



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-098

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail M. Eckstein, Esq., of counsel

Kule-Korgood and Associates, PC, attorneys for respondent, Michelle Kule-Korgood and Lauren A. Goldberg, Esqs., 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 district) appeals from a portion of a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2012-13 school year.<sup>1</sup> The appeal must be dismissed.

#### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

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<sup>1</sup> The IHO's decision also awarded tuition costs for the 2013-14 school year but, as discussed below, that portion of the IHO's decision is not at issue in this matter.

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

At the start of the 2012-13 school year, the student was 14 years old and had been continuously attending the Rebecca School since 2009 (Tr. pp. 312, 414; Dist. Ex. 1 at p. 1). The hearing record reflects the student has received diagnoses of autism and an attention deficit

hyperactivity disorder (ADHD) (Tr. p. 408; IHO Ex. II at p. 7).<sup>2</sup> The student also demonstrates difficulties with cognition, sensory regulation, academic achievement, activities of daily living (ADL), social/emotional functioning, fine and gross motor skills, and articulation as well as receptive, expressive, and pragmatic language (Tr. pp. 264, 268-72, 279-280, 300, 323-24, 336-39, 344-45; Dist. Exs. 2 at p. 2; 3; Parent Ex. MM; IHO Ex. II).

On February 8, 2012, a CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 1). Finding the student remained eligible for special education as a student with autism, the February 2012 CSE recommended a 12-month program in a 6:1+1 special class together with the service of a full time 1:1 paraprofessional (*id.* at pp. 1, 8-9; Parent Ex. MM at p. 1).<sup>3</sup> According to the February 2012 IEP, the CSE also recommended related services of individual speech-language therapy, individual occupational therapy (OT), and individual physical therapy (PT) (Dist. Ex. 1 at pp. 8-9), though the amount of OT and PT reflected on the IEP are incorrect and not consistent with what was discussed at the February 2012 CSE meeting.<sup>4</sup> The CSE recommended the student participate in the alternate assessment and adapted physical education due to his significant cognitive, academic, and communication delays (*id.* at pp. 10-11). To address the student's needs, the February 2012 CSE also developed a behavioral intervention plan (BIP) and recommended special transportation (*id.* at pp. 11, 16).

On June 18, 2012, the parent sent a letter to the district informing the district that she would be placing the student at the Rebecca School for the 2012-13 school year and would be seeking funding from the district (Parent Ex. C). The reason the parent gave for deciding to place the student at the Rebecca School was that she had not yet received an IEP or a placement recommendation for that year (*id.*). Shortly after the parent's letter, the parent received a final notice of recommendation (FNR) from the district identifying the public school to which the student was assigned to attend for the 2012-13 school year (Tr. pp. 425-26; Parent Ex. D at p. 1).<sup>5</sup> The parent reenrolled the student at the Rebecca School for the 2012-13 school year on June 20, 2012, and executed an addendum to the enrollment contract for the services of a 1:1 paraprofessional on July 26, 2012 (Parent Exs. E; F).

The parent visited the assigned public school site and sent a letter to the district dated August 1, 2012, explaining why she believed the public school site was not appropriate for her son (Parent Ex. D at pp. 1-2). In addition, the parent also informed the district in this letter that she

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<sup>2</sup> The parent testified the student had received a diagnosis of mental retardation but was unsure if the diagnosis continued to be accurate (Tr. p. 408).

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

<sup>4</sup> With respect to the recommendations for OT and PT, the February 2012 IEP itself indicates that three 40-minute sessions of OT and five 40-minute sessions of PT per week were recommended. However, the district representative testified that the frequency of OT and PT were incorrectly switched on the February 2012 IEP and were correctly identified in the minutes of the CSE meeting (Tr. pp. 169-70, 172-74; compare Dist. Ex. 1 at pp. 8-9, with Dist. Ex. 2 at p. 1).

<sup>5</sup> The FNR was not entered into evidence at the impartial hearing.

still had not received an IEP from the February 2012 CSE meeting, and she reiterated her intention to place the student at the Rebecca School at public expense for the 2012-13 school year (id.).

### **A. Due Process Complaint Notice**

By due process complaint notice dated May 30, 2013, which was amended on September 19, 2013, the parent requested an impartial hearing (IHO Decision at p. 3; Parent Ex. A).<sup>6</sup> In this amended due process complaint notice, the parent challenged the programs recommended for the student for the 2012-13 and 2013-14 school years (Parent Ex. A at p. 1). However, only the parent's claims related to the 2012-13 school year are at issue in this appeal.<sup>7</sup>

Regarding the 2012-13 school year, the parent alleged a number of procedural inadequacies regarding the February 2012 CSE meeting and asserted that the February 2012 IEP was procedurally invalid and substantively inappropriate (Parent Ex. A at p. 1). For example, the parent alleged that the February 2012 CSE meeting was conducted more than one year after the student's last annual review, the CSE was not properly constituted due to the lack of a district representative, and the district did not provide the parent with a copy of the February 2012 IEP or prior written notice (id. at pp. 1-3). In addition, the parent contended that the February 2012 CSE did not assess the student in all areas of suspected disability, did not timely evaluate the student, did not discuss the results of prior testing, and did not consult with the parent as to whether additional evaluations were necessary (id. at pp. 1-3).<sup>8</sup> The parent also alleged that the CSE failed to conduct a functional behavioral assessment (FBA) and develop a BIP to address the student's "self-stimulating behaviors" (id. at p. 3), and that the CSE failed to discuss the student's transition needs or develop an appropriate transition plan for the student (id.). Moreover, the parent argued that placement in a 6:1+1 special class with a paraprofessional would not have provided "sufficient individualized support, attention, or instruction" for the student and that the district's recommendation was based on the district's policy, rather than the student's needs (id. at p. 2). Finally, the parent raised a number of issues related to the assigned public school site recommended by the district, including that the school did not have a suitable peer group, that the school could not provide the student with "the level of support, intensity, consistency, and individual instruction" that he required, that the curriculum used at the school was too advanced, that the school did not provide "community integration," that the physical environment of the school was "very loud," that the students at the school all eat in the cafeteria together, that the school did not have a behavioral plan, that the school would not be able to fulfil the student's related services mandates, that the school did not have appropriate equipment (such as a sensory gym) to address the student's sensory needs, that the

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<sup>6</sup> The original due process complaint notice was not entered into evidence at the impartial hearing.

<sup>7</sup> Again, although the proceeding before the IHO involved both the 2012-13 and 2013-14 school years, neither party has appealed any of the IHO's findings regarding the 2013-14 school year. Accordingly, the recitation of facts is limited to those related to the 2012-13 school year.

<sup>8</sup> Specifically, the parent asserted that the CSE failed to conduct an updated social history, a psychological evaluation, an OT evaluation, a PT evaluation, a speech-language evaluation, a classroom observation, or a vocational assessment (Parent Ex. 1 at pp. 1-3).

school would not be able to implement a sensory diet, and that the school would not meet the student's transition needs (id. at pp. 3-4).<sup>9</sup>

As relief the parent requested a declaratory finding that the district did not offer the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years and "funding/reimbursement" for the student's tuition, including the cost of a paraprofessional at the Rebecca School (Parent Ex. A at p. 6).<sup>10</sup>

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on January 8, 2014 and concluded on April 25, 2014, after three days of proceedings (Tr. pp. 1-736). In a decision dated May 28, 2014, an IHO found that the parent's testimony was lacking in credibility due to "the parent's many contradictions, evasions, obfuscations, and confabulations" (id. at p. 27-28), and consequently made her decision without consideration of the parent's testimony (id. at p. 28). Despite this, however, the IHO found that the district did not meet its burden regarding the appropriateness of the program offered for the 2012-13 school year.

Specifically, and while the IHO rejected the parent's claims relating to the assigned public school site, CSE composition, annual goals and functional grouping, she determined that the recommended 6:1+1 program was not appropriate because it was based "on insufficient information" and failed to adequately address the student's substantial OT and sensory needs (id. at pp. 29, 32-33).<sup>11</sup> In addition, the IHO noted other errors in the February 2012 IEP, including that the OT recommendation contained in the IEP was "plain wrong," that there was an incorrect recommendation for PT, that there was an unchecked box indicating the student did not have a BIP, that there was an absence of a transition plan and transition activities, and that there was no recommendation for parent counseling and training in the IEP (id. at pp. 30-31). The IHO further determined that the FBA and BIP were insufficient, did not contain specifics concerning the student's behaviors, and did not identify interventions the student would need or strategies to provide the proprioceptive, vestibular, or tactile input he required (id. at pp. 30-31). In addition, the IHO determined that above flaws were compounded by the district's failure to mail a copy of the IEP to the parent since it prevented the parent from reviewing the IEP and offering corrections to the problems that existed (id. at pp. 31-32).

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<sup>9</sup> The parent raised other concerns in her amended due process complaint notice relating to the 2012-13 school year; however the IHO did not address these issues, and a complete recitation of the parent's allegations in her amended due process complaint is not necessary for purposes of this appeal.

<sup>10</sup> The district responded to the parent's amended due process complaint notice on September 26, 2013. The district's response indicated the dates of the CSE meetings, the student's classification, the recommended programs, materials the CSE relied on, a description of other programs considered, and that the "IEP contains appropriate annual goals" (Parent Ex. B at pp. 1-6).

<sup>11</sup> With respect to the parent's claims regarding the sufficiency of the assigned public school site, the IHO determined that they were speculative because the parent placed the student at Rebecca, and that the sufficiency of the district's offered program was required to be determined on the basis of the IEP itself (IHO Decision at pp. 32-33).

In addition, the IHO found that the parent sustained her burden of proving that the Rebecca School was appropriate and met the student's special education needs (IHO Decision at pp. 34-35). In this regard the IHO credited the testimony of the Rebecca School staff, including the student's teachers, and found that the teachers' testimony showed the Rebecca School utilized several strategies in the classroom and implemented a sensory diet to help the student maintain regulation (id. at p. 34). The IHO also indicated that the student worked on personal safety, staying regulated in the community, and ADL skills in his transition class during the 2013-14 school year (id.). The IHO addressed the district's argument that the Rebecca School did not provide sufficient related services by noting that the IEP contained incorrect mandates, that PT was discontinued upon the recommendation of the student's physical therapist, and that the Rebecca School provided OT and sensory support in excess of what the IEP recommended (id. at pp. 34-35). In addition, the IHO found that the student generally made progress in "small steps" at the Rebecca School, which the IHO described as meaningful for the student (id. at p. 35).

Finally, the IHO found that equitable considerations favored the parent and rejected the district's contentions that the parent did not cooperate with the district, had no intention of placing the student in a public school, and did not enter into an enforceable contract with the Rebecca School (IHO Decision at pp. 35-38). The IHO, therefore, awarded the parent reimbursement for tuition paid to the Rebecca School for the 2012-13 and 2013-14 school years and directed the district to pay the balance of the tuition due for those years to the Rebecca School (id. at p. 38).

#### **IV. Appeal for State-Level Review**

The district appeals the IHO's determinations that the district did not offer the student a FAPE for the 2012-13 school year and that the Rebecca School was an appropriate placement.<sup>12</sup> In particular, the district asserts that the IHO erred in finding that the February 2012 CSE did not have sufficient evaluative information, that the February 2012 IEP did not indicate the student's OT needs, that the FBA was inappropriate, that a failure to conduct an appropriate FBA and BIP resulted in a denial of a FAPE, and that the district failed to provide the student with a copy of the February 2012 IEP. The district also appeals the IHO's finding regarding the other "errors and omissions" in the IEP, asserting that none of those errors, including the lack of a transition plan and parent counseling and training, as well as mistakes regarding the frequency of OT and PT, had a negative impact on the student and did not rise to the level of a denial of a FAPE. In addition, the district asserts that the Rebecca School was not an appropriate placement for the student because the student required the assistance of a 1:1 paraprofessional and the service was not provided by the Rebecca School.

The parent answers, denying the substance of the allegations contained in the petition. The parent asserts that the February 2012 CSE did not have sufficient evaluative information regarding the student's needs, did not use the information that it did have (a the Rebecca School progress report and psychoeducational evaluation) effectively, recommended an inappropriate program, did not address the student's sensory processing and OT needs, and did not have a sufficient FBA or BIP to address the student's sensory needs. The parent also contends that the IHO correctly found that the district's failure to provide the parent with a copy of the February 2012 IEP contributed to

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<sup>12</sup> The district expressly declines to appeal the IHO's findings regarding the 2013-14 school year.

the denial of a FAPE, and asserts that other inadequacies, such as a lack of a transition plan and parent counseling and training, cumulatively contributed to the denial of a FAPE. In addition, the parent asserts additional grounds for finding a denial of a FAPE, alleging that the IHO erred in finding that the CSE was properly composed, that the annual goals were appropriate, and in rejecting the parent's claims related to the assigned public school site. In addition, although the parent does not cross-appeal the IHO's determinations, the parent requests a finding that the IHO erred in striking a portion of the parent's subpoena on the district and in determining that the parent was not a credible witness. Finally, regarding the appropriateness of the Rebecca School, the parent asserts that the Rebecca School provided the student with the services of a 1:1 paraprofessional.

## 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that



Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Finality of Unappealed Determinations**

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's findings that equitable considerations do not weigh against granting the parent's requested relief (IHO Decision at pp. 35-38). In addition, the district "declines to appeal" the IHO's findings regarding the 2013-14 school year (Pet. ¶ 19). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

#### **2. Response to Due Process Complaint Notice**

The parent argues that the district should be precluded from asserting that it mailed a copy of the February 2012 IEP to the parent because it did not respond to the allegation contained in the parent's amended due process complaint notice. The district responded to the due process complaint notice on September 26, 2012 (Parent Ex. B). The district's response comports with federal and State regulations requiring that a response include an explanation of why the district proposed or refused to take the action alleged in the complaint, a description of other options considered and the reasons they were rejected, a description of the evaluative data the district used as a basis for the alleged action, and a list of factors that are relevant to the district's proposal or refusal (see 20 U.S.C. §1415[c][2][B][i][I]; 34 CFR 300.508[e][1]; 8 NYCRR 200.5[i][4][i]). Contrary to the parent's argument, a response to a due process complaint notice is "qualitatively different than a federal or state court pleading" and does not require affirmative defenses or specific denials of the allegations contained in the due process complaint (see R.B. v. Dep't of Educ., 2011 WL 4375694, at \*5-\*6 [S.D.N.Y. Sept. 16, 2011]). In addition, the district presented evidence during direct examination of its witness regarding the mailing of the February 2012 IEP and the parent had ample opportunity to cross-examine the witness and present evidence that she did not receive the February 2012 IEP (Tr. pp. 90-98, 424-26, 433-34, 437-38, 523). Under these circumstances, even if the district's response were deemed insufficient, any failure to adequately respond to the due process complaint notice did not affect the student's substantive rights or the parent's ability to respond to the district's contentions regarding mailing at the impartial hearing (see, e.g., Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 20 [D.D.C. 2008]).

### 3. Subpoena

The parent asserts that the IHO erred in striking a portion of a subpoena issued by the parent to the CSE (IHO Ex. I at p. 1). The parent contends that the subpoena "would have provided pertinent metadata regarding the creation, finalization, and dissemination of the [February 2012] IEP" (Answer ¶ 63). Upon review of the subpoena, the information requested in the stricken requests is not necessary to reach a decision with respect to the issue of whether the February 2012 IEP was delivered to the parent (IHO Ex. I at p. 1).<sup>13</sup> In addition, the parent does not make any specific request for relief relating to the stricken portions of the subpoena on appeal and, other than in general terms, does not identify how the information sought in the subpoena may have impacted the IHO's determinations (Answer ¶ 63). Accordingly, the parent's assertions regarding the subpoenas do not form a basis for relief and are not otherwise addressed herein.

### 4. Credibility

The parent objects to the IHO's determination that the parent's testimony was "unreliable and lacking in credibility" (IHO Decision at p. 28). An SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]). In this instance, the IHO rejected the same arguments the parent is now raising on appeal and the hearing record does not compel a contrary conclusion from the IHO's determinations (IHO Decision at pp. 27-28). Therefore, due deference is accorded to the IHO's findings regarding the credibility of the parent's testimony (see B.O. v Cold Spring Harbor Cent. School Dist., 807 F Supp. 2d 130, 142 [E.D.N.Y. 2011]). Nevertheless, reliance on the parent's testimony is not required to resolve the parties' disputes other than the parent's claims relating to the assigned public school site, which need not be addressed for reasons discussed in more detail below.

## B. CSE Process

### 1. Timeliness of CSE Meeting

The parent contends in her amended due process complaint notice that the February 2012 CSE meeting was untimely because it was held more than one year after the student's prior annual review in January 2011. Though the IHO did not address this issue, I will consider this claim.

The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]) and a school district must have an IEP in effect at the beginning of each school year for each student with a

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<sup>13</sup> It should be noted that the parent submitted the subpoena after the start of the impartial hearing and at least four months after the amended due process complaint notice (IHO Ex. I at p.1; Parent Ex. A at p. 1). I remind the parties that two of the purposes of a prehearing conference are "simplifying or clarifying the issues" and "identifying evidence to be entered into the record" (8 NYCRR 200.5[j][3][xi][a], [c]). In this instance this issue could have been resolved prior to the start of the hearing if the parties had held a prehearing conference (Tr. pp. 123, 210).

disability within its jurisdiction (20 U.S.C. § 1414 [d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). Although the February 2012 CSE meeting took place approximately two weeks more than one year after the student's prior annual review in January 2011, constituting a procedural violation of the IDEA, the delay in developing the student's IEP was not significant and it did not prejudice the student inasmuch as the student's prior IEP was designed for implementation from July 2011 through June 2012 (Parent Ex. MM), the February 2012 IEP was designed for implementation in July 2012 (Dist. Ex. 1), and the hearing record contains no indication that the parent would have removed the student from his unilateral placement at the Rebecca School in the middle of the 2011-12 school year (see Grim, 346 F.3d at 382; E.H., 2008 WL 3930028, at \*10). Accordingly, the hearing record does not support a finding that the failure to convene a CSE within one year of the date of the student's prior IEP 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]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

## 2. CSE Composition

The parent asserts that the IHO erred in finding that the February 2012 CSE was properly composed, specifically alleging that the district representative at the meeting was not qualified because he could not recommend all programs on the continuum of services, such as placement in a nonpublic school. A district representative member of the CSE is described as a representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. §1414[d][1][B][iv]; 34 CFR 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist provided that such individual meets the above qualifications (8 NYCRR 200.3[a][1][v]). The hearing record indicates that the district representative at the February 2012 CSE meeting also served as a school psychologist during the meeting (Tr, p. 36; Dist. Ex. 1 at p. 13). The district representative testified that he is a certified psychologist, is qualified to provide counseling as a special education service, and is familiar with the district's continuum of special education services (Tr. p. 36). Accordingly, the only relevant evidence in the hearing record supports the conclusion that the district representative at the February 2012 CSE meeting was qualified to serve as a district representative.<sup>14</sup>

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<sup>14</sup> It appears that this argument stems from the interpretation by counsel for the parent as to the required qualifications of a district representative. During the hearing, counsel for the parent indicated that a district representative must have an "ability to commit resources" (Tr. pp. 190-91). Counsel for the parent further indicated that she would address her interpretation in closing; however, she did not make any further attempt to explain this position (Tr. p. 191; IHO Ex. VII; Answer; Parent Mem. of Law). To the extent the parent now asserts that the district representative was not duly qualified to serve because he was not authorized to recommend all programs available on the district's continuum of services, she does not cite to any pertinent authority supporting this position.

### 3. Parent Participation and Sufficiency of Evaluative Data

The parent asserts that the CSE did not include the parent in the evaluation process, alleging that the district did not review existing data and decide "jointly (with input from the parent)" whether additional data or evaluations were required (Parent Ex. A at p. 2). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). As part of an initial evaluation or reevaluation, a group, which includes the CSE, must review existing evaluation data (8 NYCRR 200.4[b][5][i]; see 20 U.S.C. 1414[c][1][A]). Based on that review, the CSE, with input from the student's parents, must determine whether and what additional data are needed (8 NYCRR 200.4[b][5][ii]; see 20 U.S.C. 1414[c][1][B]).

In this instance, the hearing record indicates that the district was not required to conduct a reevaluation of the student before the February 2012 CSE meeting. According to the student's January 2011 IEP and a January 2012 psychological evaluation, the district last reevaluated the student in September 2009 (IHO Ex. II at p. 1; Parent Ex. MM at pp. 3-4).<sup>15</sup> In addition, the February 2012 CSE was convened as an "annual review" rather than a three year review or pursuant to a request for a reevaluation (Dist. Ex. 2 at p. 1). The district's computer system also indicates that a "Notice of Mandated Three-Year Reevaluation" was sent to the parent in October 2012 (Dist. Ex. 4 at p. 4).<sup>16</sup> Additionally, although the parent actively participated in the February 2012 CSE meeting and was afforded an opportunity to present her concerns, there is no indication (and the parent does not allege) that she requested a reevaluation of the student at or prior to the February 2012 CSE meeting (Tr. pp. 39, 46-49; Dist. Exs. 1 at p. 13; 2 at pp. 4-5; Parent Exs. A at p. 2; N). Accordingly, because the CSE did not decide a reevaluation was warranted and because the parent did not request one, the CSE was not required to seek the parent's input to identify what additional data, if any, may have been necessary in conducting a reevaluation of the student (see 8 NYCRR 200.4[b][4]; [b][5][i], [ii]).<sup>17</sup>

Notwithstanding the above, a CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional

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<sup>15</sup> A copy of the September 2009 evaluation is not in the hearing record.

<sup>16</sup> The hearing record indicates that the district reevaluated the student prior to the student's next CSE meeting in March 2013, conducting a psychoeducational evaluation, a speech-language evaluation, an OT evaluation, and a PT evaluation between December 2012 and February 2013 (Parent Exs. DD-GG).

<sup>17</sup> The district was also not required to conduct a social history or a classroom observation of the student (see 8 NYCRR 200.1[aa]; 200.4[b][1][iii], [iv]; [b][5][i]). Nevertheless, the January 2012 psychological evaluation contained observations of the student within a classroom setting, which noted the student's difficulties with sensory regulation and attention (see IHO Ex. II at pp. 2-4) and the December 2011 Rebecca School progress report included descriptions of the student's functioning and behavior within the classroom setting (Dist. Ex. 3 at pp. 1-5).

status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). While the parent asserts that the district failed to conduct updated evaluations of the student, specifically alleging a failure to identify the student's sensory needs in an updated OT evaluation, the district contends that the CSE had ample information, including the student's prior January 2011 IEP and information provided by the Rebecca School.

Upon review, although much of the information available to the February 2012 CSE was obtained from the parent or the student's private school, the information available regarding the student's functional, developmental, and academic needs was sufficient to enable the February 2012 CSE to develop an IEP. A district may rely on appropriate privately obtained evaluations (M.H. v. The New York City Dep't of Educ., 2011 WL 609880 at \*9-10 [S.D.N.Y. Feb. 16, 2011]); and may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*23 [S.D.N.Y. March 29, 2013], aff'd, 554 Fed. App'x 56 [2d Cir. 2014]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]; see also Application of a Student with a Disability, Appeal No. 12-165). In that regard I note that the February 2012 CSE considered several sources of evaluative information which, collectively, contains a significant amount of information regarding the student. Such sources include the student's January 2011 IEP, a December 2011 Rebecca School interdisciplinary report of progress update ("Rebecca School progress report" or "report"), and a January 2012 psychological evaluation (Tr. pp. 39-40, 41-42; Dist. Exs. 2 at p. 5; 3; Parent Ex. MM; IHO Ex. II). In addition, the district representative also testified that the parent and teacher from the Rebecca School actively participated in the February 2012 CSE meeting (Tr. p. 39).

The student's January 2011 IEP contained information regarding the student's needs related to sensory processing, cognition, academics, social skills, and language (Parent Ex. MM at p. 1).<sup>18</sup> The January 2011 IEP indicated the student had received a diagnosis of autism (Parent Ex. MM at p. 3). The IEP indicated the student demonstrated severely delayed cognitive skills, prekindergarten academic skills, significant language delays, and self-stimulatory behaviors (id.). The IEP reflected that the student's delays in communication were negatively affected by his ability to interact with peers and adults (id. at p. 4). The IEP provided detailed information regarding the student's difficulties with self-regulation including that the student presented as both under-responsive to vestibular and proprioceptive input and hyper-responsive to auditory input (id. at p. 5). For example, the IEP indicated the student required intense vestibular and proprioceptive input to maintain regulation and engage with others and was hyper-responsive to auditory input and frequently placed his hands over his ears to block loud noises (id.).

In addition, the Rebecca School progress report contained significant information regarding the student's needs and abilities related to cognition, sensory regulation, academic achievement, social/emotional functioning, ADL skills, fine and gross motor skills, articulation,

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<sup>18</sup> The January 2011 CSE found the student eligible for special education services as a student with autism and recommended a 6:1+1 special class in a specialized school together with the services of a fulltime 1:1 paraprofessional and related services of speech-language therapy, OT, and PT (Parent Ex. MM at pp. 1, 13, 15).

and receptive, expressive, and pragmatic language as well as a description of the Rebecca School's instructional focus for the student, his expected/achieved learning outcomes, and his behavior within the school setting (Dist. Ex. 3 at pp. 1-13).

For example, the Rebecca School progress report described the student's sensory needs, noting the student often presented as "up-regulated" and needing movement activities or under-regulated including acting extremely lethargic and trying to nap or close his eyes (Dist. Ex. 3 at p. 1). The report also indicated the student increased his tolerance of sounds and movement and required fewer sensory breaks since the introduction of a new sensory diet (id.). The report further indicated that the student better maintained his attention during preferred activities, the student exhibited self-stimulatory behaviors such as finger snapping, hopping, and high-pitched repetitive vocalizations, and that the student required extended time to reengage in activities and social interactions (id. at p. 1). Additionally, the report noted that when dysregulated in response to a loud environment or an inability to communicate his wants, the student may cry, run around the room, or grab people (id. at p. 5). The report noted the student's progress in using the sensory tools and equipment indicating that he managed the sensory equipment more readily and efficiently than in the past (id.).

In addition, the Rebecca School progress report described the student's communication and social skills, indicating the student was nonverbal and communicated through gestures, sign, vocalizations, and picture icons (Dist. Ex. 3 at pp. 1-2). The report indicated that the student communicated with his paraprofessional for a sustained period when the content of the communication was repetitive and familiar (id. at pp. 1-2). The report noted the student's recent progress of increased engagement with peers and in classroom activities including making requests and indicating 'yes' and 'no' through head nodding (id. at p. 2). The report also noted the student demonstrated an interest in peers by exhibiting eye contact, sitting next to them, and hugging and smelling them (id.). According to the report, the student engaged in morning meeting for up to 30 minutes with minimal prompting and adequate proprioceptive input such as deep pressure to his shoulders, a deep pressure vest, or bouncing on a therapy ball (id. at p. 4).

With respect to reading, the Rebecca School progress report indicated the student was working on reading readiness skills (Dist. Ex. 3 at p. 3). The progress report also indicated the student demonstrated several reading based skills including identifying his printed name in a field of two, matching a picture of himself to his printed name, matching pictures of peers with their printed names, turning pages of a book, identifying characters, answering yes/no questions, answering simple "wh" questions with prompts, and following simple one-two step directions (id. at pp. 2-3). In the area of math, the progress report indicated the student identified numbers 1 through 10 in a field of two with maximum support, worked on measurement including knowledge of words such as "big, small, more, less," and time/space concepts increasing his efficacy with visual tracking and navigating his environment (id. at p. 3). With respect to ADL skills, the student required support for toileting, eating his lunch, and remaining safe during community outings (Dist. Ex. 3 at p. 4).

Further, and with respect to the student's related service needs, the Rebecca School progress report indicated the student received three 30-minute sessions per week of individual speech-language therapy to address the student's decreased level of engagement and oral motor skills as well as delays in receptive, expressive, and pragmatic language skills (Dist. Ex. 3 at p. 5). As

noted above, the student communicated through nonverbal language including signs, gestures, and pictures (id.). The report indicated the student's gestures consisted of pointing, reaching, and pushing away to reject (id.). The report noted the student preferred to engage in activities related to swinging, sensory-based activities, tickle and chase games, and playing with bubbles (id.).

Moreover, the Rebecca progress report indicated the student received two 30-minute sessions per week of individual OT and one 30-minute session per week of OT in a group to address sensory regulation, body awareness, muscle strength, gradation of movements, ADL skills, and motor planning (Dist. Ex. 3 at p. 4). The report also indicated the student received one 30-minute session per week of individual PT to address the student's gross motor skills, motor planning, strength, and endurance (id.). The report noted the student ran with decreased trunk rotation, decreased upper extremity movement, decreased muscle activation, and without lifting his feet from the surface (id.). The report also noted the student's postural control and trunk strength has increased and the student would continue to work on increasing overall muscle strength, coordination, and endurance (id.). Accordingly, the December 2011 Rebecca School progress report contained an adequate amount of information regarding the student's OT and PT related needs (id. at pp. 4-5). Moreover, the 2011 Rebecca School report contained detailed information regarding the student's needs related to sensory regulation as well as fine and gross motor skills, as well as goals the student was working on in those areas (see id. at pp. 1-13).

In addition, the CSE reviewed a report from a psychological evaluation conducted by the Rebecca School in January 2012, which was provided to the CSE by the parent at the end of the February 2012 CSE meeting (Tr. pp. 37-38, 42-43; IHO Ex. II; Dist. Ex. 2 at p. 5). In the report the evaluator assessed the student's functioning in the areas of cognition, behavior, self-regulation, and ADL skills (IHO Ex. II at pp. 1-8).

Specifically, the evaluator observed the student both in his classroom setting and during the individual testing process (IHO Ex. II at p. 2). During class, the report noted that the student was up-regulated as indicated by the student making loud vocalizations while quickly moving about the room, searching for food in the cabinets, touching the light switches and doorknob, and attempting to grab small bits [of food] off the floor (id.). However, during another visit to the classroom by the evaluator, the student was lethargic and napping on the beanbag chair (id. at pp. 2-3). Further, during music integration class, the student was extremely lethargic at times and at other times hyperactive (id. at p. 3). With respect to classroom activities, the evaluator indicated the student required one-to-one support to engage in a task (id. at p. 3). During individual testing, the student engaged in repetitive behaviors such as flicking his fingers in front of his eyes and vocalizing loudly (id.).

The evaluator attempted to administer two standardized assessments of cognitive functioning; however, the student was unable to engage in the testing process due to difficulties with attention, verbal processing, and sensory regulation (IHO Ex. II at p. 4).<sup>19</sup> Further, administration of the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II) with the student's mother serving as informant yielded an adaptive behavior composite of 39 (low range) including low level skills in the areas of communication, socialization, daily living skills, and

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<sup>19</sup> While the evaluator was not able to administer these tests (and thus no test results were obtained), the fact that the student was not able to engage in the testing process is itself information that is useful to a CSE.

motor skills (id. at p. 6). The evaluator noted the student previously received a diagnosis of autism, which the evaluator opined was an accurate diagnosis of the student as the student presented with symptoms of autism throughout the testing process (id. at p. 7). Specifically, the evaluator noted the student presented with significant difficulties with attention and sensory regulation (id. at p. 8). In addition, the evaluator recommended a highly supportive setting with a small student to teacher ratio together with speech-language therapy, OT, and PT (IHO Ex. II at p. 8). Notably, the district representative testified that the CSE found the 2012 psychological report to be consistent with the information shared about the student during the meeting (Tr. pp. 42-44). This is also reflected in the minutes from the February 2012 CSE meeting (Dist. Ex. 2 at p. 5).

Based on the above, the evidence in the hearing record demonstrates that the CSE had sufficient and recent evaluative information regarding the student's cognitive abilities, sensory regulation, social/emotional functioning, academic achievement, ADL skills, articulation, fine and gross motor skills, and receptive, expressive, and pragmatic language skills (IHO Ex. II; Dist. Ex. 3; Parent Ex. MM). Thus, contrary to the IHO's finding that there was "inadequate information" about the child, an independent review of the hearing record reflects that the evaluative information considered by the February 2012 CSE, coupled with the input from the student's parent and teacher, provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs (including his sensory deficits) to develop an IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]).

### **C. February 2012 IEP**

#### **1. Present Levels of Performance**

In addition to finding that the district's program was based on "insufficient information," the IHO indicated that the February 2012 IEP did not accurately reflect the student's needs, especially those relating to his sensory and OT needs (IHO Decision at pp. 29-30). The district, however, asserts that the February 2012 IEP reflected the student's then-current levels of performance which was consistent with the evaluative information available to the district (Pet. at ¶ 19). In response, the parent denies this allegation (Answer at ¶ 17) and argues that the IEP fails to "adequately capture [the student's] present levels of performance and full range of needs" (id. at ¶ 46).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]).

The evaluative information available to the February 2012 CSE and the present levels of performance contained in the February 2012 IEP provide a consistent description of the student's academic achievement, social/emotional functioning, and physical development (Dist. Ex. 1 at pp. 1-2; 3; Parent Ex. MM; IHO Ex. II). For example, consistent with the January 2012 psychological evaluation, the February 2012 IEP indicates the student's difficulties with attention and self-regulation precluded completion of a formal assessment of his cognitive functioning (compare IHO Ex. II at p. 4, with Dist. Ex. 1 at p. 1). The IEP also indicates the student's adaptive behavior composite of 39 fell within the low range of functioning, which was consistent with the



psychological report (compare Dist. Ex. 1 at p. 1, with IHO Ex. II at p. 6). In accordance with the Rebecca progress report, the IEP indicates the student communicated through nonverbal language including gestures, signs, and pictures (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 1 at p. 1). Consistent with the Rebecca progress report, the IEP indicates the student needed to improve language processing and articulation skills (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 1 at p. 1). The February 2012 IEP also indicates the student was interested in peers, as indicated by the student sitting near them, making eye contact, and hugging them, which was also noted in the Rebecca progress report (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 3 at p. 2). The present levels of physical development indicate the student maintained an upright posture while sitting on a platform swing and caught a ball from a five feet distance with moderate verbal cues (Dist. Ex. 1 at p. 2). The district representative testified that the February 2012 CSE members discussed and developed the present levels of performance based upon the student's January 2011 IEP, the Rebecca School progress report, and the January 2012 psychological evaluation (Tr. pp. 99-102).

In addition, and contrary to the IHO's finding that the February 2012 CSE did not include a sufficient description of the student's sensory needs, I find that the February 2012 CSE identified and adequately described and addressed the student's sensory needs as reflected in the evaluative data before the CSE. The February 2012 IEP indicates the student presented with a mixed sensory profile, which was consistent with the Rebecca School progress report (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 3 at pp. 1-2). The IEP indicates, as reflected in the January 2012 psychological report, the student's difficulties with attention and regulation negatively affected his ability to engage in formal cognitive testing (compare Dist. Ex. 1 at p. 1, with IHO Ex. II at pp. 4-6). The IEP reflects, as noted in the Rebecca School progress report, the student was hypo-responsive to vestibular and proprioceptive input and enjoyed sensory based activities such as jumping, swinging, deep pressure, and brushing (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 3 at p. 1). The IEP also reflects the student was hyper-responsive to auditory and visual input as shown when the student would cover his ears and make loud noises to block out sound when his environment was noisy (Dist. Ex. 1 at pp. 1-2). The IEP also indicates that when the student became dysregulated and upset he required 10-15 minutes to recover with sensory supports such as bouncing on a sensory ball or vestibular input through swinging or use of a scooter (id. at p. 2). The February 2012 IEP further reflects that the student's sensory deficits negatively affected the student's involvement and progress in the general education curriculum, which was consistent with the 2011 Rebecca School progress report (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 3 at pp. 1-5).

Finally, and contrary to the IHO's finding, the February 2012 IEP does reference the student's sensory diet and describes supports that he may have required (IHO Decision at p. 30). Specifically, the IEP reflects that upon receiving his sensory diet the student was more available to engage in an activity with his 1:1 paraprofessional that involved prolonged eye contact and visual engagement in accordance with the 2011 Rebecca School progress report (Dist. Exs. 1 at p. 1; 3 at pp. 1-2). In addition the February 2012 IEP notes that the student's sensory diet included "vestibular and proprioceptive input," and notes that to address the student's needs related to body awareness and self-regulation, the student required a sensory diet including vestibular and proprioceptive input, as well as deep pressure, including the use of a bear hug vest, throughout the day (Dist. Ex. 1 at p. 2). In addition, to address the student's sensory processing and fine motor needs, the IEP included several annual goals and short-term objectives that targeted the student's needs related to self-regulation, ability to maintain attention, visual-spatial skills, core strength, balance, motor planning, and coordination (id. at

pp. 3, 5-6). Accordingly, and although the student's sensory management needs may not have been addressed in the "management needs" section of the February 2012 IEP, the IEP as a whole (i.e., in the present levels of performance section and goals) addresses those needs (20 U.S.C. § 1414[d][1][A][ii][III]; see Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [noting that while one individual component of an IEP may be so deficient that it constitutes a denial of a FAPE, "the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole"]).

In sum, a review of the information considered by the February 2012 CSE and discussed at the CSE meeting as detailed above (Dist. Exs. 1 at pp. 1-2; 3; Parent Ex. MM; IHO Ex. II), shows that the district adequately and accurately reflected the student's present levels of performance, including the student's sensory needs (P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]). Accordingly, I disagree with the IHO on this issue and decline to find a denial of a FAPE on this basis.

## **2. Goals**

As noted above, the IHO rejected the parent's claims regarding the sufficiency of the goals contained in the February 2012 IEP. In response, the parent does not raise any specific objection to these goals in her answer. Rather, the parent simply contends that "due to the lack of appropriate evaluations and appropriate consideration of the anecdotal information, the CSE could not possibly have created sufficient annual goals" (Answer ¶ 47). However, and as discussed above, the February 2012 CSE had sufficient evaluative information to identify the student's needs and develop appropriate goals. Moreover, evidence in the hearing record establishes that the February 2012 IEP included annual goals and short-term objectives designed to support the student's needs as identified in the evaluative reports and the present levels of performance (Dist. Exs. 1 at pp. 1-8; 3; Parent Ex. MM; IHO Ex. II). More specifically, the annual goals and short-term objectives in the February 2012 IEP targeted the student's needs related to sensory regulation, attention, academics, social/emotional functioning, ADL skills, language processing, motor skills, and articulation (Dist. Ex. 1 at pp. 3-8). In addition, the minutes of the CSE meeting and the testimony of the district representative both indicate that the CSE discussed the student's progress towards all of the annual goals and short-term objectives the student was working on and assessed whether or not the CSE needed to update the goals and objectives based on the student's functioning and the information contained in the 2011 Rebecca progress report (Tr. pp. 102-03, 558; Dist. Exs. 2 at pp. 2-4; 3 at pp. 6-12; Parent Ex. N at pp. 3-5). Accordingly, I find that the district adequately addressed the student's needs by way of the annual goals contained in the February 2012 IEP (N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*9 [S.D.N.Y. June 16, 2014]; B.K. v. New

York City Dep't of Educ., 2014 WL 1330891, at \*12 [E.D.N.Y. Mar. 31, 2014]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]).<sup>20</sup>

### 3. Special Factors—Interfering Behaviors

The IHO found, and I concur, that the February 2012 CSE did not conduct a proper FBA or develop a sufficient BIP for the student. However, and for the reasons discussed below, I find that these violations, standing alone, do not amount to a denial of a FAPE.

In New York State, policy guidance explains that "[t]he 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, the "student's need for a behavioral intervention plan [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 an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]).

In this instance, the February 2012 IEP indicated the student required positive behavioral supports and strategies to address behaviors that impeded his learning, and the hearing record reflects that the district developed a BIP for the student (Dist. Ex. 1 at pp. 2, 16).<sup>21</sup> Specifically, the district representative testified that a BIP was developed during the February 2012 CSE meeting based on a discussion during the meeting and that an FBA was also conducted in the context of the February 2012 CSE meeting (Tr. pp. 106-09, 139, 147-48; Dist. Ex. 1 at pp. 14-16).<sup>22</sup> Based on the hearing record, I agree with the IHO's determinations that the FBA and BIP

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<sup>20</sup> To the extent that the parent may argue that a June 2012 Rebecca progress report indicates the student had made progress between the February 2012 CSE meeting and the start of the 2012-13 school year, there is nothing in the hearing record to indicate that a copy of the June 2012 progress report was provided to the district or that the parent requested that the CSE reconvene to review the progress report (Parent Ex. BB). In that regard, I note that "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision" (R.E., 694 F.3d at 187). Therefore, in reviewing the program offered to the student, the focus of the inquiry is on the information that was available to the January 2013 CSE at the time the January 2013 IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [an IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE]; D.A.B. v New York City Dept. of Educ., 973 F. Supp. 2d 344, 361 [S.D.N.Y. 2013] [same]).

<sup>21</sup> The February 2012 IEP, however, incorrectly indicates that the student did not have a BIP (Dist. Ex. 1 at p. 12).

<sup>22</sup> The district representative also testified that the February 2012 CSE conducted an FBA because the district's computer system prevented the CSE from recommending a 1:1 paraprofessional without an FBA (Tr. pp. 140-41).

were insufficient to identify and address the student's interfering behaviors (see IHO Decision at pp. 30-31).

An FBA is defined in State regulations 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]). State regulations require that 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]).

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 ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE" (8 NYCRR 200.22[b][2]). Furthermore, implementation of a student's BIP is required to 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," with the results of the progress monitoring documented and reported to the student's parents and the CSE (8 NYCRR 200.22[b][5]).

In review of the FBA and BIP, and the manner in which the district developed the FBA and BIP, I find both the FBA and BIP are insufficient. The FBA and BIP indicated that the student engaged in self-stimulatory behaviors, demonstrated difficulties with communication, exhibited a high need for sensory and movement breaks, and that the student was distracted by food (Dist. Ex. 1 at pp. 14-16). The FBA and BIP included the interventions of a 1:1 paraprofessional and sensory and movement breaks (*id.*). However, the FBA and BIP only provided a general outline of the student's behaviors and corresponding interventions (*id.*). The district representative testified that the FBA did not include baseline data but indicated the student's behaviors were variable regarding frequency, duration, and intensity, which the February 2012 CSE noted in the FBA (Tr. pp. 148-49; see Dist. Ex. 1 at p. 14). In addition, the district based the FBA and BIP only on the Rebecca

School progress report and input from CSE members and failed to gather baseline data (*id.*). Moreover, the FBA and BIP lacked the required specificity regarding the student's behaviors and related factors and interventions (Dist. Ex. 1 at pp. 14-16).

However, the district's failure to conduct a proper FBA and BIP do not, by themselves, automatically render the IEP deficient, as the February 2012 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see *C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 80 [2d Cir. 2014]; *F.L. v. New York City Dep't of Educ.*, 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; *M.W.*, 725 F.3d 131, 139-41 [2d Cir. 2013]; *R.E.*, 694 F.3d at 190). Here, and as noted above, the evaluative information available to the CSE reflected the student exhibited self-stimulatory behaviors including distractibility related to food, finger snapping, hopping, high-pitched repetitive vocalizations, and quickly moving about the room, as well as demonstrating difficulties with attention, hyperactivity, and awareness of personal space (Tr. p. 280; Dist. Ex. 3 at pp. 1-2, 5; IHO Ex. II at pp. 2-3). Further, the February 2012 IEP indicated the student exhibited self-stimulatory behaviors including making loud vocalizations in response to a loud environment, distractibility related to food, running around the room, and grabbing people, as well as difficulties with attention and awareness of personal space (Dist. Ex. 1 at pp. 1-2). The February 2012 IEP also identified the student's difficulties with sensory regulation, self-stimulatory behavior, attention, transitions, and communication (Dist. Ex. 1 at pp. 1-2). The IEP also indicated the student bumped into walls and people in order to receive proprioceptive input throughout the day (*id.*). Thus, while the February 2012 IEP did not specifically reflect all of the student's self-stimulatory behaviors as identified in the evaluative reports before the CSE, the IEP noted the student exhibited self-stimulatory behaviors (Dist. Exs. 1 at pp. 1-2; 3 at pp. 1-2, 5; IHO Ex. II at pp. 2-3).

In addition, the February 2012 IEP recommended strategies and supports to address the student's behaviors. For example, the IEP indicated the student needed to have a daily program that supported his sensory system and the student required intense vestibular and proprioceptive input to register these sensations (*id.* at p. 2). In addition, the IEP indicated that to address the student's needs related to body awareness and self-regulation the student required a sensory diet that included vestibular and proprioceptive input as well as deep pressure throughout the day including use of a bear hug vest (*id.*). The IEP further indicated that the student needed visual and verbal support to transition to non-preferred activities (*id.* at p. 1), and noted that the student required a daily program that was consistent and supportive with his sensory system (*id.*). The IEP also reflected that the student required visual and verbal support to transition to non-preferred activities (*id.*), and indicated the student's level of functioning and sensory-based needs required maximum support to initiate with preferred adults regarding the student meeting his own needs and communicating effectively (*id.*).

Additionally, the February 2012 CSE recommended environmental modifications and human/material resources to address the student's behavioral and management needs including a small highly structured special class in a specialized school, a 1:1 paraprofessional to assist with sensory regulation, as well as speech-language therapy, OT, PT, and assistive technology including a Picture Exchange Communication System (PECS) to improve communication (Dist. Ex. 1 at p. 2). The CSE also developed annual goals and short-term objectives that focused on the student improving his self-regulation, attention, self-stimulatory behavior, communication skills, and ability to transition between activities (*id.* at pp. 3-5, 7).

Based on the foregoing, I find that the CSE's failure to follow procedural guidelines in conducting an FBA or developing a BIP, while a procedural violation, does not, by itself, rise to the level of a denial of a FAPE (C.F., 746 F.3d at 80; A.C., 553 F.3d at 172-73).

#### **4. 6:1+1 Special Class Placement with 1:1 Paraprofessional**

The parent asserts on appeal that the district's recommendation of a 6:1+1 special class placement was not appropriate because the student required additional individualized support and a smaller educational environment to address his needs. The IHO found that the district's recommendations were not appropriate because (a) the 6:1+1 class-size recommendation was "based on insufficient information," and (b) it "failed to indicate the substantial amount of occupational therapy needs of the child" (IHO Decision at p. 29). Further, and with respect to the latter, the IHO indicated that based on the student's sensory related needs, the student required OT throughout the school day (id.). However, and as discussed above, the February 2012 CSE had sufficient evaluative data about the student to develop an appropriate program for the student. Moreover, a review of the hearing record reveals that the February 2012 CSE's recommendation of a 6:1+1 special class, along with the service of a 1:1 paraprofessional, was appropriately designed to address the student's special education needs.

As an initial matter, at the time of the February 2012 CSE meeting, the student demonstrated significant deficits in sensory processing, academics, cognition, ADL skills, articulation, fine and gross motor skills, and social/emotional development as well as expressive, receptive, and pragmatic language (Tr. pp. 264, 268-72, 279-280, 300, 323-24, 336-39, 344-45; Dist. Exs. 1 at pp. 1-2; 3; Parent Ex. MM at pp. 3-5; IHO Ex. II). The hearing record also indicates the student had difficulties with sensory regulation and communication, which sometimes resulted in the student engaging in self-stimulatory behaviors (Dist. Ex. 3 at pp. 1, 5). Thus, while the hearing record indicates that the student had intensive management needs, I note that State regulations specifically provide that a 6:1+1 special class placement is designed for the instruction of 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]).

Further, while the director from the Rebecca School testified that a 6:1+1 special class placement was not appropriate for the student because he required a smaller class (Tr. p. 362), the district representative testified that a 6:1+1 special class was an appropriate placement for the student because the support and structure provided within a 12-month program in a 6:1+1 special class in a specialized school would address the student's needs (Tr. pp. 111-12). In addition, the hearing record reflects at the time of the February 2012 CSE meeting, while at the Rebecca School, the student communicated with others through nonverbal language, showed an interest in relating with peers, and engaged in morning meetings for up to thirty minutes with prompts and proprioceptive input, which demonstrates a readiness for a 6:1+1 special class setting (see Dist. Ex. 3 at pp. 1-2, 4). Additionally, I note that to provide support to the student, the February 2012 CSE recommended a 1:1 paraprofessional, which would provide the student additional assistance within the classroom setting (see Dist. Ex. 1 at pp. 2, 9). Accordingly, I find that within the

recommendation of a 6:1+1 special class with the service of a 1:1 paraprofessional, the student would have received adequate individualized and small group support to address his needs.<sup>23</sup>

Finally, I find that the IHO erred in finding that the CSE's recommendation for a 6:1+1 special class would not address the student's sensory needs (IHO Decision at p. 29). To address the student's sensory processing and speech-language deficits as well as delays in gross and fine motor skills, the CSE recommended speech-language therapy, PT, and OT for the student (Dist. Ex. 1 at pp. 8-9).<sup>24</sup> In addition, and as discussed above, the February 2012 IEP indicates the student required a sensory diet, which included "intense" vestibular and proprioceptive input as well as deep pressure regularly "throughout the day" including use of a bear hug vest (Dist. Ex. 1 at p. 2). Moreover, and as noted above, the February 2012 IEP provides the student with 1:1 paraprofessional support to "help provide sensory regulation" (*id.* at pp. 2, 9). Thus, the hearing record overall supports a finding that the student would have received an educational benefit in the recommended 6:1+1 special class placement, especially with the other special education services and supports that were recommended for the student.

## 5. Parent Counseling and Training

Another issue raised by the IHO is the February 2012 CSE's failure to include parent training and counseling in the IEP. In this instance the February 2012 IEP did not include parent counseling and training and the district has not offered any explanation other than that it is "likely offered" at the assigned public school site (Pet. ¶ 36). Pursuant to State regulations, a district is required to provide parent counseling and training to the parents of students with autism (8 NYCRR 200.13[d]). However, and as noted by the Second Circuit Court of Appeals, the presence or absence of parent training and counseling 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.*). Thus, while failing to provide parent counseling and training in an IEP in this instance constitutes a procedural violation, and while in some cases it may contribute to a denial of a FAPE "particularly when aggregated with other violations" (*id.*), I find that there is no evidence in the hearing record indicating that the district's failure to include parent training and counseling in the IEP, by itself, contributed to a denial of a FAPE.

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<sup>23</sup> To the extent that the parent argues the CSE did not follow the suggestions of the parent or the student's private school staff, the CSE is not required to merely adopt such recommendations for different programming (*see, e.g., G.W.*, 2013 WL 1286154, at \*19; *Dirocco v Bd. of Educ.*, 2013 WL 25959, at \*23 [S.D.N.Y. Jan. 2, 2013]; *E.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; *Z.D. v. Niskayuna Cent. Sch. Dist.*, 2009 WL 1748794, at \*6 [N.D.N.Y. Jun. 19, 2009]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).

<sup>24</sup> As noted above, the hearing record indicates the frequency of the OT and PT in the IEP was incorrectly switched, and that the frequencies of related services were supposed to be five 40-minute sessions per week of OT and three 40-minute sessions per week of PT (Tr. pp. 169-70, 172-74; *see* Dist. Exs. 1 at pp. 8-9; 2 at p. 1). The parent testified she understood the OT recommendation to be for five 40-minute sessions per week and that she thought it was an appropriate recommendation (Tr. pp. 559-60).

## 6. Transition Plan

The parent asserts that the district did not conduct a vocational assessment of the student or develop a transition plan at the February 2012 CSE meeting. In response the district asserts that the lack of a transition plan does not amount to a denial of a FAPE because the student was not yet 15 years old and was "years away from graduation."

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the IEP Team, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

IEPs must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]),<sup>25</sup> as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

The hearing record does not include any indication that the district conducted a vocational assessment of the student and reflects that the February 2012 CSE did not develop a post-secondary transition plan for the student (Tr. pp. 183-84, 410; Dist. Ex. 1 at p. 3, 10).<sup>26</sup> Although the student was 14 at the time of the February 2012 CSE meeting, the student turned 15 during the 2012-13 school year (Tr. p. 183). Accordingly the February 2012 CSE was required to provide the student with transition services (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*11 [S.D.N.Y. March 19, 2013]; see 8 NYCRR 200.4[d][2][ix]). However, deficiencies in a transition plan may not amount to a denial of a FAPE where an IEP otherwise addresses a student's post-secondary needs (see, e.g., M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*9 [S.D.N.Y. March 21, 2013]; A.D., at \*11).

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<sup>25</sup> These are supposed to be listed in the present levels of performance section of a student's IEP (see 8 NYCRR 200.4[d][2][ix][a]).

<sup>26</sup> State regulations require a vocational assessment by age 12 (8 NYCRR 200.4[b][6][viii]).



Although the February 2012 IEP lacked transition goals, the Rebecca School director identified the student's transition needs as working on ADL skills and independence (Tr. pp. 371, 374). As a whole, the February 2012 IEP identified and addressed the student's post-secondary needs related to community integration, ADL skills, social skills, and communication (Dist. Ex. 1 at pp. 1-5, 7). For example, the IEP indicated the student achieved an adaptive behavior composite of 39, which reflected that the student's ADL skills fell within the low range of functioning compared to same age peers (id. at p. 1). With respect to communication, the IEP indicated the student primarily communicated through nonverbal language including gestures, signs, and pictures (id.). The IEP also indicated the student receptively identified his peers names and pictures in a field of four with moderate support (id.). The IEP noted the student demonstrated difficulties with receptive, expressive, and pragmatic language (id.). In the area of social skills, the IEP indicated the student was interested in peers as indicated by the student sitting next to peers, establishing eye contact as well as hugging and smelling his peers (id.). The IEP also indicated the student showed a preference for specific peers and enjoyed social group activities (id.).

The February 2012 IEP annual goals and short-term objectives also addressed the student's needs related to ADL skills, including community integration, as well as social skills and communication. The IEP contained numerous annual goals and short-term objectives targeting the student's ability to interact and communicate with peers and adults, which the CSE designed to increase the length and quality of social interactions (Dist. Ex. 1 at pp. 3-4). The IEP included annual goals and short-term objectives, which the CSE designed to improve the student's receptive, expressive, and pragmatic language (id. at p. 7). The February 2012 IEP also included annual goals and short-term objectives to address the student's ADL skills, which targeted the student's ability to brush his teeth and engage in a community walks including obeying rules regarding crossing the street (id. at p. 5).

While transition services were not identified as such within the February 2012 IEP, the IEP, as set forth above, identified and included goals designed to address the student's post-secondary related needs. The CSE's failure to identify the goals directed towards developing the student's ADL skills, social skills, and communication skills as postsecondary goals did not, in this instance, contribute to a denial of a FAPE (see, e.g., M.Z., 2013 WL 1314992, at \*9; A.D., 2013 WL 1155570, at \*11).

#### **D. Transmittal and Receipt of IEP**

While for the reasons discussed above I find that the February 2012 IEP offered by the district to the student, as a whole, may have been sufficient to offer a FAPE, that does not end the inquiry in this matter. Rather, and in addition to alleging deficiencies with the February 2012 IEP, the parent also contends that she did not receive a copy of the student's IEP before the start of the 2012-13 school year.

In general, a district is required to ensure that an IEP is in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at \*6 [stating a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]). In addition, it has been held that "it naturally follows from the regulations" that a district

must provide a copy of the student's IEP to the parents at the beginning of the school year (C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*13 [S.D.N.Y. May 27, 2014]; see also 34 CFR 300.322[f]).

Here, the district argued that it sent a copy of the student's February 2012 IEP to the parent, however the IHO found that the evidence in this matter "was not persuasive that the IEP was received by the parent," and that under the circumstances presented "it would be unreasonable to assume that the IEP was mailed" (IHO Decision at pp. 31-32). On appeal the district contends that the IHO erred in that it is entitled to a "presumption of mailing," and that the mere denial of receipt by the parent is not sufficient to prove that the IEP was not received. However, and irrespective of whether the district is entitled to a presumption of mailing, I am unable to find that it complied with its obligations in this case.

As an initial matter, the importance of an IEP cannot be understated. As the Second Circuit has noted, the adequacy of an IEP presents considerable reliance interests for parents in that, at the time that they must choose whether to accept or reject a school district's recommendations, they have only the IEP on which to rely (see R.E., 694 F.3d at 186). Moreover, State regulations require that districts ensure that a copy of an IEP is provided to parents at no cost to them (see 8 NYCRR 200.4[e][3][iv]; see also 34 CFR 300.322[f]). Here, however, the hearing record reflects that the parent sent two letters to the district indicating that she never received an IEP from the February 2012 CSE meeting (Parent Exs. C at p. 1; D at pp. 1-2). The first of these letters was sent on June 18, 2012, and advised the district that the parent would be enrolling the student at the Rebecca School for the 2012-13 school year because she had not yet received an IEP or a placement recommendation for the 2012-13 school year (Parent Ex. C at p. 1). Thereafter, the parent sent another letter to the district, on August 1, 2012, after the start of the 12-month school year, indicating that she received an FNR from the district and visited the assigned public school site, but had still not received an IEP from the February 2012 CSE meeting (Parent Ex. D at pp. 1-2).<sup>27</sup> These letters, to which the district did not respond, raise a question of fact as to whether the parent received the IEP (see, e.g., Sport-O-Rama Health & Fitness Ctr., Inc. v. Centennial Leasing Corp., 100 A.D.2d 584 [2d Dep't 1984]; Vita v. Heller, 97 A.D.2d 464 [2d Dep't 1983]). Accordingly, and irrespective of whether the district may have mailed a copy of the February 2012 IEP to the parent at some point, the district's failure to respond to the parent's letters prohibits a finding that the district ensured that a copy of the IEP was provided to the parent, as is required by State regulations. To this extent I remind the district that collaboration between parents and schools is a core part of the IDEA, and that the district is responsible for ensuring that the parent is provided with a copy of the IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]; see, e.g., Schaffer v. Weast, 546 US 49, 53 [2005]).

Nevertheless, and as noted by the IHO, a district's failure to provide a parent with a copy of an IEP may not rise to the level of a denial of a FAPE (see, e.g., Application of the Dep't of Educ., Appeal No. 13-032 [failure to deliver IEP prior to start of school year did not rise to the level of a denial of a FAPE because parents had actual notice of the contents of the IEP and rejected

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<sup>27</sup> The hearing record also does not include a copy of a prior written notice from the district or evidence that such notice had been sent, and I remind the district of its obligation to provide prior written notice consistent with State and federal regulations (34 CFR 300.503; 8 NYCRR 200.5[a]; see also <http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>).

it prior to the time that the district would have been required to implement it)). However, here the parent initially rejected the district's offered program based on not having received an IEP, rather than on the contents of the IEP (*id.*). Moreover, and despite the fact that the parent may have attended the February 2012 CSE meeting and may have known about the "program and placement recommendation" as a result of this participation, the record is not clear with respect to what the parent knew (or did not know) with respect to the specifics of the February 2012 IEP, including many of the errors (such as the incorrect OT and PT recommendations or the non-existence of certain required components, as discussed above) contained therein. Accordingly, and even if these errors did not individually rise to the level of a denial of a FAPE, and even if they could have been corrected easily, the parent was prevented from bringing any of these issues to the district's attention because she did not receive the IEP and, thus, her ability to participate in the CSE process and the development of the IEP was significantly impeded (*see* 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Accordingly, I find that in this instance, the district's failure to ensure the parent's receipt of a copy of the IEP resulted in a denial of a FAPE.

### **E. Unilateral Placement**

Having determined that the district did not offer the student a FAPE for the 2012-13 school year, I need not address the parent's remaining contentions regarding the provision of a FAPE to the student, including her claims related to the sufficiency of the public school site to which the student was assigned.<sup>28</sup> However, and since the district does not appeal the IHO's finding

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<sup>28</sup> I am, however, compelled to note that Second Circuit Court of Appeals has been clear that where an IEP is rejected by a parent before a district has had an opportunity to implement it, the focus must be "on the written plan offered to the Parents," and that "[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 also, e.g., K.L. v. New York City Dep't of Educ.*, 530 Fed.Appx. 81, 87 [2d Cir. 2013]; *F.L.*, 553 Fed. Appx. at 9). Accordingly, I am inclined to agree with the IHO's finding that the sufficiency of the district's program must generally be determined on the basis of the IEP itself, and to disagree with the parent's assertion in her answer (Answer at ¶ 15) that the district must "prove" that the assigned public school site "could implement the IEP and offer an appropriate functional peer group." To that extent, I note that while some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs (or that issues pertaining to a school site relate to the provision of a FAPE), the weight of the relevant authority, consistent with the precedent discussed above, supports the approach taken by the IHO (*see B.K. v. New York City Dep't of Educ.*, 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; *M.L. v. New York City Dep't of Educ.*, 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; *M.O. v. New York City Dept. of Educ.*, 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]; *E.H. v. New York City Dep't of Educ.*, 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; *R.B. v. New York City Dep't of Educ.*, 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; *E.F. v. New York City Dep't of Educ.*, 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; *M.R. v. New York City Bd. of Educ.*, 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; *A.M.*, 964 F. Supp. 2d at 286; *N.K.*, 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; *J.L. v. City Sch. Dist. of New York*, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; *Ganje v. Depew Union Free Sch. Dist.*, 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], *adopted*, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; *see also N.S. v. New York City Dep't of Educ.*, 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [school district discharges its burden by establishing that it developed and IEP that is procedurally and substantively adequate ; "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"; *but see V.S. v. New York City Dep't of Educ.*, 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; *C.U. v. New York City Dep't of Educ.*, 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; *Scott v. New York City Dep't of Educ.*, 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; *J.F. v. New York City Dep't of Educ.*, 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; *D.C. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; *B.R. v. New York City Dep't of Educ.*, 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; *E.A.M. v. New York City Dep't of Educ.*, 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).

regarding "equitable considerations," a final question remains regarding whether the parent's unilateral placement of the student at the Rebecca School was appropriate.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

In this instance, the district only objects to one aspect of the unilateral placement, asserting that the parent has not met her burden of proving that the Rebecca School is an appropriate placement for the student because the student requires a 1:1 paraprofessional, which the district asserts was not provided by the Rebecca School. In response the parent argues that the Rebecca School provided a 1:1 paraprofessional for the student. The hearing record supports the parent's argument. The parent executed an addendum to the Rebecca School contract for the provision of a 1:1 paraprofessional during the 2012-13 school year (Parent Ex. F). The student's teacher testified that the student had a 1:1 paraprofessional during the 2012-13 school year (Tr. p. 279). The district has not submitted any evidence indicating that the 1:1 paraprofessional was not provided by the Rebecca School. Accordingly, the district's argument that the Rebecca School was not an appropriate unilateral placement for the student because it did not provide the student with a 1:1 paraprofessional is factually mistaken and must be dismissed.

## **VII. Conclusion**

Based on the foregoing, I concur with the IHO's determinations that the district did not offer a FAPE to the student for the 2012-13 school year and that the Rebecca School was an appropriate placement for the student.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                      **September 10, 2014**

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**HOWARD BEYER**  
**STATE REVIEW OFFICER**