The University of the State of New York

The State Education Department
State Review Officer
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No. 13-130

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:
Mayerson & Associates, attorneys for petitioners, Maria C. McGinley, Esq., Tracey S. Walsh, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the cost of their daughter's home-based applied behavioral analysis (ABA) services, speech-language therapy, and occupational therapy (OT) 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

On November 5, 2014, the undersigned was designated to conduct the review of this case. 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 (see Application of the Dep't of Educ., Appeal No. 12-086; Application of the Dep't of Educ., Appeal No. 10-123). The Committee on Special Education (CSE) convened on March 21, 2012 and again on June 12, 2012, to formulate the student's individualized education plan (IEP) for the 2012-13 school year (see generally Dist. Exs. 5; 6). The parents disagreed with the recommendations contained in the June 2012 IEP and, as a result, notified the district of their intent to accept the recommended placement at the Hawthorne Country Day School (Hawthorne) and to unilaterally provide the student with home-based related services after school and on the weekends at district expense (see Parent Ex. Y). In a due process complaint notice, dated July 5, 2012, the parents 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).

An impartial hearing convened on August 7, 2012 and concluded on March 13, 2013 after 6 days of proceedings (Tr. pp. 1-698). In a decision dated June 12, 1013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year.

IV. Appeal for State-Level Review

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

1. The parents' application seeking recusal of the SRO.

2. Whether the district impermissibly predetermined the student's program.

3. Whether the IHO erred in determining that the program provided to the student offered her a FAPE without the addition of a home-based program.

4. Whether the district's failure to conduct a functional behavioral assessment (FBA) deprived the student of a FAPE.

5. Whether the student's IEP for the 2012-13 school year failed to offer the student a FAPE by omitting assistive technology and parent counseling and training;

6. Whether the student's IEPs for the 2012-13 school year were properly implemented.

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. 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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Parents' Request for Recusal

Regarding the parents' request that I recuse myself, I note that State regulations provide that an SRO must have no personal, economic, or professional interest in the hearing which he or she is assigned to review (8 NYCRR 279.1[c][4]) and must be "independent of, and may not report to, the office of the State Education Department which is responsible for the general supervision of educational programs for children with disabilities" (8 NYCRR 279.1[c][3]). An SRO shall

recuse himself or herself and transfer the appeal to another SRO if he or she was substantially involved in the development of a state or local policy challenged in the hearing; was employed by a party or a party's representative in the hearing; or engaged in the identification, evaluation, program or placement of the student who is the subject of the hearing (8 NYCRR 279.1[c][4]).[1]

Here, I am not personally familiar with the parties in this case, nor do I have any personal, economic, or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Moreover, the New York State Education Department is not a party in this matter. Moreover, with regard to allegations that decisions from the Office of State Review have been untimely due to staffing, such contentions are not relevant to a recusal inquiry. Additionally, recusal in such a context makes little sense insofar as it would only have the opposite effect and exacerbate any delay. Having given the parents' request due consideration, I find that I am able to impartially render a decision and that the provisions of 8 NYCRR part 279 do not require recusal in this instance.

B. IEPs for the 2012-13 School Year

On March 21, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 5 at p. 24). Finding that the student remained eligible for special education and related services as a student with autism, the March 2012 CSE recommended a 12-month special class placement in a school to be identified by the central based support team (id. at pp. 20-21, 24; see Tr. pp. 365-66).[2] The March 2012 CSE also recommended related services consisting of three 30-minute sessions per week of individual physical therapy (PT), five 30-minute sessions per week of individual occupational therapy (OT), and five 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 5 at pp. 20-21). In addition, the March 2012 CSE created annual goals and short-term objectives to address the student's identified needs and recommended management needs (see id. at pp. 2-20). The CSE reconvened on June 12, 2012 to amend the student's IEP to include a recommendation for placement in a State-approved nonpublic school in a 6:1+2 special class with modified related services (see Tr. pp. 592-97; Dist. Ex. 6 at p. 14). The student was placed at Hawthorne, the nonpublic school preferred by the patents, and began attending in July 2012 (Tr. pp. 588-89; 599; see Parent Ex. Y at p. 1; Dist. Ex. 20). The student's IEP was amended by agreement without a CSE meeting on August 10, 2012, to include a full-time 1:1 paraprofessional for the student (Tr. pp. 597-99; Dist. Ex. 7 at pp. 14, 19).

1. Predetermination

Turning next to the parents' allegations that the district impermissibly predetermined the student's program, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir.

[1] The third criterion for recusal extends to cases in which an SRO has been involved with "other similarly situated children in the school district which is a party to the hearing" (8 NYCRR 279.1[c][4][iii]).

[2] 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]).

2006] [noting that "predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506-07 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (id.).

Here, the evidence in the hearing record, and in particular, the parent's testimony reflects a pattern of active and meaningful parent participation and further suggests that the district afforded the parent input in the development of the student's 2012-13 IEPs (Tr. pp. 589-609). Although the student's mother contends that she informed the CSE that the student required home-based services, but was told the CSE was "not at liberty" to offer those services, the balance of the hearing record shows that the student's mother had considerable impact upon the details of the student's recommended program and secured many changes to her IEPs (Tr. pp. 595-96). For example, at the urging of the student's mother the CSE reduced the frequency of related services on the IEP because Hawthorne required a certain amount of mandated related services in order to accept the student (Tr. pp. 592-96). At her urging the IEP was also changed to add special education transportation with limited travel time and a full-time 1:1 paraprofessional (Tr. pp. 589-90; 606-09). In light of the participation of the student's mother at the CSE meetings held in developing the student's 2012-13 recommended program, and the willingness of the CSE to modify the recommended program to allow the student to be placed at Hawthorne, the parent's preferred nonpublic school, I find that the district did not predetermine the student's program or impair the parents' participation in developing the student's IEP and that the district maintained an open mind as to the content of the student's IEP (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294).

2. Home-Based Services as a Component of a FAPE

Upon careful review, the evidence in the hearing record reflects that the IHO correctly reached the conclusion that the CSE was not required to recommend the home-based services sought by the parents in order to offer the student a FAPE (see IHO Decision at pp. 10-12).[3] The

[3] Specifically, the parents contended in their due process complaint notice that a home- and community-based

IHO accurately recounted the facts of the case, addressed the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard, and applied that standard to the facts at hand (id. at pp. 3-12). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the 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, the findings and conclusions of the IHO are hereby adopted.

I note that several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also Walczak, 142 F.3d at 132 [stating that the "norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families"]; Application of the Dep't. of Educ., Appeal No. 12-086).

In particular in this case, the March 2012 CSE reviewed reports prepared by the home-based providers, at least one of whom also participated in the meeting, and the CSE was aware that the student received home-based services (Tr. pp. 50-51, 53, 81, 100-01; Dist. Exs. 5 at p. 27; 16). According to the district school psychologist who participated in the CSE meetings to develop the student's 2012-13 school year program, the recommended program was appropriate to meet the student's needs (Tr. pp. 100-102; 121-22). The coordinator of the student's home-based program testified that the student had received 20 hours of home-based ABA instruction for the past six years and that during that time there had been no attempts to taper the amount of services (Tr. p. 551). Testimony provided by the witnesses familiar with the home-based program supports the IHO's finding that the needs the home-based providers addressed primarily related to the level of supervision and custodial care the student required and to generalization of skills in the home environment (IHO Decision at pp. 11-12; Tr. pp. 120, 304, 310, 327, 332, 520, 526, 538-39, 658). The coordinator of the home-based program opined that home-based program was required because the day program at Hawthorne was focusing on academic skills rather than activities of daily living (ADL) skills (Tr. p. 549). However, the final IEP for the 2012-13 school year contains many goals addressing ADLs including toileting, hygiene, and leisure activities (see Tr. pp. 78, 207-11; Dist. Ex. 7 at pp. 3-13, 19). The student's occupational therapist and senior teacher at Hawthorne testified that Hawthorne addressed all the goals on the IEP (Tr. pp. 207-23, 304, 310, 332, 334). The education coordinator of the private school the student attended during the 2011-12 school year testified that the student could make progress on these goals in a program that provided 1:1 support throughout the school day (Tr. p. 367). She further testified that the home-

program consisting of twenty hours per week of ABA services, one hour every two months of "ABA supervision and consultation", four hours per week of 1:1 OT, and two hours per week of speech-language therapy was required to provide the student with a FAPE, in addition to the therapeutic day program offered by Hawthorne (Parent Ex. A at p. 13).

based program was appropriate for "carry over and generalization" and that a full-day ABA program was an appropriate "primary educational placement" (Tr. p. 361).[4]

Upon review of the hearing record, I find that the IHO correctly determined that the district offered the student an appropriate educational program that would address the student's significant needs during the school day and that the evidence does not suggest that the student required home-based programming in order to make progress during the in-school portion of her program or to receive educational benefits. Although it is understandable that the parents, whose daughter has substantial needs, desire greater educational benefits through the auspices of special education, it does not follow that the district must be made responsible for them. 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). The IDEA 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, 873 F.2d at 567 [citations omitted]).

3. Need to Conduct an FBA

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, 161 [2d Cir. 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). 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).

[4] The hearing record indicates—and the IHO determined—that the home-based services were beneficial to the student; however, the IDEA does not require districts to provide "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] [noting that "[w]hile the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"] [emphasis in original], citing N.K. v New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. Aug. 13, 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17-*18 [E.D.N.Y. Oct. 30, 2008] [finding that "while [the student] presented uncontradicted testimony that the ABA is helpful . . . testimony that [the student] would regress or make only trivial progress without the at-home services was speculative"]; see Grim, 346 F.3d at 379; IHO Decision at p. 10). The parents allege that the home-based services were required to prevent regression over breaks in school and weekends (Pet. ¶¶ 27-28). However, the most significant instances of regression cited by the parents occurred over school breaks while the student received home-based cervices but did not attend her day program at Hawthorne (Tr. pp. 320, 528, 556, 626). Additionally, the CSE was aware of the student's possible regression during breaks in services and recommended a 12-month program for the student in order to prevent substantial regression (Dist. Ex. 5 at p. 21).

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," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, 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.). 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 a functional behavioral assessment (FBA) conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines 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 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.).

Here, the parents do not contend that the FBA used by the CSE was inappropriate or inaccurate, but instead contend that the CSE erred in relying on an FBA updated in March 2012 while the student attended a private school unrelated to this matter, instead of conducting its own FBA. However, State regulations do not specifically require a CSE to conduct its own FBA when an adequate FBA from another entity containing sufficient information exists. Upon review of the FBA used by the CSE in developing the students program for the 2012-12 school year, I find that

it contains all of the required elements detailed above and provided a more than adequate basis for the CSE to consider special factors related to the student's behavior needs (Dist. Exs. 5 at pp. 2-3; 11 at pp. 1-14). Accordingly, I decline to find that the CSE failed to offer the student a FAPE on the basis that the CSE did not conduct its own FBA.

4. Related Services

a. Assistive Technology

The parents contend that the district failed to adequately provide for the student's assistive technology needs by failing to include an assistive technology device on the student's IEPs, failing to include assistive technology goals, and failing to address the student's assistive technology needs in the home. The hearing record does not support these contentions and I decline to find that the district failed to offer the student a FAPE on that basis.

On March 21, 2012 the student was referred for an assistive technology evaluation (Dist. Ex. 13 at p. 1). That evaluation recommended two assistive technology goals and, among other things, that the student be provided with a tablet computer using communication software (id. at pp. 5, 11, 15; see Tr. pp 41, 193). The student's IEP recommended that she required an assistive technology device and that the student have access to her tablet computer throughout the day both at school and in the home (Dist. Ex. 7 at p. 2). The IEP also contained five academic goals and short-term objectives that directly referenced her assistive technology communication device (id. at pp. 3-5, 9).

b. Parent Counseling and Training

The parents correctly assert that the student's IEPs should have but did not include parent counseling and training (see 8 NYCRR 200.4[d][2][v][b][5], 200.13[d]; see also 34 CFR 300.34[c][8]; 8 NYCRR 200.1[kk]; Dist. Ex. 7 at p. 14). However, the presence or absence of parent counseling and training in an IEP does not necessarily have a direct effect on the substantive adequacy of the plan (see R.E., 694 F.3d at 191). Moreover, districts are required to provide parent counseling and training pursuant to State regulations and, therefore, "remain accountable for their failure to do so no matter the contents of the IEP" (id.; see 8 NYCRR 200.13[d]; see also R.B. v. New York City Dept. of Educ., 15 F. Supp. 3d 421, 431-32 [S.D.N.Y. 2014]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11-*12 [S.D.N.Y. March 19, 2013]).

Here, the hearing record reflects that the CSE discussed parent counseling and training as a standard part of the placement offered to the student and the parent made no objections at the March 2012 CSE meeting (Tr. pp. 64-66, 105-108, 120-21). Thus, although parent counseling and training was not included on the student's IEPs, the hearing record reflects the matter was discussed during the CSE meeting in order to make the parent aware this service would be available. Based on the foregoing, while the district's failure to provide parent counseling and training in the IEPs in this instance constituted a procedural violation of State regulations, there is no evidence in the hearing record that this violation, by itself, resulted in a denial of a FAPE.

5. Implementation of the 2012-13 Program

Next, a review of the evidence in the hearing record reveals that, contrary to the parents' contentions, the CSE was responsive to the student's needs and provided the student with the program and services mandated in her IEPs during the 2012-13 school year.

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). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see 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]). In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimis failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524-25 [3d Cir. 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [holding that "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled [student] and the services required by the [student's] IEP"]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D. D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

The parents contend that the district failed to implement the 1:1 full-time paraprofessional provided for on the student's IEP[5] until "January 2012" (Pet. ¶ 41).[6] At the time of the impartial hearing there were six adults (one teacher, two teaching assistants and three paraprofessionals) and seven students in the student's classroom at Hawthorne (Tr. p. 165). The senior teacher at Hawthorne testified that because the student had a 1:1 paraprofessional on her IEP, the adults in

[5] The IEP developed by the June 2012 CSE did not include a 1:1 paraprofessional, the district school psychologist testified that he recalled that the paraprofessional had been removed from the IEP when the program recommendation changed from a 6:1+1 placement to the 6:1+2 placement at Hawthorne (Tr. pp. 94-96, 114-115). After the student began attending Hawthorne in July 2012 the parents contacted the CSE and asked for the service to be added to the IEP, which occurred by letter agreement on August 10, 2012 (Tr. pp. 96-97, 599; Dist. Ex. 7 at pp. 14, 19).

[6] I presume that the January 2012 date is a typographical error and that the allegation was intended to state "January 2013".

the classroom would be rotated among the students so that the student had 1:1 support for the entire school day (Tr. pp. 154, 165-69, 261, 263-64). The student's mother testified that a 1:1 para was in place at Hawthorne by January 2013 (Tr. p. 607). While this is a deviation from the student's IEP, the hearing record shows that staff at Hawthorne ameliorated the problem such that the student was not precluded from the opportunity to receive educational benefits and I decline to find a denial of FAPE on that basis. The other implementation claims raised by the parents do not constitute material deviations from the student's IEP or were de minimis (see Tr. pp. 262-64, 604-07).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations 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 Hawthorne with home-based services was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

I have considered the 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 11, 2014

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DAVID N. GREENWOOD
STATE REVIEW OFFICER