The University of the State of New York

The State Education Department
State Review Officer
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No. 12-088

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:
New York Legal Assistance Group, attorneys for petitioner, Joel I. Mandelbaum, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 for respondent (the district) to reimburse her for her son's tuition costs at the Rebecca School for the 2010-11 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f];, 300.511; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506; 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student exhibits cognitive deficits, difficulties with sensory processing, attention, social/emotional functioning, and has global developmental delays (Dist. Exs. 10-14). The student exhibits receptive, expressive, and pragmatic language delays, but is able to use single words and gestures to convey his needs (Dist. Exs. 11; 14 at pp. 2, 4). He received special education services as a preschool student, including placement in a 10:1+2 special class and related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Dist. Exs. 10 at p. 3; 12-14). During the 2009-10 school year (kindergarten), the CSE determined he was eligible for special education and related services as a student with autism and placed him in a district 6:1+1 special class in a specialized school with related services (Dist. Ex. 14 at p. 10; Parent Ex. C at p. 1; see Parent Ex. H at p. 4).[1]

[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Tr. p. 162; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On May 12, 2010, the CSE convened for the student's annual review and to develop the IEP for the 2010-11 school year (Dist. Ex. 7). The CSE recommended placement in a 12-month 6:1+1 special class in a specialized school with related services of two individual sessions and one group session per week of speech-language therapy, and two individual sessions of both OT and PT (Dist. Exs. 7 at pp. 1, 21; 8; 9). To address the student's academic and social/emotional, needs, the CSE recommended several accommodations and supports for the student, including a modified curriculum, a highly structured environment with minimal distractions, clear and concise directions, allowing time for processing, a positive reinforcement system, modeling appropriate behavior, and positive reinforcement (id. at pp. 3-5). The CSE also developed 20 annual goals and corresponding short-term objectives for the student addressing academic, social interaction, language, and gross and fine motor skills (id. at pp. 9-18). Also on May 12, 2010, the district provided the parent with a Final Notice of Recommendation (FNR), which identified the particular public school site to which the district had assigned the student to attend for the 2010-11 school year (Dist. Ex. 8).

By letter dated August 26, 2010, the parent notified the district of her intent to unilaterally place the student at the Rebecca School at public expense for the 2010-11 school year, and also requested that the district provide the student with round-trip transportation to the Rebecca School (Parent Ex. E). The parent indicated in the letter that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year because the district offered the student the same 6:1+1 special class at the same assigned public school the student attended the prior year where he experienced regression (id.). The parent signed an enrollment contract in September 2010 for the student to attend the Rebecca School for the ten-month school year from September 2010 to June 2011 (Parent Ex. F).

The student was not enrolled in either a public or private school program during summer 2010 (Dec. 20, 2011 Tr. pp. 686-87).[2] The student attended the Rebecca School during the 2010-11 school year in a classroom composed of one head teacher, eight students, two teacher assistants, and two individual student paraprofessionals (Tr. pp. 557, 560; Parent Exs. I; K).[3] The Rebecca School uses the Developmental Individual Difference Relationship-based (DIR) Model as the school's instructional methodology (Tr. p. 393).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated July 1, 2011 (Dist. Ex. 1). She subsequently filed an amended due process complaint notice on the same date (Dist. Ex. 2). The parent alleged that the district had denied the student a FAPE for the 2010-11 school year (id.). Specifically, she alleged that the district's recommended program was inappropriate because it was the same 6:1+1 special class and assigned school with the same teacher and classmates that the student attended the prior year (id. at pp. 2-3). According to the parent, the student had regressed in that class by imitating nonverbal students' communication methods and the teacher had not adequately addressed the student's sensory integration issues (id.). In addition, the parent alleged

[2] There are five transcript volumes from the impartial hearing. The first four transcript volumes are consecutively paginated from page 1 to page 600. The fifth transcript volume, dated December 20, 2011, is paginated from page 497 to 703. All citations in the decision to the transcript refer to the first four consecutively paginated volumes unless otherwise noted.

[3] 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).

that the academic performance section of the student's May 2010 IEP inconsistently described and underestimated the student's difficulty remaining focused and on task, and that the present health status and physical development section of the IEP indicated the student's need for "prompting and redirection," but the CSE did not offer any accommodations or supports in the "management needs" section of the IEP to address the student's difficulty maintaining attention (id. at p. 3). The parent further alleged that the social/emotional management needs section of the IEP did not prescribe any methodology to address the deficits identified in the social/emotional performance section, and that the IEP did not fully describe the student's socialization deficits (id.). According to the parent, the present health status and physical development section of the IEP identified the student's delays in fine motor, visual-perceptual/perceptual motor, and sensory processing skills, but no methodology was described for use by an occupational therapist to alleviate these deficits and no mandate was provided for use of sensory equipment (id.). The parent further alleged that the CSE failed to develop goals to address the student's sensory needs (id.). The parent also alleged that the goals on the student's IEP were inadequate, indicating that some were vague or unclear, some were inappropriate or unrealistic, and very few included the methodology to be used to accomplish the goals (id.). In addition, the parent alleged that the student's placement at the Rebecca School was appropriate (id. at pp. 3-4). As relief, the parent requested that an IHO award her the costs of the student's tuition at the Rebecca School for the 2010-11 school year, as well as direct the district to provide and pay for the student's transportation to and from the Rebecca School (id. at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 26, 2011 and concluded on December 20, 2011, after five days of proceedings (Tr. pp. 1-600, Dec. 20, 2011 Tr. pp. 497-703.). In a decision dated March 14, 2012, the IHO determined that the district offered the student a FAPE for the 2010-11 school year (IHO Decision at p. 25). In his written decision, the IHO set forth the parties' respective positions (id. at pp. 4-13). The IHO also included findings of facts about, among other things, the adequacy of the present levels of performance in the May 2010 IEP, the annual goals and short-term objectives in the IEP, the student's progress during the 2009-10 school year, and the assigned public school and 6:1+1 special class recommended for the student for the 2010-11 school year (id. at pp. 14-24). The IHO determined that the May 2010 CSE considered the student's academic achievement and learning characteristics, social development, physical development, and management or behavior needs in preparation of the student's IEP (id. at p. 25). He determined that the student's IEP provided special education and related services that were tailored to meet the student's unique needs and that were reasonably calculated to enable the student to receive educational benefits (id.). The IHO further determined that the student's IEP was likely to produce progress and that it afforded him with an opportunity for greater than mere trivial advancement (id.). He also determined that the parent's asserted procedural inadequacies did not impede the student's right to a FAPE, did not impede the parent's opportunity to participate in the decision making process, and did not cause a deprivation of educational benefits (id.). Lastly, the IHO stated that while the parent pointed to various examples in which the services offered were less than ideal or what might have been desired by a loving parent, in total they did not rise to the level of a denial of a FAPE (id.).

IV. Appeal for State-Level Review

This appeal by the parent ensued. The parent maintains that the district failed to offer the student a FAPE and alleges that the IHO improperly shifted the burden of proof from the district to the parent. The parent also alleges that the IHO did not engage in independent fact-finding

because the IHO drew his findings of fact from the district's post-hearing closing brief and did not attempt to reconcile apparent conflicts in the testimony of the district's special education teacher. Regarding the student's May 2010 IEP, the parent alleges that it does not adequately describe the student's difficulties with activities of daily living (ADL), inconsistently describes his social skills, fails to indicate the extent of his sensory deficits, and does not provide for parent counseling and training. According to the parent, the absence of an adequate baseline level of performance in the IEP precluded the development of measurable goals. The parent further alleges that the student's occupational therapist was not at the May 2010 CSE meeting and did not provide any written input to the CSE, and therefore the parent's ability to meaningfully participate at the CSE meeting regarding the student's sensory needs was impeded. In addition, the parent raises allegations regarding ABA methodology.

Regarding the parent's unilateral placement, the parent alleges that the Rebecca School was appropriate for the student as it was specifically designed to meet his unique needs and the student was likely to make progress. The parent also contends that equitable considerations favor her claim. The parent seeks to overturn the IHO's decision and requests that she be awarded the costs of the student's tuition at the Rebecca School for the 2010-11 school year.

In an answer, the district denies many of the substantive allegations made by the parent. The district alleges that the parent's allegations regarding parent counseling and training, the student's ADL needs, and input from the student's occupational therapist were beyond the scope of the impartial hearing because they were not raised in the parent's due process complaint notice. The district alleges that, even if those issues were considered, the student's IEP was substantively and procedurally appropriate and provided the student with a FAPE. According to the district, the parent's allegations that the student's IEP did not adequately describe the student's levels or deficits, and that the goals were not measurable, are unsupported by the hearing record. It further alleges that the IEP adequately addressed the student's sensory needs. With respect to the parent's allegation that the IHO misapplied the burden of proof, the district alleges that the IHO stated the proper standard in his decision and applied the correct burden of proof.

The district further alleges that the parent's unilateral placement was not appropriate for the student because it did not provide a program to meet the student's unique special education needs and did not provide sufficient academic instruction to the student. Specifically, the district alleges that the parent enrolled the student at the Rebecca School for a ten-month program despite it being undisputed that the student requires a 12-month program, and that the student was only being taught academics for about an hour and a half per day at the Rebecca School. The district also alleges that equitable considerations do not favor the parent because among other factors, she did not provide timely notice that she was rejecting the district's program. The district seeks to affirm the IHO's decision in its entirety or, in the alternative, find that the program chosen by the parent was inappropriate, that equitable considerations preclude relief, and that the parent is not entitled to the relief sought.

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., 557 U.S. 230, 239 [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]; see 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 accurately reflects the results of evaluations to identify the student's needs (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]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

VI. Discussion

A. IHO Decision – Evidentiary Burden and Findings of Fact

Initially, I will address the parent's argument that the IHO misallocated the burden of proof to the parent regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to this case (see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]). In general, a misapplication of the burden of persuasion is reversible error (see M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 459 [8th Cir. 2008]).

Here, the IHO set forth the appropriate standard in his decision that the district had the burden to prove that it offered an appropriate program (IHO Decision at p. 12). The IHO then set forth the positions of both the district and the parent, and the facts supporting their respective contentions with citations to the hearing record (id. at pp. 14-24). The IHO ultimately concluded that the district offered the student a FAPE (id. at p. 25). Although the parent correctly points out that in one instance in his decision, the IHO used less than optimal language to state that the examples of services sought by the parent did not "rise to the level of proving that the [district] did not provide a FAPE" (id.), I do not find in this case that it constitutes a misallocation of the burden of proof, but rather such language may also be read as the IHO weighing the evidence presented by both parties. Moreover, even if the IHO had allocated the burden of proof to the parent, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was equipoise (Schaffer, 546 U.S. at 58). However, assuming for the sake of argument that the IHO misapplied the burden of proof, I have nevertheless independently examined the hearing record and, as more fully described below, I find

that the evidence is sufficient to support the IHO's ultimate determination that the district offered the student a FAPE.

Next, I turn to the parent's contention that the IHO adopted many of the district's proposed findings of fact included in its post-hearing closing brief and failed to exercise independent judgment. State regulations provide that an IHO's decision shall be based upon the hearing record and shall set forth the reasons and the factual basis for the determination with citations to the hearing record (8 NYCRR 200.5[j][v]). Nothing in the IDEA or implementing regulations precludes an IHO from seeking proposed findings of fact from the parties and incorporating them into the decision to the extent relevant. Here, a review of the IHO decision reveals that the IHO incorporated parts of the district's post-hearing closing brief in his decision under the heading "findings of fact," and also included parts of the parent's closing memorandum in his "findings of fact" (IHO Decision at pp. 14-24). While I decline to find it impermissible for the IHO to rely on documents submitted by the parties and incorporate them into his decision, I remind the IHO that it is his responsibility to not simply restate various facts, but instead must resolve disputes regarding those facts that are necessary for deciding the identified issues.

B. Scope of Impartial Hearing and Review

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial 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).

Upon review, I find that the parent's amended due process complaint notice cannot be reasonably read to include claims that the IEP failed to include parent counseling and training, that the IEP failed to describe the student's ADL skills, that the May 2010 CSE failed to include the participation of an occupational therapist, or that applied behavior analysis (ABA) is an inappropriate methodology for the student (see Dist. Ex. 2). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, rather the hearing record indicates that the district objected to expanding the scope of the impartial hearing (see Tr. pp. 277, 293, 295-96; Dist. Ex. 35 at pp. 16-17). In addition, the hearing record reflects that the parent did not attempt to further amend her due process complaint notice to include the resolution of these issues.

Moreover, 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. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]), I note that the issues of ADL skills as well as parent counseling and training were first raised by counsel for the parent on cross-examination of a district witness or in the parent's closing

memorandum (see Tr. pp. 277, 295-97; Parent Ex. CC at pp. 4, 7). Thus, the district did not initially elicit testimony regarding the student's ADL skills or parent counseling and training, and therefore, I find that the district did not "open the door" to these issues under the holding of M.H.[4] To the extent that the district may have "opened the door" to the issue of methodology by questioning its witness, the student's special education teacher during the 2009-10 school year, about her professional training, the teaching methodologies used in her 6:1+1 special class, and her understanding of the parent's concerns about ABA methodology, I have included a review of the parent's claim below (see Tr. pp. 68-70, 158-59).

Regarding the parent's claim in her petition that the student's occupational therapist did not participate at the May 2010 CSE meeting, I note that the IHO did not address this issue in his decision. Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice that included the lack an occupational therapist at the May 2010 CSE meeting, I decline to review this issue. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at *4-*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "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. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], 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. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [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]).

In summary, I find that for the reasons discussed above, the parent's claims relating to the district's failure to include the participation of an occupational therapist at the May 2010 CSE meeting, the lack of parent counseling and training on the IEP, and the lack of a description of the student's ADL skills, are outside the scope of this appeal and will not be discussed.

[4] To the extent that the IHO incorporated parts of the parent's closing memorandum in his decision and thereby rendered findings of fact relating to parent counseling and training and the lack of ADL skills on the IEP, I find that the IHO exceeded his jurisdiction by addressing issues that were not raised in the parent's amended due process complaint notice (IHO Decision at pp. 21, 23). Especially, where here, counsel for the parent agreed to withdraw the parent's concerns about the lack of parent counseling and training in the IEP because such issue was not included in the parent's due process complaint notice (Tr. p. 277). 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]).

C. May 12, 2010 IEP

1. Present Levels of Performance

Upon an independent review of the entire hearing record, I decline to find that the May 2010 IEP did not adequately reflect the student's present levels of performance.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 CFR 300.320[d][2]).

The district's special education teacher testified that upon the student's entry into her 6:1+1 special class in October 2009, she reviewed a February 2009 PT report, a February 2009 speech-language annual update report, a March 2009 OT annual update report, a March 2009 educational update report, a May 2009 neuropsychological evaluation report, and the May 2009 IEP (Tr. pp. 72-74, 238; Dist. Exs. 10-14; Parent Ex. C). She testified that following her review of the documents, her impression of the student was that he exhibited emerging verbal abilities, difficulty with fine motor skills, and that although academically he was functioning below grade level, he demonstrated some basic kindergarten-level skills such as number, color, and shape recognition (Tr. pp. 73-75, 77).

In November 2009 and May 2010, the special education teacher administered The Assessment of Basic Language and Learning Skills-Revised (ABLLS-R), described as an "assessment, curriculum guide, and skills tracking system for [students] with language delays" (Tr. pp. 79-80; Dist. Ex. 15 at p. 1). According to the special education teacher, all areas the ABLLS-R assesses are important because the results assist district staff in developing IEPs, and identifying "gaps" in students' learning (Tr. p. 81). Additionally, a comparison of the results from the two administrations of the ABLLS-R during the school year enables staff to identify areas of student progress (Tr. pp. 80, 82-83, 85, 88; Dist. Ex. 15 at p. 2). The special education teacher stated that "overall" the student exhibited progress during the 2009-10 school year, and that there were not any areas that he did not demonstrate progress (Tr. p. 89).

A report of the student's progress over the course of the 2009-10 school year toward learning basic skills and behaviors at his developmental level connected to the New York State Learning Standards shows that the student exhibited progress in English language arts, math, science, and social studies (Dist. Ex. 16 at pp. 1-4). In the winter 2010 progress section of the report, the special education teacher commented that the student had made many improvements since the beginning of school (id. at p. 5). For example, the teacher stated that the student was willing to color and write, he was beginning to identify pre-primer Dolch sight words, he counted up to 100, he showed attention to print, and he was beginning to look at pictures to help tell a story (id.). At the impartial hearing, the special education teacher provided testimony about the student's progress toward the goals established in connection to the learning standards (Tr. pp. 148-53).

According to the special education teacher, during the 2009-10 school year, the student exhibited progress in his ability to sound out words, recall sight words, stay on task, decrease inappropriate vocalizations, increase time spent "on task," use words to express wants and needs, greet others without a prompt, increase verbal interactions with peers, use three to four words to communicate, and increase time spent attending during small group instruction (Tr. pp. 92-93, 95-99, 101-02, 111, 185). The special education teacher testified at length as to the progress the student exhibited during the 2009-10 school year toward his IEP annual goals in the areas of using verbalizations; following directions without exhibiting oppositional behaviors; demonstrating understanding of math concepts; showing understanding of and answering "wh" questions; identifying letters, letter sounds, and kindergarten sight words; increasing pretend play skills; decreasing self-stimulatory vocalizations; increasing task focus; improving tracing skills for writing and fine motor skills for cutting; improving stair navigation; and following 1-2 step directions with a variety of modifiers (Tr. pp. 125-48; Dist. Ex. 6 at pp. 9-13). At the time of the May 2010 CSE meeting, the special education teacher had observed a decrease in the student's behaviors, and an increase in his ability to complete academic activities and willingness to be taught (Tr. p. 165).

Prior to the May 2010 CSE meeting, the student's special education teacher requested that the student's mother provide her with input regarding particular skills or goals the parent would like addressed in the IEP (Tr. p. 154; Dec. 20, 2011 Tr. pp. 663-64; Dist. Ex. 23 at pp. 52-53). The special education teacher testified that she considered the results of the administrations of the ABLLS, "where [the student] was within the curriculum," information provided by the parent regarding the goals she wanted included in the IEP, and the results of informal classroom assessments when drafting specific present levels of performance pages for the May 2010 IEP (Tr. pp. 154-55, 158; Dist. Ex. 7 at pp. 3-6).

The May 2010 IEP academic performance and learning characteristics indicated that information about the student's reading, writing, and math skills was obtained by teacher observation and ABLLS results, and that his instructional program was based upon the alternate grade level indicators (Tr. pp. 154-55; Dist. Ex. 7 at p. 3). According to the IEP, the student was able to identify his basic wants and needs, all basic colors and two dimensional shapes, and all upper and lowercase letters (Dist. Ex. 7 at p. 3). The IEP indicated that the student knew most of his letter sounds, but confused "C, I, Q, and Y" sounds (id.). The student read 20/40 pre-primer sight words, and at the time of the IEP, was using pre-decodable texts for reading instruction and sight words (id.). In math, the IEP indicated that the student counted with 1:1 correspondence using manipulatives and pictures, and that he was starting to answer "how many" and "altogether" questions (id.). Additionally, the IEP noted that the student identified numbers up to 30 (id.).

The May 2010 IEP indicated that the student completed tasks in both large (6 students) and small groups, that he was working on independent tasks for 5-7 minutes at a time, that during lessons he raised his hand when prompted to take turns, and that he looked for praise when completing tasks at school (Dist. Ex. 7 at pp. 3-4). The student recalled some information about his day when asked about it at the end of the school day, and followed classroom routines (id. at p. 4). The IEP indicated that the student became distracted at times and sometimes needed prompting to remain on task; however, he demonstrated an improved ability to attend to a structured routine in the classroom and/or clinical activity (id. at pp. 4-4A). Additionally, the student's involvement in joint attention tasks had improved (id. at p. 4A). The student occasionally exhibited echolalia, characterized by repeating sounds, noises or phrases that he heard previously, which sometimes interfered with his learning (id. at p. 4). The IEP noted that throughout the 2009-

10 school year, the student's echolalia lessened by using a conversation book, visuals, and verbal prompting (id.).

Information about the student's social/emotional performance contained in the May 2010 IEP indicated that he enjoyed learning new concepts at school and presented as "extremely happy" (Dist. Ex. 7 at pp. 4-5). The student exhibited awareness of his teachers and peers, and often became "shy" when too much attention was placed on him (id. at p. 5). The student sought positive attention from his teachers, and took turns while playing games with a teacher or peer (id.). The IEP indicated that the student was learning to take turns with visual and verbal prompting (id.). According to the IEP, the student engaged in parallel and reciprocal play with peers and, although he preferred to play by himself rather than with a peer, he shared toys when prompted to do so (id. at pp. 4A-5). The student required prompts to greet teachers and peers, but returned greetings (id. at p. 5). The IEP noted that the student enjoyed playing with toy cars and trains, and sitting in a rocking chair looking at a book or out the window (id.). The May 2010 CSE determined that the student's behavior did not seriously interfere with instruction, and could be addressed by the special education teacher (id.). The IEP identified the special education teacher, the classroom paraprofessional, and the related service providers as the personnel responsible for providing the student with behavioral support (id.).

Regarding the student's communication skills, the IEP indicated that the student used 1-3 word utterances, gestures, and picture exchange symbols to communicate and request desired items (Dist. Ex. 7 at pp. 4A, 7). The student used speech and gestures to protest, comment, ask for assistance, or terminate activities (id. at p. 4A). Receptively, the IEP indicated that the student was able to follow functional one-step directions (e.g. "stop," "wait," and "give me"), noting that as directives increased in length, the student's ability to accurately follow the direction diminished (id.). The student identified vocabulary related to variably familiar and preferred items, and his ability to match objects to objects, pictures to pictures, and objects to pictures in a field of 12 had improved (id.).

The May 2010 IEP health and physical development present levels of performance indicated that the student exhibited delays in fine motor, visual perceptual and visual motor, and sensory processing skills, including his ability to visually focus on a task and self-regulate (Tr. p. 155; Dist. Ex. 7 at p. 8). The IEP indicated that the student engaged and completed tabletop activities with prompting and redirection, as he easily became distracted and lost visual focus (id.). The student exhibited an inefficient grip on writing implements; poor handwriting ability; and "sloppy" coloring, copying, and scissor skills (id.). The student traced and imitated letters and numbers with prompts, and was beginning to write his name with cues for correct letter formation and sizing (id. at pp. 3, 8). According to the IEP, the student exhibited good strength, and he safely and independently ambulated on stairs in an alternate step pattern without holding onto a railing (id. at p. 7). The student's coordination was "fair" but declined when the speed or amount of repetitions in the activity increased (id.). The IEP indicated that the student showed good static balance and fair dynamic balance, and that he could hop forward 3-4 steps (id.). The student was "fully toilet trained," and requested the need for the bathroom (id. at p. 6). Additionally, the IEP noted that the student was allergic to specific food items (id. at pp. 6-7).

Given the totality of information about the student provided in the IEP present levels of performance, and the special education teacher's testimony regarding her experience with the student during the 2009-10 school year as the basis for her drafting of portions of the IEP, I do not agree with the parent's assertion that the student's social/emotional development or sensory needs are not adequately acknowledged. As detailed above, the IEP provided specific information about

the student's social abilities and needs, which was consistent with the special education teacher's testimony about the student's performance during the 2009-10 school year (Tr. pp. 94-95, 237; Dist. Ex. 7 at pp. 4A-5). I decline to find under the circumstances of this case that it was inappropriate for the May 2010 CSE to rely upon information from the student's special education teacher for determining the student's skill levels (see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). Although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see 8 NYCRR 200.4[d][2][i]; Application of a Student with a Disability, Appeal No. 12-045; Application of a Student with a Disability, Appeal No. 11-043). Moreover, the student's mother testified that she attended the May 12, 2010 CSE meeting in its entirety, and that she was provided the opportunity to fully participate in the meeting (Dec. 20, 2011 Tr. pp. 627-28, 662; see Tr. pp. 161-62).[5]

Regarding the student's sensory needs, the special education teacher testified that the student was a "multisensory learner," that he was "very active," and that he enjoyed using sensory tools (Tr. pp. 108-09). She did not agree that the student was a "sensory seeker" who required sensory input to function throughout the day (Tr. pp. 222, 301). The special education teacher stated that during the 2009-10 school year, the sensory breaks built into the student's daily schedule appeared to work for him and he did not require additional sensory activities outside of that provided to the other students in the class (Tr. p. 110). According to the special education teacher, during the 2009-10 school year, the student was not removed from the class because of his energy level or because he required additional sensory stimulation (Tr. pp. 110-11). Although the reports considered by the special education teacher at the outset of the 2009-10 school year reference the student as a "sensory seeker" and indicate that OT sessions should focus on sensory processing skills (Dist. Exs. 12 at p. 2; 14 at p. 10), those reports taken as a whole do not indicate the student's sensory needs were above that which the special education teacher observed during that school year (Tr. pp. 301-03; Dist. Exs. 10-14).

As the Second Circuit recently articulated, the determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis and includes the consideration of only the information known at the time the IEP was developed (R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). Insofar as the parent alleges that the May 2010 IEP does not include reference to any "tantrum" behaviors, a review of the hearing record indicates that at the time of the May 2010 CSE meeting, the student was not exhibiting tantrum behaviors in the classroom. The special education teacher testified that during the 2009-10 school year, the student did not demonstrate the tantrum behaviors he did at home, but rather that he acted "silly" or exhibited off-task behaviors at times (Tr. p. 100; Dist. Ex. 23 at pp. 13-14, 27, 32, 41, 56, 58, 64, 66; Parent Ex. S at pp. 7, 15, 17-20). The special education teacher stated that she used redirection, positive reinforcement, visuals, verbal prompting, social stories, a token system, and gestural prompting to decrease the student's off-task behaviors, which decreased by the end of the 2009-10 school year (Tr. pp. 95-

[5] The special education teacher at the May 2010 CSE meeting stated that the meeting lasted approximately 50 minutes (Tr. pp. 157, 161).

98). She further testified that the student's "silliness" did not interfere with his ability to learn, and indicated that the episodes were relatively brief (Tr. pp. 100-01, 216-17).[6]

Moreover, in conjunction with placement in a 6:1+1 special class with OT, PT, and speech-language therapy, the May 2010 CSE determined that the student required management strategies including a modified curriculum, a small, highly structured environment with minimal distractions, clear and concise directions, time for processing information, ongoing communication between home and school, and the use of a positive reinforcement system (Dist. Ex. 7 at pp. 1, 3, 21). To support the student's behavioral needs, the May 2010 IEP provided modeling of appropriate behaviors, feedback and praise for the display of appropriate behaviors, and positive reinforcement (id. at p. 5).

Thus, based upon the evidence and the information available to the May 2010 CSE, including the information provided by the special education teacher who taught the student during the 2009-10 school year, the May 2010 IEP accurately reflected the student's present levels of academic achievement and functional performance, as well as his academic, social/emotional, sensory processing, motor, and behavioral needs for the 2010-11 school year (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of the Dep't of Educ., Appeal No. 12-010; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

2. Annual Goals

Turning to the parties' dispute regarding the annual goals contained in the May 2010 IEP, I note that 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]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

An independent review of the May 2010 IEP shows that the CSE developed annual goals and short-term objectives for the student in the areas of identifying word families and patterns, providing personal information including name and age, reading comprehension, identifying sight words, adding, skip counting to 100, telling time with an analog clock, naming and identifying the value of money, engaging in cooperative social play with others, greeting peers and teachers, following functional two step directions, increasing his ability to attend to tasks, performing gross motor movements, coloring pictures, improving handwriting and fine-motor skills, and increasing

[6] I am not persuaded by the parent's allegation that the testimony of the special education teacher regarding the student's classroom behavior is inconsistent with a report of progress toward one annual goal contained in the first quarter 2009-10 IEP progress report (compare Tr. pp. 100-01, with Dist. Ex. 6 at p. 9). A review of the special education teacher's testimony consistently reflects her view that the student's classroom behavior during the 2009-10 school year was "silly" and "off-task" rather than tantrum or oppositional (Tr. pp. 100-01, 215-21, 275-77, 300-01).

engagement and completing tasks (Dist. Ex. 7 at pp. 9-18). The special education teacher sought the parent's input regarding goals for the 2010-11 school year, to which the parent responded and the special education teacher attempted to accommodate (Tr. pp. 158-61; Dist. Ex. 23 at pp. 52-55). The special education teacher testified that she and the student's related service providers drafted the annual goals, which were reviewed and discussed during the May 2010 CSE meeting (Tr. pp. 156-57). According to the special education teacher, at the CSE meeting, the parent stated her belief that the goals were appropriate, and she did not voice any objections to the goals (Tr. pp. 161-62, 201-02; see Dist. Ex. 23 at p. 63). During the impartial hearing, the special education teacher provided testimony regarding the rationale for developing the IEP annual goals and short-term objectives (Tr. pp. 167-201).[7]

Contrary to the parent's assertion that the goals are not measurable because they do not contain "a baseline of performance," as previously discussed, the May 2010 CSE adequately developed a description of the student's present levels of performance. In addition, a review of the student's annual goals and short-term objectives shows that they were designed to meet the student's areas of need as described above, and included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress (Dist. Ex. 7 at pp. 9-18). For example, the annual goals state the skill the student will achieve in one year and specify the accuracy with which the goal will be achieved (e.g. 80%, 5/6 times, 3 out of 5 tasks), the setting in which the goal will be addressed (e.g. during circle time, classroom activities, small group instruction), the supports provided to the student (e.g. visual supports, verbal prompts), and the method personnel will use to measure progress (e.g. weekly charting by the classroom teacher, observation, data collection) (id. at pp. 9-18). Many of the short-term objectives provide additional benchmark information by identifying specific months of the 2010-11 school year (e.g. August, November, February, and May), or the timeframe (e.g. four months, four to eight months) that target skills will be achieved by (id. at pp. 9-13, 17-18). While some of the student's related services annual goals and short-term objectives do not provide this level of detail, I find that overall the annual goals and short-term objectives contained on the student's May 2010 IEP, when read together, target the student's identified areas of need and provide information sufficient to guide a teacher in instructing the student and measuring his progress (see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). Accordingly, I decline to find a denial of a FAPE for the 2010-11 school year on the basis of inappropriate goals.

D. Instructional Methodology

The parent asserts on appeal that she "consistently had reservations" about the appropriateness of using ABA instructional methods with the student, and that she preferred use of the DIR methodology.

[7] The special education teacher stated that because the May 2010 IEP went into effect 10 days after the May 12, 2010 CSE meeting, she began working on the annual goals during the remainder of the 2009-10 school year (Tr. pp. 167-69; Dist. Ex. 7 at p. 2). The student's progress toward the new annual goals observed between the date the IEP was implemented and the end of the 2009-10 school year is documented in the IEP the district admitted into the hearing record (Dist. Ex. 7 at pp. 9-18).

Insofar as the parent's concerns regarding the assigned school's use of ABA methodology asserts a challenge to the district's ability to implement the student's May 2010 IEP, the argument must be dismissed as being speculative since the student did not attend the district's program. 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]),[8] 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]). Here, it is undisputed by the parties that the parent rejected the district's program and enrolled the student at the Rebecca School for the 2010-11 school year. 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 teacher of the assigned school 6:1+1 special class testified that she is certified in special education and she described the principles of ABA instruction as using positive reinforcement and praise, breaking tasks down into smaller pieces and building upon them, and repeating lessons until they were learned (Tr. pp. 68-70). The special education teacher did not use discrete trial training as an instructional method in her classroom (id.). The special education teacher also provided sensory reinforcement using a variety of sensory tools and sensory breaks (Tr. pp. 70, 109-10). She used multisensory methods of instruction, which she described as a "very hands on" approach using all of the students' senses to help them learn (Tr. p. 70). Adults were present during daily social skills instruction to facilitate appropriate social interactions within the group of students (Tr. pp. 102-03).

During the 2009-10 school year, methods used to support the student's learning included visual cues, independent seat work, and timers to notify him of impending transitions (Tr. pp. 71, 89-91). The student's individualized program included using his interest in cars and trains during math instruction, providing visual and verbal prompting to keep him on task, using music and songs to teach certain concepts, and asking him to help others (Tr. pp. 94-96). To decrease the student's inappropriate vocalizations and distractibility, the special education teacher used positive reinforcement during times he was not vocalizing, visual and gestural prompts, a token system, social stories, and modeled appropriate behavior (Tr. pp. 96-100, 104-07). Additionally, I note that the special education teacher assessed the student's progress during the 2009-10 school year

[8] 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]).

and testified that he had made progress "all around throughout the school year" (Tr. pp. 79-89, 92-93, 95-99, 101-02). Thus, the hearing record shows that although the special education teacher used some ABA techniques, she could offer a variety of instructional techniques individualized to meet the student's needs had the parent elected to enroll the student in the public school program.

To the extent that the parent may be challenging the lack of an educational methodology within the May 2010 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]; K.L., 2012 WL 4017822, at *12; Ganje, 2012 WL 5473491, at *11-*12; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

In this case, the May 2010 IEP did not specify an instructional methodology that the student required (Dist. Ex. 7). The parent testified that in addition to her belief that the student did not make progress in the district's 6:1+1 special class during the 2009-10 school year, her desire to have the student receive instruction using the DIR methodology was a basis for his placement at the Rebecca School for the 2010-11 school year (see, e.g., Dec. 20, 2011 Tr. pp. 630-33, 687, 692, 694). Although the hearing record shows that at the time of the May 2010 CSE meeting the parent was interested in the Rebecca School and in particular the DIR methodology, she did not inform the CSE that she was considering placing the student at the Rebecca School because she did not believe it was "something [the CSE] needed to know" (Tr. pp. 422, 459; Dec. 20, 2011 Tr. pp. 633-34, 667-69, 684, 686; Dist. Ex. 20). The parent testified that she did not inform the CSE about her interest in the DIR methodology for the student because she was told in 2009 that the district did not use that instructional approach (Dec. 20, 2011 Tr. pp. 637, 668-70). However, aside from the parent's desire for DIR methodology, the hearing record does not indicate that the student required a specific methodology to address his needs.

VII. Conclusion

In summary, upon due consideration of the hearing record, there is no reason to disturb the IHO's conclusion that the May 2010 CSE's recommendation of a 6:1+1 special class with related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record demonstrates that the May 2010 IEP identified the student's multiple needs, developed annual goals and short-term objectives to address those needs, and recommended a program in the LRE (see 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]). Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parent's claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir.

2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have also considered the parties' remaining contentions and find that they are unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 15, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER