The University of the State of New York

The State Education Department
State Review Officer
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No. 12-038

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, Alexander Fong, Esq.,[1] of counsel

Mayerson & Associates, attorneys for respondents, Tracey Spencer Walsh, 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 which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Manhattan Children's Center (MCC) and additional related services for a portion of the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

[1] On the date this decision was rendered, the district indicated via telephone that Mr. Fong had been substituted as counsel in this matter.

hearing (20 U.S.C. §§ 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

With regard to the student's educational history, the student was previously found eligible for special education and, during the 2009-10 school year, the student attended the public school in a 6:1+1 special class in a special school and received related services of speech-language therapy and occupational therapy (OT) (Tr. pp. 182, 187, 935; Parent Ex. TT).[2] The student continued in the same public school program at the beginning of the 2010-11 school year (Tr. pp. 157-58, 301).

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

By letter dated October 20, 2010, the parents contacted the assistant principal at the student's school to express their concern about his lack of progress in the district school (Dist. Ex. 4). The parents submitted private speech-language, OT, and neurodevelopmental evaluations with the letter and requested that the district implement the recommendations contained therein and reimburse the parents for services obtained privately until it could do so (id.; see Tr. pp. 168-69, 945-46; Parent Exs. S-U).

The CSE met on December 7, 2010, for the student's annual review to develop an IEP for the student for the remainder of the 2010-11 school year and, at the parent's request, to review the student's programmatic needs (Tr. pp. 123; Parent Ex. D). The December 2010 CSE recommended that the student continue in the same 6:1+1 special class he was attending at the time of the meeting with related services of speech-language therapy and OT (Tr. p. 133; Parent Ex. D at pp. 1, 20). After the CSE meeting, in January 2011, in response to the parents' concerns that the student required additional 1:1 instruction using an ABA instructional method, the assistant principal provided the parents with an opportunity to visit another district school that provided more of an ABA component to its program (Tr. pp. 149-50, 190-92, 352, 425, 790-91, 817-18, 955, 959, 966-67, 971, 981-82, 1028; Parent Ex. M at pp. 1-2). The student's mother found the program to be inappropriate for the student because she believed that it did not offer sufficient individualized instruction, placed a limited emphasis on addressing sensory seeking behaviors, and did not contain sufficient opportunities for the student to interact with nondisabled peers (Tr. pp. 968-69; see Parent Ex. L at p. 1). By letter dated January 13, 2011, the parents stated their disapproval of both the student's current placement and the alternate district school, gave notice that they were unilaterally placing the student at MCC beginning February 1, 2011, and expressed their intention to seek reimbursement both for the student's MCC tuition and for additional speech-language therapy and OT (Parent Ex. L at pp. 1-2). The student thereafter attended MCC, which was described as a private school for children diagnosed with autism spectrum disorders that uses an applied behavior analysis (ABA) model and offers a criterion-based curriculum that is aligned with State standards (Tr. pp. 461-62).

A. Due Process Complaint Notice

By a second amended due process complaint notice dated May 24, 2011, the parents requested an impartial hearing (Dist. Ex. 1 at pp. 1-9).[3] Among other claims, the parents asserted that: (1) the December 2010 CSE was improperly composed because it did not include an additional parent member; (2) the CSE "failed to meaningfully consider private evaluations and take them into account;" (3) the CSE predetermined its recommendation, impeding the parents' right to participation; (4) the December 2010 IEP failed to include sufficient goals and objectives to address the student's interfering behaviors; (5) the district failed to properly conduct a functional behavioral assessment (FBA) and develop an appropriate behavioral intervention plan (BIP) that addressed the student's interfering behaviors; (6) the IEP failed to specify an appropriate educational methodology; and (7) the recommended program provided the student with insufficient 1:1 support (id. at pp. 3-7).[4] For relief, the parents requested reimbursement for the student's MCC tuition, home and community-based speech-language therapy and OT, and

[3] The parents originally filed a due process complaint notice dated March 8, 2011 (Dist. Ex. 1 at pp. 20-26), which they amended on May 19, 2011 (id. at pp. 10-18). The amended notices reference a May 2010 CSE meeting, acknowledged to be a typographical error (Tr. pp. 67-68, 1081-82; Dist. Ex. 1 at pp. 2, 11).

[4] The second amended due process complaint notice contains 75 discrete claims, most of which were not ruled on by the IHO (Dist. Ex. 1 at pp. 2-8). As the parents have not cross-appealed from the IHO's decision, those claims will not be discussed further (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

compensatory education to the extent that the district failed to implement the student's pendency (stay-put) placement or for any "gross violations" of the student's right to a free appropriate public education (FAPE) (id. at p. 8).[5]

B. Impartial Hearing Officer Decision

An impartial hearing was convened on May 26, 2011, for purposes of determining the student's educational placement during the pendency of the proceedings, as well as for evidentiary matters (Tr. pp. 1-37). The impartial hearing reconvened on July 7, 2011 to address the merits of the parents' claim and continued on nine additional hearing dates.[6]

In a decision dated January 13, 2012, the IHO found that the district denied the student a FAPE and that MCC was an appropriate placement for the student, and awarded the parents reimbursement for the student's tuition at MCC for the 2010-11 school year and for speech-language therapy and OT received by the student during the school day that were not included within MCC's tuition costs (IHO Decision at pp. 40-41).

With regard to the procedural violations alleged by the parents, the IHO found that the district did not convene a properly composed CSE meeting because of the lack of an additional parent member (IHO Decision at p. 30). Noting that the assistant principal agreed that an additional parent member should have been present on the basis of the parents' concerns regarding the student's placement, the IHO found that the district had an obligation to make sure that the parents' received a "fair hearing," and that the district should have asked the parents whether they wished to waive the presence of an additional parent member or reconvene when one was available (id.). The IHO also found that the district impeded the parents' right to participate in the formation of the student's IEP based on its failure to consider the private neurodevelopmental evaluation at the CSE meeting (id. at pp. 30-32). The IHO found that there was no evidence in the hearing record that the evaluation was considered by the CSE, preventing the parents from having any meaningful input at the CSE meeting (id. at pp. 31-32). The IHO concluded that the CSE's failure to consider the evaluation lead to "a pre-determined outcome where only the child's alleged progress in his current program was to be discussed and considered" (id. at p. 32).

Discussing the substantive adequacy of the December 2010 IEP, the IHO found that the IEP failed to sufficiently address the student's behaviors that interfered with his learning (IHO Decision at p. 32). The IHO determined that the IEP, rather than addressing the student's "bad behavior[,] essentially ignored behavioral goals as well as social goals" (id. at p. 33). The IHO

[5] While each of the due process complaint notices indicates that the parents were amenable to a resolution meeting (Dist. Ex. 1 at pp. 9, 18, 26), the student's mother testified that the district never contacted her to arrange one (Tr. pp. 1007-10). I remind the district of its obligation to convene a resolution session within 15 days of receipt of the due process complaint notice (34 CFR 300.510; 8 NYCRR 200.5[j][2]).

[6] Although a number of extensions to the timeline in which the IHO was required to render a decision were granted, no documentation of the extensions appears in the record, in violation of State regulations (8 NYCRR 200.5[j][5][i], [ii], [iv]). Furthermore, I remind the IHO that State regulation prohibits him from granting more than one 30-day extension at a time and that federal and State regulations require that requests for extensions must originate from the parties (34 CFR 300.515[c]; 8 NYCRR 200.5[j][[5][i]; Letter to Kerr, 22 IDELR 364 [OSEP 1994] [an impartial hearing officer "cannot extend the timeline on his or her own initiative, or pressure a party to request an extension"]; see Tr. pp. 927-28 [after soliciting a request for an extension, the IHO immediately solicited another upon realizing that the next hearing date was scheduled after the extended compliance date]). Finally, although the IHO may consider the timeline contained in State regulations a burden that interferes with his obligations under the IDEA (Tr. pp. 927-29), I encourage him to nonetheless attempt to follow them.

further found that the BIP failed to explain how the recommended strategies to address the student's behaviors would reduce their occurrences (id.). Furthermore, the IHO found that the recommended placement was insufficient because the student required additional 1:1 instruction to make progress (id. at pp. 34-35).

The IHO determined that the parents' unilateral placement was appropriate to meet the student's needs, noting in particular the testimony of the student's MCC and private service providers regarding the student's progress (IHO Decision at pp. 35-39). Addressing equitable considerations, the IHO found that the parents cooperated with the district in attempting to develop an appropriate IEP for the student (id. at pp. 39-40). Accordingly, the IHO awarded the parents reimbursement for the student's MCC tuition and those related services the student received during the school day that were not included in the MCC tuition (id. at pp. 40-41).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that it denied the student a FAPE and in awarding the parents reimbursement for the student's tuition at MCC and additional related services. Regarding the finding that the December 2010 CSE should have included an additional parent member, the district asserts that it was permitted to convene a subcommittee of the CSE, for which no additional parent member was required. The district further asserts that the absence of an additional parent member did not impede the parents' ability to participate at the CSE meeting, and that the parents were able to make requests regarding the student's placement. The district also contends that the IHO erred in finding that the CSE failed to consider the neurodevelopmental evaluation because the results of that evaluation were incorporated into a psychoeducational update conducted by the district's school psychologist who participated in the CSE meeting. With respect to the IHO's finding that the December 2010 IEP did not sufficiently address the student's interfering behaviors, the district argues that the BIP it developed sufficiently addressed the student's behaviors which impeded learning and succeeded in reducing the instances of interfering behaviors while the student was still attending the district's school. The district also asserts that the student's needs were met in his district placement, that he was making progress, and that to the extent the student did not generalize his progress outside of school to the parents' satisfaction, the district was not required to maximize the student's gains.

The district next asserts that the IHO erred in granting reimbursement for the additional related services the student received that were not included in his MCC tuition costs. Initially, the district notes that the IHO made no specific finding as to the necessity of such services for the student to make progress.[7] The district also contends that MCC provided sufficient appropriate related services for the student to make progress, such that the additional services were not necessary. Finally, the district asserts that equitable considerations do not support the parents' claim for reimbursement, as the parents were interested only in obtaining a 1:1 program offering ABA instruction in order to maximize the student's progress, rather than cooperating with the district to develop an IEP for the student at the December 2010 CSE meeting.

The parents answer, denying the district's allegations and requesting that the IHO's decision be affirmed and that an SRO make additional findings regarding the district's denial of FAPE to

[7] The district does not appeal the IHO's determination that MCC is an appropriate placement for the student (see Pet.).

the student.[8, 9] The parents assert that the presence of an additional parent member at a CSE meeting is required by the Education Law. The parents also assert that the district failed to meaningfully consider the recommendations contained in the private neurodevelopmental evaluation at the December 2010 CSE meeting by not including them in the program recommended for the student. Additionally, the parents argue that the FBA and BIP developed by the district did not address all of the student's interfering behaviors, failed to lead to progress with regard to those behaviors, and did not comply with State or federal requirements. The parents also contend that the district classroom provided insufficient 1:1 instruction using ABA methods to enable the student to attain educational benefits. The parents further assert that while MCC was appropriate for the student, the student's needs required additional speech-language therapy and OT. Finally, the parents contend that equitable considerations support their request for reimbursement and note that the student attended a district school for the first half of the 2010-11 school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove 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

[8] The parents request that "the SRO recuse on the grounds of demonstrable bias and lack of impartiality" (Answer ¶ 1, n. 1). The only discernable reason raised by the parent is that upon judicial review, federal district courts have from time to time disagreed with and reversed the merits of several decisions issued by another adjudicator; however, assuming for the sake of argument that such decisions had been issued by me, this would still not be a basis on which to find bias or a need for recusal, as specifically held in several of the district court cases cited by the parents (see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 39-40 [S.D.N.Y. 2011]; P.K. v. New York City Dep't of Educ., 2011 WL 3625317, at *7 n.7 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *12-*13 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *3-*4 [Mar. 28, 2011]; see also B.J.S. v. State Educ. Dep't, 2011 WL 4368545, at *10 [W.D.N.Y. Sept. 19, 2011]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *6 [S.D.N.Y. Mar. 30, 2011]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 435 [S.D.N.Y. 2010]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 285-86 [S.D.N.Y. 2010]). I have considered the parents' request and find that I am able to impartially render a decision and that there is no basis for recusal (see 20 U.S.C. § 1415[g][2]; 8 NYCRR 279.1[c]).

[9] As noted above, because the parents have not cross-appealed the IHO's failure to rule on certain of the claims raised in their due process complaint notice, to the extent they raise those claims in their answer I decline to address them (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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][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).

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. CSE Composition—Additional Parent Member

Participants at the December 2010 CSE meeting included the assistant principal of the district school the student was then attending (acting as district representative), the school psychologist who performed a December 2, 2010 pyschoeducational update, and the student's district classroom teacher, speech-language pathologist, occupational therapist, and parents (Tr. pp. 123, 134; Parent Ex. D at p. 2). Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321), in some circumstances, New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 11-136; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042). Under New York State law, CSE subcommittees have the authority to perform the same functions as the CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

I find that the hearing record supports the conclusion that the district could have convened a CSE subcommittee to conduct the December 2010 meeting, as the student was not being considered for initial placement in a special class, a school for students with disabilities, or a school outside of the district. To the extent that the parents may have desired that the CSE would recommend placement in a school for students with disabilities, as demonstrated by their subsequent placement of the student at MCC, the hearing record in its entirety indicates that the parents requested the district recommend an alternative placement in a district school that could provide the student with 1:1 instruction using ABA methods (Tr. pp. 131-32, 143, 149-50, 190-92, 352, 421-22, 425, 760, 790-91, 813, 952, 955, 958-59, 971, 981-82, 1027-28, 1042-43; Parent Ex. M at pp. 1-4).[10]

In any event, the hearing record indicates that the parents were able to actively participate at the CSE meeting and did so, stating their beliefs that the student required additional 1:1 instruction using ABA methods and that the student was not making progress in the district's school (Tr. pp. 131-32, 143-44, 149-50, 351-53, 425, 760, 813, 817-18). Accordingly, even assuming that the district violated the procedures in convening the CSE without an additional parent member at the December 2010 meeting, under the circumstances I find that the lack of an additional parent

[10] I also note that the initial notice of the CSE meeting sent to the parents indicated that if the parents did not agree with the recommended placement, they had "the right to request a meeting with" the CSE (Dist. Ex. 6 at p. 1), and the second notice of the CSE meeting did not indicate that an additional parent member would be present at the meeting (Parent Ex. P).

member did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

B. CSE Process—Parental Participation and Predetermination

The CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). I find that under the circumstances of this case, the CSE adequately considered the private neurodevelopmental evaluation provided to it by the parents. Contrary to the IHO's finding, and as noted in more detail below, the district's December 2010 psychoeducational update report contains specific cites to and incorporated the evaluation results included in the private neurodevelopmental evaluation report and the school psychologist who conducted the update participated in the CSE meeting (see Dist. Ex. 12 at p. 1; Parent Ex. U at pp. 1-12; see also Tr. p. 134; Parent Ex. D at p. 2).

The private neurodevelopmental evaluation report indicated that the student presented with cognitive functioning in the low range of ability; engaged in stereotypical behaviors associated with a diagnosis of autism; and had an array of significant weaknesses in regard to attention, impulsivity, receptive, expressive, and pragmatic communication, adaptive behaviors, graphomotor skills, self-stimulating behaviors, and sensory areas that interfered with his learning (Parent Ex. U at p. 7). In addition to previous diagnoses of autism and apraxia, the evaluators offered the student diagnoses of an auditory processing disorder, motor deficits, and an attention deficit/hyperactivity disorder (id. at pp. 1, 7). In comparison, the December 2, 2010 psychoeducational update report indicated the student had recently been evaluated at a private center for developmental pediatrics (Dist. Ex. 12 at p. 1). Consistent with the private neurodevelopmental report, the psychoeducational update report noted the student's formal cognitive testing results (below the 1st percentile) for the verbal and nonverbal domains, as well as academic achievement test results, graphomotor integration fine motor speed skills, adaptive function rating, and results of an autism rating scale (id.; Parent Ex. U at pp. 3-6, 9-12). Furthermore, the psychoeducational update report referenced the findings made in the private evaluation report that the student's behavior was self-directed and impulsive (Dist. Ex. 12 at p. 1; Parent Ex. U at p. 7). The psychoeducational update report also indicated that during the private neurodevelopmental evaluation, the student displayed poor eye contact, self-stimulatory behavior that was difficult to redirect, poor attention, little spontaneous speech, frequent echolalia, and poor articulation, which the private evaluation report characterized as difficult to comprehend (Dist. Ex. 12 at p. 1; Parent Ex. U at pp. 3, 7). Accordingly, the student required that language be simplified and demonstrations be provided in order for him to understand task demands (Dist. Ex. 12 at p. 1; Parent Ex. U at p. 7).

The assistant principal testified that all assessment results were available for the parents to review at the December 2010 CSE meeting, including the district's psychoeducational evaluation update report (Tr. pp. 129-32; Dist. Ex. 12). The student's mother further testified that she continued to raise her concerns and request at the CSE meeting that the district implement the recommendations made in the private evaluation (Tr. pp. 954-55, 958, 1029). Although I can understand the parents' concern that the private evaluations they provided to the district were not raised and discussed on the initiative of the district staff at the CSE meeting and their resultant feeling that their concerns were therefore ignored (Tr. pp. 953, 959, 971), I find that, under the circumstances of this case, the evidence in the hearing record indicates that the neurodevelopmental evaluation was sufficiently considered by the CSE and did not result in a violation of the district's obligations.[11]

In any event, the student's mother testified that once the parents came to believe that the district was not prepared to recommend a placement that offered sufficient 1:1 ABA instruction to meet their request, the parents ended the meeting, "because there was no way we were going to agree on anything" (Tr. pp. 954, 981). The student's mother further testified that the parents did not provide any input to the development of the goals for the student's IEP, as they had "showed up with very different thoughts in . . . what we wanted to get out of that meeting" (Tr. pp. 1027-28).

While the district was required to consider the parents' privately obtained evaluations, it was not required to adopt the private evaluators' recommendations (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Watson v. Kingston, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641 [7th Cir. 2010]; Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]). I find that the parents' decision to end the CSE meeting upon realizing that the district would not agree to accede to their requests, not the district's failure to ensure that every member of the CSE had studied the private evaluation, was the cause of any impediment to the parents' participation in the CSE meeting (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657 [8th Cir. 1999]; see K.E., 647 F.3d at 806; L.I. v. Hawaii, 2011 WL 6002623, at *7-*9 [D. Hawaii Nov. 30, 2011]).

C. December 2010 IEP

1. Consideration of Special Factors—Interfering Behaviors

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

[11] The IDEA procedures require that prior written notice be given to the parents, which would have required the district to describe why it refused the parents' request to provide the student with a placement offering additional 1:1 ABA services together with a description of each evaluation procedure, assessment, record, or report that was used as a basis for the refused action (see 34 CFR 300.503; 8 NYCRR 200.5[a]). Neither party included such a notice with the hearing record in this case. Prior written notice should be sent within a "reasonable time" and under the circumstances of this case it would have been reasonable to send it at some time before the March 2012 due process complaint notice. The district's response to the due process complaint notice, which is required in those cases when prior written notice has not been sent, fails to establish that the district considered the neurodevelopmental evaluation (Dist. 2 at p. 10; see 34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]).

[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 Central 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.).[12] 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

[12] 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]).

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, at *2).

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, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[13] 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 Educ. [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]).

In this case, as further discussed below, I find that the district appropriately conducted an FBA and developed a BIP that sufficiently addressed those behaviors which impeded the student's learning or that of other students in his classroom. Moreover, to the extent that the BIP did not address certain other of the student's behaviors, the district classroom teacher testified that the student could be redirected to his work through use of general classroom interventions.

The assistant principal testified that an FBA was developed through interviews with the student's family, observations made by the student's then-current classroom teacher, and input from the classroom team (Tr. pp. 140-42). The student's classroom teacher noted that prior to developing the student's December 2010 BIP, an FBA was conducted that was based upon observation and data collection regarding his particular behavior of falling to the floor, and indicated how often such behavior occurred, the antecedent to the student falling to the ground, and the consequence of that observed behavior (Tr. pp. 716-17; Parent Ex. ZZ at pp. 4-6). It was determined that the behavior occurred approximately five times per day, for less than one minute

[13] 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]).

each time (Dist. Ex. 11 at p. 3). The FBA noted that the student's preferred activities included playing on the computer, listening to music, reading books, and sensory play, while he was averse to loud noises and the redirection of other students (id. at p. 4). The FBA and BIP were also based on information gleaned from staff at the district school and from parent interview, through use of a functional assessment interview tool that included specific forms for the student's parents and school staff to complete (Tr. pp. 321, 324, 706-08; Dist. Ex. 10 at pp. 2-5; Parent Exs. D at p. 20; ZZ at pp. 4-6).

The student's teacher subsequently developed a BIP for the 2010-11 school year that targeted the student's behavior of falling to the floor, the behavior which she and the assistant principal considered to most inhibit the student's ability to learn (Tr. pp. 138-40, 142, 201-02, 210-11, 213, 256, 316; Dist. Ex. 10 at pp. 2-5; Parent Ex. D at p. 20).[14] While the hearing record indicates that the student's problem behaviors included screaming and pushing peers at the beginning of the 2010-11 school year (Tr. pp. 227-28, 721, 801; Dist. Ex. 10 at p. 11), the student's teacher testified that the occurrences of those behaviors were manageable through use of a social script and that the "behavior sort of decreased before we got a chance to really even establish it as a behavior that we should target" (Tr. p. 320). The student's teacher determined that it was more important to implement a BIP addressing the student's behavior of falling to the floor because it was difficult to redirect the student from that behavior, whereas he accepted redirection more readily from aggressive behaviors (Tr. p. 321). Furthermore, the student's behavior related to hitting other students was extinguished when the student whose crying had provoked the outbursts left the classroom (Tr. p. 721).

In addition, testimony by the student's classroom teacher and his classroom teaching assistant indicated that the student had a tendency to engage in "ritualistic activities," such as falling to the floor and rolling around, looking at door locks, and spinning coins, cards, and pencils (Tr. pp. 687, 690-92, 827). The classroom teacher testified that although the student demonstrated various behaviors stereotypic of autism, such as spinning coins or flipping a communication picture symbol card back and forth, he demonstrated some of these behaviors more prominently than others, and he did not display certain behaviors in the classroom as frequently as others (Tr. pp. 692-93, 696). Specifically, during lesson times, the student was more likely to engage in self-stimulatory behaviors (Tr. p. 696). The teacher indicated that because she and the classroom staff were familiar with the student's behaviors from the 2009-10 school year, during the 2010-11 school year they were able to anticipate when various behaviors specific to the student might happen, and subsequently redirect the student before those behaviors occurred (Tr. pp. 693-94). Therefore, for the 2010-11 school year, classroom staff focused on the student's behavior regarding his tendency to fall to the ground (Tr. pp. 694, 709, 713, 765; Parent Ex. ZZ at pp. 4-6).

The student's teacher further testified that in developing the student's FBA and BIP for the 2010-11 school year, data collection and charting focused on the student's falling to the ground behavior because it was prioritized as the behavior most dangerous for the student and/or other students (Tr. pp. 316, 694-95, 709, 742; Parent Ex. ZZ at pp. 4-6).[15] The teacher noted that focusing on the student's predominant behavior of falling to the ground when he entered the

[14] The hearing record contains two BIPs developed by the district, both bearing a date of November 2010, prior to the December 2010 CSE meeting (Dist. Exs. 8; Parent Ex. D at p. 20). Both BIPs are substantively similar and one of them was attached to the student's IEP; however, the BIP that was not attached to the IEP contains more detail (compare Dist. Ex. 8, with Parent Ex. D at p. 20).

[15] Testimony by the student's teacher indicated she received training in developing FBAs and that she understood the process involved in developing an FBA and in addressing students' behaviors (Tr. pp. 744-46).

classroom not only protected other students, it focused the student on learning and following basic rules of the classroom (Tr. pp. 695, 702-03). Furthermore, the teacher indicated that there was not a lot of opportunity for the student's falling to the floor behavior to occur during academic lesson time, and that once redirected from his stereotypy he would begin to work (Tr. pp. 696, 733). To address the student's falling to the floor behavior, the classroom staff provided the student with a scripted social story and music to prevent the behavior and encouraged the student to sing along regarding the proper way to walk in the halls (Tr. pp. 705-06, 718-19). The student's teacher testified that she considered this behavior to be ritualistic (Tr. pp. 706-07).

The hearing record reflects that not all of the student's presented behaviors interfered with his academic learning (Tr. pp. 697-98). In regard to other behaviors the student displayed that the classroom teacher characterized as self-stimulatory and ritualistic but did not impede the student's learning, such as spinning coins or flipping a picture card over during an academic lesson, the teacher initially allowed the behavior to occur, but then redirected the student to his work thereby reducing the student's level of stress and the occurrence of other behaviors that were detrimental to his learning and that of the other students in the class (Tr. pp. 697-98, 702). She also noted that in her classroom, the student knew the routine of what he was supposed to do and how to do it; the set routine and structure reduced the student's opportunities to engage in stereotypy and promoted his learning (Tr. pp. 432-33, 699-700, 738-39; see Tr. pp. 796, 839-40). While admitting that it was difficult to redirect the student from self-stimulatory behaviors and that he required additional redirection when engaged in academic activities, the student's classroom teacher testified that once redirected, the student would perform his work (Tr. pp. 731-33). This conclusion was reinforced by the teaching assistant in the student's classroom, who testified that the use of songs and social stories helped the student "a great deal," and redirected him to his work (Tr. pp. 833-36). Classroom staff also used a checklist to keep the student on task and redirect him from his behaviors (Tr. pp. 836-37). Additionally, the instructors would provide the student with 1:1 instruction while he was working on tasks requiring use of a pencil and paper, which was when the student was most likely to engage in self-stimulatory activities (Tr. pp. 805-06). Another strategy used to engage the student was to provide instruction in musical form and with the use of tangibles such as stuffed animals (Tr. p. 806). The teacher indicated that because the student's stereotypic behaviors did not interfere with his learning and he was able to perform the tasks required of him, to focus too much on the student's behavior would be detrimental to her ability to teach him (Tr. pp. 700-01). The teacher indicated that she chose to focus on the most interfering behavior until it was extinguished, then to begin work on the next most interfering behavior (Tr. pp. 701-02).

The BIP attached to the December 2010 IEP reflected a goal that the student would transition from one school environment to another without falling to the floor (Parent Ex. D at p. 20). The BIP identified strategies to assist the student in making transitions such as the use of social stories, provision of sensory integration activities, and giving the student a classroom job and reminding him of its importance to motivate him to be a hard worker and a positive helper (id.). The BIP also indicated that the student would be provided with support to change his behavior through the implementation of the BIP by all staff, communication between home and school, symbols readily available to communicate appropriate behavior, reinforcement of appropriate behavior throughout the day, and use of a sensory diet for input (id.; see Tr. pp. 833-37).

As discussed above, in addition to the BIP attached to the IEP, the district developed another BIP prior to the CSE meeting, which stated that the student would be shown a social script each morning to establish rewards for proper behavior, staff would provide social praise for

appropriate behavior, the student would be provided with sensory activities intermittently throughout the day, and preferred activities such as computer time and sensory toys would be used to reinforce the student's appropriate behaviors and for completion of tasks (Dist. Ex. 8 at pp. 2-4). I note that the BIP establishes the baseline measure of the behavior required by State regulation (8 NYCRR 200.22[b][4][i]; Dist. Ex. 8 at p. 1) and that it specifies strategies to be used to address the antecedents of and establish consequences for the behavior (8 NYCRR 200.22[b][4][ii]; Dist. Ex. 8 at pp. 2-4). Accordingly, even if the BIP attached to the IEP was procedurally deficient in some manner, the district had already developed a BIP that met State regulatory requirements and, as noted above, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP, only that the student's need for a BIP is noted (8 NYCRR 200.22[b][2]; see also "Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).[16]

In addition to the above, the student's teacher testified that by the time the student left the district's school, he had stopped staring at lights, walked more consistently in line with the group without falling to the floor, followed the classroom schedule and routine, and had reduced instances of pencil turning through use of a social script (Tr. pp. 794, 808-09). Furthermore, the student's screaming behavior had been entirely extinguished (Tr. pp. 808-09). For the above reasons, I find that the district appropriately addressed the student's behaviors that impeded learning and the FBA and BIP were appropriate.[17]

2. 6:1+1 Special Class Placement

Finally, I turn to the IHO's finding that the district failed to establish that the student could make progress without more 1:1 instructional time than offered by the district's program. As discussed below, the hearing record reflects the student made progress while still attending the district's 6:1+1 special class in a special school between September 2010 and January 2011.

Testimony by the student's district classroom teacher indicated her classroom structure was set up consistent with the TEACCH[18] model: she differentiated instruction, used teaching methodologies within the TEACCH structure that included rules and guidelines consistent with ABA, and during the time the student attended the district 6:1+1 special class for the 2010-11 school year, most of his IEP goals were addressed through use of discrete trials (Tr. pp. 395-96, 776, 806).

[16] 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]).

[17] I also note although the student's IEP reflects that his "[b]ehavior seriously interferes with instruction" and that he required "a high staff to child ratio" (Parent Ex. D at p. 4), special classes such as the one recommended for the student are intended to address the needs of 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]).

[18] Documentary evidence in the hearing record reflects that TEACCH is an acronym for Treatment and Education of Autistic and related Communication-handicapped Children, a methodology that dictates class structure and daily routine and incorporates structure, organization and prompts, in order to minimize the negative impact of student weaknesses while maximizing student strengths, for the purpose of promoting independence and communication (Parent Ex. BB at p. 1).

The student's district classroom teacher testified that after giving academic lessons, she provided small group instruction (Tr. pp. 392-93). Because the student was less capable of working independently than other students in the classroom, she would use work stations to break tasks into smaller components to address the student's attending difficulties (Tr. pp. 431-34). Furthermore, the teacher would provide 1:1 instruction in accordance with each student's needs, and additionally provided 1:1 prompting and redirection as necessary to the student (Tr. pp. 771-75, 802). She further testified that although the student worked best in a 1:1 setting, he was able to perform in other settings, especially when music was introduced (Tr. p. 805). When presented with "a desktop activity" involving writing, the student required additional 1:1 instruction and redirection, which the classroom staff provided him (Tr. pp. 805-06). She testified that overall, the student could receive more than one hour of 1:1 instruction over the course of a day (Tr. p. 815).

The district classroom teacher indicated that by the start of the 2010-11 school year, the student had mastered all but one of his 2009-10 IEP goals, and that with the use of a scripted social story he was able to use a picture symbol to ask a classmate to be quiet; as noted above, the 2009-10 IEP was still in effect until the new IEP was developed in December 2010 (Tr. pp. 741, 777, 779). At the beginning of the 2010-11 school year, the team assessed the student using a variety of assessment tools and worked on developing new goals for him (Tr. pp. 778-79, 812). The teacher indicated that academically, the student was one of her higher students in reading and that he never scored poorly in reading; that he had participated in reading tasks in the community; that he was able to do most of the work presented to him; and that his reading ability and the use of the aforementioned pictures with corresponding writing such as "be quiet" located beneath the picture enabled the student to redirect his behavior before he got angry and an inappropriate behavior escalated (Tr. pp. 396, 741, 811). According to the teacher, between the development of the December 2010 IEP and his removal from the district, the student made particular progress in his ability to decode and spell words correctly, recognize rhyming words, and understand the concepts of greater and lesser, as well as phonetically spell words when writing sentences (Tr. pp. 398-400, 777). The student had also made progress in identifying community helpers (Tr. pp. 384, 777).

As discussed above, both the student's classroom teacher at the district school and the classroom teaching assistant testified that by the time the student was removed by the parents from the district's 6:1+1 classroom in February 2011, he no longer stared at lights (Tr. pp. 794, 841). The teacher also testified that by the time he left the district's class, the student followed the classroom schedule and routine and walked in line more consistently with the group, did not engage as much in ritualistic behavior, used a social script to control this behavior, fell to the floor less often, and no longer knocked items off tables; furthermore, by January 2011, the student no longer screamed or cried and "was actually very calm" (Tr. pp. 794, 808-09). In addition, the teacher indicated that she observed the student starting to socialize with two peers, particularly during activities he enjoyed such as using the computer, and the student smiled when engaged in a reciprocal tag/chase game with the other two students (Tr. pp. 396-98, 400, 740, 794, 799-801).

Testimony by the speech-language pathologist who worked with the student for approximately two years indicated that by December 2010, the student was independently requesting tools such as a pencil or crayons for school related tasks (Tr. pp. 1093, 1095, 1100). In addition, during literacy-based activities he had mastered the ability to answer "what" and "where" "wh" questions, he independently greeted staff and peers, he was starting to ask questions, his social skills were improving, and he was expressing himself in longer utterances (Tr. pp. 1099-1100, 1117).

The IDEA requires the district to provide the student with an IEP that is "reasonably calculated to enable the child to receive educational benefits" (Rowley, 458 U.S. at 207), but does not require the district to "maximize the potential" of the student (id. at 199, Walczak, 142 F.3d at 130). Based on the above, I find that the hearing record reflects that the IEP was designed to enable the student to receive educational benefits in the 6:1+1 special class placement, the student actually made progress upon the provision of services under the IEP, and the district was not required to provide further 1:1 instruction in order for the student to receive a FAPE for the 2010-11 school year.

VII. Conclusion

Having found that the district offered the student a FAPE for the 2010-11 school year, the necessary inquiry is at an end and I need not determine the appropriateness of the student's unilateral placement or whether equitable considerations support the parents' request for reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]). I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED THAT the IHO's decision is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and directed the district to pay for the student's tuition costs at MCC and for additional related services.

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

JUSTYN P. BATES
STATE REVIEW OFFICER