hitting or crying out, rather than sharing as he was willing to do with adults (id.). The teacher reported that the student had demonstrated the ability to enter into a two-way purposeful emotional interaction with an adult around sensory activities, using mostly gestures and one to two word utterances, with an average of 10 circles of communication and more than 50 circles of communication when the student was highly motivated (id.). In novel situations, the student would typically open and close five circles of communication with maximum adult support (id.). According to the teacher, the student had demonstrated the ability to engage with adults in two-way problem solving interactions around a desired object (id.). She noted that this was a relative strength for the student as he was able to motor plan through multiple steps (at least five) in order to get a desired object (id.). The teacher commented that social problem solving with adults and peers was a challenge for the student, and that the student required maximum adult support to resolve a social problem (id.).

In addition to detailing the student's functional emotional developmental levels, the Rebecca School teacher provided information regarding the student's academic abilities (Dist. Ex. 10 at p. 3). According to the teacher, the primary focus of the students' ELA program was on helping him to read, listen, and speak for information and social interaction in a continuous flow of communication (id.). The teacher reported that she had been working on increasing the student's vocabulary and comprehension by having him engage in pretend play including acting out fairy tale scenes, verbally describing the who, what, and where of each picture from a story, and matching words to different elements of the story (id.). The teacher reported that she used the Lindamood Bell Visualizing/Verbalizing program as a guide to help the student develop situational comprehension, but modified the program to include photographs of the student and classmates, which were more motivating than the program's pictures (id.). The teacher also reported using "Thinking Goes to School" to develop the student's visual and auditory thinking skills (id.). According to the teacher, the student was not formally tested on the extent of his vocabulary but

demonstrated recognition of symbols related to basic needs and wants (id.). She indicated that the student demonstrated his ability to comprehend verbal instructions by following 2-step simple directions, but noted that the student's ability to express comprehension of a given situation was inconsistent (id. at p. 4). The teacher stated that the student could often identify the "who" of a picture when given verbal prompts and/or visual supports, and would occasionally respond correctly to "what" or "where" questions when given a "silly" and a correct choice (id.). The teacher reported that the student displayed interest in books surrounding anticipation and playfulness and when books were read with high affect and energy, but he did not gravitate toward them individually (id.). The teacher reported that the primary focus of the student's math program was on developing his "general movement" and "discriminative movement" skills by utilizing the thinking games outlined in "Thinking Goes to School" (id.). With respect to social studies, the teacher reported that the student required maximum adult support to help him develop his understanding and ability to follow classroom and community rules (id. at p. 5). According to the teacher, the student's awareness of self in relation to others and simple emotions was emerging (id.). With respect to science, the teacher reported that the student had become more engaged in weekly science experiments, which introduced the student to the concepts of observation, prediction, and testing (id.).

The December 2009 Rebecca School progress report indicated that the student received OT twice per week for 30-minute individualized sessions and a once per week during a co-treatment with the student's speech-language therapist (Dist. Ex. 10 at p. 6). The occupational therapist reported that the student transitioned smoothly from the classroom to the gym with the use of the Picture Exchange Communication System (PECS) (id. at p. 5). The occupational therapist further indicated that the student demonstrated a "persistent need to close doors, backpacks, and lockers," behaviors which could interfere with therapy (id.). She noted that when the student was prevented from following through with these behaviors, he could become easily dysregulated (id. at p. 6). According to the occupational therapist, the student presented with sensory over-responsivity throughout the school day (id.). Consistent with the report of the student's teacher, the occupational therapist reported that when the student became frustrated he could become dysregulated and act aggressively toward classroom staff (id.). She noted that the student was able to regulate with rotary and linear swinging, as well as by bouncing on a ball combined with deep pressure through therapeutic activities (id.). According to the occupational therapist, the student was able to sequence motor actions together when motivated and could visually track on all planes (id.). She reported that the student had difficulty establishing eye contact without sensory input (id.). The occupational therapist reported that the student frequently threw objects across the classroom and sensory gym with no awareness of the potential to hit others (id.). She surmised that the throwing of objects was an attempt by the student to explore his environment and determine how far away he was from things and also a means of demonstrating that he was all done (id.).

The progress report reviewed by the January 2010 CSE also indicated that the student received PT services twice per week for 30-minute individualized sessions (Dist. Ex. 10 at p. 6). According to the physical therapist, the student often had difficulty transitioning from the classroom to the sensory gym and he would hit and punch the therapist (id.). She commented that during treatment sessions the student's eye contact and interaction were inconsistent and dependent upon his regulation (id.). She further noted that the student's ability to communicate using simple words during therapy had improved (id.). The physical therapist reported that the student inconsistently followed simple commands during therapy dependent on his motivation and

regulation (id.). She indicated that the student enjoyed swinging and that when his physical state was challenged, the student would often become agitated with the therapist and begin pinching, hitting, and spitting at the therapist as well as begin to bite his hands and hit his head (id. at pp. 6-7). According to the physical therapist, she attempted to redirect the student's agitation by having him stomp his feet or hit a "foof" chair (id. at p. 7).⁹ She noted that the student responded well to proprioceptive and vestibular input to assist in calming and regulating himself (id.).

The December 2009 progress report also indicated that the student received speech-language therapy three times per week individually and once during a co-treatment with the occupational therapist (Dist. Ex. 10 at p. 7). The speech-language pathologist reported that the student demonstrated difficulty transitioning to therapy when only verbal cues were given, however, the addition of visual cues maximized the student's ability to transition (id.). Consistent with the other therapists, the student's speech-language pathologist reported that the student's engagement varied depending on his regulated state, the therapeutic environment, and the student's motivation behind the interactions (id. at p. 8). The speech-language pathologist also reported that the student's ability to initiate and remain engaged to open and close circles of communication was maximized during the co-treatment session with the occupational therapist (id.). According to the speech-language pathologist, the student remained highly engaged when problem solving for a motivating item and was able to use various modalities to open and close circles when the end result was a highly preferable item (id.). The speech-language pathologist reported that the student's limitation with respect to engagement was influenced by his fleeting attention and self-directed play (id.). The speech-language pathologist further noted that the student often engaged in self-organizing behaviors and that when playful obstruction was employed, the student occasionally became dysregulated and used aggression to express his frustration (id.). The speech-language pathologist reported that when the student lost interest in an activity or became dysregulated it was often difficult to bring him back to the interaction (id.). The speech-language pathologist reported that the student had been introduced to a communication device and that he was able to use one button representing an object or place to initiate requests during therapy (id.). According to the speech-language pathologist, the student also had the ability to use one word approximations and gestures such as pointing, and would also reach for an object or pull the clinician toward a desired object (id.). The speech-language pathologist reported that the student also used his communication device to improve his comprehension of questions, as the device provided the student with visual support in the form of a field of items to choose from (id.). The speech-language pathologist reported that the student presented with oral sensory seeking behaviors and decreased awareness of the oral mechanism, which was addressed through the use of an oral motor protocol both in the classroom and in therapy sessions (id.).

The December 2009 Rebecca School progress report reviewed by the January 2010 CSE also indicated that the student received once weekly music therapy sessions (Dist. Ex. 10 at p. 9). According to the music therapist, the student typically interacted with music vocally (id.). The music therapist reported that music awareness continued to be a strength for the student as did music communicativeness, which showed the student's capacity to focus and attend (id.).

The December 2009 progress report included educational/DIR/Floortime goals related to sustaining shared attention and engagement and developing the ability to enter into two-way

⁹ A "foof" chair is described as being similar to a beanbag chair (Tr. p. 396).

purposeful interactions; literacy goals related to word recognition, comprehension, and interest in reading; math goals related to number sense, 1:1 correspondence, money, measurement, and time/space; and social studies and science goals (Dist. Ex. 10 at pp. 11-12). In addition, the progress report included OT goals related to improving sensory processing, motor planning, and visual-spatial processing; PT goals related to improving motor planning and sequencing, core strength and endurance, and cooperation and skill of ball play; speech-language therapy goals related to improving engagement/pragmatic language skills, expressive language skills, receptive language skills, and oral motor and articulation skills; and music therapy goals related to increasing intentional music communicativeness and music inter-responsiveness (id. at pp. 12-14).

The information contained in the student's January 2010 IEP accurately reflected the CSE's understanding of the student's present levels of academic performance and special education needs in light of the evaluative information available to it at time the IEP was formulated. For example, the student's present levels of performance in the IEP reflected elements of the December 2009 progress report submitted by the Rebecca School (compare Dist. Ex. 5 at pp. 3-5, with Dist. Ex. 10). Based on the information reviewed, the CSE recommended that the student be found eligible for special education services as a student with autism (Dist. Ex. 5 at p. 1). To address the student's deficits in academics, socialization, attending, and behavior, the CSE recommended that the student be placed in a 6:1+1 special class in a specialized school with the services of a 1:1 crisis management professional (id.). The CSE also recommended environmental modifications and human/material resources to address the student's academic needs including the use of visual and verbal prompts, redirection, and motivating objects to engage the student in class activities (id. at p. 3). In addition, the CSE recommended environmental modifications and human/material resources to address the student's social/emotional needs including frequent sensory breaks, use of visuals to illustrate directions and transitions, setting of consistent limits, continuous 1:1 support to address issues of aggression and make the student more aware of safety issues, and use of an oral motor protocol (id. at p. 4). The IEP indicated that the student benefited from having a concrete place to put objects when he was done using them (id.). The IEP also indicated that the student's behavior seriously interfered with instruction and required additional adult supervision (id.). A behavior intervention plan was also developed by the CSE (id. at p. 18).

The CSE also recommended related services to address the student's deficits in speech and language, motor development, and sensory processing. Specifically, the CSE recommended that the student receive individual speech-language therapy five times per week, individual OT five times per week, individual PT three times per week and individual counseling one time per week (Dist. Ex. 5 at p. 17).

The hearing record supports the impartial hearing officer's determination that the student required a significant amount of sensory integration therapy. However, the hearing record also indicates that the numerous strategies recommended by the Rebecca School staff to address the student's sensory needs were not limited to swinging. According to the Rebecca School program director, if the student's sensory system was not regulated, his ability to learn would be affected (Tr. p. 407). The program director testified that swinging and other vestibular stimulation best provided the student with the input he needed to become regulated (Tr. pp. 395-97). She indicated, for example, that deep pressure and joint compression also helped to regulate the student (Tr. pp. 396, 408). To address the student's aggressive and self-injurious behaviors, the program director reported that the Rebecca School put the student on an intense sensory diet where he was receiving sensory input all day long in a proactive way (Tr. p. 399). She described an oral motor protocol

which was used to minimize the student's need to engage in self-injurious behavior and noted that OT and sensory input were used to assist the student with regulating his sensory system (Tr. pp. 399-400, 407). The program director also reported that the student benefited from being provided with picture cues and time to process information during transitions (Tr. p. 408).

The student's Rebecca School teacher reported that the student became dysregulated when he was not able to organize his visual system or have the deep pressure or input that he needed (Tr. p. 577). She stated that squeezing the student's hand helped him to process transitions and his emotions (id.). In addition, she indicated that the student was regulated through the provision of speech-language therapy, OT, and PT, in addition to the use of a swing (Tr. p. 580). The student's Rebecca School teacher reported that staff at the school also employed pressure, squeezes, co-regulated breathing, mirroring games, physical activities, and scooter boards to regulate the student (id.). The teacher indicated that when the student was aware of his schedule and had time to process his next activity, and was provided with repeated support and visual aids, he was able to ease his frustration in less time (Tr. p. 621). According to the teacher, the components of the student's sensory diet included use of the sensory gym, therapy services provided by the occupational and physical therapists, use of an oral motor protocol, access to scooter boards and physical activities, and the use of deep pressure and brushing (id.).

The social worker at the Rebecca School testified that the student's greatest need was "sensory based," noting that the student was most regulated when he was able to get the sensory support he needed and that without it, the student could become very dysregulated (Tr. pp. 726-27, 731). In addition, the school psychologist who participated in the January 2010 CSE meeting acknowledged that sensory input was key to maintaining the student in a regulated state so that he would be available for learning (Tr. p. 122).

The hearing record shows that the January 2010 CSE considered the student's need for sensory input and recommended that the student receive related services of speech-language therapy, OT, and PT, in part, to address this need (Dist. Ex. 5 at p. 17). The January 2010 IEP also included the strategies deemed necessary by the Rebecca School staff to address the student's sensory needs including the provision of frequent sensory breaks, use of visuals to illustrate directions and transitions, and use of an oral motor protocol (id. at p. 3). In addition, the behavior plan developed by the January 2010 CSE indicated that sensory input would be used to assist the student with regulation (Tr. p. 122; Dist. Ex. 5 at p. 18). The behavior plan stated that the student would have a sensory diet and that a sequence of sensory input, such as brushing and swinging, would be provided to the student (Dist. Ex. 5 at p. 18). The behavior plan further noted that the student would be provided with sensory "snacks," such as the use of a scooter, and movement breaks, walking, and gross motor activities (id.). The behavior plan also called for the student to be provided with deep pressure and joint compression (id.). The student's IEP included goals related to expanding his oral motor skills, improving his ability to use sensory information to interact with his environment, improving his motor planning and sequencing skills, and improving his ability to regulate his sensory system in order to sustain shared attention with an adult (id. at pp. 9, 10, 12, 13).

The teacher of the proposed classroom at the assigned school testified that she did not have a swing in her classroom, nor could she recall seeing one in the gym or sensory room (Tr. p. 294). However, she indicated that during the day, students in her class went to the gym and also to a movement room, where they had the opportunity to move around with music (Tr. pp. 294-95). She

further indicated that the school had a sensory room that was used by the occupational and physical therapists (Tr. p. 234). According to the teacher, the sensory room included a water table, sand table, sensory balls, scooters, scarves, and hula hoops (Tr. pp. 234, 294).

As detailed above, the hearing record shows that the district identified the student's sensory needs and recommended related services, program modifications, and behavior strategies designed to address those needs in the January 2010 IEP. The hearing record also shows that while the assigned school did not use a swing, it had other equipment available to address the student's sensory needs.¹⁰ Therefore, I cannot conclude, as the hearing officer did, that the lack of any swings or appropriate sensory equipment at the assigned school amounted to a fatal flaw in the district's recommended program.

Conclusion

Based on the foregoing, I find that the CSE's recommendation of a 6:1+1 special class in a special school with related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record demonstrates that the January 2010 IEP identified the student's multiple needs, developed annual goals and short-term objectives to address those needs, and recommended a program in the LRE (see 20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]). Furthermore, I note that the hearing record, in its entirety, does not support the conclusion that had the student attended a 6:1+1 special class at a district school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P., 2010 WL 1049297; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn, 502 F.3d 811; Houston Independent Sch. Dist., 200 F.3d at 349; see also Catalan, 478 F. Supp. 2d 73 [D.D.C. 2007]).

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations supported the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not reach them in light of my conclusions herein.

THE APPEAL IS SUSTAINED.

¹⁰ There is no information in the hearing record regarding whether a swing could have been provided to the student in the event that the student had attended the public school setting.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated June 10, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year, and directed the district to either pay or reimburse the parent for the student's tuition costs at the Rebecca School for the 2010-11 school year are annulled.

Dated: **Albany, New York**
 August 29, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER