The University of the State of New York

The State Education Department
State Review Officer
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No. 13-017

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

Appearances:
The Law Offices of Neal H. Rosenberg, attorneys for petitioners, Meredith B. Duchon, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

A party aggrieved by the decision of an IHO may 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]).[1]

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.[2] The Committee on Special Education (CSE) convened on April 12, 2011, to formulate the student's individualized education program (IEP) for the 2011-12 school year (see generally Dist. Ex. 1 at pp. 1-18).[3] The parents disagreed with the recommendations contained in the April 2011 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2011-12 school year, and as a result, notified the district of their intent to unilaterally place the student at RFTS (Parent Exs U-V; AA).[4] In a due process complaint notice, dated March 27, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A).

An impartial hearing convened on June 15, 2012 and concluded on November 27, 2012 after three days of proceedings (Tr. pp. 1-515).[5] In a decision dated January 2, 2013, the IHO determined that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 6-13).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal focuses on whether the April 2011 CSE was properly composed, as well as the appropriateness of the annual goals in the April 2011 IEP, the

[1] The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

[2] Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

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

[4] During the 2011-12 school year, the student attended RFTS where she has continuously attended school since the 2008-09 school year (kindergarten) (Tr. p. 428).

[5] On June 21, 2012, the IHO issued an interim order on the student's pendency (stay-put) placement, and directed the district to continue to fund the student's placement at RFTS (Interim IHO Decision at pp. 2-4).

behavioral intervention plan (BIP), the recommended 6:1+1 special class placement with a 1:1 paraprofessional, and the assigned public school site.[6, 7]

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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v.

[6] On appeal, the parents also allege that the April 2011 CSE failed to recommend an appropriate level of related services; however, because the parents failed to raise this allegation in the due process complaint notice, it may not be raised now for the first time on appeal and will not be considered (R.E., 694 F.3d at 187 n.4 [2d Cir. 2012]).

[7] As neither party appealed the IHO's finding that the April 2011 CSE relied upon sufficient evaluative information in the development of the April 2011 IEP (see IHO Decision at p. 9), the IHO's determination is final and binding on both parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 486 Fed. App'x 954, 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. New York City Bd. 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

Upon careful review, the decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (IHO Decision at pp. 2-13). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

A. CSE Process—April 2011 CSE Composition

Turning first to the issue of whether the April 2011 CSE was properly composed, the evidence in the hearing record supports the IHO's finding that the district's failure to include a special education teacher responsible for implementing the student's April 2011 IEP was not a fatal error, and further, that the composition of the April 2011 CSE comported with regulatory requirements (IHO Decision at pp. 8-9). At the time of the April 2011 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).[8]

The evidence in the hearing record shows that the participants in the April 2011 CSE meeting included a district special education teacher (who also served as district representative); a

[8] The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

district school psychologist; a district social worker; an additional parent member; the student's mother; and staff from RFTS, including the student's classroom teacher (RFTS teacher), speech-language therapist, occupational therapist, and program director (Tr. pp. 15, 85-86; Dist. Ex. 1 at p. 2). The student's RFTS teacher provided special education instruction to the student and held certifications in both special education and regular education (Tr. pp. 15, 281-83, 285-86). Although, there is no indication in the hearing record that the district special education teacher in attendance at the April 2011 CSE meeting would have been responsible for implementing the student's IEP (see Tr. pp. 84-85), the CSE otherwise included a special education teacher of the student—namely, the RFTS teacher (Dist. Ex. 1 at p. 2). Additionally, according to the testimony of the parent and district special education teacher, both the RFTS teacher and the parent participated during the April 2011 CSE meeting by providing input related to the student's needs and progress (Tr. pp. 127-29, 131, 430).

Thus, while the April 2011 CSE lacked a special education teacher who would be responsible for implementing the student's April 2011 IEP had the student attended the district's program, assuming without deciding that this constituted a procedural violation, the hearing record lacks sufficient evidence to conclude that such procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]; see also A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]).

B. April 2011 IEP

1. Annual Goals and Short-Term Objectives

With regard to the issue of whether the annual goals and short-term objectives in the April 2011 IEP were appropriate, a review of the evidence in the hearing record supports the IHO's conclusion that the April 2011 CSE developed annual goals and objectives in all needed areas and based the annual goals and short-term objectives upon information provided by the parent and RFTS staff (see IHO Decision at pp. 9-10).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The parents assert that April 2011 CSE derived the annual goals and short-term objectives from the RFTS reports (see Parent Exs. D; G; Q), but arbitrarily used only some of the annual goals, which resulted in a failure to include necessary annual goals and short-term objectives in the April 2011 IEP, as well as a failure to discuss whether the annual goals could be implemented in a setting other than a 1:1 educational setting. In this case, the April 2011 IEP contained annual

goals and short-term objectives targeting the student's needs in the areas of adapted physical education; reading readiness; math; social development; attention; play skills; self-regulatory behavior; oral motor skills; fine and gross motor skills; and receptive, expressive, and pragmatic language as identified in the present levels of performance (Dist. Ex. 1 at pp. 6-14). For example, the present levels of academic performance reflected the student's needs in reading readiness skills and early math skills wherein the CSE developed annual goals and short-term objectives related to matching lower and upper case letters, labeling letters, and identification and counting of numerals 1 through 30 (id. at pp. 3, 6). In addition, the present levels of social/emotional performance identified the student's needs related to a low frustration tolerance and noncompliant behavior, and in accordance with these needs, the CSE developed annual goals and short-term objectives to improve the student's frustration tolerance, attention, and ability to follow rules (id. at pp. 4, 7).[9]

Next, while the RFTS occupational therapist, speech-language pathologist, and director all testified that the annual goals were specifically developed to be implemented within the 1:1 educational setting at RFTS (see Tr. pp. 227, 386, 413), a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]). Consequently, a review of the annual goals and short-term objectives in the April 2011 IEP reveals no reason why the goals and objectives could not be addressed or implemented in a 6:1+1 special class placement as recommended by the CSE.

Based upon the above—and consistent with the IHO's determination—the annual goals and short-term objectives in the April 2011 IEP appropriately targeted the student's areas of need, and contained sufficient specificity by which to guide instruction, intervention, and evaluation of the student's progress.

[9] The district special education teacher who was present for the April 2011 CSE testified that the CSE developed the annual goals and short-term objectives to address the student's special education needs in the areas of academics, speech-language, OT, PT, and pertaining to the 1:1 behavior management paraprofessional (Tr. pp. 101-03). According to the district special education teacher, the RFTS occupational therapist and speech-language pathologist assisted in the development of the annual goals in their respective areas (Tr. pp. 105, 107). The district special education teacher testified that the April 2011 CSE reviewed all of the student's annual goals during the meeting (Tr. p. 105).

2. Consideration of Special Factors—Interfering Behaviors

Turning to the dispute regarding the district's failure to conduct a functional behavioral assessment (FBA) of the student and to develop an appropriate BIP, the IHO noted that the April 2011 CSE recommended a 1:1 behavior management paraprofessional to assist with the student's behavior and attention needs and that the April 2011 CSE developed the BIP based upon information provided by the parent and staff from RFTS (IHO Decision at pp. 10-11). Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). 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., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 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).

However, although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

In this case, it is undisputed that the district did not conduct an FBA of the student prior to developing the student's BIP. However, at the time of the April 2011 CSE meeting the student was attending RFTS, and conducting an FBA of the student at that time 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 RFTS and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]). Regardless, when read as a whole the evidence in the hearing record supports a finding that the April 2011 CSE obtained and considered information sufficient to identify the student's problem behaviors, the reasons why she engaged in the behaviors, and the strategies to address the behaviors, which resulted in a BIP that was sufficient to meet the student's needs.

The district's special education teacher who attended the April 2011 CSE meeting testified that the CSE—including the RFTS teachers—engaged in a discussion about the student's social/emotional and behavioral needs as reflected in the IEP (Tr. p. 99; Dist. Ex. 1 at p. 4). According to the special education teacher, the April 2011 CSE, including input provided by the

parent and teachers from RFTS, gathered information regarding the student's behaviors akin to an FBA and developed the BIP based on the information (Tr. pp. 109-12).[10] Specifically, the April 2011 CSE took notes based on the information provided by the RFTS staff regarding the student behaviors that interfered with instruction, including antecedents and interventions of the behaviors (Tr. pp. 109-10).[11]

The BIP attached to the April 2011 IEP described the student's behaviors that interfered with her learning, which included occasional tantrums, focusing and transition difficulties, body tensing when things did not go her way, attempts to leave the room, hitting, kicking, stuffing her mouth with food, and significant difficulties with expressing her needs appropriately (Dist. Ex. 1 at p. 18). The expected changes identified in the BIP were that the student would refrain from hitting and kicking, transition between activities with minimal assistance, indicate she needed assistance when frustrated instead of tensing her body, not leaving the room without an adult, and slowing down during eating time as well as taking smaller bites of food (id.). The CSE identified strategies to change the student's behaviors, including providing a token economy with the use of preselected reinforcers, use of high interest and short activities, teach self-calming strategies, redirection, frequent and consistent positive reinforcement for appropriate behaviors, verbal praise, tangible rewards, modeling, encouragement, and a picture schedule (id.). Other strategies and supports included in the BIP were a small structured therapeutic class; a 1:1 behavior management paraprofessional; and ongoing contact and collaboration between parents, school, and therapists. Additionally, the student's RFTS teachers reported to the April 2011 CSE that the student demonstrated significant progress related to her noncompliant behavior over the 2010-11 school year (id. at p. 4). The hearing record further shows that the April 2011 CSE obtained and discussed information about the student's behaviors from the RFTS staff, and developed a BIP commensurate with that information. For all the reasons discussed above, the hearing record in this instance supports that the April 2011 BIP was sufficient.

The hearing record reflects that in addition to the BIP, the April 2011 IEP identified the student's maladaptive behaviors and provided supports to improve the student's behavior. In addition, the April 2011 CSE and resulting IEP identified the student's behavioral needs, namely, her noncompliant behavior including walking away from the teacher and difficulty with "'accepting no"' (Dist. Ex. 1 at p. 4). The IEP also indicated the student hit others when frustrated and she exhibited poor awareness of danger (id.). The April 2011 CSE recommended accommodations and strategies including a small, structured class; speech-language therapy; repetition; rephrasing; short and high interest activities; frequent opportunities for peer socialization; a 1:1 behavior management paraprofessional; assistance with activities of daily living (ADL) skills (toileting and feeding); physical therapy (PT) and occupational therapy (OT); and positive reinforcement to enhance academics, behavior, and attention (id. at pp. 3-5). The April 2011 CSE recommended a full-time, 1:1 behavior management paraprofessional to address the student's needs related to social and behavioral functioning, academics, and sensory regulation (see Tr. p. 100; Dist. Ex. 1 at p. 17). The April 2011 IEP also included annual goals and short-term objectives designed to improve the student's attention, ability to follow rules, and social skills

[10] RFTS implemented a BIP with the student during the 2011-12 school year (Tr. p. 290; Parent Ex. K).

[11] The special education teacher testified that the district attempted to obtain the RFTS FBA of the student, but was unsuccessful in its attempt (Tr. pp. 110-11).

(Dist. Ex. 1 at 7, 10, 12). Thus, the hearing record shows that in conjunction with the BIP, the April 2011 IEP provided additional supports to improve the student's behavior.

Based on the foregoing, the April 2011 IEP and BIP provided an adequate description of the student's interfering behaviors and recommended appropriate strategies and supports to adequately address the student's behavior problems; thus, the district's failure to conduct an FBA in this case does not support a finding that the district failed to offer the student a FAPE.

3. 6:1+1 Special Class Placement with a 1:1 Paraprofessional

With regard to the appropriateness of the 6:1+1 special class placement with a 1:1 paraprofessional, a review of the evidence in the hearing record supports the IHO's conclusion that the district's recommended placement was appropriate (see IHO Decision at pp. 10-12). However, the parents assert in their petition the district failed to establish that the 6:1+1 special class placement addressed the student's needs and that the 1:1 behavior management paraprofessional was inappropriate to address the student's academic and behavioral needs.

The hearing record reflects, according to the April 2011 IEP, that the student demonstrated needs in the areas of academics, cognition, language processing, fine and gross motor skills, sensory regulation, and social/emotional and behavioral functioning (Dist. Ex. 1 at pp. 3-5). The April 2011 IEP reflects that the CSE considered and rejected a special class in a community school with related services because it would not adequately meet the student's academic, cognitive, speech/language, fine and gross motor skills, and behavioral needs (id. at p. 16). According to the April 2011 IEP contact sheet, the CSE discussed all aspects of the IEP including input from the parent and RFTS staff (Dist. Ex. 4). According to the testimony of the parent and district special education teacher, the parent and RFTS staff participated during the April 2011 CSE meeting by providing input related to the student's needs and progress (Tr. pp. 127-29, 131, 430).

According to the testimony of the parent, she expressed reservations during the April 2011 CSE meeting regarding whether a 6:1+1 special class placement addressed the student's needs (Tr. pp. 429-30). Further, the district special education teacher testified that the RFTS staff indicated the student required a 1:1 educational setting (Tr. p. 115). According to the testimony of the district special education teacher, the CSE discussed a 1:1 program, but believed it was too restrictive for the student because the student needed to develop her social skills (Tr. p. 88). State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with the student's needs—as described in detail below—and State regulations, the April 2011 CSE appropriately recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school with a 1:1 behavior management paraprofessional together with related services to address the student's needs in the area of academics, language processing, sensory regulation, social/emotional and behavioral functioning, and fine and gross motor skills (Dist. Ex. 1 at pp. 1-5, 17).

The district special education teacher testified that the 6:1+1 special class would provide the student with adequate support and opportunities for socialization (Tr. pp. 88, 114-15). According to the district special education teacher a 6:1+1 special class addressed the student's needs in academics, speech-language, behavior, and fine and gross motor skills (Tr. p. 87).

Furthermore, the hearing record supports the conclusion that a special education teacher in a 6:1+1 special class would be able to provide the needed accommodations and modifications to instruction required by the student. Contrary to the testimony of the RFTS director and teacher that the recommended placement would not provide the student with adequate support regarding her academic and social and behavioral needs, the April 2011 IEP addressed these needs by recommending specific accommodations for the teacher to implement (see Dist. Ex. 1 at pp. 3-5). Furthermore, in addition to the April 2011 CSE's recommendation of a 6:1+1 special class placement, the CSE recommended related services to support the student in this placement in the form of four 45-minute sessions per week of individual speech-language therapy, one 45-minute session per week of speech-language therapy in a small group, four 30-minute sessions per week of individual OT, and two 30-minute session per week of individual PT that would address the student's needs related to receptive, expressive, and pragmatic language, as well as her motor skills and sensory processing (id. at p. 17).

The parents assert that the April 2011 CSE recommendation of a 1:1 behavior management paraprofessional was inappropriate to address the student's academic and behavioral needs. In support of this, according to the RFTS director, the student received 1:1 instruction at RFTS meaning the student attended a class with one lead teacher, four teachers, one speech-language pathologist and five students during the 2011-12 school year (Tr. p. 204). During group time, the student received 1:1 teacher support, and depending on the student's needs for support, the teachers "fade[d] . . . back" and provided verbal prompts (Tr. pp. 275-76). The director testified that the student required 1:1 instruction to address her behaviors that interfered with learning, to modify her instruction, to meet her annual goals, and to provide her with social skills instruction, modeling, and reinforcement (Tr. pp. 227-28, 263, 268-70). The master lead teacher (lead teacher) from RFTS also testified about the student's need for 1:1 assistance and stated the student required 1:1 instruction to address her annual goals, acquire new skills, reinforce concepts, provide support while eating, implement a BIP, and provide individualized adaptations to address her needs (Tr. pp. 292-93, 302, 311). The director specified reasons the student required a "one to one teaching" throughout the day; however, the needs for which the director indicated the student required 1:1 instruction are those that could be addressed by a special education teacher within a 6:1+1 special class in conjunction with a 1:1 paraprofessional. According to the testimony of the district special education teacher, the April 2011 CSE recommended a full-time, 1:1 behavior management paraprofessional to address the student's needs related to social and behavioral functioning, academics, and sensory regulation (see Tr. p. 100; Dist. Ex. 1 at p. 17). Here, the evidence indicates the recommended 6:1+1 special class placement—consisting of a special education teacher, a classroom paraprofessional, and the student's 1:1 behavior management paraprofessional—was designed to address the student's needs through the provision of supports and accommodations, such as modifying instruction, implementing a BIP as well as providing instruction for academic and behavioral concepts, social skills, and feeding. Therefore, the IHO properly found that that the hearing record lacked evidence that the student required 1:1 instruction throughout the school day (IHO Decision at p. 10-11).

Next, the parents assert that the student required 1:1 instruction using applied behavioral analysis (ABA) throughout the school day; however, there is insufficient evidence in the hearing record to show that ABA was the only approach capable of offering the student educational

benefit.[12] The student's April 2011 IEP did not limit instruction to one specific instructional methodology (see Dist. Ex. 1). Although the RFTS provided the student with ABA instruction throughout the day (Tr. pp. 209-10), the hearing record lacks evidence that the special education supports, accommodations, and related services in the student's April 2011 IEP would not have effectively addressed the student's needs related to academics, sensory regulation, social/emotional and behavioral needs, language processing, and motor skills.[13] The district special education teacher testified that the 1:1 behavior management paraprofessional would provide the student with breaks, behavioral redirection, support to remain on task, and assistance with the her low frustration tolerance (Tr. p. 100). Further, the special education teacher also testified that the RFTS staff indicated the student would require a 1:1 paraprofessional if she attended a district program (Tr. p. 134). The district special education teacher testified that special education teacher of the student would determine the methodology used to instruct the student (Tr. pp. 145-46). Based on the foregoing, the hearing record lacks evidence to support a finding that the student required instruction exclusively using a 1:1 ABA approach in order to receive educational benefits or a FAPE.

Accordingly, the April 2011 CSE's failure to recommend a 1:1 educational setting or ABA instructional support in the IEP did not rise to the level of a denial of a FAPE, given the CSE's recommendation of a 6:1+1 special class placement with a 1:1 behavior management paraprofessional, in conjunction with the recommended related services, the program accommodations, and strategies. After careful review of all of the evidence in this case, the IHO properly determined that the district offered the student a FAPE for the 2011-12 school year.

C. Challenges to the Assigned Public School Site

With respect to the parent's claims regarding the assigned public school site, the IHO correctly concluded that such claims were speculative because the student did not attend the district for the 2011-12 school year, and thus, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see IHO Decision at pp. 12-13).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has 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" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669, at *6 [2d

[12] The parent testified that the student attended special education preschool programs wherein the student did not exhibit progress within the group setting consisting of one teacher, one teacher assistant, and eight students (Tr. pp. 426-28).

[13] The director testified that the RFTS instructed students with the use of multiple curriculums (Tr. pp. 209-10).

Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 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 a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [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]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587, at*4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. 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 to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B., 2013 WL 5438605, at *17; E.F., 2013 WL 4495676, at *26; M.R. v. New York City Dep't of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K. v. New York City Dep't of Educ., 2013

WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3).

In view of the forgoing, the parents cannot prevail on claims that the district would have failed to implement the April 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the April 2011 IEP containing the recommendations of the April 2011 CSE or the programs offered by the district and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Exs. U; V). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether RFTS was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 30, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER