The University of the State of New York

The State Education Department
State Review Officer
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No. 12-050

Application of a STUDENT WITH A DISABILITY, by his parent, 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:
Lewis Johs Avallone Aviles, LLP, attorneys for petitioner, Jennifer Frankola, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Diane da Cunha, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Rebecca School for the 2011-12 school year. Respondent (the district) cross-appeals from the impartial hearing officer's award of additional after school services. The appeal must be dismissed. The cross-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 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

According to the parent, the student has received a diagnosis of a pervasive development disorder, not otherwise specified (PDD-NOS), and has received special education and related services through the Committee on Preschool Special Education (CPSE) and the district's CSE (Parent Ex. A at p. 3). In November 2010, the parent unilaterally placed the student at the Rebecca School (Tr. p. 753). During the 2010-11 school year, the student also received speech-language therapy and occupational therapy (OT) outside of school (Tr. pp. 768-69, 772-73).

At the time of the May 10, 2011 CSE annual review meeting, the student was attending the Rebecca School (Tr. p. 753; Dist. Ex. 1). The CSE determined that the student continued to exhibit global developmental delays and remained eligible to receive special education and related

services as a student with autism (Dist. Ex. 1 at pp. 1, 3-5; see Parent Ex. O at p. 1).[1] For the 2011-12 school year, the CSE recommended placement in a 6:1+1 special class in a specialized school, with full time 1:1 transitional paraprofessional services, counseling, occupational therapy (OT), and speech-language therapy (Dist. Ex. 1 at pp. 1, 16). The CSE discontinued the student's speech-language therapy he had been receiving outside of school, and recommended he undergo a speech-language evaluation to determine the need for "after school services" (Dist. Exs. 1 at p. 17; 2 at p. 2). Upon parent request, the CSE also agreed to conduct an OT evaluation of the student (Dist. Ex. 2 at p. 2).

By final notice of recommendation (FNR) dated June 4, 2011, the district advised the parent of the recommendations of the May 2011 CSE meeting and resultant IEP (Dist. Ex. 3). The FNR noted that the student was recommended for placement in a 6:1+1 special class in a specialized school, the receipt of related services of speech-language therapy, OT and counseling, and notified the parent of the particular school to which the student was assigned for the 2011-12 school year (id.).

By letter dated June 21, 2011, the parent asserted her concern over not being able to contact the assigned school listed on the FNR, and that after appearing unannounced on June 14, 2011, she found the public school site to be unacceptable for the student (Parent Ex. H). The parent notified the district that she was rejecting the assigned school and unilaterally placing the student at the Rebecca School for the 2011-12 school year, and that she would seek tuition at public expense for the 2011-12 school year (id. at p. 4; see also Parent Ex. I).[2] On June 22, 2011, the parent signed a contract with the Rebecca School for the 2011-12 school year (Parent Ex. E). The student attended the Rebecca School during the 2011-12 school year, and in accordance with an August 2, 2011 interim decision in this proceeding, the student also received district funded speech-language therapy and OT services outside of school (Tr. pp. 1, 11-12, 13, 771-72, 809; see IHO Decision at pp. 4-5).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2011, the parent requested an impartial hearing asserting that the district failed both procedurally and substantively to offer the student a free appropriate public education (FAPE) for the 12-month 2011-12 school year (Parent Ex. A).

With respect to the CSE process, the parent asserted that: the CSE failed to consider placement in an 8:1+1 special class in a community school, despite that recommendation from one of the district's staff members; the CSE failed to meaningfully consider private school reports and the parent's input; the CSE did not have proper assessments, including a functional behavioral assessment (FBA) with which to determine the student's present levels of performance; no educational evaluator was present at the CSE meeting; the minutes of the CSE meeting did not accurately or truthfully reflect the discussions held at the CSE; the CSE did not address the use of assistive technology; the CSE predetermined the student's program based on district policy; the

[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Tr. pp. 4-5, 222-23; Dist. Ex. 4; see 34 CFR 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

[2] 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).

CSE did not provide for requested independent educational evaluations (IEEs); the assigned school and program were not discussed during the CSE meeting, thereby depriving the parent of any meaningful participation; the CSE decreased the student's speech-language therapy frequency without an evaluation to justify the decrease; and the CSE did not discuss which teachers and providers would be working with the student at the proposed placement (Parent Ex. A at pp. 4-8).

With respect to the IEP, the parent asserted that the CSE failed to consider the student's physical limitations under the "Special Medical/Physical Alerts" section; the goals and objectives were vague, ambiguous, lacked a method of measurement or were not objectively measurable, did not exist for some of the student's needs, and/or were insufficient to meet the student's needs; the short-term goals were vague and ambiguous; the recommended 6:1+1 placement was insufficient to meet the student's needs; the related services were insufficient, inappropriate, and not individually tailored to meet the student's needs; the IEP services would not promote generalization; the IEP did not indicate how or where the student's adapted physical education would be implemented; no transition plan was developed for the student; the IEP did not contain an FBA or a behavioral intervention plan (BIP); the IEP did not contain the provision of parent counseling and training; the IEP did not adequately address the student's sensory needs; the student's academic management needs were inadequate, and the IEP failed to promote the student's self-sufficiency and independence (Parent Ex. A at pp. 5-8).

In relation to the particular public school site, the parents claimed that the CSE failed to send an FNR to the parent with a specific school, classroom or program as of the date of the due process complaint notice (Parent Ex. A at p. 3). The parent asserted that the assigned school and class were not appropriate for the student and they lacked sufficiently trained or supervised staff who could address the student's unique needs, including providing behavioral support (Parent Ex. A at p. 6).

As a remedy, the parent proposed that the district publicly fund the student's 12-month tuition costs at the Rebecca School, the individual speech-language therapy, OT, and counseling services, and individual parent counseling, all at enhanced rates (Parent Ex. A at p. 8). The parent also requested that the district pay for "independent and comprehensive educational and psychological evaluations" and any transportation costs already incurred, and that the district provide special education transportation services and an aide for the student (id. at p. 9).

In a response dated July 12, 2011, the district listed the reports and evaluations the CSE used in making its recommendations for the student's program and placement, the personnel who attended the CSE meeting, and it asserted that the May 2011 IEP contained measurable goals for academics and related services (Dist. Ex. 9 at pp. 2-4). The district also noted that the CSE had recommended the provision of a transitional paraprofessional, and included goals for the paraprofessional (id. at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 2, 2011 and concluded on December 15, 2011 after six days of hearing (Tr. pp. 1, 18, 82, 288, 499, 658). During the first hearing day the issue of pendency was addressed, and the IHO ordered the district to provide the student with three individual 60 minute speech-language therapy sessions, five individual 30 minute speech-language

therapy sessions, and two individual 30 minute sessions of OT (Tr. p. 13; IHO Decision at pp. 4-5). The second day of the hearing addressed the issuance of subpoenas (Tr. p. 20). In a decision dated January 31, 2012, the IHO found that the May 10, 2011 IEP was neither procedurally nor substantively flawed, that the district had offered the student a FAPE for the 2011-12 school year, but that the parent also demonstrated that an after school program was an essential component to the student's educational program, and as a result, was entitled to public funding the for the student's after school speech-language therapy and OT services (IHO Decision at pp. 22, 24). The IHO also determined that the parent was entitled to an IEE at public expense (id. at p. 22).

In determining that the district offered the student a FAPE for the 2011-12 school year, the IHO found that the May 10, 2011 CSE was composed of all of the required members, the parent fully participated and was given opportunity to express her opinions and concerns, the CSE had ample and appropriate evaluations and reports upon which to base its recommendations, and that the CSE utilized the Rebecca School progress reports, and the reports were thorough concerning the student's present levels of performance, how his deficits were addressed, and the progress he made (IHO Decision at p. 24). The IHO agreed with the parent's claim that the CSE should have waited until it had copies of the student's speech-language and OT evaluation reports, but the Rebecca School reports contained thorough statements of: the student's OT and speech-language abilities and deficits, the manner in which those deficits were addressed, the progress the student made toward his current goals, and a list of future goals (id. at pp. 24-25). Finally, the IHO determined that when taken together, the evaluation reports, classroom observation, social history, and input at the CSE meeting of the parent and the student's Rebecca School teacher regarding the student's academic functioning, abilities, and goals provided sufficient evaluative information to the CSE (id. at p. 25). The IHO also determined that the record did not support that the CSE predetermined the student's program, but that his deficits, performance levels, and management needs were thoroughly discussed by the CSE before a recommendation was made (id. at p. 26).

Regarding the student's IEP, the IHO determined that the hearing record did not support a conclusion that the student required the use of an assistive technology device because the student did not use a device at the Rebecca School and neither the parent or any Rebecca School staff member had indicated he needed one (IHO Decision at p. 25). The IHO also determined that the CSE was not required to perform an FBA or create a BIP because the record indicated that the student did not exhibit violent or aggressive behavior that interfered with his instruction; the student's Rebecca School teacher testified that the student's behavior did not seriously interfere with his instruction and did not require a BIP; and the IEP goals adequately addressed the student's behavior, dysregulation, and transition problems (id.). The IHO also noted that although the Rebecca School reports and the CSE meeting minutes showed that the student exhibited avoidance behavior, classroom teachers could address this behavior without a BIP (id.).

The IHO determined that the goals found in the May 10, 2011 IEP were specific, could be objectively measured, and were appropriate for the student (IHO Decision at p. 25). The IHO noted that the goals were based almost entirely on the Rebecca School progress reports and were drafted by the student's classroom teacher and service providers, and that the goals were discussed at the CSE meeting with input from the teacher and parent (id.). The IHO also credited the testimony of the district's special education teacher/district representative who testified that there were no objections at the CSE meeting to the goals (id.). Finally, with regard to the student's

transition from a nonpublic to a public school, the IHO determined that the IEP contained goals that addressed the transition (id.).

With respect to parent counseling and training, the IHO found that the IEP lacked a provision for parent counseling and training and this service should have been offered (IHO Decision at p. 25). However, the IHO noted that lack of parent counseling and training on an IEP does not constitute a denial of a FAPE, when as is the case here, the public school contained a parent training component, and therefore, lack of this provision on the IEP did not rise to the level of a denial of a FAPE (id. at p. 26).

With respect to the recommendation in the IEP for a 6:1+1 special class placement, the IHO found that this was an appropriate placement, providing the student with an appropriate level of support, structure, and supervision (IHO Decision at p. 26). The IHO also found that a 1:1 paraprofessional would have helped the student transition into the district's program and implemented strategies to deal with the student's dysregulation (id.). The IHO also noted that the district offered the student a greater level of OT and speech-language therapy than he was receiving at the Rebecca School (id.).

With respect to the particular public school site the IHO determined that contrary to the parent's contention, the district was under no obligation to put a specific school site on the IEP, and its only obligation was to provide a placement for the student prior to the beginning of the school year (IHO Decision at p. 26). The IHO also found that the teacher of the proposed classroom had extensive experience teaching students with autism, and testified credibly how she would address the student's academic, social, and behavioral management needs (id.). The IHO also noted that the assigned school has an autism coordinator, parent coordinator, offers workshops and parent training, and could provide all of the student's related services (id. at pp. 26-27). The IHO also credited the assigned school special education teacher's testimony that the student would have functioned at a level similar to other students in the class, that the student had similar management needs to the other students in the class, and that she would have been able to implement the student's IEP goals (id. at p. 27). The IHO also found that the teacher would have been able to appropriately address the student's need for sensory regulation, and that the assigned school could have appropriately accommodated the student's allergies and other dietary and health needs (id.).

Although the IHO found that the district offered the student a FAPE for the 2011-12 school year, and that the assigned school and class were appropriate, he nonetheless determined that the student required a home-based/after school program in addition to his school program in order to receive educational benefit (IHO Decision at p. 27). The IHO credited the parent's testimony that the student had always received a home-based program in addition to his school day program, even during those time periods that the district placed the student at approved private schools (id.). While noting that the speech-language evaluation performed after the May 10, 2011 IEP meeting indicated that the student still required speech-language services, the IHO found that it did not specify the level of service that the student required (id.). The IHO concluded that the student required the same level of speech-language therapy he received when the evaluation was conducted, which included home-based services (id.). The IHO also determined that the parent demonstrated that the student required the home-based services to foster generalization of skills across different environments and people, and to prevent regression (id.).

The IHO further found that the parent was entitled to an IEE at public expense, noting that the parent requested one in her due process complaint notice and she stated during the impartial hearing that she was concerned with the results of the district's psychoeducational evaluation (IHO Decision at pp. 27-28). The IHO noted that the district did not request an impartial hearing to show its evaluation was appropriate and it did not defend its evaluation during the hearing (id. at p. 28).

Having found that the district's "school day program" was appropriate, the IHO did not consider the appropriateness of the Rebecca School, or whether equitable considerations supported the award of tuition reimbursement (IHO Decision at p. 28).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in his determination that the district offered the student a FAPE for the 2011-12 school year. The parent also asserts that the IHO erred when he failed to order "full and comprehensive" IEEs, including a neuropsychological evaluation, at the commencement of the impartial hearing. The parent also asserts that the IHO erred when he failed to remand the student's case back to the CSE in order to develop a new IEP even after finding that the district should pay for an IEE. The parent also asserts that the district did not fully comply with the IHO's subpoenas, and that the IHO erred in continuing the impartial hearing over the parent's objections and continued requests for certain documents from the district.

With respect to the IHO's decision that the district offered a student a FAPE, the parent re-asserts many of her claims contained in her due process complaint notice, including but not limited to, the district failed to conduct an FBA and develop a BIP; the district teacher's testimony should not have been given credit; the district did not develop a plan to assist the student's transition from the Rebecca School to the public placement; even if a transitional plan existed, the district does not employ any titled paraprofessionals who would fill that role; the IHO should have ordered a full and comprehensive set of IEEs, including a neuropsychological; and the CSE eliminated the provision of home-based related services without any evaluative material to justify the eliminations. The parent also asserts that she had no input into the determination of the assigned school. The parent also asserts that the IHO used an improper legal standard of "possibility."

With respect to the assigned school the parent asserts that the classroom could not offer the intensive, cohesive, and properly supervised individualized research based instruction and behavioral support that the student needed. The parent also asserts that the IHO erred in crediting the testimony of the district teacher, because she testified that she used the universal methodology, which does not exist, and that her testimony showed she did not have the specialized training to work with students with autism. The parent also asserts that the functional grouping of the assigned classroom was not appropriate for the student, and that the school lacked the specialized suspended and sensory equipment needed and a sensory gym.

The parent requests that an SRO reverse the IHO's determination that the district offered the student a FAPE and then remand the matter to the IHO with instructions to make findings with respect to the Rebecca School and equitable considerations.

The district answered, asserting that the parent's petition should be denied in its entirety. The district also cross-appeals, asserting that the IHO improperly ordered an after school program

of speech-language therapy and OT services. The district asserts that the IHO should not have ordered relief after finding that a district has offered a student a FAPE, and that the student received home-based services previously because the student's previous in-school services at a prior school were inappropriate. The district also asserts that a public school is not required to provide services outside of school or after school for the purpose of generalizing skills learned during school. The district also asserts that the only evidence to support the proposition that the student would regress without after school services was vague and equivocal. For relief the district requests reversal of the portion of the IHO's order that directed the district to fund after school OT and PT services.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346

F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing and Review

Prior to addressing the merits of the instant case, I note that the parent does not appeal several of the IHO's determinations, including his findings that the present levels of performance and goals contained in the May 10, 2011 IEP were appropriate (IHO Decision at pp. 24-25). Accordingly, these determinations are final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Additionally, A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, at *8 [S.D.N.Y. Mar. 10, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]).

1. IEE

In this case, the IHO ordered the district to fund an IEE (IHO Decision at pp. 27-28).[3] After reviewing the parent's due process complaint notice, I find that it may not be reasonably read as asserting a claim that the parent disagreed with an evaluation that had been conducted by the district or requested an IEE as contemplated by the regulations, but only that the parent sought additional evaluations of the student as a remedy for other perceived deficiencies for the first time in the hearing request (see 8 NYCRR 200.5[g][1]; Parent Exs. A; H). Additionally, while the hearing record contains some testimony relating to this issue (Tr. pp. 242-43), there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing or that the parent requested to amend her due process complaint notice. "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Accordingly, I find that the IHO erred in addressing this issue that was not raised in the parent's due process complaint notice and I will not address the merits of this issue further in my decision (B.P. v. New York City Dep't of Educ., 2012 WL 33984, at * 4

[3] The IHO noted that the parent complained about the psychoeducational evaluation in her due process complaint notice and ordered an IEE (IHO Decision at p. 28). In contrast, the parent asserted in her petition for review that the IHO failed to order a neuropsychological IEE (Pet. ¶ 6).

[E.D.N.Y. Jan 6, 2012]; see M.R., 2011 WL 6307563, at *12-*13; M.P.G., 2010 WL 3398256, at *8).

B. Minutes of the May 2011 CSE Meeting

With regard to the parent's claim that the minutes of the May 2011 CSE meeting were "inaccurate" and did not reflect what was discussed at the meeting, I have reviewed the hearing record and I am not persuaded by the parent's assertion. First other than the conclusory allegation, the parent does not actually allege any facts that were inaccurate, leaving little or nothing for the district to prove with respect to this issue. Furthermore, during the impartial hearing it became clear that the claim has no basis in fact insofar as the parent testified that when she received a copy of the minutes, she did not actually review them, and instead just gave them to her attorney (Tr. p. 829). Therefore, I find the parent's claim with regard to the alleged inaccuracy of the CSE meeting minutes is without merit.

C. May 2011 IEP

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 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.).[4] 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,

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

duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[5] 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]).

In this case, the hearing record shows that the participants at the May 2011 CSE meeting included the student's mother, a special education teacher who also acted as the district representative, a school psychologist, a Rebecca School social worker, the student's Rebecca School classroom teacher, and an additional parent member (Dist. Ex. 1 at p. 2). According to the district representative, the CSE reviewed January 2011 and May 2011 Rebecca School interdisciplinary progress reports, a January 5, 2011 classroom observation report, an April 19, 2011 psychoeducational evaluation report, and an April 19, 2011 social history (Tr. pp. 218, 220-21, 264; Dist. Exs. 4-8).

The hearing record reflects that the district did not conduct an FBA of the student (see Tr. pp. 332-35). I note that the student was attending the Rebecca School at the time of the May 2011 CSE meeting (Dist. Ex. 8). Assuming for the sake of argument that the district was required to conduct an FBA, under these circumstances, 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 the responsibility of identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]).

As further described below, the hearing record as a whole also supports the IHO's conclusion that the student did not require an FBA or a BIP (IHO Decision at p. 25). The information reviewed by the May 2011 CSE regarding the student's behaviors indicated that overall the student's demeanor was "calm," but that he could become over stimulated, un-regulated or upset when he did not get his way immediately, or was asked to transition from a highly motivating activity to a less-preferred activity or out of the classroom when he did not understand the reason for doing so (Dist. Exs. 6 at pp. 2-3; 7 at p. 1; 8 at p. 1). At these times, the student exhibited behaviors including verbally expressing his anger and frustration, removing himself from the situation, dumping classroom items around the room, refusing to participate in the non-desired activity, and demonstrating avoidance behaviors such as hiding his face in his shirt, going into a tent in the classroom, attempting to engage adults in games, and kicking objects (Dist. Exs. 6 at pp. 2-3; 7 at pp. 1, 7; 8 at pp. 1, 6). According to the January 2011 progress report, episodes

[5] 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]).

of the student's dysregulation lasted approximately 5-10 minutes, and since the beginning of the 2010-11 school year, Rebecca School staff had noted a significant increase in the student's ability to become regulated in a shorter amount of time and reenter the situation that had caused him to become angry or upset (Dist. Ex. 7 at p. 1). The May 2011 Rebecca School progress report indicated that since December 2010, the student had exhibited a decrease in his avoidance of non-preferred classroom activities, and his frustration level (Dist. Ex. 8 at p. 1). The May 2011 progress report also noted improvement in the student's ability to participate in activities he did not find motivating, and his ability to express how he was feeling (id.). Staff at the Rebecca School reported that the student required firm and direct verbal reminders and gestural cues to assist him during transitions between activities, and that compromising with the student and providing a "break" prior to beginning a non-preferred activity had helped to reduce avoidance behaviors (Dist. Exs. 7 at p. 1; 8 at p. 1). Other strategies employed included talking 1:1 with the student about classroom rules and expectations, moving him away from items he used to avoid completing the requested task, and modeling slower speech, reduced language complexity, and deep breathing (Dist. Ex. 7 at p. 1).

Similar to the documentation that the CSE reviewed, the present levels of social/emotional performance contained in the May 2011 IEP were developed from discussion at the CSE meeting with the student's classroom teacher, the social worker, and the district's school psychologist (Tr. pp. 234-35; Dist. Ex. 2). The district representative testified that the student's Rebecca School teacher reported to the May 2011 CSE that the student's behavior did not seriously interfere with classroom instruction, and could be addressed by the special education teacher (Tr. pp. 239-41, 425; Dist. Ex. 2 at p. 2).[6] The IEP indicated among other things, that recent reports described the student as "generally calm," but that he could become over stimulated, un-regulated or upset when he did not get his way immediately, had to stop a preferred activity, or when he needed to transition out of the classroom and did not understand the reason for doing so (Dist. Ex. 1 at p. 4). The IEP further noted that the student may use a variety of techniques to avoid non-preferred activities (id.).

The May 2011 CSE concluded that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher; therefore there was no need to develop a BIP (Tr. p. 239; Dist. Ex. 1 at p. 4). To address the student's behavioral needs, the May 2011 CSE developed annual goals to improve his understanding of feelings, use self-regulating strategies with assistance, and his ability to ask to speak with an adult when frustrated (Tr. pp. 236-37; Dist. Ex. 1 at pp. 11, 13). The CSE recommended the use of co-regulation strategies such as an adult talking with the student 1:1 using a calm, soothing tone, limited language, and deep breathing models (Dist. Ex. 1 at p. 4). The May 2011 IEP provided the student with redirection, repetition, sensory input and breaks, visual and verbal cues, teacher support to help the student choose sensory tools that will help him re-regulate, and recommended that adults use clear, firm limits, and reminders of the rules and expectations (id. at pp. 3-4). The CSE recommended that adults use compromise to keep the student engaged, and provide him with access to sensory materials and tools throughout the day, and advance warning of transitions (id. at p. 4).

[6] Although not dispositive, the district representative further testified that the parent did not request that the district conduct an FBA or develop a BIP for the student (Tr. pp. 241, 425).

Based on the foregoing evidence, I find that it was reasonable for the CSE to conclude that the student did not exhibit behaviors that interfered with his instruction or that of the other students to the extent that the district was required to conduct an FBA and develop a BIP (8 NYCRR 200.22 [b]). I also find that the district had obtained and considered information sufficient to identify the student's problem behaviors and the strategies/goals used to address the behaviors, which were reflected in the May 2011 IEP (8 NYCRR 200.22 [a][2], [3]; Dist. Ex. 1 at pp. 4, 11, 13).

2. Related Services

With regard to the parent's assertions that the district failed to obtain evaluative data to justify reducing the student's levels of related services, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Additionally, a CSE is not required to use evaluative information from its own sources only in the preparation of an IEP and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80).

a. Speech-Language Therapy

In this case, evaluative information reviewed by the May 2011 CSE about the student's communication skills indicated that although he maintained minimal eye contact, he was friendly and cooperative, established a rapport with the evaluator, and responded to all questions and worked on all tasks asked of him during the April 2011 psychoeducational evaluation (Dist. Ex. 4 at pp. 1-2, 4). The student was able to state who he lived with, the month and day of his birthday, the name of his school, the names of friends at school, what he enjoyed/disliked about school, and what he enjoyed doing at home during leisure time (id. at p. 1). According to the evaluator, the student initially appeared to understand directions and instructions in the testing situation; however, experienced more difficulty remaining on topic as the evaluation progressed and his attention waned (id.). During times when the student was off-topic, the evaluator reported that he was easily redirected back to task (id.). The April 2011 social history indicated that according to the parent, the student made up stories and used sentences of three to five words in length (Dist. Ex. 5 at p. 2). The parent reported that the student had been on play dates and played well with a cousin (id.).

During the January 2011 classroom observation of the student at the Rebecca School, the district school psychologist reported she observed the student responding to preference questions, identifying pictures on a poster, identifying the title of the book the poster pictures came from, and answering questions about a picture he drew (Dist. Ex. 6 at pp. 1-2). The student was also observed initiating questions to an assistant teacher and engaging in continued conversation with her, counting verbally using 1:1 correspondence, naming several musical instruments, developing a title for his poster, and writing his name on it (id. at p. 2). When unsure how to spell a word, the student expressed that he was afraid of making an error while writing on his poster and indicated that he did not know what letter came next in the word (id.). According to the school psychologist, as he began to exhibit agitation, the student further expressed that he did not want to participate in a morning meeting activity and appeared to verbalize a "script" utterance (id. at p. 3). The student was observed to verbally engage in a group morning meeting activity, respond with the activity that came next in the sequence, comment about being stuck in a blanket, request assistance from an assistant teacher, and spontaneously apologize for accidentally stepping on an assistant teacher's fingers (id.). The observation report indicated that the student attempted to interact with a peer, and persisted in his attempts despite the peer's disinterest (id.). The school psychologist noted in her observation report that the student's "verbal skills appeared to be significantly higher [than] that of his peers within the classroom" (id. at p. 2).

January and May 2011 interdisciplinary progress reports prepared by Rebecca School staff indicated that the student is a verbal child who primarily used multiple words and full sentences to communicate throughout the day (Dist. Exs. 7 at p. 1; 8 at p. 1). The reports stated that the student asked "why" questions about his daily schedule, verbally expressed frustration and displeasure when told he could not engage in a preferred activity, used language to express his opinion about a non-preferred activity, and engaged in "compromise" with staff about the length of a requested break (id.). The May 2011 report indicated that during the course of the school year the student had improved his ability to verbally express how he was feeling, and his ability to stay connected to the individual he was talking to for longer periods of time (Dist. Ex. 8 at pp. 1-2). Rebecca School staff also reported a decrease in the student's conversation topic "scatter" and an increase in his ability to remain on topic about things directly related to his school day (id. at p. 7).

In May 2011, the student was able to open and close more than 50 circles of communication about highly motivating activities with a preferred adult (id. at p. 2). The progress report indicated that the student was working on sustaining a topic, and communicating his ideas in a fluent, cohesive manner (id.). The student exhibited an interest in peers, and verbally related positive experiences to them with adult support (id.). As of May 2011, Rebecca School staff reported the student exhibited progress regarding pretend play skills, allowing staff to join him in his scripts and verbal play scenarios (id.). The student's 2010-11 Rebecca School speech-language pathologist reported that language sessions focused on developing the student's expressive and receptive language, and his engagement and pragmatic language skills with peers and adults (id. at p. 6). Goals developed by the Rebecca School in May 2011 included improving the student's ability to remain in a conversational exchange with adults and peers, ask for a break or to talk with a teacher, request that an adult read a book to him, identify peers by various characteristics, initiate activities with peers, answer "wh" questions, use language to communicate his feelings, follow two and three step directions, produce complex, grammatically complex sentences during various activities, and produce narratives given support (id. at pp. 7-12).

The May 2011 IEP present levels of performance indicated that the student answered a variety of "wh" questions about familiar stories, that he understood concepts such as "big, medium, small" and identified objects accordingly, and that he was developing understanding of positional concepts and the ability to sequence five to seven step directions (Dist. Ex. 1 at p. 3). The IEP stated that when calm and regulated, the student easily related to and engaged with adults in the classroom; typically initiating interactions with adults by calling their name or asking a question (id. at p. 4). Although the student exhibited more difficulty relating and engaging with peers, he demonstrated the ability to initiate interactions with peers but required support to sustain the interaction (id.). At times the student's engagements were "fragmented as he jumps from topic to topic;" however, the IEP indicated that he was extremely interested in talking to people and communicated in complete sentences (id.). The student preferred to talk about topics familiar to him, and "struggled" to remain in interactions when the topic was expanded (id.).

Annual goals and short-term objectives provided in the May 2011 IEP addressed the student's need to identify vocabulary words related to his environment and stories read in class, answer a variety of "wh" questions, seek out an adult to read a book to him, demonstrate understanding of size, quantity, and positional concepts, initiate and sustain shared social problem solving sequences, communicate ideas for work or play activities, identify pictures that match sounds, maintain logical and continuous flow of communication with adults and peers with supports, follow two to three step directions, produce complex grammatically complex sentences, and simple/cohesive narratives with support, initiate interactions with peers, and ask adults to discuss his feelings (Dist. Ex. 1 at p. 6-13).

The May 2011 CSE recommended that the student receive five 30-mintue sessions of speech-language therapy per week consisting of three individual sessions and two sessions in a group of two (Dist. Ex. 1 at p. 16). According to the district representative, the CSE based its recommendation on information contained in the January and May 2011 Rebecca School progress reports, which indicated that the student in January 2011 the student received three individual speech-language therapy sessions, but by May 2011 he received two individual sessions and one session in a group with one other student per week (Tr. pp. 226-27, 422-24). The district representative stated that the CSE continued the January 2011 recommendation of three individual

speech-language sessions to address his receptive and expressive language skill needs, and recommended that he receive two group sessions to address his need to initiate and maintain communication with peers (Tr. p. 227).

The hearing record reflects that the May 2011 CSE was aware that the student had been receiving speech-language therapy outside of the Rebecca School during the 2010-11 school year (Tr. pp. 337, 394; Dist. Ex. 2 at p. 2). According to the school psychologist, the CSE considered the frequency of speech-language therapy provided to the student by the Rebecca School, and modified that amount in the May 2011 IEP (Tr. pp. 371-72; Dist. Ex. 1 at p. 2). Although the CSE did not recommend services outside of school, it provided three individual sessions and two group sessions per week (compare Dist. Ex. 1 at p. 16, with Dist. Ex. 8 at p. 6). The school psychologist testified that the CSE did not recommended speech-language therapy outside of the school day for the student because it believed the student's educational needs would have been met in the recommended program with daily speech-language therapy and supports (Tr. pp. 230, 337-38). [7]

Based on the foregoing, I find that the CSE had sufficient evaluative information to determine the student's speech-language needs. I also find that the amount of speech-language therapy the district offered was reasonable). While the IDEA required the district to ensure that the student had been adequately evaluated to ascertain his needs, contrary to the parent's contention, it was not required that the CSE in this case to go further from that point and "justify" its decision to make modifications to the speech-language services as described in the IEP through additional evaluations, because the IDEA does not specify a particular level of educational benefit that must be provided through the IEP (Rowley, 458 U .S. at 189; Walczak, 142 F.3d at 130; S.F. v. New York City Dept. of Educ., 2011 WL 5419847, at *13 [S.D.N.Y. Nov. 9, 2011] [noting that once access to appropriate educational services is provided, no particular level of education is guaranteed]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *3 [S.D.N.Y., Sept. 22, 2011]).[8]

[7] The May 2011 CSE recommended that a speech-language evaluation of the student be conducted to determine the need for speech-language therapy outside of school, which occurred on June 7, 2011 (Tr. p. 339; Dist. Exs. 2 at p. 2; 14). A review of the evaluation report reveals that the student exhibited similar communication skills and deficits as those described in the January and May 2011 Rebecca School progress reports that the May 2011 CSE considered (compare Dist. Exs. 7 and 8, with Dist. Ex. 14). The June 2011 evaluation report recommended that the student receive speech-language therapy to improve his pragmatic, receptive, and expressive language skills (Dist. Ex. 14 at p. 4). The school psychologist testified that the CSE did not reconvene after receipt of the speech-language evaluation report because the May 2011 IEP already provided the student with speech-language therapy services (Tr. p. 340).

[8] The IDEA's scheme provides safeguards to assist parents in having sufficient information to participate in the development of an IEP. In a prior written notice to be given to the parents, districts are required to describe why it proposes or refuses to changed or initiate a student's services and provide a description of each evaluation, procedure, assessment, record or report that was used as a basis for the proposed or refused action (see 34 CFR 300.503; 8 NYCRR 200.5[a][5][ii]). As noted above, if a parent disagrees with an evaluation conducted by the district, the parent may request an IEE at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]), which must then be considered by the CSE (34 CFR 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]).

b. Occupational Therapy

According to January and May 2011 Rebecca School progress reports, the focus of the student's OT sessions at the Rebecca School was providing sensory input to help the student maintain regulation and attention, and developing sequences of motor plans while expanding on shared attention, interaction, and problem solving skills (Dist. Exs. 7 at p. 6; 8 at p. 5). The progress reports described the student's sensory needs, and difficulty with motor planning and visual spatial processing (Dist. Exs. 7 at pp. 6-7; 8 at p. 5). Information considered by the May 2011 CSE reflected that the student was able to navigate around the school environment, write in both upper and lower case letters, use scissors, and draw pictures (Dist. Exs. 4 at p. 3; 5 at p. 2; 6 at p. 2; 7 at p. 6).

As described above, the May 2011 IEP provided descriptions of the student's sensory needs and recommended supports to address those needs (Dist. Ex. 1 at pp. 4-5). The May 2011 Rebecca School progress report indicated that progress toward annual goals in the areas of sensory processing, motor planning and sequencing, and visual spatial skills had been made; however, more time with the goals was still needed (Dist. Ex. 9 at pp. 9-10). The May 2011 CSE recommended continuing the student's annual sensory processing, motor planning and sequencing, and visual spatial goals as set forth in the May 2011 Rebecca School progress report (compare Dist. Ex. 1 at pp. 8-9, with Dist. Ex. 8 at pp. 9-10).

The school psychologist testified that the parent informed the May 2011 CSE that the student was receiving OT services outside of school (Tr. pp. 341-42). At the Rebecca School during the 2010-11 school year the student received one individual session and one group session of OT per week (Dist. Ex. 8 at p. 5). Although the May 2011 CSE did not recommend that the student receive OT outside of school, it modified the student's then-current level of OT services by recommending he receive three individual and two group sessions of OT per week for the 2011-12 school year (Dist. Ex. 1 at p. 16). The school psychologist testified that the CSE did not recommended OT outside of the school day for the student because it believed the student's educational needs would have been adequately addressed in the recommended program with daily OT and the supports provided in the IEP (Tr. p. 230).[9]

The hearing record supports the IHO's conclusion that the May 2011 CSE had adequate information about the student's skills and needs upon which to base its recommendation (IHO Decision at pp. 24-25). It also showed that the CSE considered the student's communication, sensory, motor planning and sequencing, and visual processing needs, and made speech-language and OT service recommendations accordingly (Tr. pp. 218, 220-21, 264; Dist. Exs. 1 at p. 16; 4-8). While it is understandable that the parent would like to continue the student's related services outside of school, based upon the information reviewed and considered by the CSE, I find that the

[9] At the May 2011 CSE meeting the parent requested and the district agreed to conduct an OT evaluation of the student (Dist. Ex. 2 at p. 2). The hearing record showed that the OT evaluation did not occur due to scheduling difficulties (Tr. pp. 844-48, 853-55). Although I do not find the absence of an OT evaluation at the time of the May 2011 CSE meeting to have diminished the CSE's ability to develop appropriate OT recommendations, if it has not been done already, I encourage the district to conduct the OT evaluation as previously agreed to.

speech-language and OT recommendations provided in the May 2011 IEP were sufficient to address the student's needs.

c. Transitional Support Services

On appeal, the parent argues that despite knowledge of the student's difficulty with "'transition,'" the district failed to develop a "transition plan" to help the student move from the DIR/Floortime instructional setting at the Rebecca School to the district's placement at the assigned school.[10] It has been held that the IDEA does not specifically set forth provisions requiring a school district to formulate a "transition plan" as part of a student's IEP when a student moves from one school to another (A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *12 [S.D.N.Y. Aug. 19, 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. Jan. 24, 2011]). Consequently the parent's argument that a transition plan was required must be dismissed.

I also note that State regulations require that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). In this case, all of the students in the assigned classroom for the 12-month 2011-12 school year were classified as students with autism (Tr. pp. 105, 143-44). Therefore the district was not obligated provide transitional support services for the student's teacher in the IEP.

Even assuming for the sake of argument that IDEA or State regulation procedures require the formation of a transitional support plan or transitional support services in the IEP, based on the evidence described below, the parent's assertions would not rise to the level of a denial of a FAPE. The district representative testified that the May 2011 CSE recommended placement of the student in a "highly structured 12-month[] program with a very small student to teacher ratio, six students to one teacher and one paraprofessional" (Tr. p. 223). For "transitional purposes" the CSE also recommended that the student receive the assistance of a full time 1:1 transitional paraprofessional (Tr. pp. 223, 226; Dist. Ex. 1 at p. 15). The hearing record also reflects that the recommended 1:1 paraprofessional was to assist the student not only in his transition from the Rebecca School to the district's placement, but also to provide the student with support to achieve goals which addressed

[10] To the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student has not yet attained age 15 (see Dist. Ex. 1 at p. 1).

his behavioral needs (Tr. pp. 226, 239, 406-07; Dist. Ex. 1 at p. 13).[11] Specifically, the May 2011 IEP includes two annual goals and corresponding short-term objectives to be implemented with the assistance of the 1:1 transitional paraprofessional, the first designed to improve the student's ability to maintain regulation in the classroom throughout the day and during challenging situations by using self-regulation strategies developed through co-regulating interactions, and improving the student's ability to seek out an adult to discuss his feelings (Dist. Ex. 1 at p. 13). The second annual goal and related short-term objectives indicated that the 1:1 transitional paraprofessional would help the student improve his ability to remain in a continuous flow of interaction across a range of emotions, by initiating an interaction with a peer, and remaining in an interaction with an adult during a non-preferred activity (Dist. Ex. 1 at p. 13).

d. Parent Training and Counseling

The parent contends that the May 2011 IEP failed to provide for the provision of parent counseling and training. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M., 583 F. Supp. 2d 498, 509; but c.f., P.K., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011], adopted at, 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).[12]

In the instant case, although the provision of parent counseling and training was not set forth in the May 2011 IEP in violation of the procedures for formulating an IEP, the hearing record reflects that such services were available at the assigned school. At the impartial hearing, the special education teacher of the assigned class testified that the assigned school had different kinds

[11] According to the district representative, all of the annual goals contained in the May 2011 IEP were reviewed at the CSE meeting, and Rebecca School staff did not offer objections to any of the annual goals (Tr. pp. 236-37; Dist. Ex. 2 at p. 2).

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

of workshops and programs for parents of students with autism (Tr. pp. 101, 103, 139). The teacher also testified that the parent coordinator at the assigned school would contact the parent; that some of the workshops and programs were provided by outside agencies, that the parent coordinator requests parents attend; and the agencies provided transportation to some of the programs (Tr. p. 140). The district representative at the May 2011 CSE meeting also testified that she informed the parent that all of the district's special classes have a component of parent training, and because each parent's needs are different and vary from time to time, the CSE does not develop goals; rather, the parent training is part of each school's program (Tr. pp. 241-42, 345-46; Dist. Ex. 2 at p. 1).

A deficiency in a single component of the IEP may not suffice to conclude that an IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies])Given that parent counseling and training was available at the assigned school, I find under the circumstances of this case that the district's failure to incorporate parent counseling and training into the February 2011 IEP did not result in any substantive harm, nor did it, in this case, rise to the level of a denial of a FAPE to the student (see C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

Having carefully reviewed the evidence relevant to the parent's claims regarding the IEP, I find that the evidence described above supports the conclusion that the IEP was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

D. Assigned School

The parent also makes several assertions regarding the specific classroom and school to which the student had been assigned, but did not actually attend or take services under the proposed IEP. In this case, a meaningful analysis of the parents' claims with regard to the student's particular public school assignment 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 [N.D.N.Y. Aug. 21, 2008], aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F.

Supp. 2d 28, 42 [S.D.N.Y. 2011]). 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 (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southhold Union Free Sch. Dist., 2011 WL 3919040, * 13 [E.D.N.Y. Sept. 2, 2011]; A.L., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 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 parent 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 the student had been grouped appropriately upon the implementation of her IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in 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 (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

1. School Building/Classroom Selection

One of the parent's assertions is that she was not provided the opportunity to provide input into the school assignment process and that the decision as to which school the student would be assigned was made after the May 2011 CSE meeting.[13] Federal and State regulations specify that parents have the right to participate in meetings to determine the "identification, evaluation and educational placement of the child" (34 CFR 300.501[b][1][i]; A.L., 2011 WL 4001074 * 11; S.F., 2011 WL 5419847 * 12 [S.D.N.Y. Nov. 9, 2011]). In A.L., the court noted however that this right extends "only to the general type of educational program in which the child is placed" (citing Concerned Parents v. City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). In S.F., the court further clarified that parents do not have the right under the IDEA to visit a proposed school or classroom before the recommendation is finalized or prior to the start of the school year. Furthermore, while parents must be afforded the opportunity to participate in the formation of an educational program—the classes, individualized attention, and additional services—they are not entitled to determine the bricks and mortar of an actual school's location (T.Y., 584 F.3d 412, 419). The United States Department of Education (USDOE) has also clarified that a school district "may

[13] The parent also asserts on appeal that the district failed to prove that its program for the 2011-12 school year was appropriate for the entire 12-month school year because the composition of the students and teachers changed in September. However, the district was not required to prove the successful implementation of the student's IEP for each and every day of the school year after the parent had unilaterally placed the student.

have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).

In this case, the parent was present at, and meaningfully participated in, the May 2011 CSE meeting (see Tr. pp. 707, 713-15). The hearing record also shows that district provided the parent with notification of the assigned school (see Dist. Ex. 3). Furthermore, although not required by the IDEA or the Education Law, the parent did visit the assigned school offered by the district, and based upon her visit, she rejected the assigned school prior to the start of the 12-month school year recommended for the student for the 2011-12 school year (see Parent Ex. H). Thus, the hearing record shows that the district complied with, and exceeded its procedural obligations (S.F., 2011 WL 5419847, at *12). In light of these facts, the prevailing statutory and regulatory framework, and the interpretive case law, I find the parent's assertion that the district failed to provide her with sufficient input into the placement of the student is without merit.

2. Methodology

The parent also asserts that the IHO erred in giving weight to the district's special education teacher when she testified that she used the "universal" method of instruction. Although an IEP must provide for specialized instruction in a student's areas of need, 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]; A.S. v. New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; 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 a Student with a Disability, Appeal No. 09-092; 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).

Assuming for the sake of argument that the student had attended and remained in the particular classroom to which the district assigned the student, the hearing record shows that students in the particular 6:1+1 special class at the assigned school received instruction through a variety of teaching methods and strategies (Tr. pp. 108-110, 117-22, 173-75, 177). For example, to help the students relax and prepare to transition to academic work, they participated in a "get ready to learn" activity involving yoga (Tr. pp. 108-09). The special education teacher at the assigned school indicated she used Touch Math, a program to help students with autism learn math skills such as counting, adding and subtracting, and Starfall, a reading program that students access on the internet (Tr. pp. 109-110, 175, 177). She used a behavior modification chart that displayed faces showing different expressions to help students understand their behavior (Tr. pp. 117-18).

The special education teacher also used a visual schedule with words and pictures to make students aware of their daily routine (Tr. pp. 118-19). In her classroom, the special education teacher used manipulatives such as dice, dominoes, flash cards, and numbers with touch points (Tr. p. 122). Students were exposed to the Mayer-Johnson symbol system which consists of pictures/words for a wide variety of objects and concepts (Tr. pp. 174-75). As described above, the special education teacher also incorporated a variety of sensory materials into her instruction (Tr. pp. 118-21). The special education teacher indicated that she used different teaching method techniques and "whatever works" to instruct the students in her class depending on what she is teaching at the time (Tr. pp. 173-74).

Based on the foregoing, I find that the hearing record supports a finding that had the student attended the assigned 6:1+1 special class, the special education teacher had the ability to implement a variety of teaching methods, and was capable of adapting instruction to address his special education needs in conformity with his IEP.

3. Functional Grouping

With regard to the parent's claim related to grouping the student in the assigned classroom, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, the hearing record indicates that the district was capable of appropriately grouping the student for instruction and socialization in the event he had been enrolled in the public school. The special education teacher at the assigned school testified that she reviewed the

student's May 2011 IEP and that he could have been appropriately placed in her class because he exhibited many of the same "disabilities" as most of the students in her class (Tr. pp. 101, 103-04; Dist. Ex. 3). Beginning in July 2011, the 6:1+1 special class identified for the student was composed of four students between eight and nine years of age who were classified as students with autism, and who demonstrated reading, mathematics, and writing skills between a first and third grade level (Tr. pp. 104-05, 143-44, 157-58).[14] At that time, two of the four students communicated verbally, and two students used augmentative communication devices due to unclear speech (Tr. pp. 105-06). All of the students had BIPs (Tr. p. 182).

The May 2011 IEP indicated that the student was verbal, his reading and spelling skills were at an early first grade level, and his math skills were at a kindergarten level (Dist. Ex. 1 at pp. 3-4). Although the student did not require a BIP, as discussed above, he nevertheless exhibited behaviors that needed to be addressed through the services provided in the May 2011 IEP (id. at pp. 3-5, 16). Although the parent claims that as of July 2011 the functioning levels of the students in the assigned class "were not appropriate" for the student, the hearing record shows that in July 2011, the student exhibited academic, communication, and behavioral skills and needs similar to those students in the assigned school's 6:1+1 special class, and therefore I decline to find the district would not have followed procedures and appropriately grouped the student if he had attended the public school.

4. Sensory Equipment and Gym

With regard to the parent's contentions that the assigned school lacked sensory equipment and did not have a sensory gym, a school district is not required to furnish "every special service necessary to maximize each handicapped child's potential," provide the optimal level of services, or even a provide level of services that would confer additional benefits (A.H., 2010 WL 3242234 at *3 [2d Cir. Aug. 16, 2010]; Cerra, 427 F.3d at 195; D.B. v. New York City Dep't. of Educ., 2011 WL 4916435, at *12 [S.D.N.Y. Oct. 12, 2011] [although IEP did not provide student with all of the services her parents would have liked and which were available to the student at a private school, the IEP did provide the student with a FAPE in the LRE]; see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]).

According to the evidence, the student was "under responsive" to proprioceptive and vestibular input and "over responsive" to auditory and tactile input such as loud sounds and light touch (Dist. Ex. 7 at p. 6). To address the student's sensory needs, Rebecca School staff provided deep pressure input via '"hand hugs"' and joint compression techniques throughout the day (id.). While in the sensory gym at the Rebecca School, the student sought out vestibular and proprioceptive input by using a variety of swings, log rolling, animal walking, propelling himself on a scooter board, jumping, and using a trampoline (id.; 8 at pp. 5, 9-10). According to the

[14] In her petition, the parent alleges that in July 2011 the functioning levels of the students in the assigned school's classroom were not appropriate for the student and she provides cites to specific transcript pages purportedly in support of that position (Pet. ¶ 34). The hearing record shows that the classroom composition in July 2011 remained consistent throughout the summer program (Tr. pp. 104-05, 157-58), and the transcript pages cited by the parent reflect the classroom composition and functional levels beginning in September 2011, which is not an issue raised in the petition (see Tr. pp. 158-65).

Rebecca School occupational therapist, providing sensory input to the student helps with regulation and attention, and continued to be a large focus of OT sessions (Dist. Ex. 8 at p. 5).

The May 2011 IEP stated that the student presented with a mixed sensory profile consisting of under responsiveness to proprioceptive and vestibular input, and over responsiveness to auditory and tactile input (Dist. Ex. 1 at p. 5). The IEP indicated that the student benefited from deep pressure, joint compression, and vestibular input; and provided him with access to sensory tools, materials, input and breaks throughout the day (id. at pp. 3-5). The May 2011 CSE recommended that the student receive three individual 30-minute OT sessions per week, and two 30-minute OT sessions in a group to two (id. at p. 16). The May IEP contains one annual goals and short-term objectives designed to improve the student's sensory processing and regulation skills to complete social problem solving tasks (id. at p. 8).

The special education teacher at the assigned school testified that she had taught students with autism for approximately four years, and that in addition to her graduate degree in special education, she also had received training in sensory issues (Tr. pp. 101, 141-42, 144, 146, 183). Upon implementation of the student's IEP, to help the student remain regulated, she indicated she would first try to determine why the student became dysregulated, and then attempt to calm him by using deep pressure techniques such as rubbing his back, hands or shoulders (Tr. pp. 114-15, 118, 165).[15] Sensory items available in the assigned class included a bouncing ball for students to sit on, special chairs designed to help students remain correctly seated, and balls filled with sand, shakers, and fastening activities to help decrease self-stimulatory behavior (Tr. pp. 119-21). The special education teacher indicated that sensory breaks were provided during the day, and that she used manipulatives during math instruction (Tr. pp. 121-22). Additionally, the special education teacher stated that she would use a calm tone, compromise, and a behavior modification chart with the student to manage his behavioral difficulties (Tr. pp. 116-17). The assigned school had a gym and a yoga room, and although the special education teacher did not know if the assigned school was equipped with swings or a trampoline, she testified that the OT and physical therapy (PT) rooms at the assigned school contained "all different kinds of equipment" (Tr. pp. 184-85, 206). Finally, contrary to the parent's assertion, the hearing record showed that the student's sensory needs while at the Rebecca School were met through a variety of strategies, tools and methods, as reported by Rebecca School staff, and were not solely met via the use of suspended sensory equipment (Dist. Exs. 7 at p. 6; 8 at pp. 5, 9-10). Although I can fully appreciate that the parent may have preferred a school with sensory equipment that had greater similarity to the sensory equipment available at the Rebecca School, I find that the hearing record does not support a finding that had the student attended the assigned school, the district was obligated to provide the same equipment that the private school provided or that the district was incapable of addressing the student's sensory needs sufficiently to enable him to receive educational benefits.

5. Implementation of Related Services

According to the parent, the particular public school had a history of failing to fulfill related services mandates (see Parent Exs. C; X), and that the district assigned the student to the school

[15] Upon reviewing the hearing record as a whole, I agree with the district's statement that the word "peer" rather than "deep" pressure points appears from the context to be a transcription error (see Tr. p. 165; Answer and Cross-Appeal ¶ 22, n.8).

without determining whether or not the school would be able to fulfill the student's related services mandates. Over the district's objections, the parent introduced two documents into the record that purport to show that the district was not able to provide all of the mandated related services to students at the assigned school (Tr. pp. 432-34, 502-04; see Parent Exs. C; X). While the documents were introduced into evidence, the IHO advised the parties that they would be given whatever weight they were due (Tr. pp. 434, 504-05). The district's special education teacher from the assigned school testified that there were three full-time speech-language therapists at the assigned school (Tr. pp. 185-87), that OT and speech-language therapy was available during the summer months (Tr. pp. 107-08), and that all of the students were provided all of their mandated related services during July 2011 (Tr. p. 208).

Even assuming for the sake of argument that the district could not provide all of the student's related services through the efforts of its own employees, the parent still would not prevail under the circumstances of this case. A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

> [S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html, Question 5; see http://www.emsc.nysed.gov/resources/contractsforinstruction/).

Moreover, case law supports a finding that data indicating that a school has not always delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding (see M.S. v. New York City Dep't of Educ., 734 F.Supp.2d 271, 278-79). In this case, the available evidence supports the conclusion that when needed, the district was able to provide related services authorizations (RSAs) that allow the parent to obtain the needed related services for the student at public expense (see Tr. pp. 624, 647, 768-69, 809). Therefore, assuming for the sake of argument that district-employed service providers were unavailable this would not have resulted in a denial of a FAPE to the student because the means to use other qualified individuals was available.

6. Staff Training

The parent asserts that the staff at the public school lacked the specialized training to work with students with autism.[16] A State has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]), and that the purposes of the IDEA may nevertheless be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is provided by personnel who are not certified (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]; Carter, 510 U.S. at 14 [noting that in a tuition reimbursement case, the lack of services by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE, but rather the issue is a fact-specific inquiry. I also note, however, that the precise extent to which each distinct state requirement is adopted for purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 821 F.Supp.2d 1197, 1201 n.3 [S.D.Cal. Sept. 26, 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730 [2d Cir.2007]]).

The district and its personnel in this case are subject to State standards, and the special education teacher from the assigned classroom testified as to her qualifications and certifications (Tr. pp. 102, 146-47). Had the student attended the public school, this evidence and the evidence above describing the special education teacher's various classroom techniques shows that the district had appropriately certified personnel and it does not support the conclusion that the district's staff was unable implement the student's IEP. I find that the parent's assertions with regard to the district staff's qualifications and certifications to be without merit.

E. Relief

In its cross-appeal, the district contends that the impartial hearing officer improperly awarded relief related to the 2011-12 school year despite finding that the district offered the student a FAPE via the May 10, 2011 IEP.[17] Absent a determination by the impartial hearing officer that there was a denial of a FAPE, no basis exists upon which to predicate the awarding of any relief (see 34 CFR 300.148[a]; Application of a Student with a Disability, Appeal No. 11-110; Application of a Student with a Disability, Appeal No. 11-032, Application of the Dep't of Educ., Appeal No. 11-026; Application of the Dep't of Educ., Appeal No. 11-014, Application of a Student with a Disability, Appeal No. 08-078).

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[16] The parent is referring directly to answers provided by a district special education teacher (see Tr. pp. 147-48). When taken out of context, the teacher's statements could be construed as the parent connotes (see Pet. ¶ 33); however, reading the transcript in context, the teacher's answers related to her college course and workshop experiences, and not whether or not she understood or was capable of working with autistic children (id.).

[17] As noted above, the parent also agrees that ordering relief when FAPE is found is improper; her argument however, is that ordering relief constitutes proof that FAPE was not offered. It does not.

In this case, the hearing record supports the IHO's determination that the May 10, 2011 IEP was not defective (IHO Decision at p. 24). As noted above, the hearing record does not support a conclusion that the CSE process when the May 2011 IEP was created was flawed, nor does the hearing record support the contention that the recommended program and placement as recommended in the IEP was inappropriate to the extent that the flaws in the IEP rose to the level of a denial of a FAPE. Moreover, where, as here, the parent has exercised her right to unilaterally place the student at the Rebecca School for the 2011-12 school year and there is no indication in the hearing record that the parent intended to return the student to the district for the remainder of the school year, it is unnecessary to direct the district to provide the parent with relief. Consequently, in the absence of any other basis, the impartial hearing officer's remedial directive awarding relief to the parent by ordering the district to continue funding the additional after school related services of speech-language and OT services must be reversed (id. at p. 41).

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of the Rebecca School or consider whether equitable factors favor an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.[18]

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated January 31, 2012 is modified by reversing that portion which ordered the district to continue to provide speech-language therapy and OT services outside of the school day and to conduct an IEE.

Dated: **Albany, New York**
June 5, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[18] The parent notes but does not specifically claim any error with respect to the IHO's determination to press forward with the hearing when parent was of the view that there was less than full compliance with a subpoena (Pet. ¶ 18). To the extent that the parent intended to appeal this ruling, I would find no basis to disturb the IHO's determination since the hearing record was otherwise adequate to understand and address the issues, the time for discovery had elapsed (see 34 CFR 300.512[a][3], [b][1]; 8 NYCRR 200.5[j][3][xii][a]), and there was no evidence that the parent had taken action to enforce the subpoena either at that point in time or since that point.