The University of the State of New York

The State Education Department
State Review Officer
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No. 12-034

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, G. Christopher Harriss, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse them for their son's tuition costs at the McCarton School (McCarton) for the 2011-12 school year.[1] The appeal must be sustained.

II. Overview—Administrative Procedures

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

[1] The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

§§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has been the subject of two prior administrative appeals, and as a result, the parties' familiarity with the student's educational history and prior due process proceedings is assumed and will not be repeated here in detail (Application of the Dep't of Educ., Appeal No. 11-099; Application of the Dep't of Educ., Appeal No. 09-114; see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28 [S.D.N.Y. 2011], appeal docketed, 11-1266-cv [2d Cir. 4/1/2011]). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (Tr. pp. 230, 233; Dist. Ex. 2 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student has attended McCarton since 2002 (Tr. pp. 658-59). On May 17, 2011, the CSE convened for a review of the student's program and to develop his IEP for the 2011-12 school year (Dist. Ex. 2 at pp. 1-2). The May 2011 CSE recommended placement for the student in a 12-month, 6:1+1 special class in a specialized school combined with related services (id. at p. 1; Dist. Ex. 3).

In a final notice of recommendation (FNR) dated June 14, 2011 to the parents, the district summarized the May 2011 CSE's recommendations and notified them of the particular school to which the student was assigned for the 2011-12 school year (Parent Ex. F). In a letter dated June 15, 2011, the student's father advised the district that he had yet to receive a copy of the student's IEP and the FNR (Parent Ex. E at p. 1). Additionally, the student's father indicated that unless the district offered the student an appropriate program and placement, the student would remain at McCarton for the 2011-12 school year and the parents would be requesting tuition reimbursement or direct payment of the student's tuition (id.). By letter dated June 23, 2011, the student's father advised the district that although he was in receipt of the June 2011 FNR, he was unable to contact the assigned school to arrange for a tour, despite several attempts to do so (Parent Ex. D at p. 1). On June 27, 2011, the parent visited the public school identified in the FNR (Tr. p. 646; see Parent Ex. D at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated June 30, 2011, the parents commenced an impartial hearing (Parent Ex. A). As relief, the parents requested, among other things, tuition reimbursement for McCarton for the 2011-12 school year (id. at pp. 1, 8).[2] The parents alleged that the district denied the student a FAPE during the 2011-12 school year, in pertinent part, based on the following reasons: (1) the parents were not included in the selection process of the particular school site; (2) the proposed program was not reasonably calculated to provide the student with a FAPE; (3) the district failed to develop an appropriate functional behavioral assessment (FBA), despite the student's interfering behaviors; (4) the district failed to develop an appropriate behavioral intervention plan (BIP); (5) the May 2011 IEP failed to provide for parent counseling and training as a related service; (6) the district failed to develop an appropriate transition plan for the student to enter a district school; (7) the district failed to consider and accommodate the student's need for 1:1 support; (8) the district failed to provide the student with 1:1 teaching support; (9) the district recommended a 6:1+1 special class that utilized the TEACCH methodology, which was not appropriate for the student;[3] (10) the paraprofessional assigned to the student lacked adequate training and could not properly fulfill the IEP mandates; (11) the students in the proposed classroom were grouped by age and not by functioning level and/or their classifications; and (12) the assigned school could not satisfy the student's related services mandates (id. at pp. 2-7). The parents also maintained that McCarton was an appropriate placement for the student, and that equitable considerations favored their request for relief (id. at p. 8).

[2] Although the parents included 69 allegations that pertained to the provision of a FAPE to the student during the 2011-12 school year in their due process complaint notice, during the impartial hearing, the parents agreed to limit the scope of their claims to the issues addressed in their closing memorandum of law (Tr. pp. 758-59).

[3] TEACCH is an acronym for Treatment and Education of Autistic and Communication Handicapped Children (Parent Ex. CC at p. 1).

On August 5, 2011, the district responded to the parents' due process complaint notice (Parent Ex. C).

B. Impartial Hearing Officer Decision

By decision dated January 13, 2012, the IHO awarded the parents tuition reimbursement for the McCarton School for 2011-12 school year, in addition to reimbursement for the cost of transportation (IHO Decision at pp. 41-42). Although the IHO rejected the parents' claim that the district denied them an opportunity to meaningfully participate in the selection of the assigned school for the student, she ultimately concluded the student was not offered a FAPE during the 2011-12 school year (id. at pp. 26, 38). Specifically, the IHO concluded that the lack of a written FBA, in conjunction with the district's reliance on the student's McCarton Behavior Reduction Plan for the previous school year, rendered the resulting BIP inappropriate (id. at p. 29). She further found that the student's BIP did not offer a sufficiently specific description of the suggested strategies or any guidance regarding how to implement them (id.). Next, although the IHO acknowledged that there was no legal requirement that an IEP include a specific transition plan for a student attending a new placement, the IHO stated that an IEP should include specific services to help the student transition from one school to another (id. at p. 30). In this case,, the IHO determined that there was no evidence regarding transition goals or a plan prepared for the student, which resulted in a denial of a FAPE (id. at p. 30). In addition, the IHO found that the omission of parent counseling and training on the student's IEP, combined with the CSE's failure to discuss the provision of such services with the parents contributed to a denial of a FAPE to the student (id. at pp. 32-33).

With respect to the proposed 6:1+1 placement, the IHO was not persuaded by the parents' contention that the district failed to establish its appropriateness because the district only presented evidence regarding the assigned school the student was recommended to attend for the summer (IHO Decision at p. 33). Nevertheless, the IHO ultimately determined that the 6:1+1 placement was not reasonably calculated to provide the student with educational benefits, in part, because there was no evidence to support a finding that any of the McCarton witnesses believed that a 6:1+1 class with a 1:1 paraprofessional was appropriate for the student's needs (id. at p. 35). Moreover, the IHO found no evidence to show that the student would have benefitted from a 6:1+1 class without intensive teacher support on a 1:1 basis, and further noted that the district failed to demonstrate that the qualifications of the paraprofessional assigned to the student were equivalent to those of a "1:1 instructor" (id.). Regarding the assigned school, the IHO was found that school's use of the TEACCH methodology would not have been appropriate for the student (id. at pp. 35-36). Next, the IHO found that the students in the proposed class were inappropriately grouped by age and similarity of needs (id. at pp. 36-37). Lastly, notwithstanding her other findings regarding the assigned school, the IHO found no evidence to support a finding that it could not meet the student's related services mandates (id. at p. 38). The IHO also found that the parents met their burden of establishing the appropriateness of McCarton and that no equitable considerations weighed against their request for relief (id. at pp. 40-41).

IV. Appeal for State-Level Review

The district appeals and requests a reversal of the IHO's decision. The district maintains that it offered the student a FAPE, in part, because the hearing record does not demonstrate that the lack of a written FBA rendered the BIP inappropriate. Next, although the district notes that there is no legal authority calling for a transition plan for a student who is transferring to a district

school, the district submits that the May 2011 CSE built recommendations into the IEP to ease the student's transition from McCarton to a public school. Furthermore, although the district admits that the May 2011 CSE failed to include parent counseling and training on the IEP, it maintains that this omission did not rise to the level of a denial of a FAPE to the student. Regarding the appropriateness of a 6:1+1 special class placement, the district further submits that a 6:1+1 special class could provide the student with individual and group instruction, and accordingly, could provide him with appropriate instruction in the least restrictive environment (LRE). Lastly, the district contends that equitable considerations preclude the parents' requested relief, either in whole or in part.

The parents submitted an answer. Notwithstanding their request to affirm the IHO's decision, they also request additional findings in support of a conclusion that the district deprived the student of a FAPE. Moreover, the parents contend that the district is estopped from asserting that the 6:1+1 special class constituted the student's LRE. The parents also submit that the district failed to offer any proof that it could implement the May 2011 IEP. Finally, the parents maintain that equitable considerations favor their request for relief.

The district submitted a reply, in which it asserts, in pertinent part, that the parents are barred from seeking additional findings that the district did not offer the student a FAPE because they failed to cross-appeal any portion of the IHO's decision. The district also argues that it was not precluded from arguing on appeal that the student was offered a placement in the LRE.

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 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 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]; 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 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 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 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't 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 enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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 v., 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

1. Unappealed IHO Findings

Initially, I note that neither party has appealed from the IHO's decision with respect to the following issues: (1) that the students in the assigned school received their related services on site; and (2) McCarton was an appropriate placement for the student (IHO Decision at pp. 38-40). Therefore, those aspects of the IHO's decision have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also Application of a Student with a Disability, Appeal No. 11-027; Application of a Student with a Disability, Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-115; Application of a Student with a Disability, Appeal No. 10-102).

2. Scope of Review

Regarding the parents' request in their answer for additional findings related to the district's alleged deprivation of a FAPE, the district correctly argues that the parents are precluded from seeking findings of fact and conclusions of law in addition to those rendered by the IHO related to the purported deprivation of a FAPE because even after the district "opened the door," so to speak, by appealing the IHO's decision they have failed to interpose a cross-appeal. State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer (8 NYCRR 279.4[b]). Although the parents assert in their answer reasons to support their claim that the student was denied a FAPE, a review of the parents' verified answer indicates that they did not cross-appeal from the IHO's January 2012 decision (see Answer). Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the aggrieved party either asserts an appeal or the nonaggrieved party interposes a cross-

appeal.[4] Under the circumstances, the parents' request for additional findings related to the provision of a FAPE to the student based on allegations raised in the due process complaint notice, is denied.

Regarding the parents' claim that the district is precluded from interposing the defense in its petition that the proposed program constituted the student's LRE, there is no legal authority to support the parents' position. Here, the district submitted a response to the due process complaint notice that comported with federal and State regulations, and there is no indication in the hearing record that its failure to include a defense below resulted in a denial of a FAPE to the student (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]; see also Application of the Dep't of Educ., Appeal No. 11-118; Application of a Student with a Disability, Appeal No. 08-151). Moreover, Neither federal or State regulation does not require the insertion of affirmative defenses in the response to the due process complaint notice, nor does it suggest that unasserted defenses will be waived (R.B. v. Dep't of Educ., 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011]). Under the circumstances, the district is not precluded from arguing on appeal that the proposed program served as the student's LRE in response to the IHO's findings regarding the lack of 1:1 teacher support.

B. May 2011 IEP

Turning to a discussion of the merits of the instant matter, as set forth in greater detail below, while the IHO's decision is thorough and well-reasoned in most respects, I disagree with her resulting conclusions regarding the district's alleged failure to offer the student a FAPE. Accordingly, based on an independent review of the evidence in the hearing record, I am persuaded that the May 2011 IEP was reasonably calculated to enable the student to receive educational benefits, and therefore, offered him a FAPE during the 2011-12 school year.

1. 6:1+1 Special Class Placement

According to the district's special education teacher who attended the CSE meeting, the May 2011 CSE reviewed and discussed McCarton reports, which included the student's behavior reduction plan for the 2010-11 school year, a December 2010 educational progress report, a December 2010 speech-language progress report, and a December 2010 OT progress report as well as a classroom observation completed by the district's school psychologist (Tr. pp. 227-28, 230-31, 233-39, 679-81; Dist. Ex. 3 at p. 2; see Dist. Exs. 11-16). Based on the information before it, the May 2011 CSE determined that the student exhibited significant delays with regard to academics, receptive, expressive and pragmatic language and communication, social interaction, motor development, and sensory processing (Dist. Exs. 2 at pp. 3, 7; 11; 13-14). The May 2011 CSE also found that the student exhibited interfering self-stimulating behaviors which affected his ability to attend and complete tasks in all environments (Dist. Ex. 2 at p. 5).

State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with the student's needs and State regulations, the May 2011 CSE recommended a 12-month

[4] As noted previously, an IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of a Student Suspected of Having a Disability, Appeal No. 09-063; Application of the Dep't of Educ., Appeal No. 09-051; see also Parochial Bus Sys. Inc. v. Board of Educ., 60 N.Y.2d 539, 545 [1983]).

placement in a 6:1+1 special class in a specialized school with the assistance of a full-time 1:1 behavior management paraprofessional (Tr. pp. 255-56; Dist. Ex. 2 at pp. 1, 29). The May 2011 CSE also developed a BIP for the student (Dist. Ex. 2 at p. 31). In addition, based on information from the student's McCarton teachers and service providers, as well as McCarton reports, the CSE incorporated environmental modifications and human/material resources into the IEP, that the CSE believed the student needed in order to be successful in a 6:1+1 setting, including: (1) previewing activities before a transition; (2) provision of verbal prompting, modeling, and redirection; (3) provision of a consistent positive reinforcement schedule; (4) repetition, review, and functional application; (5) generalization of skills over various contexts and settings; (6) provision of frequent breaks to improve the student's ability to persevere and attend; (7) presentation of material in manageable units; (8) use of a step by step approach to learning; (9) provision of extra time for processing verbal information; (10) provision of phonemic cues and visual supports; (11) use of manipulatives to help the student visualize; (12) provision of a 1:1 behavior management paraprofessional; (13) provision of clear and detailed expectations in and out of the classroom; and (14) related services consisting of speech-language therapy and occupational therapy (OT) (Tr. p. 239; Dist. Ex. 2 at pp. 4-5).

In addition to the CSE's recommendation for placement in the small, highly structured environment provided in a 6:1+1 class, the May 2011 CSE developed academic goals and short-term objectives to address the student's deficits in reading, writing, math, and classroom skills to improve the student's learning potential (Tr. pp. 240-44; Dist. Ex. 2 at pp. 12-14, 22). The May 2011 CSE also developed annual goals and short-term objectives to address his deficits in social and play skills, and recommended the provision of two 30-minute counseling sessions per week in a group of three (Tr. p. 249; Dist. Ex. 2 at pp. 9, 26, 29). In addition, the CSE created annual goals and short-term objectives designed to target the student's deficits in articulation, receptive and expressive language, pragmatics and social communication, and also recommended the provision of individual and group speech-language therapy services (Dist. Ex. 2 at pp. 15-18, 29). To address the student's deficits in motor delays and sensory processing, the CSE also added to the IEP annual goals and short-term objectives related to improving the student's fine motor skills, motor planning skills, activities of daily living (ADL) skills, self-regulation skills and his interaction with the environment, together with the provision of group and individual OT (id. at pp. 8-9, 23, 29).

Notwithstanding the IHO's conclusion that placement in a 6:1+1 special class combined with a 1:1 behavior management paraprofessional was not appropriate for the student based on her finding that the student could not benefit from a 6:1+1 program without intensive teacher support on a 1:1 basis, a review of the evidence shows that the student's needs could appropriately be addressed in a 6:1+1 setting with the assistance of a 1:1 behavior management paraprofessional and did not require the level of support provided by a full-time 1:1 teacher exclusively devoted to addressing this student's needs alone in order to be offered a FAPE, regardless of how much the parents may have preferred that type of setting (see IHO Decision at p. 35). The district's special education teacher described the 6:1+1 special class placement, as "a very small nurturing site within a larger public school setting" (Tr. p. 254). She further noted that in the 6:1+1 class, the student would be working with one teacher, specifically trained to work with children with autism and one classroom paraprofessional, in addition to his own behavior management paraprofessional (Tr. pp. 253-54, 258). Moreover, the May 2011 CSE recommended the provision of related services, the majority of which were to be delivered in a 1:1 setting (Tr. pp. 253-54, 258).

According to the district's special education teacher, the CSE developed its recommendation for the 6:1+1 placement with a 1:1 behavior management paraprofessional based

on reports regarding the student's functioning in his classroom at McCarton at the time of the May 2011 CSE meeting and LRE considerations (Tr. p. 299). She noted that reports at the May 2011 CSE meeting indicated that the student had made improvements with regard to his social/emotional functioning, which made it easier for him to be in a large group (Tr. p. 236). The special education teacher further testified that the CSE relied on McCarton and district reports which indicated that with support, the student was able to function in a group (Tr. pp. 320-21). She also referenced the McCarton December 2010 educational progress report, which stated that the student was increasing his ability to learn and function in small groups, and that the focus of the school year was for the student to work on increasing his ability to independently participate in group activities and lessons (Tr. pp. 319-20; see Dist. Ex. 11 at p. 1). The December 2010 educational progress report also revealed that when the student successfully transitioned to a new classroom in 2010, this transition marked the "use of more dyad, small and whole group teaching" (Dist. Ex. 11 at p. 1). The student's McCarton teacher also commented that he was being provided with "careful fading of teacher support" (id.). Similarly, the district's special education teacher noted that the district's school psychologist who conducted a classroom observation of him found that the student worked well in a small group and seemed to enjoy participating in the math lesson (Tr. pp. 320-21; see Dist. Ex. 15). Moreover, the classroom observation also indicated that overall, the student followed the routine of the classroom, and appeared independent in checking his schedule and in "going about some of the tasks on his schedule" (Dist. Ex. 15). Additionally, the student's McCarton teacher indicated that the student took part in academic groups for science, health, and social studies for approximately 25 to 30 minutes and adapted physical education for 30 to 45 minutes several times per week in accordance with a schedule (Tr. pp. 541, 551, 556; Parent Ex. Q). She further commented that the student was making progress with regard to attending in a group (Tr. p. 551). Likewise, the student's McCarton speech-language pathologist indicated that she arranged dyads, triads or group conversations for the student in which to practice his language skills (Tr. pp. 578, 581-82, 586). Finally, the teacher at the assigned school indicated she provided both individual and group instruction to students in her class (Tr. pp. 326, 328, 335, 349-51).

While I can appreciate the parents' desire to have a teacher work with the student on a 1:1 basis throughout the school day, a review of the evidence in the hearing record suggests that the student's primary need for 1:1 support was to address his attention deficits and his self-stimulatory behaviors including his need for frequent reinforcement, redirection and prompting to remain focused, stay on task, follow directions, play appropriately and learn new skills (Dist. Ex. 11 at p. 2). While desirable, 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). In the instant case, according to the December 2010 McCarton educational progress report, the student utilized a special reinforcement system where he was reinforced for attending (Dist. Ex. 11 at p. 2). The report also indicated that his 1:1 teacher redirected the student by pointing where to look, briefly pausing him to instruct him to sit appropriately, or by taking simple notes for the student to help him follow the lesson (id.). His teachers also reported that the student attended nine academic-based groups with two to four peers and that a 1:1 teacher helped him remain focused on the lead instructor and the activity (id. at p. 3). According to the McCarton teachers, the student participated in reading, twice per day, and received extra practice in a 1:1 setting, before attending the group with his peers (id.). Like all groups, during reading, the teachers noted that the student had a 1:1 instructor with him to implement his token systems (id.). Additionally, his teachers recommended the provision of 1:1 staff support for the student, to increase his abilities and "help him develop attention skills and behavioral controls" (id. at p. 7). Under the circumstances, based on this description of the level and type of support provided by the 1:1 teacher at McCarton, the hearing record demonstrates that the student did not require the support

of full-time 1:1 teacher instruction, but rather suggests that the student's needs related to his attention deficits and behavior could be adequately and appropriately provided by a 1:1 behavioral paraprofessional in the 6:1 +1 special class setting recommended on the IEP.

Accordingly, I find that the CSE's recommendation of a 6:1+1 special class with the added supports of a 1:1 behavior management paraprofessional and the recommended program accommodations and strategies described above was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

2. Special Factors and Interfering Behaviors

The IHO concluded that the absence of an FBA, coupled with the CSE's reliance on only a discussion at the meeting of the student's interfering behaviors and a review of his McCarton behavior plan, resulted in a deficient BIP for the student, which in turn, deprived him of a FAPE (IHO Decision at p. 29). As set forth in greater detail below, the May 2011 CSE properly considered special factors relating to the student's behavioral concerns that impeded his learning, and developed an appropriate BIP for the student in accordance with State regulations.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/

iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[5] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency,

[5] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[6] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Here, the district's special education teacher testified that although the CSE did not generate a written FBA, the CSE had information regarding the student's behaviors that was provided by McCarton personnel in the student's behavior reduction plan for the 2010-11 school year, in a December 2010 educational progress report, a December 2010 speech-language progress report, and in a December 2010 OT progress report (Tr. pp. 230-31, 249-51; Dist. Exs. 11-14). She testified that the CSE had additional information regarding the student's behaviors that was provided in the May 2011 classroom observation in addition to input from the student's McCarton providers who participated in the CSE meeting (Tr. p. 251; Dist. Ex. 15). The special education teacher testified that the CSE discussed the contents of the McCarton reports with the McCarton personnel who participated in the CSE meeting, and that for the purposes of developing the student's BIP, the CSE determined that a discussion of all relevant assessments, including its own observations, was sufficient and constituted an FBA (Tr. pp. 255, 263). The special education teacher agreed that consideration of the frequency, duration and intensity of behaviors was important in the development of a BIP; however, given that the CSE did not have access to the student in order to generate this information, the CSE relied on information from the student's McCarton providers who had access to the student during the school year and had developed a behavior reduction plan based on data that McCarton was able to collect (Tr. pp. 263-64). Regarding the accuracy of the student's McCarton behavior plan, testimony by the director of the upper school at McCarton (director) confirmed that in order to develop a student's behavior plan, McCarton staff conducted a "functional behavior assessment" or a "functional behavior analysis," the latter which he described as a "much more sophisticated" and a "much more clinical intervention" (Tr. pp. 473-74). The director testified that McCarton staff first tracked the frequency of the behavior, then collected data with regard to that behavior and its frequency and sometimes staff collected data regarding duration and intensity (Tr. p. 475). Additionally, the director testified that McCarton staff also looked at the function of the student's behavior to determine why the student is exhibiting the behavior in order to determine an alternative skill to replace that behavior (Tr. pp. 474-75).

With regard to the development of the student's BIP, the hearing record reflects that the district's special education teacher was knowledgeable with respect to the purpose and content of both an FBA and a BIP (see Tr. pp. 249-52, 255, 263-64, 268-71, 274-77). Although she acknowledged that the FBA developed by the CSE did not result in a written document, she further

[6] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

testified that the May 2011 CSE discussed all of the student's behaviors, the behaviors that "impacted" his classroom performance, and the strategies employed by McCarton personnel, which the CSE memorialized into the BIP (Tr. p. 252). She added that the CSE, including the student's McCarton providers, discussed the student's behaviors that interfered with his classroom performance, prioritized them, and included them in written form in the student's BIP (Tr. pp. 252, 271-72). Similarly, May 2011 CSE meeting minutes reflect that the CSE discussed "triggers" for the student's behaviors and reviewed changes in his behaviors (Dist. Ex. 3 at p. 2). The special education teacher further indicated that the CSE discussed the strategies employed by McCarton staff, and that the results of its discussion were reflected in the student's BIP (Tr. p. 252; compare Dist. Ex. 2 at p. 31, with Dist. Ex. 12). Specifically, a review of the student's BIP shows that the CSE incorporated a significant portion of the student's McCarton behavior plan in the resultant BIP. For example, the six behaviors that were identified as interfering with the student's learning in the student's BIP correlate directly with the behaviors targeted for reduction in the short-term objectives outlined in the McCarton behavior plan, and both documents contain similar strategies to change the student's behavior including the use of verbal prompts (or verbal redirection), visual or written schedules, positive reinforcement for on task behavior (or DRO/DRA), predictability of events and advance warning of changes, and a token reward system (see Tr. p. 275; compare Dist. Exs. 2 at p. 31, with Dist. Ex. 12 at p. 1).[7] Additionally, although the McCarton behavior plan called for the provision of a sensory diet, the district's special education teacher testified that she did not include a sensory diet on the student's BIP because it was provided programmatically within the recommended class and as such, it was not a necessary component of the student's BIP (Tr. pp. 277-79).

Although the IHO found that the BIP did not contain a sufficiently specific description of the suggested strategies or guidance on how the strategies would be implemented, the evidence establishes that the May 2011 CSE allowed for teacher discretion with regard to how the BIP would be implemented (IHO Decision at p. 29; Tr. pp. 275-76).[8] The district's special education teacher testified that the CSE writes a BIP, which will be implemented in a school that will have its own ways of approaching things and where school staff will decide for example, the type of token economy, the type of reinforcement of alternative behaviors or the type of reinforcement of other behavior that will be implemented (Tr. pp. 275-76). Furthermore, I note that testimony by the special education teacher also indicated that the BIP was a fluid document, and could be changed by the classroom teacher if, for example, the student's behaviors changed during the course of the school year (Tr. pp. 270-71).

Based on the foregoing, in this case, the hearing record does not support a finding that the student was a denied a FAPE, where the May 2011 CSE addressed the student's behavioral needs and the district formulated a BIP based on information and documentation provided by the student's providers, and developed management needs designed to target the student's interfering behaviors (C.F. v. New York City Dep't. of Educ., 2011 WL 5130101, at *9-*10 [S.D.N.Y., Oct. 28, 2011]; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30,

[7] Although unsworn statements, DRO was described as an acronym for Differential Reinforcement of Other Behavior and DRA is an acronym for Differential Reinforcement of Alternative Behavior (Tr. p. 191).

[8] While the IDEA does not preclude a CSE from initially formulating a BIP, it is not unusual for a classroom teacher or other special education provider to formulate or modify a BIP over the course of a school year when a BIP is called for in the implementation of the student's IEP (see, e.g., Application of a Child with a Disability, Appeal No. 05-107). As noted above, if the district creates a BIP for the student, the CSE is thereafter required to review the BIP at least annually (8 NYCRR 200.22[b][2]).

2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

3. Transitional Support Services

With regard to the parents' contention that the district failed to develop a transition plan for the student, the IDEA does not specifically set forth the provisions requiring a school district to formulate a "transition plan" as part of a student's IEP when a student moves from one school to another.[9] However, under separate State regulations, "transitional support services" are to be provided to a regular or special education teacher to aid in the provision of services to a student with a disability who is transferring to a regular program or to a program or service in a less restrictive environment (8 NYCRR 200.1[ddd]). I find that for the reasons discussed below, any perceived lack of transition support by the district did not rise to the level of a denial of a FAPE to the student.[10]

Here, an overview of the hearing record does not suggest that the student exhibited particular difficulty with transitions; rather, the evidence shows that at McCarton, the student successfully navigated his transition from the lower school to the upper school and successfully transitioned to his new classroom in 2010 (Tr. p. 500; Dist. Ex. 11 at p. 1). The student's McCarton teachers reported that his transition to his new classroom marked the use of more dyad, small and whole group teaching (Tr. p. 316; Dist. Ex. 11 at p. 1). The teachers also reported that the student's transition to a new classroom also brought changes to the his routine, and that in order for the student to learn and perform activities independently, he used written schedules to help him through morning routine, lunch, and some hobby groups (Dist. Ex. 11 at p. 1). In addition, the teachers noted that the student was showing "excellent progress" increasing his ability to adapt to his environment and demonstrated less anxiety in new environments and situations (id. at pp. 2, 6). According to the teachers, some changes in routines no longer provoked anxiety in the student, such as a different activity incorporated into the student's morning routine (id. at p. 6). Although the teachers explained the effectiveness of written schedules to help the student anticipate change, they noted that the student did not require written schedules to tolerate one mild change within the classroom environment; however, he might need a written schedule, if the change was more severe, such as a doctor's appointment (id.). Finally, at the time of the May 2011 CSE meeting, the student had mastered the ability to look at his schedule and understand it (Dist. Ex. 3 at p. 3). This evidence is consistent with the description of the student in the IEP, as well as the provision of a 1:1 behavioral paraprofessional (Dist. Ex. 2 at pp. 3, 5). Given the aforementioned set of

[9] Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.).

[10] The Office of Special Education recently issued a guidance document updated in April 2011 entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transition support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

circumstances, transition support services, beyond what was provided for in the IEP, as further discussed below, were not required for the student.

Even though transition support services were not required for the student, the May 2011 CSE built supports into the student's IEP to help ease his transition into the public school setting, such as the provision of twice weekly group counseling (Tr. p. 247). According to the district's special education teacher, the recommended counseling services were also designed to target the student's classroom anxiety (Tr. p. 249; Dist. Ex. 3 at p. 2).[11] Although the special education teacher acknowledged that the CSE did not develop a formal written transition plan for the student, she added that the CSE recommended 1:1 behavior support paraprofessional services to support the student's transition to a district school, which the committee deemed sufficient for the student (Tr. pp. 280-81). Additionally, the CSE incorporated other supports into the student's IEP to aid in transitions, such as previewing activities before a transition and the use of a visual schedule (Dist. Ex. 2 at pp. 4-5). Accordingly, the hearing record reflects that the district was capable of providing transition support services in order to facilitate the student's placement in the assigned school in the event that it was later determined that the student required such services (see A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *12 [S.D.N.Y. Aug. 19, 2011]; E. Z.-L. v. New York City Dep't of Educ., 763 F.Supp.2d 584, 598 [S.D.N.Y. 2011]). Under the circumstances of this case, I find that the lack of notation of transitional support services on the May 2011 IEP to assist the student in transitioning from McCarton to the public school program did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause 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]).[12]

4. Parent Counseling and Training

Next, I will consider the parents' contention that the omission of parent counseling and training in the May 2011 IEP contributed to a denial of a FAPE to the student. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F., 2011 WL 5130101, at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. March 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011]; adopted at 2011 WL 3625317 [E.D.N.Y. Aug. 15,

[11] I note that in contrast, at the time of the development of the student's prior May 2008 IEP, the district court was troubled by the district's concession that a transition from McCarton to the proposed program would create significant anxiety for the student, and the district's failure to address this concern in the resultant IEP and BIP (see R.E, 785 F. Supp. 2d at 34).

[12] Any change in restrictiveness between the McCarton and the public school program is also minimal, if any, which further diminishes a need to note transition support services on the student's IEP (8 NYCRR 200.1[ddd]).

2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).[13]

In the instant case, although the provision of parent counseling and training was not memorialized in the May 2011 IEP, the hearing record reflects that such services were available at the assigned school (Tr. pp. 257, 283, 750). According to the assistant principal of the assigned school, the school had a parent coordinator who facilitated workshops on a monthly basis, and the teacher of the proposed class communicated daily with parents via a communication board (Tr. p. 750). She noted that the teacher also communicated with parents telephonically, and she also was available for support, if needed (id.). In addition, the assistant principal added that, if necessary, a behavior program was also available (id.). Notwithstanding the parents' allegation that the district failed to recommend any parent counseling and training, let alone, individualized parent counseling and training in the IEP, the hearing record shows that the assigned school made efforts to provide parents with trainings and workshops based on their individual needs (see Tr. pp. 355-57). Specifically, the teacher from the assigned school testified that she discussed strategies with the parents of her students regarding how to cope with their children's diagnosis of autism (Tr. p. 380). She further explained that she worked with parents regarding the use of a communication board or an individual schedule at home (Tr. pp. 380-81). Additionally, the teacher from the assigned school testified that the school set aside several days during the year for training, on a departmental basis (Tr. p. 335). For example, she noted that the assigned school's speech-language department held training dates during the year to work with parents on the use of a new communication board or a new technique (id.). The teacher from the assigned school further testified that the school employed an individual whose responsibility was to perform home visits for parents (Tr. p. 355).

Under the circumstances presented herein, I concur with the IHO's finding (IHO Decision at p. 32; see Tr. p. 257) that the district should have complied with the State regulations by identifying parent counseling and training on the May 2011 IEP; however, given that parent counseling and training was available at the assigned school, the district's failure to incorporate it into the challenged IEP did not result in any substantive harm, nor did it, in this case, rise to the level of a denial of a FAPE to the student (see C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509). In summary, the evidence above shows that the district did not fail to offer the student an IEP that was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

C. Assigned School

The parents also raise a number of concerns regarding the particular public school to which the district assigned the student. Specifically, they challenge the appropriateness of the educational methodology utilized at the assigned school and further contend that the age and functioning levels of the students in the proposed class were in excess of the levels permitted by State regulations.

As they did before the District Court with respect to a prior school year (R.E., 2011 WL 924895, at *10), the parents make much of the fact that the district must be held to the "four

[13] To the extent that P.K. or R.K. may be read to hold that the failure to adhere to the procedure of listing parent counseling and training on an IEP constitutes a per se, automatic denial of a FAPE, I note that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y., Oct. 30, 2008]).

corners" of the IEP. However, I note that the parents' claims with respect to the actual provision of special education services at the site in which the IEP would be implemented suffer from the same problem of which the district is accused—the claims go beyond the challenged IEP and are speculative insofar as the parents did not accept the recommendations of the CSE or the programs offered by the district and, therefore, the district was not required to prove that it could implement the May 2011 IEP. Yet the parents attempt to apply a "reasonably calculated" standard to the implementation of the IEP while failing to acknowledge the IEP implementation standards described by the courts and set forth below. In this case, 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 (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District 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]). 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., 2011 WL 924895, at *10). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). Additionally, as discussed below, the parents' concerns are not adequately supported by the evidence in the hearing record.

1. Educational Methodology

I will first consider the parents' concerns regarding the educational methodology employed at the assigned school. 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).

Although the student's father testified that he was concerned that the assigned school was not designated as an applied behavior analysis (ABA) school, as set forth in greater detail below, the evidence in this case does not support a conclusion that the student could only learn with a

specific educational methodology (Tr. p. 650).[14] The student's father testified that the student began attending McCarton at the age of 3 1/2 to four years and had never attended a public school as a school-aged student (Tr. pp. 659-60). As a result, the student had never received instruction utilizing a methodology other than ABA, nor failed to progress utilizing a methodology other than ABA. The parent added that the student had never been in a TEACCH-based classroom and McCarton's director admitted that he had never seen the student in a 6:1 +1 classroom or in a classroom where TEACCH was the methodology used (Tr. pp. 525-26). While the assigned school was not designated as an ABA school, the teacher of the proposed class was familiar with ABA methodology, had received training in ABA, and utilized many components of ABA instruction in her classroom including among other things, positive reinforcement, 1:1 discrete trials, data collection, repetition, task analysis, modeling, prompting, structure, data analysis and revision of instruction based on the progress or lack thereof reflected in the data, and generalization (compare Tr. pp. 332-35, 338-343, 361-65, 372, 650, with Tr. pp. 527, 670).[15, 16]

Based on the above, the hearing record does not support a finding that the use of a combination of the ABA and TEACCH[17] methodologies such as that utilized in the assigned class would have deprived the student of a FAPE.

2. Grouping

Turning next to the parties' contentions regarding the functional grouping of the proposed class, the hearing record reflects that had the student attended the assigned school, he would have been functionally grouped for instructional purposes. The parents allege that the age and functioning levels of the students in the recommended class spanned more than three years, in violation of State regulations. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational

[14] Although the parents are familiar with the CSE process, the student's father did not raise any objections at the CSE meeting with regard to methodology (Tr. p. 308).

[15] The teacher from the assigned school who testified at the impartial hearing stated that she was told by the assistant principal at the beginning of summer school that the student might be in her class and also stated that she was the teacher who had an opening in her class at that time (Tr. pp. 378-79). Testimony by the assistant principal also indicated that the student would have been placed in this teacher's class because there was room in that class for the student and because based on the student's IEP, he fit with the population of that class with regard to his reading and math functional levels (Tr. pp. 728, 730).

[16] The teacher of the proposed class also testified that she utilized input provided by parents in a reinforcement inventory which reflected the types of things students were likely to be reinforced by and would work for in order to change certain behaviors (Tr. pp. 334-35).

[17] The hearing record reflects that TEACCH was the primary methodology utilized in the assigned class (Tr. p. 751).

achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]–[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of a Student with a Disability; Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

According to the teacher of the proposed class, had the student attended the assigned school, the class would have included students whose functional levels ranged from kindergarten through sixth grade; however, she had reviewed the student's IEP and believed the student would have fit into her class in summer 2011 (Tr. pp. 325-26, 331, 337-38).[18] Her testimony indicated that according to the student's IEP, his academic functional levels ranged from first grade to third grade, which would allow the student to be grouped in her class with students with similar functional levels for both reading and mathematics (see Tr. pp. 337-38; 733-347; Dist. Ex. 2 at p. 3). In addition, when grouping the students, the teacher from the assigned school stated that she considered their verbal ability as well as their academic functioning because she paired verbal students with nonverbal students, so that while they were working together the students were also verbalizing with each other and working on the social aspects of instruction (Tr. p. 349). The teacher of the proposed class also testified that she had reviewed the student's management needs in the IEP and that she utilized many of them in her classroom including among other things, OT tools, manipulatives, repetition, modeling, prompting, generalization, positive reinforcement, visual supports and visual schedules, and the provision of breaks (compare Tr. pp. 332-35, with Dist. Ex. 2 at pp. 4-5). In view of the foregoing, the hearing record indicates that the student could have been functionally grouped in the class as there were students who were functioning on or close to the same level as he was. Additionally, although the parents contend that the functional grouping of the students in the proposed class spanned six years, and therefore, constituted a violation of State regulations, I note that the parents have not alleged that the lack of the provision of a notice from the district advising them that the functional levels of the students was in excess of three years deprived the student of a FAPE.

Regarding the age levels of the students in the proposed class, the student was twelve years old for most of the 2011-12 school year; however, it is unclear from the hearing record that the chronological age range of the students in the class exceeded 36 months because notwithstanding evidence that the proposed class was comprised of students aged 11 to 14 years, the hearing record

[18] The teacher from the assigned school testified that although the assistant principal advised her in summer 2011 that the student might be in her class because a space was available, she also testified that she did not know if the student was on her class register; however, as noted above, the hearing record indicates that the student's enrollment in the proposed class was speculative because he never attended the assigned school (Tr. pp. 331, 376-79).

does not contain evidence reflecting the students' birthdates (Tr. p. 325; Dist. Ex. 2 at p. 1). Regardless, an age range outside of 36 months does not rise to the level of a denial of a FAPE, where as here, the students are appropriately grouped within the class for instructional purposes (see Application of a Student with a Disability, Appeal No. 08-133; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-034; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-023; Application of a Child with a Disability, Appeal No. 06-019; Application of the Bd. of Educ., Appeal No. 06-010); Application of a Child with a Disability, Appeal No. 05-102; Application of a Child with a Disability, Appeal No. 00-065; see also Application of a Child with a Disability, Appeal No. 98-21). Therefore, I find the parents' argument to be unpersuasive especially where, as is the case here, the student did not attend the assigned school. Moreover, the evidence in hearing record does not support the conclusion that upon implementation the district would have deviated from the IEP in a material or substantial way in the event that the student enrolled in the public school and triggered the district's obligation to provide the student with the services in conformity with his IEP (A.P., 2010 WL 1049297 at *2; Van Duyn, 502 F.3d at 822; Houston Indep. Sch. Dist., 200 F.3d at 349; see T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L., 2011 WL 4001074, at *9; see 20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see also 20 U.S.C. § 1414[d]; 34 CFR 300.320).

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to reach the issue of whether McCarton was appropriate for the student or whether equitable considerations support 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 address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated January 13, 2012 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year and ordered the district to provide tuition reimbursement for the student's attendance at the McCarton School.

Dated: **Albany, New York**
April 12, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER