The University of the State of New York

The State Education Department
State Review Officer
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No. 13-117

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Office of Anton Papakhin PC, attorney for petitioner, Anton Papakhin, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Rebecca School for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

The decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). 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]).

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 they will not be recited here. The Committee on Special Education (CSE) convened on May 2, 2012, to formulate the student's individualized education plan (IEP) for the 2012-13 school year; the student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Tr. pp. 26-27; Dist. Ex. 2 at p. 11; Parent Ex. A at p. 2). The hearing record shows attendees at the May 2012 CSE meeting included a district school psychologist, who also served as the district representative, a district social worker, a district special education teacher, and an additional parent member; participating via telephone were the parent and her advocate, the student's Rebecca School teacher, and a Rebecca School social worker (Tr. pp. 29-30; Dist. Exs. 2 at p. 13; 3 at p. 1). At the time of the CSE meeting, the student was enrolled at the Rebecca School; she was described as "a non-verbal child who communicates using a combination of gestures, signs, word approximations, and a communication book" (Dist. Ex. 2 at p. 1). The IEP also indicates the student presented as loving and affectionate, although during periods of "dysregulation," she could become aggressive towards herself and others (id. at p. 1). The hearing record reflects that the CSE considered the student's most recent Rebecca School progress report, dated December 2011, and input from the student's parent and Rebecca School teacher (Tr. pp. 31, 34-44, 48-49, 51-56, 58-60, 279-80, 289-90, 306-07; Dist. Exs. 2 at pp. 1-3, 5-7; 3 at pp. 1, 3-4; 5 at pp. 1, 3, 5, 10-12). The school psychologist also noted he had reviewed the student's special education records prior to the CSE meeting, including an April 2011 psychoeducational evaluation report (compare Dist. Ex. 2 at pp. 1-2, with Dist. Ex. 4 at pp. 1-4).

Based upon the May 2012 CSE's review, the IEP provided a 6:1+1 special class in a specialized school with a full time 1:1 paraprofessional, three individual 40-minute speech-language therapy sessions and one small group (3:1) 40-minute speech-language therapy session per week, four individual 40-minute occupational therapy (OT) sessions per week and one small group (3:1) 40-minute OT session per week (Tr. p. 196; Dist. Exs. 2 at p. 8; 5 at p. 5). In addition, the IEP recommended the provision of assistive technology software on a daily, "as needed" basis (Dist. Ex. 2 at p. 8).

The parent disagreed with the recommendations contained in the May 20, 2012 IEP, and by letter dated June 18, 2012, notified the district of her intent to unilaterally place the student at the Rebecca School (Parent Ex. B).[1] In a due process complaint notice, dated October 15, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A).[2] An impartial hearing convened on January 29, 2013 and concluded on April 23, 2013 after five days of proceedings (Tr. pp. 1-385).

[1] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The hearing record includes a copy of this document submitted as a district exhibit (Dist. Ex. 1); only the parent copy is referenced herein.

In a decision dated May 10, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year (IHO Decision at pp. 12, 15).

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in determining the lack of a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) did not result in a denial of a FAPE;

2. Whether the IHO erred in determining that the annual goals in the May 2012 IEP were sufficient and appropriate to address the student's needs;

3. Whether the IHO erred in determining that the recommended educational placement in the May 2012 IEP was appropriate to address the student's needs;

4. Whether the IHO erred in determining that the particular public school site to which the district assigned the student was appropriate for the student.

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 [2d Cir. 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 [2d Cir. 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. 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 [2d Cir. 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]).

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 evidence in the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly concluded that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 11-15).

A. Special Factors—Interfering Behaviors

Turning first to the issue of whether the May 2012 CSE was required to conduct an FBA and develop a BIP in order to offer the student a FAPE, the IHO conducted a well-reasoned analysis of the relevant evidence. After careful review of all of the evidence in this case, I agree with the conclusion reached by the IHO.

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., 361 Fed. App'x 156, 160-61 [2d Cir. 2009]; A.C., 553 F.3d at 172; J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 25-26, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id. at p. 25). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it.

(8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 394 Fed. App'x at 722).[3] Indeed, although the Second Circuit has cautioned that "[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" (R.E., 694 F3d at 190), the court also acknowledged that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE" although particular care must be taken to determine whether the IEP addresses the student's behaviors in the absence of a formal FBA (id.).

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

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE "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 . . . is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . .; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). 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 Educ. [Apr. 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" (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 . . . and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In the instant case, while the May 2012 IEP stated the student required a BIP, the hearing record does not contain an FBA (Tr. p. 189; Dist. Ex. 2 at p. 2). Although the district school psychologist, who also served as the district representative at the May 2012 CSE meeting, testified an FBA had been created, he was unable to produce a copy of the document during the hearing (Tr. pp. 78-79, 115). Consequently, the IHO concluded "an FBA was not conducted" (IHO Decision at p. 11; Dist. Ex. 2 at p. 2). However, at the time of the May 2012 CSE meeting the student was attending the Rebecca School, and conducting an FBA of the student at that time to determine how the student's behavior related to her present school environment would have had diminished value because the CSE did not have the option of recommending that the student be placed at the Rebecca School and was instead charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]). Nonetheless, the hearing record indicates that with input from discussions during the May 2012 CSE meeting and the student's progress report from the Rebecca School, the May 2012 IEP did identify the student's interfering behaviors, such as engaging in self-injurious actions "during periods of dysregulation," including "banging her head and biting her hands" (Dist. Exs. 2 at pp. 1-2; 3 at p. 2; 5 at p. 1). The IEP also identified the precipitating factors for the student's interfering behaviors, such when her wishes were thwarted or limitations were placed on her (Dist. Exs. 2 at pp. 1-2; 5 at p. 1). In addition, the IEP delineated intervention strategies, such as providing "sensory input" and "breaks during

activities" to help the student maintain a regulated state or calm her ire when dysregulated (Dist. Ex. 2 at p. 1). The May 2012 IEP also indicated the student required "redirection, positive reinforcement, frequent breaks, and a communication book" to assist the student in conveying her wants and needs (Dist. Ex. 2 at p. 2).

Despite documenting a number of the student's interfering behaviors and related factors, the BIP developed by the May 2012 CSE falls short of the regulatory minimum standard noted above. Specifically, the BIP listed the student's self-injurious and other-directed aggressive behaviors, but indicated only that the student "will show a decrease in the frequency, duration and intensity of these behaviors" as determined by "teacher and school staff observation" (Dist. Ex. 6 at p. 1). The BIP further indicated the student's progress would be assessed at least once every ten weeks (id.). Upon review, the IHO found the BIP to be "inappropriate because it contains no intervention strategies, no schedule, and no baseline measure," although he noted that the IEP contained language indicating that the student should receive deep pressure and quiet time to help her when dysregulated (IHO Decision at p. 11). Nonetheless, as the IEP incorporated input from the Rebecca School, identified the student's interfering behaviors, the precipitating factors for those behaviors as well as intervention strategies; and as the parent did not specify how the failure by the district to prepare an FBA or an appropriate BIP deprived the student of educational benefit, I agree with the IHO that these procedural violations did not rise to the level of a denial of a FAPE in this instance (IHO Decision at pp. 11-12; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]; R.E., 694 F.3d at 190-91; A.C., 553 F.3d at 172-73).

B. Annual Goals

Turning next to the issue of whether the annual goals were appropriate, the IHO conducted a well-reasoned analysis of the relevant evidence. The IHO noted that initially, the parent contended the goals were "generic and not appropriate to meet the [s]tudent's needs," but later contended the goals were not appropriate because "they were drafted by Rebecca, and that some of these goals contained terms specific" to the instructional model used by the Rebecca School (IHO Decision at p. 13). As detailed below, a review of the hearing record does not support the parent's assertions, and therefore, there is no reason to disturb the IHO's determination that the annual goals were appropriate and designed to meet the educational needs of the student. I agree with the conclusions reached by the IHO and adopt his findings of fact and conclusions of law as my own.

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]). For a student who takes a New York State alternate assessment, the CSE must develop short-term objectives that are the measurable

intermediate steps between the student's present level of performance and the measurable annual goal (8 NYCRR 200.4[d][2][iv]).

In the present case, the May 2012 IEP contained approximately 13 annual goals and 36 short-term objectives; the goals addressed the student's needs in the areas of socialization, behavior, literacy, math, daily living skills, OT, speech-language, and counseling (Dist. Ex. 2 at pp. 3-7). In addition, each annual goal included criteria by which to measure successful attainment of the target behavior, a method by which progress would be measured, and a schedule for progress monitoring (id.). Furthermore, at least six of the annual goals incorporated some aspect of sensory exploration and input, thereby addressing a need described in the Rebecca School progress report and reflected in the present levels of performance portion of the May 2012 IEP (Dist. Exs. 2 at pp. 1-2; 5 at pp. 1-2, 4-6, 10). A careful review of the relevant evidence supports the IHO's conclusion that the goals were not in fact "generic" and that they were designed to address the student's unique special education needs (IHO Decision at p. 13).

With regard to the parent's claim that certain of the goals could not be implemented in the district program, the hearing record does not support a conclusion that these goals could only be implemented at the Rebecca School. The specific goals with which the parent takes exception focus on enhancing the student's ability to communicate as well as her capacity to maintain equanimity during situations when she might otherwise lapse into a state of dysregulation (see Tr. pp. 20-21; Dist. Exs. 2 at pp. 3-7; 5 at pp. 10-12). When questioned in detail regarding the district staff's ability to implement the goals in the recommended program, a district special education teacher from the assigned public school site testified that the school staff would be able to fulfill the goal requirements of the May 2012 IEP (Tr. pp. 191, 198-201, 207-08, 216; Dist. Ex. 2 at pp. 3, 5-7). While the program director of the Rebecca School testified that certain phrases in the annual goals and short-term objectives on the May 2012 IEP were specific to the methodology used at the Rebecca School and opined that the district "would not be able to implement the goals as written [because they were] very specific to the Rebecca School" and could only be implemented by someone with training in that methodology (Tr. pp. 240-50), on cross-examination she admitted that although the approach used differed, "ultimately" the same goal could be achieved in another manner (Tr. pp. 262-63). Therefore, although the terminology utilized in describing some of the goals may be unique to the Rebecca School program, the underlying concepts of the goals are consistent with the tenets of specially designed instruction and are commonly used by teachers engaging in responsive special education instruction (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *12 [S.D.N.Y. Mar. 19, 2013]). Accordingly, there is no reason to disturb the IHO's conclusion that the annual goals and short-term objectives contained in the May 2012 IEP were appropriate to meet the student's special education needs.[4]

[4] While the parent asserts on appeal a variety of claims with respect to the counseling goals contained in the May 2012 IEP, they were not raised in her due process complaint notice (Parent Ex. A at pp. 2-3) and accordingly are not properly presented for review (20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; see K.L. v. New York City Dep't of Educ., 530 Fed., App'x 81, 87 [2d Cir. 2013]).

C. 6:1+1 Special Class

With regard to the issue of whether the educational placement was appropriate, I agree with the conclusion reached by the IHO, but do so on different grounds than those stated by the IHO.[5] As discussed below, a review of the hearing record does not lead to the conclusion that the recommendation for a 6:1+1 special class was insufficiently supportive to meet the student's needs. According to State regulations, a 6:1+1 special class is intended 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]). In the instant case, according to information provided by Rebecca School staff and the student's progress report, the student's behavioral challenges included tantrum-like behaviors when she became "dysregulated," and required adult assistance to quiet and resume a "regulated" state (Tr. pp. 42; Dist. Exs. 2 at p. 3; 5 at pp. 1, 5-6, 9). The district school psychologist testified that the CSE felt a 6:1+1 special class would be appropriate because it would offer the student a full time, 12-month "supportive small group special education program . . . designed to provide support in academic skill development, language development, social skill development, life skill development . . . [with] relevant related services" (Tr. p. 61). The May 2012 CSE also coupled the small class size with a recommendation for a full time crisis management paraprofessional (Tr. pp. 39-40, 49; Dist. Ex. 2 at pp. 2, 8). According to the district school psychologist who attended the CSE meeting, the committee recognized the student's need for "a lot of 1:1 support . . . and assistance for her to perform classwork . . . and engage in the classroom activities and routines" and that the additional one-to-one support would be "potentially effective" in addressing the student's more challenging behaviors (Tr. pp. 39-40, 48).

In conjunction with the supports inherent to a 6:1+1 special class, the services of a full-time individual paraprofessional, and the intervention strategies to address the student's behavioral needs described above, the May 2012 IEP provided the student with three individual 40-minute speech-language therapy sessions and one small group (3:1) 40-minute speech-language therapy session per week, four individual 40-minute OT sessions per week and one small group (3:1) 40-minute OT session per week (Tr. p. 196; Dist. Exs. 2 at p. 8; 5 at p. 5). In addition, the IEP recommended the provision of assistive technology software on a daily, "as needed" basis" (Dist. Ex. 2 at p. 8). Accordingly, I agree with the IHO's determination that the 6:1+1 special class with related services would have provided sufficient support to meet the student's needs.[6]

[5] The IHO noted the parent's claim was "not clear in connection with this argument," but nonetheless determined that the special class setting recommended in the IEP was "similar" to the student's class at the Rebecca School, which contained eight students (IHO Decision at p. 12).

[6] The IHO noted that the parent raised the issue of "sensory interventions" in her closing arguments, despite not having raised the matter in her due process complaint notice (IHO Decision p. 12). In addition to the reasons stated above, and although this issue was not raised in the due process complaint notice, a careful review of the May 2012 IEP reveals that the CSE documented the student's need for sensory input throughout the IEP, including in the present levels of performance, the discussion of special factors, and the annual goals (Dist. Ex. 2 at pp. 1-7).

D. Assigned Public School

The parent asserts on appeal that the assigned public school site would not have been able to implement the May 2012 IEP because the district "failed to provide evidence that the proposed placement could provide an appropriate education to the [s]tudent." However, the IHO found that, "the preponderance of the evidence indicates that the [d]istrict would have implemented the IEP had the student attended the school" (IHO Decision at p. 15).

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., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding that "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'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding 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"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; 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"]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; 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]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).

In view of the foregoing, the parent cannot prevail on her claims regarding implementation of the May 2012 IEP because a retrospective analysis of how the district would have implemented the student's May 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the May 2012 IEP (see Parent Exs. A; B). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. 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 parent 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 the district's case to describing a snapshot of the special education services

set forth in an IEP (C.L.K., 2013 WL 6818376, at *13 [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[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"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claims that the assigned public school site would not have properly implemented the May 2012 IEP.[7]

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the preponderance of the evidence in the hearing record supports the IHO's conclusion that the district would not have violated the FAPE legal standard related to IEP implementation—that is, that the district would not have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

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 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the Rebecca

[7] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. 2010]). 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]). 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). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D], 1414[d][2]; 34 CFR 300.17[d], 300.323; 8 NYCRR 200.4[e]).

School was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request for relief.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

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

CAROL H. HAUGE
STATE REVIEW OFFICER