The University of the State of New York

The State Education Department
State Review Officer
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No. 12-122

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:
Mayerson & Associates, attorneys for petitioner, Gary S. Mayerson, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 that respondent (the district) reimburse her for her son's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a 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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 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 has received a diagnosis of a pervasive developmental disorder-not otherwise specified (PDD-NOS), and exhibits language delays, regulation difficulties, and auditory sensitivity (Parent Ex. D at p. 3).[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (id.; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). Since 2008, the student has attended the Rebecca School (Tr. p. 579). 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).

[1] I note that the hearing record contains multiple duplicative exhibits (Dist. Ex. 6; Parent Ex. D). For purposes of this decision, only Parent exhibits were cited in instances where both a Parent and District exhibit were identical. I remind the IHO that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

The CSE convened on March 30, 2011 for the student's annual review and to develop an IEP for the student for the 2011-12 school year (Parent Ex. D 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 related services of speech and language therapy, physical therapy (PT), occupational therapy (OT), counseling, and a 1:1 transitional paraprofessional (id. at pp. 1, 2, 15, 17-18). In addition, the CSE recommended special education transportation and adapted physical education (id. at p. 1). The CSE also determined that the student's behavior does not seriously interfere with instruction and could be addressed by a special education teacher (id. at p. 4). To address the student's academic, social/emotional, and physical needs, the CSE recommended several accommodations and supports for the student, including visual supports, redirection, repetition, clear and explicit expectations, sensory and movement breaks, and access to sensory materials throughout the day (id. at pp. 3-5). The CSE also developed 17 annual goals and 52 corresponding short-term objectives to address the student's needs in academics, handwriting, visual spatial processing, social/emotional functioning, motor skills, language skills, sensory regulation, and transitioning to a public school setting (id. at pp. 6-14). The IEP was sent to the parent on April 6, 2011, with a projected date of initiation of July 1, 2011 (id. at p. 2).

By final notice of recommendation (FNR) dated June 11, 2011, the district summarized the recommended special education and related services for the 2011-12 school year, and notified the parent of the particular public school site to which the district had assigned the student to attend for the 2011-12 school year (Parent Ex. I). Sometime in June 2011, the parent and the student's Rebecca School teacher toured the school site listed on the FNR and met with the assistant principal (Tr. pp. 603-06, 728-31; Pet. Ex. D).[2, 3]

The parent sent a letter to the district dated June 29, 2011, asserting that the school assigned on the FNR would not have been appropriate for the student, for several reasons (Tr. pp. 608-09; Pet. Ex. D). These reasons included that the program was not age appropriate for the student, no one at the assigned school had heard of "DIR,"[4] no one could tell her which classroom the student would be placed in, the cafeteria was too noisy, it was not clear that the student would receive all his related services, sensory equipment was not regularly available, it was unclear whether the student would have the same teacher in the summer and fall, the program focused on life skills rather than academics, and most of the students in the assigned school had physical impairments and were nonverbal (Pet. Ex. D). In addition, the parent informed the district that the student would continue to attend the Rebecca School for the 2011-12 twelve month school year, and the parent intended to hold the district financially responsible for said services (id.).

[2] The assistant principal did not recall providing the parent and the Rebecca School teacher with a tour of the site; however, both the parent and the teacher provided similar testimony regarding the tour (see Tr. pp. 479-80, 603-06, 728-31).

[3] The district and parent agree that Parent Ex. L contained in the hearing record was submitted in error and should have been replaced during the impartial hearing with the parent's 10-day notice letter dated June 29, 2011, which is attached to the petition as exhibit "D" (Tr. pp. 75-76, 428; Pet. ¶ 11, n.4; Answer ¶ 7, n.2; see Pet. Ex. D). Accordingly, Pet. Ex. D is made part of the hearing record and all references herein will be to Pet. Ex. D.

[4] DIR stands for Developmental Individual Different Relationship Based and is the core methodology utilized by the Rebecca School (Tr. p. 231).

The parent signed an enrollment contract with the Rebecca School on June 21, 2011 for the student's attendance for July 2011 through August 2011, and executed another enrollment contract on August 12, 2011 for the student's attendance at the Rebecca School for September 2011 through June 2012 (Parent Exs. K; N). At the Rebecca School, the student was enrolled in an 8:1+3 special class and received OT, PT, speech therapy, adaptive physical education, and art therapy (Parent Ex. E).

A. Due Process Complaint Notice

The parent requested an impartial hearing pursuant to a due process complaint notice dated September 27, 2011, seeking the costs of the student's tuition at the Rebecca School for the 12-month 2011-12 school year, transportation services, and compensatory education for any lapse in pendency (Parent Ex. A at p. 9). The parent also requested an interim order determining the student's pendency (stay put) placement during the impartial hearing (id. at p. 2).

The parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, that the Rebecca School was an appropriate placement for the student, and that equitable considerations weighed in favor of the parent (Parent Ex. A at pp. 1-2). The parent alleged, among other things, that: (1) the district's proposed program was not reasonably calculated to provide the student with a FAPE (id. at pp. 2, 3, 7, 8); (2) the March 2011 CSE was not duly constituted (id. at p. 3); (3) the CSE failed to conduct a functional behavioral assessment (FBA), develop a proper behavioral intervention plan (BIP), or include goals to address the student's interfering behaviors (id. at pp. 3, 5, 6); (4) the IEP did not include the provision of parent counseling and training (id. at p. 3); (5) the parent was denied meaningful participation in the IEP development and selection of the assigned public school site, and the district engaged in impermissible predetermination (id. at pp. 3, 5); (6) the district failed to conduct a triennial evaluation, failed to provide evaluations to the parent, and did not consider private evaluations of the student (id. at pp. 2, 3); (7) for various reasons, the IEP did not include appropriate goals for the student (id. at pp. 3, 4, 7); (8) the IEP did not include adequate levels and frequencies of related services (id. at p. 4); (9) the IEP did not address the student's difficulty with generalization (id.); (10) the 1:1 transitional paraprofessional recommended in the IEP was not appropriate for the student, was not adequately described in the IEP, and the IEP itself did not include goals for the transitional paraprofessional (id. at pp. 4, 5); (11) the IEP did not include a transition plan (id. at pp. 5, 7); (12) the IEP did not address the student's needs for assistive technology (id. at p. 6); (13) the CSE failed to select or identify an educational methodology on the student's IEP and to the extent that the district intends to educate the student using the Training and Education of Autistic and Related Communication Handicapped Children (TEACCH) methodology, it is not appropriate for the student (id. at pp. 6, 7); and (14) the district failed to identify the particular public school site to which the student was assigned at the CSE meeting or thereafter (id. at pp. 5, 7). The parent further alleged that the district would not have been able to implement the program and services contained in the IEP if the student had attended the assigned public school (id. at pp. 7, 8). According to the parent, the assigned school would have been unsafe, the district would not have been able to deliver the mandated related services, and the district's staff would not have been adequately trained (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 5, 2012 and concluded on April 2, 2012, after eight nonconsecutive hearing dates (Tr. pp. 1-770). The IHO issued an interim order dated

February 14, 2012 awarding the student pendency entitlements retroactive to September 27, 2011 for placement, tuition, and costs at the Rebecca School (IHO Order on Pendency at p. 3).

In a decision dated May 14, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 7-10). The IHO first found that there were no procedural errors that may have impeded the student's right to a FAPE, impeded the parent's opportunity to participate, or deprived the student of educational benefits (id. at p. 8). The IHO specifically found that the CSE was validly constituted, the CSE considered and incorporated school reports and evaluations in the IEP, and the IEP was developed with full participation by all of the CSE members (id.). The IHO also found that the program offered by the district was reasonably calculated to provide the student with meaningful educational benefits and more than trivial advancement (id. at p. 10). In addition, the IHO determined that the IEP was based on reliable and comprehensive evaluations and school reports and that an assistive technology evaluation as well as an FBA and BIP were not required to develop a program reasonably calculated to meet the student's needs (id.). The IHO further determined that the parent's request for parent counseling and training was addressed verbally at the March 30, 2011 CSE meeting and was offered within the district's program (id.). The IHO also found that the student would have received transition services requested by the parent from a transitional paraprofessional, the student's teacher, and other service providers (id.). Regarding the assigned school, the IHO found that the school specified by the district in the FNR offered programs in several locations and that the student would have attended the site appropriate for his needs (id. at p. 9). Accordingly, the IHO denied the parent's request for relief (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision that the district offered the student a FAPE for the 2011-12 school year. The petition begins by alleging that the IHO erred in failing to address "all of petitioners' expressly pleaded claims" (Pet. p. 1). The parent alleges that the IHO was biased and should have recused herself. The parent also alleges that SROs are biased.[5]

The parent then raises a number of bases to support her claim that the student was denied a FAPE for the 2011-2012 school year. The parent alleges the district improperly predetermined the IEP by drafting the IEP prior to the CSE meeting and by not sharing the draft IEP with the meeting participants. As part of her predetermination claim, the parent also asserts that the CSE team failed to address her concerns raised at the CSE meeting regarding the student's sensory needs, his auditory sensitivity, and the inclusion of a 1:1 transitional paraprofessional. The parent argues that the district failed to conduct a triennial evaluation and failed to assess the student for assistive technology. In addition, the parent argues that the CSE failed to address the student's interfering behaviors and should have conducted an FBA and developed a BIP. The petition also

[5] Although the parent argues that the district's failure to amend the March 2011 IEP during the thirty day resolution period should be held against the district, the district is not under an obligation to amend the offered program. According to federal regulations, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [school district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (34 CFR 300.510[a][2]; see also 8 NYCRR 200.5[j][2]). I further note that the Second Circuit recently held that the consequence to the district of failing to rehabilitate a deficiency in the IEP during the resolution session is that the district may not allege that the deficiencies would have been cured if the student attended the district placement (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187-88 [2d Cir. 2012]).

includes further allegations that the district failed to include parent counseling and training on the IEP and that the district did not address the student's need for a transition plan to assist the student in transferring from the student's private school to the district's public program. The parent raises additional concerns over the lack of a specific teaching methodology in the IEP, averring that the student is unable to learn using TEACCH or applied behavioral analysis (ABA) methodologies.

The parent also raises arguments regarding the assigned school. First, the parent argues the school listed on the district's FNR is the only school that the district may defend. The parent contends that because the district notified the parent of a specific classroom, the district cannot alter the proposed offering to an appropriate classroom that was available for the student. The parent also raises arguments regarding the availability of sensory equipment, the educational methodology, and the functional levels of the students at both the school listed on the FNR and the school which the student would have attended if he had enrolled in public school. The parent also alleges that the district violated a stipulation in the Jose P. class action lawsuit by not providing the parents with a meeting to discuss the assigned school. Additionally, the parent argues that the district's failure to remedy any of the parent's complaints during the 30-day resolution period or at a resolution meeting supports the parent's positions.

The parent concludes by alleging that the parent's unilateral placement of the student at the Rebecca School was appropriate for the 2011-12 school year and that equitable factors weigh in favor of the parent. The parent reasons that because the Rebecca School had been adjudicated as appropriate for the student in previous school years, it should continue to be appropriate for the 2011-12 school year. The parent further contends that the Rebecca School is appropriate because it addresses the student's auditory processing needs through the use of an FM system; that the student is functionally within the middle range of the students in his Rebecca School classroom; that the student receives OT, speech therapy, and music therapy at the Rebecca School; that the Rebecca School appropriately addresses the student's dysregulation through the use of sensory equipment; and that the student's 8:1+3 classroom at the Rebecca School is less restrictive than the district's proposed 6:1+1 program with the addition of a 1:1 transitional paraprofessional.

The parent seeks an order reversing the IHO decision in its entirety and finding that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was appropriate for the student, that equitable considerations favored the parent, and awarding her the costs of the student's tuition at the Rebecca School for the 2011-12 school year.

The district answers, denying the allegations contained in the petition and asserting that the IHO was correct in finding that the IEP was substantively appropriate and that there were no procedural errors which impeded the student's right to a FAPE, impeded the parent's opportunity to participate in the decision making process, or caused a deprivation of educational benefits. The district also explains that the school listed on the FNR was a procedural error and that the district had a space available for the student in an appropriate classroom, which the student would have attended if he had attended public school. The district also addresses the parent's remaining contentions regarding the assigned school and the offered program. The district requests that the IHO decision be upheld or, alternatively, requests a finding that the parent failed to meet the burden of proving the appropriateness of the unilateral placement or that equitable considerations weigh in favor of the district.

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 US 230, 238-239 [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; 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]; see 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]; 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. Preliminary Matters

1. Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's findings that the student is entitled to placement at the Rebecca School during the pendency of this action retroactive to September 27, 2011 and that the March 2011 CSE was validly composed (IHO Decision at p. 8; IHO Order on Pendency at p. 3). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

2. Scope of Review

I next turn to the district's argument that the parent failed to properly appeal from any specific decision of the IHO and instead used the petition as a method of relitigating the parent's original arguments. Upon review of the petition, the parent raised a one sentence allegation asserting that the IHO erred to the extent that she "failed to adequately address all of petitioners' expressly pleaded claims" (Pet. at p. 1). The parent's due process complaint notice is nine single spaced pages and contains 79 enumerated allegations; however, the parent only raises specific arguments in her petition as to a relatively small number of those allegations (see Petition; Parent Ex. A). A party appealing must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" and this includes clearly identifying which particular issues the that the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]).

While I have carefully reviewed the entire hearing record to consider those claims that the parent has specifically identified in her petition (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]), I will not sift through the parent's due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on her behalf and I find the petition insufficient with respect to those issues not specifically raised on appeal (8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 12-032); Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

3. Allegations relating to the Impartial Hearing Officer

I will now address the parent's allegation that the IHO failed to disclose a personal relationship with an employee of the district and that it constituted an impermissible appearance of impropriety. The IDEA and its implementing regulations set forth the requirements for an IHO.

Among other things, an IHO may not be "an employee of the State educational agency or the local educational agency involved in the education or care of the [student]" or be "a person having a personal or professional interest that conflicts with the person's objectivity in the hearing" (20 U.S.C. § 1415[f][3][A][i][I], [II]; 34 CFR 300.511[c][1][i][A], [B]; see also Educ. Law § 4404[1][c]; 8 NYCRR 200.1[x], [x][3]).

Further, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 12-064; Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

Based on my independent review, and contrary to the contentions of the parent, I find that the hearing record does not support a reversal of the IHO's decision on the basis that she acted with bias. During the hearing, the IHO stated that she was not an employee of the district and that she did not have a personal interest that conflicts with her objectivity in the hearing; however, she declined to answer the parent's counsel's question of whether she had a personal relationship with an employee of the district (Tr. pp. 714-15, 717-18). Although a personal relationship with an employee of the district does not necessarily create an impermissible conflict, it can create the appearance of impropriety—particularly when the IHO is not open and forthcoming. In this instance, there is no evidence in the hearing record of any personal relationship other than parent's counsel's allegations. While I agree with the parent insofar as it would have been a better course of action for the IHO to advise the parties of any relationship to avoid any unnecessary perceptions of impropriety, I decline to reverse her decision on this basis alone, especially when it does not appear to have affected the parties' presentation of their cases in this instance. Moreover, after reviewing the hearing record and as further set forth below, I did not find any evidence of actual bias, and the parent has not set forth any genuine basis in her petition to support a finding that the IHO exercised any bias, unfairness, or impartiality. Although the parent disagreed with the conclusions reached by the IHO, that disagreement does not provide a basis for finding that the IHO acted with bias (Application of a Student with a Disability, Appeal No. 12-032; Application of a Student with a Disability, Appeal No. 11-074; Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75). To further mitigate any potential prejudice to the parent, I have conducted an independent and impartial review of the hearing record

and have also reached the conclusion that the district offered the student a FAPE for the 2011-12 school year.[6]

Reviewing the parent's remaining contentions against the IHO, the hearing record does not show any unreasonable delay by the IHO in issuing a pendency order. Although a request for pendency was included in the parent's due process complaint notice, the hearing record reflects that parent's counsel first requested a pendency order on the record on January 27, 2012 (Tr. pp. 221-24; Parent Ex. A at p. 2).[7] The hearing record shows that there were not any unreasonable delays from the point the request was raised in front of the IHO—January 27, 2012—to the date of the pendency order—February 14, 2012 (Tr. pp. 221-24; IHO Order on Pendency at p. 3).[8] The hearing record shows that the IHO acted appropriately in according each party the opportunity to be heard regarding pendency and the IHO also provided each party an opportunity to be heard on other matters that arose during the hearing (see, e.g., Tr. pp. 57-59, 79-81, 143-45, 201-03, 221-24, 377-78, 392-93, 421-28, 482-84, 505-07, 630-33). Additionally, despite the contentiousness of the hearing, the IHO remained courteous, treated the parties with respect, and explained her rationale for rulings and decisions (see, e.g., Tr. pp. 57-59, 79-81, 117, 119-20, 136, 143-45, 147, 149-51, 156-57, 201-03, 216-17, 330-32, 358-59, 361, 369, 376-78, 392-93, 402-04, 421-28, 482-84, 505-07, 509-11, 513-15, 539, 614-17, 630-33, 649-52, 713-21). In sum, an independent review of the hearing record in this matter demonstrates that the parent was provided an opportunity to be heard at the impartial hearing, which I also find was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]). For the reasons stated above, I do not find that the hearing record, as a whole, supports a finding of bias or impartiality.

[6] I note that the parent has alleged in a footnote that SROs are also biased. Although it has been held that an argument raised on appeal in only a footnote need not be addressed (see R.R. v. Scarsdale Union Free Sch. Dist., 2010 WL 565659, at *3 [2d Cir. 2010]), I have considered the parent's request to the extent that she seeks my recusal and find that I am able to impartially render a decision and that there is no basis for recusal in this instance (see 20 U.S.C. § 1415[g][2]; 8 NYCRR 279.1[c]).

[7] The hearing record indicates that on January 27, 2012, the IHO suggested scheduling a pendency hearing and the district objected to the immediate issuance of a pendency order (Tr. p. 222). The parties then agreed that they would discuss pendency on February 8, 2012 (Tr. p. 317). On January 31, 2012, parent's counsel again raised the issue of pendency and was again advised that it would be addressed on February 8, 2012 (Tr. pp. 326-29, 408-14). A hearing on pendency was in fact held on February 8, 2012 (Tr. pp. 421-27). The hearing record indicates that the IHO forwarded a proposed pendency order to the impartial hearing office on February 9, 2012 (Tr. p. 558; IHO Order on Pendency at p. 3). Apparently, due to a problem with the February 9, 2012 pendency order, the IHO issued a second pendency order on February 14, 2012 granting the student pendency payments retroactive to September 27, 2011, the date of the parent's due process complaint notice (IHO Order on Pendency at p. 3).

[8] The pendency provision of the IDEA operates as "an automatic preliminary injunction" (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]), such that the district became liable for continuing to fund the student's Rebecca School tuition immediately upon the filing of the due process complaint notice (20 U.S.C. § 1415[j]; 34 CFR 300.518[a], [d]; see T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4069299, at *4 [S.D.N.Y. Aug. 7, 2012]). Accordingly, the date of the IHO's determination was irrelevant with regard to the district's obligation, inasmuch as the district never contended that the student's pendency was other than that asserted by the parent.

B. CSE Process

1. Predetermination/Parent Participation

Turning to the parent's procedural challenges, I first address whether the March 2011 CSE impermissibly predetermined the student's IEP and whether the parent was afforded a meaningful opportunity to participate in the development of the student's IEP.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration by district personnel of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Participants at the March 2011 CSE meeting included the student's mother, a district special education teacher also serving as the district representative, a district school psychologist, an additional parent member, the student's teacher at the Rebecca School, a Rebecca School social worker, and an additional teacher of the student (Tr. pp. 10-11; Parent Ex. D at p. 2). According to the school psychologist's testimony, all of the members of the March 2011 CSE had an opportunity to participate in the meeting, including the parent (Tr. pp. 11-12). The hearing record indicates that the district representative brought a draft IEP to the CSE meeting, the March 2011 CSE verbally reviewed the draft, including the student's present levels of performance, reviewed

and revised the student's annual goals, and discussed whether the student's behavior interfered with his instruction (Tr. pp. 17-18, 20-21, 23-24, 26-27, 29-30, 36, 63-64; Parent Exs. D; H).[9]

The hearing record supports the school psychologist's testimony that the parent had the opportunity to participate at the March 2011 CSE meeting. The CSE considered samples of the student's work that the parent brought to the meeting (Tr. at p. 16; Dist. Ex. 2). In addition, the student's Rebecca School teacher supplied information as to the student's present levels of performance and management needs, which the CSE incorporated into the IEP (Tr. pp. 20-21, 43, 132-34, 165, 586; Parent Ex. D at p. 3). The parent did not object to the description of the student in the IEP or the student's goals, rather the parent's testimony confirmed that the March 2011 IEP accurately described the student (Tr. pp. 22, 37, 45-46, 585-87; Parent Ex. D. at p. 3). The parent also testified that the student's related services were reviewed during the CSE meeting and that she accepted them as being appropriate for the student (Tr. pp. 591, 593).

Additionally, the parent did raise concerns during the CSE meeting that were discussed and addressed by the CSE. The parent raised a concern regarding the student's hearing, in that he cannot be in a loud atmosphere because he "breaks down, holds his ears, falls to the floor" (Tr. p. 584). This concern is reflected in the IEP, which describes the student as becoming upset when there is too much noise, which may result in the student crying, withdrawing, and covering his ears (Parent Ex. D at p. 4).[10] The parent also expressed concern that the student would become dependent upon the 1:1 transitional paraprofessional, however, the CSE addressed the parent's concern by fashioning an annual goal that described the paraprofessional's role as that of promoting independence while providing support (Tr. pp. 96-97, 584; Parent Ex. D at p. 12). Although the parent raised additional concerns regarding the qualifications of the 1:1 transitional paraprofessional and the period of time that the paraprofessional would be assigned to the student, the parent concedes that she did not object to the inclusion of a 1:1 paraprofessional in the student's IEP (Tr. pp. 627-28; see Tr. p. 584). According to the district school psychologist, the CSE increased the student's PT services at the request of either the parent or the student's Rebecca School teacher (Tr. p. 14). The parent alleges that the CSE failed to address her concern that the IEP should include "sensory equipment" rather than "sensory tools" (Tr. p. 635). Although the term "sensory tools" is used in the academic management needs section of the IEP, the social/emotional management needs section of the IEP actually reads that the student requires access to "sensory materials," and it also provides for sensory/movement breaks as needed, along with movement breaks during daily and academic activities (Parent Ex. D. at pp. 3, 4). The description of the student's need for sensory materials and movement breaks in the IEP is further evidence of the CSE's willingness to consider the parent's concerns. Additionally, there is no evidence to suggest that anyone on the March 2011 CSE precluded the parent from participating fully in the meeting (see M.W. v. New York City Dep't. of Educ., 2012 WL 2149549 at * 11 [E.D.N.Y., 2012]). Based on the foregoing, I find that the evidence in the hearing record does not support a finding that the district predetermined the student's program for the 2011-12 school year,

[9] Although the parent asserts on appeal that a copy of the draft IEP was not provided to her at the CSE meeting, she testified that district personnel advised her that they had a draft IEP and that she did not request a copy of the draft IEP at the CSE meeting (Tr. pp. 590, 644-45). The parent did request a copy of the meeting minutes, which were provided to her at the end of the meeting (Tr. p. 612).

[10] The parent testified that she also requested a change to the student's diagnosis to include the student's auditory sensitivity; however, she also testified that this request was discussed at the meeting and she agreed with the CSE's classification of the student as a student with autism (Tr. pp. 585-86).

but instead shows that the parent meaningfully participated and contributed to the development of the student's IEP during the March 2011 CSE meeting.

2. Evaluative Data

Turning to the sufficiency of the evaluative data available during the March 2011 CSE meeting, the hearing record reflects that the CSE had before it adequate and current evaluative information with respect to the student, which the CSE utilized in the development of the student's March 2011 IEP. Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see E.A.M, 2012 WL 4571794, at *9-*10; S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The student's last neuropsychological evaluation was conducted in July 2008 (Dist. Ex. 1 at p. 1). A reevaluation must use a variety of assessment tools and strategies and must also "be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (34 CFR 300.303[a], 304[b][1], [2]; 8 NYCRR 200.4[b][4]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211 at *10-11 [S.D.N.Y. Feb. 9, 2007]). The July 2008 neuropsychological evaluation included the Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV) and referenced a psychological evaluation performed between April and June of 2008, and the Stanford-Binet (Fifth Edition), as well as a number of earlier evaluations (Dist. Ex. 1). As discussed below, even if the 2008 neuropsychological evaluation did not fully describe the student's needs, the March 2011 CSE had before it sufficient evaluative data to determine the student's needs. Because the student's last evaluation was within three years of the March 30, 2011 CSE meeting, the student was not yet due for a mandatory reevaluation (34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). Additionally, there is no indication in the hearing record that either the parent or the student's teacher requested a reevaluation of the student.

The hearing record also establishes that the description of the student's present levels of performance and academic and social/emotional needs set forth in the March 2011 IEP were based on various evaluative measures. The CSE reviewed the student's previous year's IEP, a January 5, 2011 classroom observation conducted by the district, a response to that observation created by the student's Rebecca School teacher, the December 2010 Rebecca School progress report, and the student's July 2008 neuropsychological evaluation (Tr. p. 16; Parent Exs. E; F; G; Dist. Ex. 1).[11] In addition, the parent brought samples of the student's work to the CSE meeting for review (Tr. p. 16; Dist. Ex. 2).

According to the 2008 neuropsychological evaluation, the student attained a full scale score of 55 on the Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV) which fell in the "mild range of impairment," below the first percentile (Dist. Ex. 1 at p. 2). The student's general abilities index score was in the mild range of impairment in the second percentile (id.). The student's scores in verbal comprehension, working memory, and processing speed also fell below the first percentile (id.). The student's score on the perceptual reasoning scale was in the average range at the 45th percentile and reflected normal "visuospatial" and nonverbal problem solving ability (id.). The student also attained average scores on a nonverbal problem solving task that required adaptive behavior and cognitive flexibility, and in the area of visual memory (id.). Pragmatics, morphology, syntax, and lexical ability were markedly impaired (id.). The student's verbal memory ranged from borderline to impaired, depending on the amount of language content (id.). Overall the test demonstrated the student's difficulty with language skills and verbal tasks in general (id.). Assessment of the student's academic skills indicated that the student, who had recently completed second grade, had word recognition and phonetic decoding skills in the mid second grade level (id. at p. 3). However, the student's comprehension skills fell at an early first grade level (id.). In math, the student's computational skills were "problematic," but the student demonstrated adequate skills with regard to numeration (id.). The evaluator opined that the student had significant linguistic, social pragmatic, and functional communication difficulty, but displayed normal visual skills and nonverbal problem solving abilities (id.). The evaluator further asserted that the student fell within the pervasive developmental disorder (PDD) spectrum and was autistic (id.). The evaluator stated that the student required a small, structured learning environment; an intensive speech and language program, provided individually and in small groups; formal social skills training; and a behavioral component to address inappropriate behavior (id. at p. 4). The district school psychologist testified that the evaluation indicated that the student had high potential, and that his overall score did not necessarily reflect the discrepancies in various areas of functioning (Tr. pp. 28-29).

The March 30, 2011 CSE also considered a classroom observation report of the student conducted at the Rebecca School by the district representative on January 5, 2011 (Parent Ex. G).[12] The report includes a detailed observation of the student (id.). Upon entering the classroom, the

[11] Additional testimony by the school psychologist indicates that she does not believe the neuropsychological evaluation was discussed directly at the March 30, 2011 meeting, but that she had reviewed it prior to the meeting (Tr. p. 33).

[12] The classroom observation report provides that the student was scheduled to be observed from 9:00 to 9:30; however, the student did not arrive until 9:15, so he was observed from 9:15 until 9:55 (Parent Ex. G). The student's Rebecca School teacher submitted an undated response to the CSE suggesting that any observations prior to 9:30 are invalid because the observer may have been observing an additional student prior to that time (compare Parent Ex. G at p. 1, with Parent Ex. F at p. 1).

student sat at a small table next to a teacher (id. at p. 1). While the teacher sang the morning meeting song, the student remained sitting with a big smile, but did not sing (id.). When the teacher said the year was "two thousand and …" the student said "eleven" (id.). He picked a chair and joined the morning meeting circle (id.). During circle time the student suddenly screamed "bye-bye," a teacher stopped him, and he left the classroom quietly (id.). He went to the hallway and had a tantrum, and was observed rolling on the floor and screaming (id.). The student reentered the classroom several minutes later, sat quietly, but did not participate in the discussion (id.). He was then directed to a table for journal writing (id.). He did not write his name on his paper as his peers did, but did write the date (id.). The student's teacher prompted him what to write, and he complied (id.). He was unable to maintain appropriate spacing between words, or independently write on the line (id.). When prompted to write on the line by the teacher he was able to follow directions (id.). He suddenly screamed "goodbye," grabbed an adult's sleeve and threw himself on the rug, where he remained until the teacher prompted him to come back and finish his work (id.). He finished his journal and went to get his snack (id.). The observer noted that the student was able to follow directions, but was observed to tantrum quickly (id.). He was able to write a complete sentence, but was unable to use correct capitalization, to use correct punctuation, to write on the line, or maintain appropriate spacing (id.).

In developing the March 2011 IEP, the CSE also reviewed the Rebecca School's December 2010 progress report, basing its draft of the IEP substantially on the description of the student contained therein (Tr. pp. 16-17, Parent Ex. E). The Rebecca School progress report provides a thorough description of the student (Parent Ex. E). The student was described as a verbal child, who communicated mostly with adults, using both language and gestures (id. at p. 1). When the student was motivated and regulated, he was able to attend to adults, and to peers with adult support (id.). He transitioned easily given clear expectations and sensory breaks throughout the day, and was generally regulated given movement breaks and sensory supports (id.). If the student was asked to do something he did not understand, as in the case of new activities and games, the student could become dysregulated (id.). At these times, he may scream, fall to the floor, bang his head with his fist or into the nearest adult (id.). The student also became upset when there was too much noise or when confused (id. at p. 2). His ability to remain engaged was dependent upon his regulation and motivation (id.). He was able to sustain attention with an adult for 30 minutes, and benefitted from written directives or encouragement to express himself (id.). He was able to read small paragraphs when motivated, to answer fact based questions at the first grade level, and inferential questions at the primary or kindergarten level (id. at p. 5). The student was described as a strong sight and phonemic reader, therefore his program was focused on fluency and comprehension (id.). In the area of math, the student was able to add and subtract double digit numbers, could identify coins and their values, understood the concept of size and capacity, and could tell time (id. at p. 6). The student needed visual cues, sensory supports, verbal redirection, reminders, repetition, clear expectations, sensory/movement breaks, praise, and written instructions and choices (id. at pp. 1, 2, 4, 5, 7, 10, 11).

In addition to the above mentioned written reports and evaluations, the CSE also relied on information provided by the student's Rebecca School teacher at the meeting and amended the IEP to include the Rebecca School teacher's input (Tr. pp. 17-18, 52). In particular, the student's Rebecca School teacher provided information regarding the student's current grade levels, as well as the student's functional behaviors and management needs (Tr. pp. 18, 20, 23, 25, 65, 127-29, 154-55). A review of the hearing record also indicates that the parent did not object to the description of the student's present levels of performance or management needs as set forth in the

March 2011 IEP and in fact confirmed much of what was included in the IEP as being accurate (Tr. pp. 585-88).

Regarding the parent's contention that the district failed to assess the student for assistive technology, I note the hearing record indicates that the student receives assistive technology services in the form of FM units wired into the classrooms at the Rebecca School to support the student's auditory processing deficits (Tr. p. 241). The director of the Rebecca School opined that several students in the student's class benefit from the use of the FM unit, and that it is important for the student to help him "bridge his auditory processing issues" (Tr. pp. 242-43). The student's Rebecca School speech therapist also testified that she believed the use of the FM system was pivotal to the student's progress (Tr. p. 307). Despite this testimony, the use of an FM system was not raised during the March 2011 CSE meeting and was not included in the December 2010 Rebecca School progress report (Tr. p. 628; Parent Ex. E). Although the district was aware of the student's auditory processing difficulties at the time of the March 2011 CSE meeting, I find that the district did not have reason to suspect that the student's processing difficulties could not be addressed through the use of a written list detailing new activities, as identified in the March 2011 IEP and the December 2010 Rebecca School progress report (Parent Exs. D. at p. 4, E at p. 1).

Based on the above, I find that the evaluative data considered by the March 2011 CSE and the input from the participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847 at * 12 [S.D.N.Y. Nov. 9, 2011]; Application of the Dep't of Educ., Appeal No. 12-075; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

C. March 2011 IEP

1. 6:1+1 Program

The March 2011 CSE recommended that the student be placed in a 12-month 6:1+1 special class in a specialized school due to significant developmental concerns which require "a lot of support" (Tr. p. 12; Parent Ex. D at p. 1). Additionally, the March 2011 CSE recommended a 1:1 transitional paraprofessional for one year, and related services including an increase to the recommended frequency of the student's PT services due to a request from either the parent or the Rebecca School teacher (Tr. p. 14; Parent Ex. D at p. 17-18).[13] The March 2011 CSE considered a special class in a specialized school with student teacher ratios of 12:1+1 and 8:1+1, finding them to be insufficiently supportive, and also considered a special class in a specialized school with a student teacher ratio of 6:1+1without the support of a 1:1 transitional paraprofessional,

[13] In addition to the 1:1 transitional paraprofessional, the student's related services consisted of speech and language therapy four times a week for 30 minutes individually and once a week for 30 minutes in an dyad, PT twice a week for 30 minutes individually, OT three times a week for 30 minutes individually and once a week for 30 minutes in a dyad, and counseling twice a week for 30 minutes individually and twice a week for 30 minutes in a dyad (Parent Ex. D at pp. 17-18).

finding it to be insufficiently supportive given the student's difficulty with novelty and the transition from private to public school (Parent Ex. D at p. 16).

The present level of performance section of the March 30, 2011 IEP was based mainly on the December 2010 Rebecca School progress report (Tr. at p. 17, compare Parent Ex. D at pp. 3-4, with Parent Ex. E). Specifically, the IEP reiterates the progress report description of the student as becoming dysregulated when presented with new academic tasks, requiring the support of movement breaks, and able to share attention with staff when regulated (Parent Ex. D at pp. 2-3). Further, both documents reveal that the student's ability to share attention in a group setting is directly related to his motivation, he is auditorily sensitive, and he rarely engages with peers (compare Parent Ex. D at p. 3-4, with Parent Ex. E at pp. 1-2). In reading, he is working on general fluency and comprehension (Parent Ex. D at p. 3). He is able to read small paragraphs when motivated, to answer fact based questions at the first grade level, and inferential questions at the primary or kindergarten level (id. at pp. 2-3). In the area of math, the student is able to add and subtract double digit numbers, can identify coins and their values, understands the concept of size and capacity, and can tell time (compare Parent Ex. D at p. 3, with Parent Ex. E at p. 6). The student needs visual supports, sensory materials, redirection, repetition, clear expectations, sensory/movement breaks, written choice and minimized verbal directions (Parent Ex. D at pp. 3-4).

The March 30, 2011 CSE developed goals and objectives for the 2011-12 IEP to address the student's specific needs as described in the IEP (Parent Ex. D at pp. 6-13). The goals and objectives were based on the 2010-11 IEP, the Rebecca School progress report, and input from the Rebecca School staff at the CSE meeting (Tr. pp. 33, 36, 582). The student's March 2011 IEP incorporated 17 annual goals and 52 corresponding short-term objectives to address the student's identified needs in all areas (Parent Ex. D at pp. 6-13). Goals included are to develop basic math concepts, computation and word problem solving skills; develop vocabulary and reading comprehension; develop basic handwriting skills; improve visual spatial processing; expand his repertoire of representations and symbolic play; improve functional negotiation skills; improve strength and coordination; strengthen his capacity for sustained back and forth interactions; improve engagement and pragmatic language skills; improve receptive and expressive language skills; successfully transition from private school to public school setting; increase regulation throughout the day; improve ability to use sensory information; and improve motor planning (Dist. Ex. 6 at pp. 6-13). Most of the academic and related service objectives on the 2011-12 IEP were taken directly from the December 2010 Rebecca School progress report (compare Parent Ex. D at pp. 6-13, with Parent Ex. E at pp. 12-15). Upon review of the hearing record, I find that the annual goals and short-term objectives were consistent with the student's identified needs in all areas, including mathematics, reading, writing, language, social/emotional functioning, sensory regulation, and motor skills (compare Dist Ex. 6 at pp. 3-4, with Parent Ex. D at pp. 6-13). In addition, the annual goals and short-term objectives contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision (Parent Ex. D at pp. 6-13).

State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). I find that the hearing record demonstrates that the student exhibited highly intensive management needs that required a high degree of individualized attention and intervention, such that the March 2011 CSE's

recommendation to place the student in a 6:1+1 special class in a specialized school with a 1:1 transitional paraprofessional and related services was designed to address the student's academic, social and behavioral needs, and accordingly, was reasonably calculated to enable him to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

2. Special Factors and Interfering Behaviors

I now turn to whether the March 2011 CSE erred by not conducting an FBA or developing a BIP for the student. As set forth in greater detail below, the hearing record indicates that the student's behaviors did not seriously interfere with instruction, that the CSE properly considered special factors related to the student's behavior that impeded his learning, and that the March 2011 IEP appropriately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50; 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., 569 F. Supp. 2d at 380; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP]

must be documented in the IEP" (id. at p. 25).[14] 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).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s);

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

and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[15] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

The parent alleges that the March 2011 CSE failed to conduct an FBA to understand the student's interfering behaviors. I note at the outset of this discussion that the student was attending the Rebecca School at the time of the March 2011 CSE meeting and conducting an FBA to determine how the student's behavior related to that environment has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at the Rebecca School and was charged with identifying an appropriate placement for the student (see 8 NYCRR 200.1[r]). As explained more fully below, I find that the district had obtained and considered information sufficient to identify the student's interfering behaviors and the strategies/goals the Rebecca School used to address the behaviors, which were reflected in the March 2011 IEP.

As previously discussed, the March 2011 CSE had before it a December 2010 Rebecca School progress report that described the student's interfering behaviors in the classroom (Parent Ex. E). The district's school psychologist testified that the CSE did not conduct an FBA of the student, but the CSE discussed with the student's Rebecca School teacher the conditions that elicited the student's behaviors that interfered with learning and had an understanding of the function of his behaviors (Tr. pp. 62-65). As previously noted, the parent does not dispute that the March 2011 IEP adequately described the student, including the student's behaviors (Tr. pp. 585-88; Parent Ex. D at pp. 3, 4).

A review of the March 2011 IEP shows that it reflected information about the student's interfering behaviors consistent with the December 2010 Rebecca School progress report (compare Parent Ex. D at p. 4, with Parent Ex. E). Both the December 2010 Rebecca School progress report and the March 2011 IEP described the student as being generally regulated throughout the day given the support of movement breaks, but noted he may become dysregulated when asked to do something he does not understand (Parent Exs. D at p. 4; E at pp. 1-2). He may scream, fall to the floor, bang his head with his fist, or bang his head into an adult (Parent Exs. D at p. 4; E at p. 2). He can become upset when there is too much noise, or if physically uncomfortable, and may cry, withdraw, and cover his ears (Parent Exs. D at p. 4, E at p. 2). He may become dysregulated when confused, which may lead to lying on the floor with occasional non-aggressive kicking (Parent Ex. D at p. 4; E at p. 2). When regulated, the student is able to share attention with adults and his

[15] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

ability to share attention in group activities is related to his motivation (Parent Exs. D at p. 4; E at p. 1).

According to the March 2011 IEP, based on information obtained from the student's Rebecca School teacher, the student's behaviors do not seriously interfere with learning and can be addressed by the special education teacher (Parent Ex. D at p. 4; see Dist. Ex. 7 at p. 1). On appeal, the parent states that the student did not require a BIP while at the Rebecca School due to the use of "special 'sensory regulation' equipment and supports" that kept the student available for learning (Pet. ¶ 43, n.6). I note that the March 2011 IEP similarly includes the use of sensory materials, sensory breaks, and supports to keep the student available for learning (Parent Ex. D at pp. 3-4).

In addition, the March 2011 IEP includes a goal to increase the student's regulation throughout the school day, across a range of emotions, given the support of his special education teacher and his 1:1 transitional paraprofessional (Parent Ex. D at p. 12). This goal includes objectives targeting the student's ability to accept a co-regulation strategy, such as encouragement to use his words or written suggestions, to remain regulated and not scream, fall on the floor or hit his head; and to self-regulate in the form of asking for a break, using his words or squeezing his head instead of screaming (id.). The IEP identifies the environmental modifications and human/material resources needed to address the student's behaviors including visual supports, sensory tools, redirection, repetition, clear and explicit expectations, sensory/movement breaks, written choice, minimized verbal directions, and counseling services (id. at p. 3). Additional supports include promoting independent problem solving, providing clear expectations during unpredictable or novel tasks, and providing a written list detailing the new activity due to processing concerns (id. at p. 4). It is also noted that the student benefits from writing down his choices during moments of dysregulation and acknowledging his feelings (id.). Thus, the hearing record reflects that the March 2011 IEP provided supports to address the student's behavior needs.

In summary, I find that the district's failure to conduct an FBA or develop a BIP in this case does not support a finding that the district failed to offer the student a FAPE, particularly where as here, there was agreement between the information before the March 2011 CSE and the resultant IEP as to the function of the student's behaviors; the March 2011 CSE accurately identified the student's behavior needs in the March 2011 IEP, and the March 2011 CSE addressed the student's behavior needs based on information and documentation provided by the student's providers (see R.E., 694 F.3d at 190-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; A.C., 553 F.3d at 172-73; Cabouli, 2006 WL 3102463, at *3; F.L., 2012 WL 4891748, at * 7-*9; 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]).[16]

[16] I further note that, as set forth above, State regulations require in pertinent part that a CSE consider developing a BIP when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1]). Here, because the student has not attended the district's recommended program, there has been no opportunity to determine if the student's impeding behaviors would have persisted despite consistently implemented general school-wide or class-wide interventions.

3. Parent Counseling and Training

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided a "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 M.M., 583 F. Supp. 2d at 509). The Second Circuit has explained that "because school districts are required by [State regulation][17] 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 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 parent would have had access to parent counseling and training that satisfied the requirements of the State regulation. The district's school psychologist testified that she discussed the availability of parent counseling and training with the parent at the March 2011 CSE meeting and explained that it is programmatic and the specific details would be available from the assigned school (Tr. pp. 105-07, 126; Parent Ex. H). In addition, the district's special education teacher of the assigned classroom testified that the school provided parent training workshops on at least a monthly basis (Tr. p. 189). The district's assistant principal testified that the assigned public school provided parent training workshops as well as individual parent training (Tr. pp. 525-26, 533-34). The assistant principal also testified that the assigned school provided individual problem solving where parents can make requests for individual training at the school, or where the school could send a paraprofessional to the student's home (Tr. pp. 520-23). Given that parent counseling and training was available at the assigned school and was explained to the parent during the March 2011 CSE meeting, 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

[17] 8 NYCRR 200.13[d].

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).

4. Transition Plan

The parent also asserts that the district failed to include a transition plan on the March 2011 IEP to help the student transfer from the Rebecca School to the district's program. The IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y., Oct. 16, 2012]).[18] Nevertheless, a review of the hearing record supports the IHO's finding that the March 2011 IEP provided the student with a transitional paraprofessional as well as other specialized services to assist him in his transfer from the Rebecca School to the district-recommended class (see M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]).

The March 2011 IEP included a full time 1:1 transitional paraprofessional to assist the student in transitioning from the Rebecca School into the district's program (Tr. p. 38; Parent Ex. D. at pp. 2, 15). After discussion during the CSE meeting, the role of the transitional paraprofessional was defined in the March 2011 IEP as providing academic and social support to the student to aide him in making the transition from his current private school setting to public school, while also promoting the student's independence (Tr. pp. 96-97, 128-29, 142, 403-04; Parent Ex. D at pp. 12-13).[19] The March 2011 IEP also included an annual goal and short-term objectives designed to increase the student's ability to maintain regulation throughout the school day (Parent Ex. D at p. 12). Additional annual goals included that given the support of his special education teacher and 1:1 transitional paraprofessional, the student will successfully make the transition from his current private school setting to the public school, and will respond to and initiate adult initiations in new contexts (id. at pp. 7-8). In regard to the student's difficulty with transitions, the March 30, 2011 IEP also noted that the student's social emotional management needs included the need for clear expectations and written lists, especially during unpredictable or novel tasks (id. at p. 5). Accordingly, the hearing record reflects that the March 2011 IEP was

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

[19] The parent also raised concerns that a 1:1 transitional paraprofessional would create dependence and would be "too restrictive" for the student (Tr. pp. 595-97, 600). To the extent the 1:1 transitional paraprofessional might create dependence, the district's testimony explains that the paraprofessional would have been phased out once the student adjusted to the public school setting (Tr. pp. 161-62, 403-04). And to the extent the parent argues that the provision of a 1:1 paraprofessional is more restrictive than the Rebecca School's program, I note that the student would not have had access to general education in either program (Tr. p. 227; Parent Ex. D at pp. 1, 16). The least restrictive environment refers to the extent to which the student will be educated with non-disabled peers rather than the teacher/student ratio in the classroom (8 NYCRR 200.1[cc]; See Newington, 546 F.3d at 114, Gagliardo, 489 F.3d at 108).

designed with services in mind to address the student's needs relating to transitioning to a new environment.[20]

Moreover, the hearing record also indicates that had the student attended the district's program, the district would nevertheless have offered the student specialized services to assist him in his transfer from the Rebecca School to the district-recommended class. The teacher of the proposed class testified that her classroom is very structured and that the students have a visual schedule board that indicates what activity is coming next, which helps them with transitions (Tr. pp. 192-93). According to the teacher, the students are encouraged to be as independent as possible, but are provided with verbal and visual cues as necessary (Tr. p. 193). In addition, the teacher discussed management methods that she uses in her class, including visual supports, repetition, explicit expectations, and sensory and movement breaks (Tr. p. 195). The teacher also incorporates the use of "sentence strips" to help students communicate their needs, such as needing to take a break, if they are unable to independently initiate a sentence (Tr. pp. 195-97). Thus, the hearing record does not support the parent's contention that the district failed to consider the student's needs relating to transitioning to a new environment.

D. Assigned School

I will next address the parties' contentions regarding the district's choice of assigned school. 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]),[21] 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). In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L., 2012 WL 4891748, at *15-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were

[20] I also note that distinct from the "transition plan" at issue in this case, the parent does not assert that the district failed to recommend "transitional support services" pursuant to State regulations governing the provision of educational services to students with autism. That particular State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). In April 2011, the Office of Special Education issued an updated guidance document entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

[21] 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]).

speculative and therefore misplaced]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; c.f. E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). 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 (R.E., 694 F.3d at 186-88; 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 parent rejected the IEP and enrolled the student at the Rebecca School prior to the time that the district became obligated to implement the student's IEP (Pet. Ex. D; Parent Ex. K). Thus, the district was not required to establish that the assigned school was appropriate, and a meaningful analysis of the parent's claims with regard to the student's particular public school assignment would require the IHO—and an SRO—to speculate to determine what might have happened had the district been required to implement the student's IEP. 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]).

1. FNR

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; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. Jan. 6, 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"]). 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 412, 419-20 [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 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).

When determining how 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 420; 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). 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 CFR 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 (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504).

The hearing record reflects that the district developed the student's 2011-12 IEP and offered the student a placement by June 11, 2011, prior to the start of the 12-month school year, and was therefore in conformity with State and federal regulations (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; see Parent Ex. I). It is undisputed that the parent rejected the district's program prior to the start of the school year and enrolled the student at the Rebecca School (Pet. Ex. D; Parent Ex. K). During the impartial hearing the district identified another class—which was a part the same school listed on the FNR, but was located in a different school building—as the class the student would have attended for the 2011-12 school year (Tr. pp. 460-61, 467-68, 478, 485). The parents have not submitted any legal authority to show that a future change in school buildings amounts to an actionable claim pursuant to the IDEA (see K.L., 2012 WL 4017822, at *16). Moreover, 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]). Additionally, a possible change in location of the delivery of the student's IEP cannot be considered to have significantly impeded the parent's opportunity to participate in the decision making process as there is no requirement that the district identify a specific school location (C.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *8-9 [S.D.N.Y. October 28, 2011]; A.S. v. New York City Dep't of Educ., No. 10–CV–00009, slip op. at 18–19[ARR][RLM][E.D.N.Y. May 25, 2011], see T.Y., 584 F.3d at 419). For these reasons, I decline to find a denial of a FAPE based on a change of location of the school the student may have attended had he attended the public school program.

To the extent the parent argues that the district violated a stipulation reached in the Jose P. class action suit, I note that the remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see also Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal

No. 00-092). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]). Therefore, I lack the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K., 2011 WL 1131492, *17 n.29 [E.D.N.Y. Jan. 21, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. Apr. 15, 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. Aug. 25, 2010] [addressing the applicability and parents' rights to enforce the Jose P. consent order]).

2. Functional Grouping

With regard to the parent's claim that the student would not have been grouped with students having similar functional ability at the public school site, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to 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 district's special education teacher testified that in July 2011, her classroom was composed of five students who were classified with autism and ranged in age from eight to

eleven (Tr. pp. 180-82, 340). In terms of academic skills, the teacher stated that the student would have fit into one of her groups, in which the other students are reading on a mid first grade level (Tr. pp. 194-95). The IEP indicates the student was functioning at a "late first grade" level for reading computation and computation (Parent Ex. D at p. 3). Further, the teacher opined that based on a review of the student's IEP, the student was "very similar" to the students in her class (Tr. pp. 194-95, 338). In view of the foregoing, I find that the hearing record shows that the assigned school was capable of suitably grouping the student for instructional purposes in compliance with State regulations and that had the parent elected to place the student in the assigned 6:1+1 special class, the student would have been appropriately grouped with students exhibiting similar needs and abilities.

3. Educational Methodology

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.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; 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]; F.L., 2012 WL 4891748, at *9; K.L., 2012 WL 4017822, at *12; Ganje, 2012 WL 5473491, at *11-*12; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012]; 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).

On appeal, the parent asserts that the district failed to assess the student to determine an appropriate instructional methodology and that "TEACCH was not 'reasonably calculated' to work for [the student]" (Pet. ¶ 55). For the reasons set forth below, I find the parent's assertions regarding instructional methodology unpersuasive. Initially, I note that while a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), neither the IDEA nor federal nor State regulations require a district to evaluate a student with a disability relative to the potential efficacy of a particular teaching methodology.

The student's March 30, 2011 IEP did not set forth a specific instructional methodology (Parent Ex. D). The district special education teacher of the proposed 6:1+1 special class testified that she used TEACCH methodology and 1:1 "trial" instruction (Tr. pp. 363-64). The special education teacher explained how she takes students through TEACCH workstations by first presenting tasks that she knows a student can perform independently and she works with students

to increase the number of tasks that they can complete independently (Tr. pp. 386-87). She testified that TEACCH has been effective for students in her class and allows them to work independently within a structured schedule (Tr. pp. 365, 386-88).

Although testimony from the parent indicates that the student had not made progress using TEACCH and ABA approaches, the student has not received instruction in either since before the student first began attending the Rebecca School in 2008 (Tr. pp. 576-77). The student's teacher at the Rebecca School opined that he did not think the ABA method would work with the student, based on the teacher's prior experience utilizing the ABA method and his experience in working with the student, because he felt the student would not understand consequences and rewards (Tr. pp. 671-72). Upon cross-examination, the Rebecca School teacher admitted that he had never observed the student in an ABA setting (Tr. pp. 686-87). In addition, the Rebecca School director stated that she believed a TEACCH based program would not be effective for the student (Tr. p. 239). She believed that the student's rigidity, difficulty with being independent, distractibility, inability to understand directions, and auditory processing difficulties would make it challenging for him to benefit from a TEACCH based program (id.).

However, in light of the evidence illustrating how the special education teacher of the district 6:1+1 special class could implement the student's IEP and manage his behaviors had the student attended the district's program and given the other services enumerated in the March 30, 2011 IEP, the record does not support a finding that the assigned school was not appropriate for the student because it did not employ a specific educational methodology. In addition, evidence suggests that the student could benefit from TEACCH and ABA since the student's 2008 neuropsychological evaluation specifies that the student needs a "formal social skills training component to his program, and a behavioral component as well, in order to address inappropriate and undesirable behavior" (Dist. Ex. 1 at p. 4).[22]

4. Sensory Equipment

Despite the parent's claims to the contrary, a review of the hearing record indicates that the assigned school could have met the student's sensory needs. The hearing record shows that the student had difficulties with maintaining regulation—especially during transitions—and that the student required sensory and movement breaks in order to maintain his focus and attention on academic tasks (Tr. pp. 20, 23, 44, 245-46; Parent Ex. D at pp. 3, 4). The special education teacher at the assigned school testified that she used visual supports, repetition, clear expectations, and sensory and movement breaks in her classroom (Tr. p. 195). In addition to the OT and PT therapy room being located next to the classroom, sensory materials including swings and balls were available in order to provide sensory input to the students (Tr. pp. 195-96). The teacher also indicated that she could implement the student's social and emotional management needs such as sensory movement breaks and access to sensory materials (Tr. p. 200). Based on the above, had the parent enrolled the student in the public school program, the evidence supports the conclusion that the district was capable of addressing the student's sensory needs at the assigned school.

[22] The Rebecca School director characterized ABA and TEACCH as behavioral interventions (Tr. pp. 234-36).

VII. Conclusion

Based on the hearing record evidence, I find that the recommended 6:1+1 special class in a specialized school with related services was reasonably calculated to provide the student with educational benefits and, therefore, offered him a FAPE during the 2011-12 school year. Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of the Rebecca School or whether the equities support the parent's claim for the tuition costs at public expense (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED

Dated: Albany, New York
March 22, 2013

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STEPHANIE DEYOE
STATE REVIEW OFFICER