The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-041

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

Appearances:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to direct respondent (the district) to reimburse their son's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a psychologist, and school district representatives (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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 received diagnoses of autism, an obsessive compulsive disorder (OCD), and hypotonia (Tr. pp. 647-50; Dist. Ex. 10 at p. 4). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8 [c][1]; 8 NYCRR 200.1[zz][1]). In September 2007, the student was unilaterally placed by the parents at the Rebecca School and he has remained there since that time (Tr. p. 654). The Rebecca School has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). During the 2010-11 school year, the student attended the Rebecca School in a classroom composed of eight students, one teacher, and three teacher assistants and received related services including occupational therapy (OT), speech-language therapy, adapted physical education, and music therapy (Tr. pp. 324-25; Dist. Ex. 18 at p. 1).

On February 9, 2011, the CSE convened for the student's annual review and to develop an IEP for the 2011-12 school year (Dist. Ex. 8 at pp. 1-2). The CSE recommended placement of the student in a 6:1+1 special class in a specialized school with a 1:1 paraprofessional and related services on a 12-month basis (id. at pp. 1, 17). However, the district's school psychologist who attended the February 9, 2011 CSE meeting stated that she decided to obtain additional evaluations and reconvene the CSE at a later date because the CSE was unable to obtain sufficient information regarding the student's academic functioning (Tr. pp. 40-41). Subsequently, the school psychologist decided to conduct a functional behavioral assessment (FBA) and updated psychoeducational evaluation prior to reconvening the CSE (Tr. pp. 69-71; Dist. Exs. 7; 8; 14; 15; see Parent Ex. E).

On May 26, 2011, the district completed a psychoeducational evaluation of the student (Dist. Ex. 10 at p. 1).

In a notice to the parents dated June 15, 2011, the district summarized the student's recommended placement for the 2011-12 school year reflected in the February 2011 IEP, and identified the particular school to which the district assigned the student (Parent Ex. H at p. 1).

On June 16, 2011, the district's school psychologist conducted an FBA of the student in the student's classroom at the Rebecca School (Dist. Ex. 3 at pp. 1-3).

On June 17, 2011, the parents signed a contract with the Rebecca School enrolling the student in the school for the 2011-12 school year, and on that same date, notified the district that they were unilaterally placing the student at the Rebecca School for that school year and would seek funding from the district for the placement because the district's February 2011 IEP was inappropriate for the student (Parent Exs. A at pp. 1-2; I at pp. 1, 4, 6). The parents also stated in their June 17, 2011 notice to the district that they had not received a "final notice of recommendation" assigning the student to a particular district school (Parent Ex. A at p. 2).

In a letter from the student's mother to the district dated June 22, 2011, she described a visit she had made to the public school site identified in the June 15, 2011 letter from the district and informed the district that she did not believe the assigned school would be appropriate for the student (Parent Ex. G at pp. 1-2).

On June 23, 2011, the CSE reconvened and recommended that for the 2011-12 school year, the student be placed in a 6:1+1 special class in a specialized school with the services of a 1:1 crisis management paraprofessional, speech-language therapy, OT, and counseling services on a 12-month basis (Dist. Ex. 5 at pp. 1, 16).

On July 22, 2011, the district "re-sent" the June 15, 2011 notice identifying the public school site (Parent Ex. H at p. 1).[1] On July 26, 2011, the student's mother again wrote to the district rejecting the placement and enclosed a copy of the letter she had previously sent on June 22, 2011 (id. at pp. 2-4).

[1] Parent Exhibit H contains a handwritten notation that the June 15, 2011 letter was re-sent on July 22, 2011 (Parent Ex. H at p. 1).

A. Due Process Complaint Notice

In an amended due process complaint notice dated August 24, 2011, the parents asserted that the district had failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year and invoked the student's right to his pendency (stay put) placement (Parent Ex. D).[2] Among other arguments, the parents contended that the behavioral intervention plan (BIP) attached to the student's June 2011 IEP was inappropriate because the FBA conducted by the district was inappropriate, and the BIP was "generic and vague" and did not provide proper guidance to the person implementing it at the assigned school (id. at p. 3). The parents asserted that the IEP should have included a recommendation for parent counseling and training (id.). The parents further contended that the 6:1+1 special class placement recommended by the CSE had insufficient 1:1 instruction, and expressed concern that the recommended paraprofessional on the IEP would not be sufficiently qualified (id.). The parents also noted that the notice identifying the public school site had been sent two times, once based on the recommendations made at the February 2011 CSE meeting and once based on the recommendations from the June 2011 CSE (id. at pp. 4-5). Regarding the assigned school, the parents contended the school was too large, busy and over stimulating; the lack of sensory equipment in the classroom would not meet the student's sensory needs; and the assigned school used "'TEACCH with some ABA,'" while the student required the "Floortime" methodology (id. at p. 5).[3] Lastly, the parents asserted that the unilateral placement at the Rebecca School was appropriate and that equitable considerations favored their request for reimbursement (id.). As relief, the parents sought reimbursement for the cost of the student's tuition at the Rebecca School for the 2011-12 school year (id. at pp. 5-6).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on July 27, 2011 for purposes of determining the student's educational placement during the pendency of the proceedings (Tr. pp. 1-10).[4] The impartial hearing was reconvened on September 13, 2011, to address the merits of the parents' claims and continued on six additional hearing dates, concluding on December 30, 2011 (Tr. pp. 11, 196, 292, 375, 547, 730).

In a decision dated January 20, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 23-24). Regarding the parents' contentions concerning the FBA and the BIP, the IHO found that the FBA was appropriate in that it was developed after observation of the student at the Rebecca School and consultation with the student's teachers, and that the BIP was appropriate because it addressed many, although not all, of the student's problem behaviors (id. at pp. 13-14). The IHO also found that a 6:1+1 special

[2] The hearing record also contains another "amended" due process compliant notice dated July 7, 2011 (Parent Ex. B). The IHO refers to an initial due process complaint notice dated July 5, 2011 in his decision, but this complaint was not included in the hearing record (see IHO Decision at p. 4; Parent Ex. B at p. 1).

[3] In his decision, the IHO identified TEACCH as an acronym for the methodology "Treatment and Education of Autistic and Related Communication-Handicapped Children" and identified ABA as an acronym for "Applied Behavior Analysis" (IHO Decision at p. 21). The program director (director) of the Rebecca School stated that the Rebecca School utilized a "model called DIR, which stands for Developmental Individual Difference Relationship based model" and that the student's program included "Floortime" sessions (Tr. pp. 300-02, 332).

[4] In an interim decision dated July 28, 2011, the IHO found that the student's pendency placement was at the Rebecca School (IHO Interim Order on Pendency at pp. 4-5).

class placement with a 1:1 paraprofessional was sufficient to meet the student's needs and would provide a sufficient amount of 1:1 instruction for the student (id. at pp. 17-19).

With regard to the parents' arguments concerning the classroom at the public school site, the IHO found that the parents' concerns were speculative and that the class would not be overly stimulating for the student because the variety of visual materials in the class were there to aid the students, and the student was not overly distracted by similar materials that were present in the classroom at the Rebecca School (id. at pp. 19-21). Concerning the parents' claim that the student's sensory needs would not be addressed at the assigned school, the IHO noted that there were two gyms in the assigned school and an OT room, that some sensory equipment was available, and that although not every piece of equipment or facility that the parents might want was available, accommodations could have been made at the public school site and the student's needs could be met without a specific sensory gym (id.). Regarding the parents' concerns that the teaching methodologies employed by the assigned school would not be appropriate for the student, the IHO found that ABA instructional techniques had been implemented with the student in the past with success, that a district witness testified that other students had successfully transitioned from the Rebecca School to the assigned school in the past, that methodology was not typically required to be listed on student's IEP unless it is established that a particular methodology is required, and that he was not convinced that the student required the DIR/Floortime methodology employed by the Rebecca School to obtain an educational benefit (id. at p. 21).

Having found that the district offered the student a FAPE during the 2011-12 school year, the IHO determined that it was unnecessary to examine the appropriateness of the Rebecca School or whether equitable considerations warranted tuition reimbursement to the parents (IHO Decision at p. 24).

IV. Appeal for State-Level Review

The parents appeal the IHO's finding that the district offered the student a FAPE during the 2011-12 school year and his denial of their tuition reimbursement claim. The parents first contend that the FBA conducted by the district was inadequate because it failed to provide a baseline regarding frequency, duration and intensity of the student's behaviors; it offered no new information about the student; and did not result in any modifications to the existing BIP. The parents further argue that the BIP was inappropriate. The parents also assert that the recommended 6:1+1 placement would not offer the student sufficient 1:1 instruction. The parents argue that the district's recommended 1:1 paraprofessional could not have provided the student with instructional services, which he required.

The parents assert that the district failed to offer the student a "specific placement" pursuant to the June 2011 IEP because the district only "re-sent" the same notice identifying the public school site that was made pursuant to the February 2011 IEP and offered no evidence that a separate placement decision was made based upon the recommendations in the June 2011 IEP after the CSE meeting. Accordingly, the parents allege that the district failed to implement the student's IEP because the district failed to issue a "placement notice." The parents next contend that the IHO erred in finding that the student's sensory needs would have been met at the assigned school. The parents argue that the IHO's finding that accommodations would have been made to remedy the lack of sensory equipment had the student attended the assigned school was speculative. The parents assert that the IHO erred in finding that there was insufficient evidence in the hearing record to show that the student required a setting that utilized the DIR/Floortime methodology and

the IHO gave insufficient weight to the testimony of the student's teachers and providers from the Rebecca School. Lastly, the parents contend that their unilateral placement of the student at the Rebecca School was appropriate and that equitable considerations supported tuition reimbursement.[5]

In its answer, the district requests that the petition be dismissed in its entirety. The district denies that the IHO erred in determining that the district offered the student a FAPE during the 2011-12 school year. Regarding the parents' concerns with the placement notice, the district contends that it was not improper to send the same notice with a new date after the June 2011 CSE meeting, that the parents were on notice of the assigned school, and that they received the notice before the start of the school year. The district also contends that the IHO correctly found the FBA and BIP to be appropriate. The district contends that the IEP as a whole considered and addressed the student's behavioral needs. Regarding the parents' concern that the paraprofessional assigned to the student would not be qualified, the district contends that there is no right of action regarding qualifications of specific school personnel, and accordingly the IHO correctly did not address this issue. The district also asserts that the IHO correctly determined that the student's sensory needs would be addressed in the assigned school. Regarding methodology, the district contends that ABA has worked for the student in the past, that the program of TEACCH and ABA that was available in the assigned school would have been appropriate and individualized for the student, and that other students had transferred from the Rebecca School to the assigned school with good results in the past. Lastly, the district contends that the unilateral placement at the Rebecca School is not appropriate for the student because it is not providing counseling and that equitable considerations preclude reimbursement.

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.

[5] I note that the parents do not appeal several claims that were raised in their due process complaint notice and addressed by the IHO in his decision (see Pet.). I will address only those issues raised in the parents' petition.

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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 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. 2011-12 IEP

Turning to the parents' challenges to the IHO's decision regarding the adequacy of the IEP developed by the district, I will address each in turn.

1. Special Factors and 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 [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.).[6] 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, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[7]

[6] 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]).

[7] 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

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]).

As discussed above, the hearing record shows that the CSE convened on two occasions to develop the student's 2011-12 IEP (Dist. Exs. 4; 5; 7; 8). Information available to and reviewed by the February 2011 CSE included an October 28, 2010 Rebecca School report from the administration of the Test of Word Reading Efficiency (TOWRE) and the Peabody Picture Vocabulary Test (PPVT), a November 8, 2010 classroom observation of the student at the Rebecca School, a December 2010 Rebecca School Interdisciplinary Report of Progress, and the student's prior school year IEP (Tr. pp. 47-50, 56-59, 61-62; Dist. Exs. 7; 9; 16; 17; 18). On June 16, 2011, the district's school psychologist conducted an FBA of the student in his classroom and during an OT session at the Rebecca School over the course of approximately one hour and 45 minutes (Tr. pp. 95-96; Dist. Ex. 3).

When the CSE reconvened on June 23, 2011, it reviewed the Rebecca School May 2010 Interdisciplinary Progress Report Update, the May 26, 2011 district psychoeducational evaluation report, and the June 16, 2011 FBA report (Tr. pp. 62, 68-69; Dist. Exs. 3; 10; 13). In her FBA report, the school psychologist identified the antecedent to the student exhibiting behaviors that interfered with learning as situations where demands are placed on him with which he does not want to comply (Dist. Ex. 3 at p. 3). Documentation reviewed and considered by the CSE described the student's behaviors as difficulty transitioning from preferred to non-preferred activities, avoiding group activities, loud scripting, running around, leaving the classroom without permission, engaging in aggressive behaviors and self-stimulatory behaviors with his hands, and covering his eyes and ears to limit auditory and visual stimuli, some of which were observed during the FBA (compare Dist. Ex. 3, with Dist. Exs. 4; 7; 10; 16; 18 at pp. 1, 4-7). The FBA report indicated that the student's behaviors "clearly served as an escape/avoidance of a non-preferred task," a statement with which the student's Rebecca School teacher agreed during a conversation with the school psychologist following her observation of the student (Dist. Ex. 3 at pp. 1, 3). According to the school psychologist, the consequence for the student's behaviors was that he received 1:1 support and attention from Rebecca School staff (id. at p. 1).

I note that the student was attending the Rebecca School at the time of the February and June 2011 CSE meetings, and conducting an FBA to determine how the student's behavior related to that environment has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at the Rebecca School and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; see also Cabouli, 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [stating that it may be appropriate to address a

of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

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]). The parents argue that the district's FBA was inappropriate because it was based on less than two hours of observing the student in the classroom and failed to provide any baseline information regarding the frequency, duration, and intensity of the student's behaviors. As to the first allegation, the regulations regarding how FBAs are to be conducted do not provide requirements as to the length of time evaluators should spend observing the student (8 NYCRR 200.22[a]). The hearing record shows that the FBA was conducted by the district after the February 2011 CSE meeting wherein the CSE had reviewed documentation pertaining to the student's behaviors and discussed the student's behaviors with the Rebecca School participants and the parents (Tr. pp. 46-48; Dist. Exs. 7; 8 at pp. 2, 4-5, 18; see Tr. pp. 46-47, 50; Dist. Exs. 16; 18). Prior to preparing the FBA report, the school psychologist observed the student at the Rebecca School both in his classroom and during an OT session, and spoke to the teacher after the observation to confirm her findings (Dist. Ex. 3). She testified at the impartial hearing that she had information about the student's behaviors from the February 2011 CSE meeting that "fit" what she observed during the June 2011 FBA, which was further confirmed by the student's teacher (Tr. pp. 95-96). Therefore, the hearing record supports a finding that the FBA was based upon multiple sources of data as contemplated by State Regulations, and the parents' assertion that the time spent on the observation of the student was inappropriate to gather an accurate description of the student is without merit (8 NYCRR 200.22 [a][2]).

As to the parents' second argument, they are correct that the June 2011 FBA does not contain baseline data about the frequency, duration and intensity of the student's behaviors. The parents further argue that the lack of this information rendered the BIP inadequate in that the BIP failed to include concrete behavioral information to guide those implementing it. As set forth above, 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]). Here, while it is true that the lack of baseline data in the FBA constituted a procedural violation of the State regulations governing the formulation of FBAs (see 8 NYCRR 200.22[a][3]), for the reasons set forth below, I do not find that this procedural violation rose to the level of a denial of a FAPE in this case.

The BIP developed by the June 2011 CSE indicated that when the student was dysregulated, he exhibited behaviors including loud scripting, tantrumming, running around, aggression toward objects and people, covering his ears, leaving the classroom without permission, and engaging in self-stimulatory behaviors primarily with his hands (Dist. Ex. 5 at p. 17). The BIP further stated that the student demonstrated difficulty transitioning from preferred to non-preferred activities (id.). Finally, the BIP indicated that the student's behaviors functioned as a means of letting others know what he was experiencing due to his difficulty communicating, and as a means to escape from/avoid overwhelming demands and unexpected changes (id.). As previously indicated, the information reflected in the BIP describing the student's behaviors is consistent with the information available to and considered by the February and June 2011 CSEs (compare Dist. Ex. 5 at p. 17, with Dist. Exs. 3; 4; 7; 10; 16; 18 at pp. 1, 4-7).

The BIP also included goals to improve the student's ability to maintain a regulated state, identify and utilize coping strategies, eliminate self-directed scripting except as a means to engage others, and transition from preferred to non-preferred activities without dysregulation (Dist. Ex. 5

at p. 17). The school psychologist testified that the BIP was developed at the CSE meetings with the parent and Rebecca School staff who provided information about strategies helpful to the student at that time (Tr. pp. 94-95). According to the BIP, strategies to be implemented included using a classroom picture chart identifying strategies for coping/re-regulation; providing sensory supports such as a compression vest, gum, and "body breaks" scheduled throughout the day; following a sensory diet and oral-motor protocol with sensory supports provided within the student's visual field; providing verbal warnings and preparation for interactions and transitions; providing a written schedule indicating the order of events; and using social stories (Dist. Ex. 5 at p. 17). Additional supports for the student's behavior recommended in the June 2011 IEP were using frequent redirection, repetition, visual cues and prompting, a soft soothing affect, quiet space, and vestibular input (id. at p. 4). The hearing record shows that some of the strategies contained in the BIP were also identified in the information before the CSE (Dist. Exs. 18 at pp. 1, 4-8). The CSE identified the special education teacher, a 1:1 paraprofessional; and counseling, speech-language therapy, and OT as supports to be employed to help the student change the behaviors (Dist. Ex. 5 at p. 17).

According to the school psychologist who attended the February and June 2011 CSE meetings, the parent did not express disagreement with either the description of the student's behavior or, at the June 2011 CSE meeting, the information contained in the FBA report (Tr. p. 90; Dist. Exs. 5 at p. 2; 8 at p. 2). A review of the information provided by the Rebecca School and testimony adduced at the impartial hearing shows that the Rebecca School does not conduct FBAs, nor did the school implement a BIP with the student (Tr. pp. 130-31, 135-36, 405-07, 512, 515-16, 718). The classroom social worker from the Rebecca School who attended both the February and June 2011 CSE meetings testified that she had observed the student exhibit most of the behaviors described in the BIP (Tr. pp. 490-91, 495, 514-16).[8] In light of the above, I conclude that the lack of baseline data in the FBA did not (a) impede the student's right to a FAPE, (b) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) cause a deprivation of educational benefits. Therefore, I decline to disturb the IHO's finding that the parents' objections to the sufficiency of the student's FBA and BIP are without merit (IHO Decision at p. 14; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011] [explaining how even the absence of an FBA may not result in a denial of a FAPE]).

2. 6:1+1 special class with a 1:1 paraprofessional

In the August 2011 due process complaint notice, the parents argued that the recommended placement of the student in a 6:1+1 special class with a 1:1 paraprofessional was not appropriate, in part because the student required "constant 1:1 support from a special education teacher" (Parent Ex. D at p. 3). To support their argument, on appeal, the parents reference a guidance memorandum recently issued by the Office of Special Education in January 2012 which states, in part that:

> One-to-one aides may not be used as a substitute for certified, qualified teachers for an individual student or as a substitute for an appropriately developed and implemented behavioral intervention plan or as the primary staff member

[8] I note that the student's Rebecca School special education teacher during the 2011-12 school year testified that the student benefited from strategies including sensory breaks and social stories to assist the student in regulating his behaviors, which are also recommended in the BIP (Tr. pp. 555-57, 579-81; Dist. Ex. 5 at p. 17).

> responsible for implementation of a behavioral intervention plan. While a teaching assistant may assist in related instructional work, primary instruction must be provided to the student by a certified teacher(s). A teacher aide may assist in the implementation of a behavioral intervention plan, but may not provide instructional services to a student.

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf).[9]

However, upon review of the hearing record, I find that the evidence does not compel the conclusion that the 1:1 support the student required in this case must be provided by a special education teacher, rather, it shows that the 6:1+1 special class placement with 1:1 paraprofessional assistance offered the student a FAPE (see generally A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 499-505 [S.D.N.Y. 2011]).

Information reviewed by the February and June 2011 CSEs from the Rebecca School reflected that the student required frequent adult assistance to provide redirection and to intervene when he engaged in behaviors that interfered with learning (Dist. Exs. 3; 18 at pp. 1, 4-7). In both the December 2010 Rebecca School interdisciplinary report of progress and the June 2011 FBA report, adults from the Rebecca School interacted with the student by attempting to engage him to join a group activity, having him sit on their laps, rubbing lotion on him, physically blocking him from leaving the classroom, tickling him, using a soft, soothing voice, providing sensory input, and verbally affirming his feelings (id.). None of the documents considered by the CSE reflected that the student required 1:1 instruction provided by a special education teacher throughout the school day, and the descriptions of the types of assistance provided to the student in the documentation before the CSE did not show that only a special education teacher could provide the type of support he was receiving (Dist. Exs. 3; 10; 13; 16-18). While the June 2011 IEP indicated that the student "benefits from 1:1 assistance for academics," it does not state that the assistance referred to must be provided by a special education teacher (Dist. Ex. 5 at p. 3). Moreover, as described below, the testimony adduced at the impartial hearing by one of the Rebecca School social workers[10] and the student's mother, who did participate in the development of the student's 2011-12 IEPs, shows the student's need for 1:1 "support," rather than 1:1 instruction by a special education teacher.[11]

In her February 14, 2011 letter to the district, the parent expressed her concern that the 6:1+1 special class with a 1:1 paraprofessional was not appropriate for the student as he "requires more support than can be provided in that program," and that at the February 2011 CSE meeting she had discussed her concern that the student required a more restrictive setting "given [the student's] need for 1:1 support" (Parent Ex. E). The student's mother testified that she wrote the

[9] The Office of Teaching Initiatives has also provided a description of the certification, qualification, and duties of teacher aides and assistants, which is available at http://www.highered.nysed.gov/tcert/career/tavsta.html.

[10] Another of the Rebecca School's social workers attended the February 2011 CSE meeting but testified that she did not say anything during the meeting (Tr. pp. 467, 470-71, 483).

[11] As I have determined that the student did not require 1:1 instruction provided by a special education teacher in addition to the teacher in the 6:1+1 special class, I need not consider the parents' claims regarding the qualification or allowable duties of any paraprofessionals that may have been assigned to the student had the student attended a district's placement.

letter in the hope that the district would have available an 8:1+3 setting or a placement offering "more adult supervision" than a 6:1+1 setting (Tr. pp. 707-08; see Tr. p. 657). When discussing the district's February 2011 6:1+1 special class placement with a 1:1 paraprofessional recommendation, the student's mother testified that she believed that the student needed "more adult supervision in the classroom" specifically from people trained to work with students with autism, and that because the student's needs were very specific, she believed that he "needed more adult support in the room" (Tr. p. 672). Following the June 2011 CSE's recommendation for a 6:1+1 special class placement with a 1:1 paraprofessional, the student's mother continued to state her belief and the belief of Rebecca School personnel that the placement did not provide enough "adult supervision" in the classroom (Tr. pp. 688-89). The hearing record reflects that the parents' position was that the student would not receive sufficient adult support and supervision in the district's recommended program, not that he required 1:1 instruction by a special education teacher.

The student's classroom social worker during the 2010-11 school year from the Rebecca School testified that she attended both the February and the June 2011 CSE meetings (Tr. pp. 490-98). Regarding the CSE's recommendation for a 6:1+1 special class placement with a 1:1 paraprofessional, the social worker testified that she believed "it would be better to have a higher staff ratio" in the student's classroom without a 1:1 paraprofessional, such as the type of staff ratio provided at the Rebecca School (Tr. pp. 492-94, 497-98, 517-18). The social worker stated that the rationale for her opinion was that the student benefitted from a higher ratio in the classroom to foster independence, without one person assigned to him, although she acknowledged that she had never observed the student in any staffing ratio other than the Rebecca School (Tr. pp. 498, 509, 517-18). Her testimony did not indicate that the "higher ratio" the student required include additional special education teachers (see Tr. pp. 488-520).

The hearing record shows that in developing the student's placement recommendation, the June 2011 CSE considered placing the student in special classes with 12:1+1 and 8:1+1 ratios, and a 6:1+1 special class without a 1:1 paraprofessional (Tr. p. 49; Dist. Ex. 5 at p. 15). According to the school psychologist and the IEP, the CSE rejected those placement and support combinations as not providing sufficient support to the student, and acknowledged that the student required 1:1 support throughout the school day to address issues of dysregulation that impeded his ability to function (id.). 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 as described in detail above and State regulations, the June 2011 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with a 1:1 crisis management paraprofessional to provide additional support to the student throughout the school day (Tr. p. 92; Dist. Ex. 5 at pp. 1, 16). In conjunction with this placement, the CSE recommended that the student receive five individual speech-language therapy sessions per week, four individual OT sessions per week, two individual counseling sessions per week, and one session of OT per week in a group of two (Dist. Ex. 5 at p. 16). As also described above in detail, the June 2011 IEP included a BIP and management strategies to address the student's behavioral needs (id. at pp. 3-5, 17). The IEP provided annual goals and short-term objectives designed to improve the student's sensory processing, regulation, and engagement skills (id. at pp. 8-9, 11-13). Thus, the recommendations of the June 2011 CSE acknowledged and addressed for the student's need for 1:1 support and intervention, which he would have received both in the classroom and during the receipt of related services (see A.L., 812 F. Supp. 2d at 504 [finding that the district offered the student a FAPE and noting that the parent had the opportunity to express disagreement regarding the manner in which a 6:1 versus 1:1 student-to-teacher ratio was employed]).

In summary, the hearing record demonstrates that the student required adult support to manage his behaviors which interfered with learning so he could benefit from instruction that would have been provided in the recommended special education program and the 6:1+1 special class placement with 1:1 paraprofessional services. While I can appreciate the parents and the Rebecca School staff's viewpoint that the student should receive 1:1 support only from a special education teacher, this amounts to conflicting viewpoints among educators over the best manner in which to deliver special education instruction and services to the student (see, e.g., J.A. v. New York City Dep't of Educ., 2012 WL 1075843, *9-*10 [S.D.N.Y. Mar. 28, 2012] [resolving conflicting views over the quality and extent of adult support services that must provided to a student]; D.S. v. Hawaii, 2011 WL 6819060, at *10 [D.Hawai'i, Dec. 27, 2011] [commenting that the IDEA does not set forth with specificity the level of adult support services to be provided to particular students]). The IEP in this case was personalized to address the student's needs and the district was not required to maximize the student's potential (A.C., 553 F.3d at 173; T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at *15 [E.D.N.Y. Mar. 30, 2012]). The district was not required to guarantee a specific level of benefit to the student and instead was required to offer an IEP that was designed to offer the opportunity for greater than trivial advancement (A.C., 553 F.3d at 173; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 130; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *5–*6 [S.D.N.Y. 2009]). The district has satisfied this standard and, accordingly, I decline to disturb the IHO's finding that June 2011 CSE recommended an appropriate IEP for the student for the 2011-12 school year.

B. Assigned School and Class

With regard to the parents' contention that the district failed to implement the student's IEP and provide notices to the parents specifying the public school site for the student for the 2011-12 school year, I note that to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"]).[12] The student's mother testified that she received the June 15, 2011 notice identifying the public school site around June 15, 2011 and a few days later on June 21, 2011, she visited and was given a tour of the school (Tr. pp. 676-78).[13] On June 17, 2011, the parents had signed a contract with the Rebecca School enrolling the student there for the 2011-12 school year

[12] The parents initially asserted in their July 7, 2011 amended due process complaint notice that the district had failed to offer a specific school location (Parent Ex. B at p. 4). However, the parents failed to raise the issue in their August 24, 2011 amended due process complaint notice (Parent Ex. D). On appeal, the parents again attempt to raise the allegation that the district failed to offer a specific school location (Pet. ¶¶ 57-60). The IHO did not address this argument as it was not raised in the parents' amended due process complaint notice (see IHO Decision). Having failed to raise this argument in the August 24, 2011 amended due process complaint notice, I find that this contention has been raised for the first time on appeal and is outside the scope of my review (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

[13] The parents' due process complaint notice asserts that the parents' received the June 15, 2011 notice on June 17, 2011 (Parent Ex. D at p. 5).

and they informed the district of their rejection of the assigned school shortly thereafter (Parent Exs. A; G; I). As noted above, the CSE reconvened and generated a new IEP for the student's 2011-12 school year on June 23, 2011, and after the CSE meeting, the district sent another copy of the notice identifying the public school site to the parents with a handwritten date of July 22, 2011 (Tr. pp. 64-68, 74; Dist. Ex. 5; Parent Ex. H). Given that the district's recommended special education services and program for the student remained the same in the June 2011 IEP as what was recommended in the February 2011 IEP, the fact that the district recommended the same assigned school for the student as it did pursuant to the February 2011 IEP did not in itself deny the student a FAPE. Thus, the parents' contention that the district made no placement recommendation pursuant to the June 2011 IEP is unpersuasive. Moreover, given that the parents had already visited the assigned school, rejected it, and unilaterally placed the student at the Rebecca School prior to the June 2011 CSE meeting, I find the parents' contention that they were somehow prejudiced by the timing of the notice of placement after the June 2011 CSE meeting to be unpersuasive as well.

I will next address the parties' contentions regarding the district's selection of the public school site and classrooms. In this case, a meaningful analysis of the parents' claims with regard to the student's sensory needs and educational methodology would require me to determine what might have happened had the district been required to implement the student's IEP.

The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11, 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., 785 F. Supp. 2d at 42). 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]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (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]). In this case, the parents rejected the IEP and enrolled the student at the Rebecca School prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that all of the student's sensory needs would have been addressed and that he would have received an appropriate educational methodology upon the implementation of his IEP in the proposed classroom and school.

Even assuming for the sake of argument that the student had attended the district's recommended school and class, the evidence in the hearing record nevertheless shows that the

6:1+1 special class and 1:1 paraprofessional at the assigned district school would have addressed the student's sensory needs and provided the student with a suitable educational methodology, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see T.L., 2012 WL 1107652, at *14; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L., 812 F. Supp. 2d at 502-03]).

1. Sensory Needs

Assuming the parents had enrolled the student in the public school, the evidence supports the IHO's determination that the absence of a sensory gym would not deny the student a FAPE (see IHO Decision at p. 20). The hearing record provides extensive information about the student's sensory and regulatory needs and describes how the Rebecca School addressed those needs, in part through the use of sensory materials and equipment in the sensory gym (see e.g. Tr. pp. 313-18, 525-30, 533-34, 560-63, 579-81, 651; Dist. Exs. 5 at pp. 3-5, 17; 18 at pp. 1, 4-7). However, a review of the hearing record also shows that the student's sensory and regulatory needs could be addressed with a variety of strategies and techniques, as indicated in reports from the Rebecca School as well as in the June 2011 IEP described above, and that the assigned school could have implemented those strategies.

The site coordinator for the assigned school testified that the school implements the "Champs" program, described in the hearing record as a means to observe students' behaviors throughout the day in different settings, to provide assistance to students needing to regulate their behaviors (Tr. pp. 141, 162-63). The special education teacher of the assigned school classroom testified that she had reviewed the student's June 2011 IEP and her classroom would have been appropriate to meet his needs (Tr. pp. 201-03, 229, 265). Specifically, the special education teacher testified that all the students in her class were classified as students with autism, and that they exhibited needs similar to the student's needs (Tr. pp. 210, 229-31, 235). According to the special education teacher, the assigned classroom provided students with sensory items to manipulate such as a variety of different textured and shaped squeeze balls, textured writing implements, "squishy" pads, different textured squeeze toys, and mats, and that students in the class participated in sensory activities using items such as shaving cream and rice (Tr. pp. 223-24). For students who required sensory breaks outside of the classroom, the special education teacher indicated that staff take students on walks and encourage students to participate in stretching, clapping, playing ball or exercising activities to give students the chance to move about (Tr. p. 225). The special education teacher testified that students in her class also received sensory opportunities during receipt of OT services (id.). To help students maintain regulation, the special education teacher stated that she uses social stories, cards provided to students to request a "break," and sensory breaks (Tr. pp. 235-36). Although at the time of her testimony she did not have any students in her class that required specific sensory items such as gum, she stated she "did not have a problem with that, if that's [the student's] individual need" (Tr. p. 236). The special education teacher indicated that use of a quiet space, soothing affect, social stories, visual supports, sensory breaks as needed and counseling services—all strategies recommended in the June 2011 IEP—were available to the students at the assigned school (Tr. pp. 236-37; Dist. Ex. 5 at pp. 3-5, 17). Given the variety of sensory materials and strategies available to the student at the assigned school, I agree with the conclusion reached by the IHO that the absence of a dedicated sensory gym and specific equipment did not result in a denial of a FAPE because the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way when addressing the student's sensory deficits.

2. Educational Methodology

I will next 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).

On appeal, the parents assert that the "eclectic model" of TEACCH and ABA methodologies used at the assigned school would not be appropriate for the student. A review of the June 2011 IEP shows that no specific teaching methodology for the student was indicated (Dist. Ex. 5). Testimony from the program director of the Rebecca School indicated that a DIR/Floortime model of instruction is the sole methodology used at the school and that it is appropriate for the student (Tr. pp. 300, 331-33, 408-09, 428-29). The program director acknowledged that other methodologies can be effective when teaching students with autism, and that the decision to use a particular methodology is individualized to each student (Tr. pp. 407-08). Although she testified that no other methodology had been tried with the student during the 2011-12 school year, she also stated nothing but the DIR/Floortime method would be appropriate because his difficulties were not behavioral in nature (Tr. pp. 450-51, 463). A review of the hearing record supports a different finding.

The student's mother testified that from the time the student began receiving special education services prior to the age of two, he received instruction using ABA methods until his placement at the Rebecca School at four years of age (Tr. pp. 651-54). She stated that "at the time," ABA was an appropriate methodology for the student, but after two years the ABA instruction "took [the student] as far as he could go" and that it was time to try a new methodology with him (Tr. pp. 659, 693-94). According to the student's mother, the private tutor who worked with the student twice weekly did not use any particular methodology, but used a structured setting and picture schedule to help him anticipate things they would be working on (Tr. pp. 697-99). Picture schedules were used in the student's 2011-12 Rebecca School classroom and the student's special education teacher during the 2011-12 school year testified that although the student needed support to interact with other people, in the classroom, he was "pretty independent" (Tr. pp. 560-61, 615).

The site coordinator for the assigned school testified that although TEACCH and ABA instructional techniques were used at the assigned school, the school attempted to "use different programs based on [] the student's needs" and acknowledged that not every student would benefit from instruction using one particular method (Tr. pp. 141, 177-78). Classrooms in the assigned school provided work stations and visual schedules, and ABA "drills" based upon students' needs (Tr. pp. 177, 226, 28). When asked what "model" was used in the classroom, the special education teacher replied that she provided "very individualized, differentiated instruction throughout the day", and provided examples of how the curriculum was differentiated (Tr. pp. 211-16). The

special education teacher of the assigned class also testified that her classroom was divided into learning areas for small group and 1:1 instruction and that the students remained in close proximity to staff at all times (Tr. pp. 212-13).

The hearing record as a whole indicates that the student had successfully been exposed to methodologies other than DIR/Floortime in the past, and that some strategies, such as the use of visual schedules, that had been in use in the home and the Rebecca School at the time of the impartial hearing were also employed at the assigned school. The hearing record also shows that the student's private tutor did not use only the DIR/Floortime method, and that the special education teacher of the assigned class differentiated instruction to meet students' needs. I therefore agree with the IHO's finding that the hearing record did not establish that the DIR/Floortime methodology was the only appropriate instructional method for the student, and that the assigned school would have provided an appropriate methodology to meet his special education needs.

Based on the above, the hearing record does not support a conclusion that the district would have denied the student a FAPE for the 2011-12 school year by deviating from the student's IEP in a material or substantial way.

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 the Rebecca School 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; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13; 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 DISMISSED.

Dated: **Albany, New York**
May 03, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER