The University of the State of New York

The State Education Department
State Review Officer
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No. 12-061

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Sonia Mendez-Castro, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's unilateral placement for the 2011-12 school year. The parents cross-appeal from the IHO's determination, and allege that the IHO failed to address the student's need for a specific methodology to address his oral-motor apraxia. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 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

In this case, the CSE convened on March 14, 2011 to conduct the student's annual review and to develop his IEP for the 2011-12 school year (see Dist. Exs. 1 at pp. 1-2; 5 at pp. 1-2). Finding that the student remained eligible for special education and related services as a student with autism, the CSE recommended placing the student in a 12-month school year program in a 6:1+1 special class in a specialized school with the following related services: three 45-minute sessions per week of individual occupational therapy (OT); two 45-minute sessions per week of

OT in a small group (2:1); three 45-minute sessions per week of individual physical therapy (PT); two 45-minute sessions per week of PT in a small group (2:1); three 45-minute sessions per week of individual speech-language therapy; two 45-minute sessions per week of speech-language therapy in a small group (2:1); the services of a full-time, 1:1 crisis management paraprofessional (1:1 paraprofessional); and the services of a transportation paraprofessional (Dist. Ex. 1 at pp. 1-2, 15-16).[1, 2] In addition, the CSE recommended special education transportation, adapted physical education, assistive technology, and a barrier free site to accommodate the student's difficulty navigating his environment (id. at pp. 1, 5). Having determined that the student's behavior seriously interfered with instruction, the CSE also developed a behavior intervention plan (BIP), which was included with the IEP (id. at pp. 4, 17). The CSE also developed 13 annual goals with 35 corresponding short-term objectives to target the student's needs in the following areas: reading, mathematics, and writing skills; physical and gross motor skills; sensory processing and motor planning skills; and receptive, expressive, and pragmatic language skills, as well as articulation skills (id. at pp. 6-12).[3]

On May 29, 2011, the parents executed an addendum to the payment schedule for the 2011-12 school year for the Rebecca School; on the same date, the parents made a $10,000.00 payment to the Rebecca School for the 2011-12 school year (see Parent Exs. H at p. 1; J at p. 1).[4] On May 31, 2011, the parents executed an enrollment contract with the Rebecca School for the student's attendance during the 2011-12 school year (see Parent Ex. G at pp. 1, 4).[5]

By final notice of recommendation (FNR) dated June 15, 2011, the district summarized the recommended special education and related services for the 2011-12 school year, and notified the parents of the particular public school site to which the district had assigned the student to attend for the 2011-12 school year (see Parent Ex. D).

In a letter dated June 17, 2011, the parents notified the district of their intention to unilaterally place the student at the Rebecca School at public expense for the 2011-12 school year

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

[2] The district special education teacher who participated in the development of the student's IEP at the March 2011 CSE meeting testified that although the CSE modified the duration of the recommended related services from 40-minute sessions to 45-minute sessions, the finalized IEP contained a clerical error, which mistakenly continued to report the duration of these services as 40-minute sessions in the IEP (see Tr. pp. 120-21; Dist. Ex. 5 at p. 2; compare Dist. Ex. 1 at p. 2, with Dist. Ex. 1 at p. 15). She also testified that the term "argumentative device" in the student's finalized March 2011 IEP was also a clerical error, and instead, the term should have read "augmentative device" (see Tr. pp. 131-32).

[3] A finalized copy of the IEP was sent to the parents on March 15, 2011 (see Dist. Ex. 1 at p. 2; see also Tr. pp. 162-63).

[4] According to the payment schedule, the Rebecca School required the payment of $10,000.00 as a total deposit by May 31, 2011, and required the payment of $21,187.00 as "[p]ayment 1" by June 15, 2011 (see Parent Ex. H at p. 1).

[5] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has continuously attended the Rebecca School since September 2006 (compare Tr. p. 326, with Dist. Ex. 1 at pp. 1, 3).

beginning on July 5, 2011 (see Parent Ex. A at p. 1). The parents indicated in the letter that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, and further indicated that the FNR they received on June 15, 2011 omitted the specific program recommendation and the recommended program's "start date" (id. at p. 2). The parents noted that they could not "accept the district's offer" until they could visit the assigned school (id.). However, based upon "previous" visits to "other" 6:1+1 special class programs, the parents did not "believe the program" could offer the "level of support" that the student required (id.). In addition, the parents expressed concerns about the CSE's recommendation to place the student in a 6:1+1 special class and the training of the recommended 1:1 paraprofessional (id.). Finally, the parents requested that the district provide round-trip transportation to the Rebecca School with a transportation paraprofessional (id.).

By letter dated July 11, 2011, the parents advised the district that they had visited the assigned school, toured the facilities, and observed three 6:1+1 special classes on July 8, 2011 (see Parent Ex. E at p. 1). Based upon their visit and observations, the parents rejected the assigned public school (id. at pp. 1-3). Specifically, the parents noted that during the visit they had not observed any other students using augmentative communication devices; the speech-language provider at the assigned school had "no experience working with [PROMPT] therapy," which the student required to address his apraxia;[6] the student's speech-language therapy sessions would be provided in his classroom ("'push-in'"), which was not consistent with the student's need for individualized therapy in a quiet room; the observed curriculum and levels of academic instruction were not appropriate for the student; the parents had not observed students engaged in social interactions with each other; and the OT and PT therapy rooms were small and contained no swings or other sensory equipment necessary for the student (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 26, 2011, the parents asserted that the district failed to offer the student a FAPE for the 2011-12 school year, alleging both procedural and substantive violations (see Parent Ex. B at pp. 1-5).[7] The parents indicated that the March 2011 IEP was deficient because it failed to contain annual goals and short-term objectives related to the services provided by the 1:1 crisis management paraprofessional, the services provided by the transportation paraprofessional, and the student's participation in adapted physical education; and the IEP failed to incorporate the student's use of an augmentative communication device into each annual goal and short-term objective (id. at pp. 2-3). In addition, the parents noted that the March 2011 IEP's provisions for assistive technology—and specifically, the student's augmentative communication device—were "inadequate, ambiguous, and confusing;" failed to identify the specific communications technology that would be provided and how it would be used to facilitate the student's learning; and that the student's use of the augmentative communication device was

[6] Although not clarified in the hearing record, "PROMPT" is typically used as an acronym for "Prompts for Restructuring Oral-Motor Phonemic Targets" (see Application of a Student with a Disability, Appeal No. 11-068 at p. 3; Application of a Student with a Disability, Appeal No. 10-004 at p. 1 n.1).

[7] On July 27, 2011, the parents executed a second addendum to the payment schedule for the student's attendance at the Rebecca School for the 2011-12 school year, which obligated the parents to pay an additional cost of $19,845.00 to provide the student with the services of a full-time, 1:1 paraprofessional during the 2011-12 school year (see Parent Ex. I at pp. 1-2).

not incorporated into "each and every goal" proposed for the student (id.). Next, the parents complained that the March 2011 CSE failed to conduct a functional behavioral assessment (FBA) before developing the student's BIP; the March 2011 CSE failed to recommend parent counseling and training on the student's IEP; and the recommended placement in a 6:1+1 special class was not appropriate (id. at pp. 3-4). With respect to the assigned public school, the parents complained in the due process complaint notice about the instructional content observed at the assigned school, the absence of other students using assistive technology at the assigned school, the unavailability of PROMPT as a methodology to address the student's apraxia at the assigned school, the observed lack of social interactions among students at the assigned school, and the lack of sensory equipment necessary for the student's OT and PT at the assigned school (id. at pp. 4-5).

With respect to the unilateral placement, the parents asserted that the Rebecca School met the student's academic, social/emotional, and physical needs (see Parent Ex. B at p. 5). The parents also asserted that equitable considerations did not preclude an award of tuition reimbursement in this case, and requested that the IHO award reimbursement for the costs of the student's tuition at the Rebecca School, including the costs of a crisis management paraprofessional, and the provision of round-trip transportation with a "matron" (id. at pp. 1, 5).

B. Impartial Hearing Officer Decision

On September 26, 2011, the parties proceeded to an impartial hearing, which concluded on February 7, 2012 after four days of proceedings (see Tr. pp. 1, 88, 295, 387). In a decision dated February 17, 2012, the IHO found that the district failed to offer the student a FAPE, the Rebecca School was appropriate to meet the student's needs, equitable considerations favored the parents' claim, and the parents were entitled to an award of tuition reimbursement (see IHO Decision at pp. 14-19).

With respect to the March 2011 IEP, the IHO determined that the district failed to offer the student a FAPE, in part, due to the CSE's failure to include a speech-language provider at the March 2011 CSE meeting, the CSE's failure to conduct a speech-language evaluation of the student, the CSE's failure to conduct an FBA, the CSE's failure to recommend parent counseling and training, the CSE's failure to develop annual goals related to adapted physical education and the services of the 1:1 paraprofessional, and the CSE's failure to sufficiently integrate the student's use of an augmentative communication device into all of his annual goals (see IHO Decision at p. 17). In addition, the IHO determined that the functional levels of the students in the assigned school were not similar to the student's functional levels, the communication system used by the special education teacher in the assigned school was not sufficient to meet the student's needs, the students in the assigned school were not socially appropriate for the student, the assigned school was not equipped to meet the student's need for consistent sensory stimulation, and the student's communication needs would not have been addressed in the proposed classroom (id. at pp. 17-18). Therefore, the IHO concluded that the district failed to recommend an appropriate program and placement, and failed to offer the student a FAPE (id.).

Turning to the unilateral placement, the IHO found that the parents sustained their burden to establish that the Rebecca School was appropriate to meet the student's needs (see IHO Decision at pp. 18-19). The IHO determined that the Rebecca School offered a "supportive, small class environment with intensive instruction and supports and the individual and small group attention"

the student required to make progress (id. at p. 18). Next, the IHO concluded that equitable considerations supported an award of tuition reimbursement because the parents had cooperated and communicated with the CSE, and the amount of the student's tuition was "reasonable" (id. at p. 19). As such, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School and for the costs of the 1:1 paraprofessional upon proper proof of payment (id.).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred, in part, by addressing issues in the decision that were not raised in the parents' due process complaint notice to determine that the district failed to offer the student a FAPE for the 2011-12 school year. In addition, the district asserts that the IHO erred in concluding that the March 2011 CSE's failure to conduct an FBA, and failure to recommend parent counseling and training contributed to the district's failure to offer the student a FAPE. The district also contends that although the IHO found the March 2011 IEP deficient because it did not contain annual goals and short-term objectives to address the student's participation in adapted physical education and to address the services provided by the 1:1 paraprofessional, the IHO failed to mention that the IEP did contain specific references to the student's use of an augmentative communication device in order to reach his short-term objectives. The district argues that the IHO erred in addressing the parents' claims about the assigned school, since the student never attended the assigned school. Alternatively, even if the IHO properly addressed these issues, the IHO's findings are not supported by the evidence in the hearing record. With respect to the unilateral placement, the district contends that the Rebecca School was not appropriate for the student because it did not provide sufficient levels of OT, PT, and speech-language therapy services, which required the parents to provide additional services to supplement the Rebecca School's program. The district also contends that the IHO's decision regarding equitable considerations is not supported by the evidence in the hearing record. As relief, the district seeks to reverse the IHO's decision in its entirety.

In an answer, the parents respond to the district's allegations with admissions, denials, and additional arguments to support upholding the IHO's decision in its entirety. In a cross-appeal, the parents assert, however, that the IHO erred in failing to mention the student's need for "PROMPT therapy" to address his oral-motor apraxia. The parents argue that the district's program and placement recommendations were not appropriate due to the failure to address this specific need. As relief, the parents request a finding that the student would not make progress at the assigned school without a PROMPT trained therapist, and seek to affirm the remainder of the IHO's decision.

In an answer responding to the parents' cross-appeal, the district asserts general admissions and denials, and further argues that the parents' due process complaint notice did not allege that the "recommended program" was not appropriate due to the failure to recommend the use of "PROMPT methodology." The district seeks to dismiss the parents' cross-appeal.

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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; 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], aff'd, 2009 WL 3326627 [2d Cir. 2009]; 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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of the Impartial Hearing

An independent review of the entire hearing record supports the district's argument that the IHO exceeded his jurisdiction by addressing and relying upon issues that were not raised in the parents' due process complaint notice in order to conclude, in part, that the district failed to offer the student a FAPE for the 2011-12 school year (see Tr. pp. 1-420; Dist. Exs. 1-6; Parent Exs. A-J; L-N).

Before addressing the merits of the district's argument, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51), I note that the issues of whether the CSE erred in failing to include the participation of a speech-language therapy provider at the March 2011 CSE meeting or in failing to conduct a speech-language evaluation of the student were first raised by the parents or by counsel for the parents on cross-examination of a district witness or during closing statements at the impartial hearing (see Tr. pp. 108-11, 114, 119-22, 182-85, 395). Here, the district did not initially elicit testimony regarding these issues and therefore, I find that the district did not "open the door" to these issues under the holding of M.H.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 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-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include claims that the district failed to offer the student a FAPE for the 2011-12 school year because the March 2011 CSE failed to include the participation of a speech-language therapy provider at the meeting or because the March 2011 CSE failed to conduct a speech-language evaluation of the student (see Parent Ex. B at pp. 1-5; see also Tr. pp. 182-85, 390-403). The hearing record demonstrates that the issues for resolution before the IHO generally included challenges to the sufficiency of the annual goals in the IEP, the provisions in the IEP related to assistive technology, the CSE's failure to conduct an FBA, and the CSE's failure to recommend parent counseling and training in the IEP, as well as challenging the district's ability to implement certain aspects of the student's IEP at the assigned school (see Parent Ex. B at pp. 2-5; see also Tr. pp. 182-85, 390-403). A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to amend their due process complaint notice (see Tr. pp. 1-420; Dist. Exs. 1-6; Parent Exs. A-J; L-N).

Based on the foregoing, the IHO exceeded his jurisdiction in finding that the district's failure to include the participation of a speech-language therapy provider at the March 2011 CSE meeting or the district's failure to conduct a speech-language evaluation of the student contributed, in part, to the overall determination that the district failed to offer the student a FAPE for the 2011-12 school year. These determinations must, therefore, be annulled.

B. March 2011 IEP

An independent review of the entire hearing record also supports the district's arguments that the IHO erred in concluding that the district failed to offer the student a FAPE based upon the insufficiency of the annual goals in the student's March 2011 IEP, the CSE's failure to conduct an FBA, and the CSE's failure to recommend parent counseling and training in the IEP.

1. Annual Goals

In the decision, the IHO indicated that the student had "significant physical limitations" and required "frequent and intense sensory input," and therefore, the March 2011 IEP should have included annual goals for the student's participation in adapted physical education to address his "physical and gross motor deficits," as well as annual goals for the 1:1 paraprofessional—noting that the paraprofessional "should be trained to deal" with the student's "unique physical needs" as well as "how to address these needs" in the classroom (see IHO Decision at p. 17). In addition, the IHO found the March 2011 IEP deficient because it failed to incorporate the student's use of an augmentative communication device into all of the student's annual goals (id.). However, neither the law nor the facts of this case support the IHO's findings.

a. Adapted Physical Education

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum, and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to

measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

While the IHO and the parents accurately note that the March 2011 IEP did not include annual goals related to the student's participation in adapted physical education, this deficiency, alone, does not rise to the level of a denial of a FAPE in this case.

State regulation defines adapted physical education as "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]). If a student with a disability is not participating in a regular physical education program, the IEP shall describe "the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education" (8 NYCRR 200.4[d][2][viii][d]). In this case, although the March 2011 CSE recommended adapted physical education in the IEP as a direct service to be provided to the student, the CSE did not otherwise provide any description of the extent to which the student would participate in such specially-designed instruction or develop annual goals related to the student's participation in adapted physical education (see Dist. Ex. 1 at pp. 1, 5). However, as described more fully below, I cannot conclude, as the parents assert, that the CSE's failure to develop annual goals to guide and address the provision of this direct service to the student resulted in a failure to offer the student a FAPE, especially given that the March 2011 IEP described the student's deficits and included the recommendation for the provision of adapted physical education as well as related services to address the student's needs (see id.).

The evidence in the hearing record demonstrates that contrary to the IHO's findings, the March 2011 CSE properly identified the student's significant physical limitations, his need for frequent and intense sensory input, and his physical and gross motor deficits. In addition, the March 2011 CSE appropriately included recommendations for adapted physical education as a direct service; related services, such as OT and PT, to address the student's physical and gross motor skills, sensory processing, and motor planning skills; and environmental modifications, human and material resources, and specialized equipment (health/physical management needs) to further address the student's identified needs in these areas (see Dist. Ex. 1 at pp. 1, 5, 8-9, 12). In particular, the March 2011 CSE relied upon information contained in a previous IEP—which the parents confirmed was "accurate" at the meeting—to draft the section of the March 2011 IEP describing the student's present levels of health and physical development (see Tr. p. 136; Dist. Exs. 1 at p. 5; 5 at p. 2). Specifically, the March 2011 CSE noted in the IEP that the student exhibited "weakness on the right side of his body" and that this right-sided hemiplegia limited his "capacity for bilateral coordination" (Dist. Ex. 1 at p. 5). The March 2011 CSE also noted that the student wore orthotics, he had a seizure disorder and was lactose intolerant, he was nonverbal and used an alternative augmentative communication device, he was a picky eater and experienced disrupted sleep that could affect his ability to remain regulated, and his sensory seeking behavior required the use of a chew tube for "input into his oral musculature throughout the day" (id.). Under physical needs, the March 2011 CSE indicated in the IEP that the student exhibited mobility limitations and required the following: the provision of an accessible program, adapted physical education in a 6:1+1 staffing ratio, an assistive technology device, and assistive technology services (id.). In addition, the March 2011 CSE recommended the following health and physical

management needs: the provision of a barrier free site to "accommodate [the student's] difficulty with navigation due to his physical limitations;" the use of an augmentative communication device, noting that the student could use a "Dana by Alpha Smart or a large keyboard" to express his "wants and needs," or an "iPad" with specific applications/programs that allowed him to "type and provide voice output as well as word prediction;" the student should be allowed to eat or drink when needed; and he required the presence of a nurse on site to address his seizure disorder, medication needs, and orthotics (id.). According to the hearing record, the March 2011 CSE reviewed and discussed the health and physical management needs recommended in the IEP, and the parents did not object to them at the meeting (see Tr. pp. 136-37; Dist. Ex. 5 at p. 2).

In addition, the March 2011 CSE also recommended related services, such as OT and PT, with corresponding annual goals and short-term objectives that also addressed the student's physical and gross motor deficits (Dist. Ex. 1 at pp. 1, 8-9, 12).[8] According to the evidence, the March 2011 CSE drafted annual goals related to PT that addressed the student's physical and gross motor deficits that were based largely upon a review, revision, and modification of annual goals for PT in the student's previous IEP (see Tr. pp. 122, 141; Dist. Ex. 5 at p. 2). Specifically, the IEP included annual goals to improve the student's bilateral strength and coordination skills, his endurance for physical tasks, his functional negotiation skills, and his motor planning skills (Dist. Ex. 1 at pp. 8-9, 12). Among other things, the short-term objectives targeted the student's abilities to improve his body posture while seated; to improve his gait; to run smoothly; to throw a ball upward; to build strength in the right side of his body; to navigate throughout the classroom and school environment, such as ascending and descending stairs and pushing or pulling open doors; and to improve his ability to reach for and grasp objects (id. at pp. 8-9). In addition, at the impartial hearing the parents testified that upon review of the finalized IEP, they did not notify the district that they either wanted additional or different annual goals added to the IEP or that the IEP failed to contain annual goals that they had requested at the March 2011 CSE meeting (see Tr. pp. 366-70).

Therefore, in reviewing and considering the evidence regarding the services provided by the IEP as a whole, in this instance I decline to find that the lack of annual goals related to the student's participation in adapted physical education instruction rose to the level of a denial of a FAPE (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]). Based on the foregoing, the hearing record demonstrates that the student's March 2011 IEP appropriately addressed the student's significant physical limitations, his need for frequent and intense sensory input, and his physical and gross motor deficits through a variety of

[8] The parents testified that they agreed with the March 2011 CSE's recommendations for related services (see Tr. pp. 338-39, 342-44).

direct special education programs, related services, and annual goals, and therefore, the IHO's findings must be reversed.

b. Services of the 1:1 Crisis Management Paraprofessional

Next, I will turn to the district's argument that the IHO erred in finding that the CSE's failure to develop annual goals to detail the services to be provided to the student by the 1:1 paraprofessional or to specify training needed by the 1:1 paraprofessional in order to provide services to the student contributed to the district's failure to offer the student a FAPE for the 2011-12 school year. Initially I note that annual goals must relate to the student's needs that result from the student's disability and need not be tied to a specific service.[9] However, upon reviewing the student's March 2011 IEP, I find that it appropriately reflected the role of the 1:1 paraprofessional in supporting the student.

In their due process complaint notice, the parents asserted that the March 2011 IEP failed to contain annual goals or short-term objectives to "integrate" the 1:1 paraprofessional into the student's "daily school routine or to enable [the 1:1 paraprofessional] to work with [the student] in a meaningful fashion or to measure [the student's] progress incrementally on an ongoing basis" (Parent Ex. B at p. 2). A review of the March 2011 IEP reveals, however, that although it does not describe in detail every possible duty that the 1:1 paraprofessional may have engaged in with the student, the March 2011 IEP does include annual goals targeting the student's academic skills in mathematics, reading, writing, and self-editing with the support of the 1:1 paraprofessional (see Dist. Ex. 1 at pp. 6-7). Moreover, the March 2011 IEP accurately identifies the student's present levels of social/emotional performance, and implies that the role of the 1:1 paraprofessional includes, at a minimum, facilitating the student's issues with distractibility, communication, the potential for aggression and self-injurious behavior, peer interactions, participation in classroom activities, and assisting the student to deal with dysregulation and his emotional needs (id. at pp. 4, 14).[10] As such, I decline to find that the CSE's failure to develop annual goals to detail the

[9] Districts are not, however, prohibited by law from developing annual goals related to the services of a paraprofessional.

[10] I note that neither the IDEA, nor federal and State regulations require that the duties of district staff be detailed in a student's IEP. Distinguishable from this point are cases in which IHOs or SROs have relied upon their equitable authority to fashion a remedy in a specific case by directing the identification of staff duties in a student's IEP in a manner that is beyond that normally required by the IDEA or attendant federal or State regulations (J.K. v. Springville-Griffith Inst. Cent. Sch. Dist. Bd. of Educ., 2005 WL 711886, at *9 [W.D.N.Y. Mar. 28, 2005] [noting that the directive to a CSE to consider the addition of a 1:1 aide and the inclusion of the duties of such aide in writing in the student's revised IEP "as required by SRO Munoz," but also noting that the failure to include such duties in the IEP in accordance with the SRO's order did not constitute a denial of a FAPE]).

services to be provided to the student by the 1:1 paraprofessional in the March 2011 IEP with the particularity desired by the parents does not rise to the level of a denial of a FAPE.[11, 12]

c. Augmentative Communication Device

With regard to the IHO's determination that the March 2011 IEP was deficient because the student's use of an augmentative communication device had not been incorporated into each and every annual goal, a careful review of the IEP contradicts the IHO's finding. Specifically, each and every annual goal or short-term objective in the student's March 2011 IEP that did not require expressive communication as a factor in the student's ability to demonstrate mastery of the particular annual goal—such as the annual goals requiring a physical or motor response or related to the student's articulation skills—incorporated the student's use of an augmentative communication device (compare Dist. Ex. 1 at pp. 6-7, 10-11, with Dist. Ex. 1 at pp. 8-9, 11-12). For example, all of the academic annual goals for reading, mathematics, and writing indicated that the student would use an augmentative device while working toward mastery of these annual goals (see Dist. Ex. 1 at pp. 6-7). In the area of speech-language, the IEP indicated that the student would use an augmentative communication device (denoted, at times, as "AAC device" in the IEP) to open circles of communication with an adult or peer; to answer who, what, where, and yes or no questions in reference to an ongoing activity and personally relevant information; and to request and reject items and activities (id. at pp. 10-11). As such, the hearing record demonstrates that the March 2011 IEP appropriately incorporated the student's use of an augmentative communication device in the annual goals, and therefore, the IHO's finding must be reversed.

2. Special Factors, Interfering Behaviors, and an FBA

In his decision, the IHO noted that the parties did not dispute that the student exhibited behaviors that "significantly interfere[d] with his instruction," and summarily concluded that the March 2011 CSE failed to conduct an FBA, which was "required to determine the causes and frequency of behaviors" and to "develop an appropriate BIP" (IHO Decision at p. 17). Consequently, the IHO found that the failure to conduct an FBA contributed to his determination that the district failed to offer the student a FAPE for the 2011-12 school year (id. at pp. 17-18).[13]

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[11] To the extent that the IHO concluded that the student's IEP required annual goals to specify training the 1:1 paraprofessional needed "to deal" with the student's "unique physical needs" as well as "how to address these needs" in the classroom, State policy guidance indicates that this information, if necessary for the student to receive a FAPE, is more appropriately documented in the section of the IEP for supports for school personnel on behalf of the student ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 41-45, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

[12] In addition, I remind the district that IEPs developed for the 2011-12 school year and thereafter, must be on a form prescribed by the Commissioner of Education ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 7, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

[13] It appears that the IHO considered the March 2011 CSE's failure to conduct an FBA of the student as a per se procedural violation in this case (see IHO Decision at p. 17; see R.E., 694 F.3d at 190-92; 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]).

As set forth in greater detail below, I find that although the March 2011 CSE did not conduct a formal FBA of the student, it nonetheless properly considered the special factors related to the student's behavior concerns that impeded his learning, and developed an appropriate BIP for the student in accordance with State regulations; therefore, the IHO's determination that the district's failure to conduct an FBA contributed to a failure to offer the student a FAPE must be reversed.

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. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. 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. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 25-26, 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. at p. 25). 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]). State regulations define an FBA 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, at *2).[14]

In this case, the parties do not dispute that the March 2011 CSE did not conduct a formal FBA of the student prior to modifying or revising the BIP from the student's previous IEP. However, as noted above, the district's failure to conduct an FBA prior to developing the student's 2011-12 BIP and IEP does not, by itself, automatically render the March 2011 IEP so deficient as to deny the student a FAPE (A.H., 2010 WL 3242234, at *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 R.E., 694 F.3d at 190-92; 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]).[15] Furthermore, the facts and circumstances of this case do not support the IHO's conclusion that the March 2011 CSE's failure to conduct an FBA of the student contributed to his determination that the district failed to offer the student a FAPE for the 2011-12 school year.

An independent review of the entire hearing record reflects that although the March 2011 CSE did not complete a formal FBA of the student prior to developing the March 2011 BIP and IEP, the March 2011 CSE did conduct an "informal" FBA of the student (see Tr. pp. 134-35, 166-68; Dist. Ex. 5 at p. 2). At the impartial hearing, the district special education teacher who participated at the March 2011 CSE meeting testified that a "formal observation" of the student,

[14] 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 [Aug. 14, 2006]).

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

in this case, was not necessary because the student's "behavior" was "clearly identified already" (Tr. pp. 134-35, 166-68).[16] In addition, she testified that both the student's then-current special education teacher from the Rebecca School (Rebecca School teacher) who participated at the March 2011 CSE meeting, as well as the student's parents, provided "a lot of input" about the student's behaviors, which resulted in a modification and revision of the BIP from the student's previous IEP (Tr. pp. 134-35, 146-48, 166-68; compare Dist. Ex. 1 at p. 17, with Dist. Ex. 5 at p. 2). For example, the Rebecca School teacher informed the March 2011 CSE that the student continued to exhibit self-injurious behaviors when he became dysregulated (see Tr. p. 146-47).

The district special education teacher further testified that the parents actively participated in the development of the BIP and did not object to the BIP developed by the March 2011 CSE (see Tr. pp. 147-48). Notably, the BIP describes the behaviors that interfere with the student's learning, the behavior changes expected through the implementation of the BIP, the strategies to be used to change the student's behaviors, and the supports to be used to help the student change the behaviors (see Dist. Ex. 1 at p. 17). In addition, the student's behaviors described in the BIP are consistent with the information provided by the Rebecca School teacher, the information set forth in the section of the March 2011 IEP describing the student's present levels of social/emotional performance, and a December 2010 Rebecca School progress report, all of which generally indicate that, among other things, the student continues to become dysregulated when he experiences intense emotions and when dysregulated, he often engages in self-injurious behaviors (scratching his neck, biting and hitting his wrists), makes loud noises, digs his fingers into his flesh, pinches, grabs at himself and others, and occasionally pulls hair (see Dist. Exs. 1 at pp. 4, 17; 4 at p. 2). Thus, the evidence in the hearing record supports a conclusion that although the March 2011 CSE did not conduct a formal FBA prior to developing the student's March 2011 IEP or the accompanying BIP consistent with regulations, the March 2011 CSE had sufficient information to accurately identify the student's behaviors that seriously interfered with his ability to engage in instruction and as detailed below, recommended sufficient supports and services to address these needs.[17]

As indicated by the evidence in the hearing record, in addition to developing a BIP to address the student's behavior needs the March 2011 CSE recommended further behavioral support to be provided by the student's special education teacher; the provision of OT, PT, and speech-language therapy; and the services of a full-time, 1:1 crisis management paraprofessional (see Dist. Ex. 1 at pp. 4, 15-16). The March 2011 CSE also recommended environmental modifications and human or material resources (social/emotional management needs)—such as using an augmentative communication device to assist the student in expressing himself to prevent frustration; prompting the student to initiate interactions and to express his ideas, needs and desires; providing access to sensory materials and sensory breaks to assist the student in

[16] Notwithstanding this testimony, however, the district special education teacher who participated in March 2011 CSE meeting conducted a classroom observation of the student and prepared a report of that observation, which the March 2011 CSE reviewed and discussed (see Tr. pp. 123-25; Dist. Exs. 2 at pp. 1-2; 5 at pp. 1-2). The classroom observation report documented the student's behaviors while participating in an 8:1+3 classroom with the assistance of his 1:1 paraprofessional (see Dist. Exs. 2 at pp. 1-2; 4 at p. 1).

[17] I also note that the parents did not allege in the due process complaint notice that either the March 2011 IEP or the attached BIP failed to accurately identify the student's behaviors (see Parent Ex. B at pp. 1-5).

maintaining regulation; and providing the student with choices, breaks, and movement activities in order to regulate his feelings—to address the student's behavior needs (see id. at p. 4). Academic management needs reflected in the March 2011 IEP also provided strategies directed at reducing the student's frustration during academic tasks, including visual and verbal prompts, using manipulatives and a calculator, allowing access to a quiet place when needed, and using an augmentative communication device for writing as further support of the student's behavior needs (id. at p. 3).

Based upon the foregoing, the hearing record does not support the IHO's finding that the failure to conduct an FBA contributed to a failure to offer the student a FAPE, especially where as here the March 2011 CSE accurately identified the student's behavior needs in the March 2011 IEP and attached BIP, the March 2011 CSE addressed the student's behavioral needs and formulated a BIP based on information and documentation provided by the student's providers, and the March 2011 CSE developed management needs designed to target the student's interfering behaviors without the need for conducting a formal FBA of the student under the facts and circumstances of this case (see R.E., 694 F.3d at 190-92; C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

3. Parent Counseling and Training

Finally, the IHO noted in his decision that State regulations required the provision of parent counseling and training for parents of students classified with autism, and summarily concluded that the March 2011 CSE's failure to recommend parent counseling and training contributed to the district's failure to offer the student a FAPE (see IHO Decision at p. 17). As set forth in greater detail below, I find that neither the law nor the facts of this case support the IHO's findings.

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]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F., 2011 WL 5130101, at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 25, 2010]), or where the district was not unwilling to provide such services at a later date (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). Recently, the Second Circuit explained that "because school districts are required by [State regulation][18] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not

[18] 8 NYCRR 200.13[d].

receiving this service" (R.E., 694 F.3d at 191). The Court further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (id).

It is undisputed that the March 2011 CSE did not recommend parent counseling and training in the student's March 2011 IEP, which violates the procedures for formulating an IEP. However, the hearing record demonstrates that had the student attended the particular school to which the district had assigned the student during the 2011-12 school year, the parents would have had access to parent counseling and training that satisfied the requirements of the State regulation. Initially, the evidence reflects that the March 2011 CSE discussed parent counseling and training at the March 2011 CSE meeting (see Tr. pp. 122-23, 171; Dist. Ex. 5 at p. 1). Specifically, the district special education teacher who participated in the March 2011 CSE meeting advised the parents this service was a "component" of the district's "city-wide programs" and more specific information about the details of the program would be provided by the "specific school" (Tr. pp. 122-23, 171). In addition, she testified that if parents have concerns, "the school will definitely deal with it more in detail" (Tr. p. 171).

At the impartial hearing, the district special education teacher of the assigned classroom testified that the principal of the assigned school was "very thorough" in the area of parent counseling and training (see Tr. pp. 12-15, 30-31). Specifically, she testified that during the school year, related services' providers (speech-language therapists, occupational therapists, and physical therapists) offered workshops for parents (see Tr. pp. 30-31). Workshop topics included introducing new communication devices, books, and websites where parents could locate information to support their children with regard to communication and relaxation (see id.). The special education teacher also testified that the district offered "a lot of workshops" throughout the entire school year, including on weekends, and that parents received "all of the addresses within [the district]" where the workshops took place (id.). In addition to the workshops, parents also had access to the special education teacher personally through email or by telephone, and could communicate daily with her through the students' communications notebooks (see Tr. pp. 31-32).

Based upon the foregoing, I find that although the March 2011 CSE's failure to recommend parent counseling and training in the student's IEP was a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509; M.W., 2012 WL 2149549, at *13).

C. Assigned School

In his decision, the IHO also addressed the parents' concerns raised regarding the particular school to which the district assigned the student to attend during the 2011-12 school year. On appeal, the district contends that the IHO erred in reaching the parents' contentions about the assigned school since the student did not attend the assigned school, and alternatively, even if the IHO properly addressed these issues, the hearing record does not support his conclusions. As set forth in greater detail below, neither the law nor the facts of this case support the IHO's conclusions.

1. Implementation of the IEP

Initially, the district correctly argues that the IHO erred in reaching the parents' contentions about the assigned school since such analysis would require the IHO—and an SRO—to determine what might have happened had the district been required to implement the student's March 2011 IEP. Generally, challenges to an assigned school involve implementation claims, and failing to implement 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]),[19] and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). Therefore, 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 the IEP (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]).

In this case, the parents rejected the March 2011 IEP and enrolled the student at the Rebecca School prior to the time that the district became obligated to implement the student's March 2011 IEP (see Parent Ex. A at pp. 1-2).[20] Thus, the district was not required to establish that the assigned school was appropriate or that the student would have been grouped appropriately upon the implementation of his IEP in the proposed classroom, and therefore, it was error for the IHO to reach any of the parents' contentions with respect to the assigned school or how the student's March 2011 IEP would have been implemented at the assigned school. However, even assuming for the sake of argument that the student had attended the district's recommended program at the assigned school, 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 that would have resulted in a failure to offer the student a FAPE (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. Aug. 19, 2011]).

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6). The IDEA and State regulations also 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 at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in

[19] With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

[20] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

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).

In order to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063).[21] Additionally, the United States Department of Education (USDOE) has also clarified that a school district "may 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 [Aug. 14, 2006]).

2. Functional Grouping

In his decision, the IHO concluded, among other things, that the assigned school was not appropriate for the student because the functional levels of the students in the assigned school were not similar to the student's functional levels, the communication system used by the special education teacher in the assigned school was not sufficient to meet the student's needs, the students in the assigned school were not socially appropriate for the student, and the student's communication needs would not have been addressed in the proposed classroom (see IHO Decision at pp. 17-18). However, the hearing record does not support the IHO's findings.

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

[21] The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504).

individual needs of the students according to the following: the levels of academic or educational achievement and learning characteristics; the levels of social development; the 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. Specifically, the hearing record demonstrates that the student's instructional level for reading and writing ranged between a 3.7 grade level and a 7.5 grade level; similarly, his instructional level for mathematics ranged between a 4.9 grade level and a 5.7 grade level (see Dist. Ex. 1 at p. 3). The special education teacher of the assigned 6:1+1 special class testified that in July 2011, the students' academic instructional levels for reading and mathematics in the proposed classroom included a kindergarten grade level (one student in both reading and mathematics), a 3.0 to 3.5 grade level (two students in both reading and mathematics), and a 7.0 grade level (two students in both reading and mathematics) (see Tr. pp. 15-17; see also Tr. pp. 59-61). Socially, the hearing record demonstrates that the student required "adult support to join in social situations and initiate interactions" (Dist. Ex. 1 at p. 4). The special education teacher testified that she used "prompting all day long" and that a "social decision field" and "board games" were used to encourage the students' socialization and communication (see Tr. pp. 26-27). She further testified that three students in the proposed classroom also required adult support for social interactions and peer relations (see Tr. pp. 68-69). Given the instructional levels and the social needs of the students in the proposed classroom, the student's similar instructional levels and social needs suggests that he would have been appropriately grouped academically and socially in the proposed classroom.

With regard to communication skills, the hearing record reflects that the student was nonverbal and used augmentative communication devices—including the Dana AlphaSmart, a large keyboard, and an iPad with Proloquo2go, iMean and Speakit software applications—to effectively communicate his wants and needs as well as to write (see Dist. Ex. 1 at p. 3-5). Here, the special education teacher of the proposed classroom testified that similar to the student in the instant case, two nonverbal students in her classroom in July 2011 used iPads to assist them to write and speak (see Tr. pp. 21-22, 63-64). According to her testimony, she was familiar with the Dana AlphaSmart and in addition to the iPads with Proloquo2Go software applications currently used at the assigned school, other equipment could be ordered for students more specific to their

needs (see Tr. pp. 23-24, 29). In addition, the special education teacher testified that similar to the student in the instant case, all of the students in her class in July 2011 were eligible for special education and related services as students with autism and one student required a 1:1 paraprofessional to address his behaviors (see Tr. pp. 65-66).

Based upon the foregoing, I find that contrary to the IHO's finding, the hearing record supports a conclusion that had the student attended the assigned school he would have been appropriately grouped for instructional and social purposes within the assigned classroom, and also that the special education teacher would have been able to appropriately address the student's communication needs and could have appropriately supported the implementation of the student's use of an augmentative communication device within the assigned classroom.

3. Sensory Needs

In his decision, the IHO also concluded that the assigned school and classroom were not appropriate for the student because the assigned school was not equipped to meet the student's need for consistent sensory stimulation (see IHO Decision at pp. 17-18). As explained below, the hearing record does not support the IHO's finding.

In this case, the parents alleged in the due process complaint notice that the assigned school was not appropriate for the student because it did not have "swings or other sensory equipment" or "adequate space for [the student to engage in] weight bearing activities" (Parent Ex. B at p. 5). However, 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 the IEP did not provide the 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]).

Here, the hearing record demonstrates that had the student attended the assigned school, he would have had access to a quiet/sensory area within the proposed classroom—consistent with the student's management needs recommended in the March 2011 IEP—and moreover, that the sensory area was equipped with a variety of sensory tools to address the varying unique needs of the students and to prevent a student from becoming overwhelmed (see Tr. pp. 21-23, 75-76; Dist. Ex. 1 at p. 3-4). For example, the special education teacher testified that the quiet/sensory area in her classroom provided the students with access to squeaky balls and brushes for massage or pressure (see Tr. pp. 21-22). She further testified that the occupational therapist at the assigned school trained the paraprofessionals and teachers to provide sensory input to students (see id.). In addition, students could go to OT or PT if they needed to work on sensory input (see Tr. pp. 76-77).

To further meet a student's sensory needs, the students at the assigned school had access to additional quiet areas in the dean's and the assistant principal's offices, and the paraprofessionals were trained to note when students became excited or upset and could either take the students for a walk or take the students to these additional quiet areas and stay with them, if they needed to

leave the classroom for a while (see Tr. pp. 21-23, 75-77). The special education teacher also testified that she would have been able to implement the social/emotional management needs recommended on the student's March 2011 IEP, which included, among other things, the provision of sensory materials, sensory breaks, movement activities, and choices in order to regulate his feelings (see Tr. pp. 23-26; Dist. Ex. 1 at pp. 3-4). Based on the above, the hearing record demonstrates that contrary to the IHO's finding, the assigned school would have been able to provide consistent sensory stimulation that the student required, and the IHO's finding must be reversed.

4. PROMPT Methodology

Turning to the parents' cross-appeal, the parents assert that the IHO erred in failing to "mention" that the student needed PROMPT therapy to address his oral-motor apraxia. The parents argue that the assigned school could not provide the student with a PROMPT trained speech-language therapist, and therefore, the student would not make progress toward his speech-language goals. As relief, the parents request a finding that the student would not have made progress at the recommended placement without a PROMPT trained speech-language therapist.

Insofar as the parents' concerns regarding the inability of the assigned school to provide the student with a PROMPT trained speech-language therapist asserts a challenge to the district's ability to implement the student's March 2011 IEP, the argument must be dismissed as being speculative since the student did not attend the assigned school. To the extent that the parents' cross-appeal could be construed to challenge the March 2011 CSE's failure to include PROMPT as a methodology with which to address the student's oral-motor apraxia needs within the March 2011 IEP, such argument is also without merit, as discussed more fully below.

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).

In this case, the hearing record indicates that the student's mother testified that the student received PROMPT therapy at the Rebecca School to address his apraxia in order to help him make sounds more clearly, to improve his articulation, and that the therapy had been very successful (see Tr. pp. 360-61). In addition, the director of Rebecca School testified that the student received

PROMPT therapy in addition to an oral motor protocol, which was carried over into the classroom and implemented during the entire school day (see Tr. pp. 210-11). However, aside from this testimony, the hearing record does not otherwise indicate that the student required this specific methodology to address his oral-motor apraxia or other speech-language needs, or that the student would not have made progress in the area of his speech-language needs without this specific methodology. Therefore, the hearing record does not support a finding that the student's needs required the inclusion of PROMPT methodology in the student's March 2011 IEP to receive a FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at the Rebecca School was an appropriate placement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated February 17, 2012 is modified by reversing those portions that concluded that the district failed to establish that it offered the student a FAPE in the LRE for the 2011-12 school year and ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School and for the costs of a full-time, 1:1 paraprofessional for the 2011-12 school year.

Dated: **Albany, New York**
December 17, 2012

STEPHANIE DEYOE
STATE REVIEW OFFICER