The University of the State of New York

The State Education Department
State Review Officer
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No. 10-104

Application of the [redacted] for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Karyn R. Thompson, Esq., of counsel

Legal Services NYC-Bronx, attorneys for respondent, Oroma H. Mpi, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to pay the student's tuition costs at the Rebecca School for the 2009-10 school year. The appeal must be sustained.

Throughout the impartial hearing, the student was attending the Rebecca School in an 8:1+3 classroom and receiving art therapy, music therapy, occupational therapy (OT), speech-language therapy, and counseling (Tr. pp. 319-20, 327, 369-70). The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The hearing record indicates that the student's greatest area of need is in expressive language: he has difficulty expressing his ideas in a logical sequence, often resorts to scripted language, and has difficulty staying with a continuous flow of language for more than five minutes (Tr. pp. 315-16). The student also has deficits in sensory integration and regulating his behavior, and exhibits difficulty with fine motor skills, forming relationships, and accepting others' ideas (Tr. pp. 332, 351, 360). According to the hearing record, the student is delayed in all academic areas and functions between a kindergarten and first grade level in various academic skills (Tr. pp. 330, 342-43, 370; Dist. Ex. 3 at p. 3). He demonstrates strong visual skills and memory skills, shows

an awareness of his schedule, and transitions easily from one activity to another (Tr. p. 335). The student's classification and eligibility for special education programs and services as a student with autism are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

With regard to the student's educational history, the parent reported that as an infant, the student received services through the Early Intervention Program and later received special education preschool services (Tr. pp. 370-73). For the student's kindergarten year, the parent reported that the student attended a district school and was classified as a student with a speech or language impairment (Tr. pp. 374-76). For first grade, the 2005-06 school year, the district's committee on special education (CSE) developed an individualized education program (IEP) for the student that recommended a 10-month 12:1+1 special class in a community school with related services of OT and speech-language therapy (Parent Ex. H). On October 3, 2006, the district conducted a triennial evaluation of the student, which determined that the student's overall functioning was in the moderate range of mental retardation (Dist. Ex. 6 at p. 1; Parent Ex. G at p. 3). On October 26, 2006, the CSE developed an IEP for the student that reflected a change in the student's classification from a student with a speech or language impairment to a student with mental retardation and the CSE recommended a 10-month 12:1+1 special class in a community school with related services of OT and speech-language therapy (Parent Ex. G at pp. 1, 2, 13, 14).

In February 2007, the parent had the student privately evaluated by a psychologist due to concerns about the district's recent revaluation and uncertainty of the student's then-current class placement (Tr. p. 379; Dist. Ex. 6 at pp. 1-9). The resulting psychological evaluation report indicated that test results, behavioral history, parent report, and observation supported a diagnosis of a "pervasive developmental or autistic spectrum disorder" (Dist. Ex. 6 at p. 7). According to the evaluation report, the student's performance on abstract tasks that do not require language mediation or verbal responses indicated that his cognitive abilities were in the average to low average range (id.). The psychologist recommended, among other things, an appropriate class placement that is individualized and more intensive speech-language therapy and support services (id. at p. 8).

The student's 2007-08 (third grade) IEP reflected that he was eligible for special education programs and services as a student with autism and recommended a 12-month 6:1+1 special class in a specialized school with related services of OT and speech-language therapy (Parent Ex. F at pp. 1, 16). According to the parent, she received a Nickerson letter[1] from the district because the student had not received a school placement by September 2007; however, none of the schools identified by the district had an opening for the student (Tr. pp. 382-83). The parent continued to seek a program for the student and ultimately, with the assistance of an attorney, enrolled the student in the Rebecca School in April 2008 (Tr. pp. 274, 383-84; see Dist.

[1] A "Nickerson letter" is a letter from the New York Department of Education authorizing a parent to place a student in a New York State approved non-public school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner (see Application of the Dep't of Educ., Appeal No. 09-114; Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

Ex. 19 at pp. 1-4). The student has continued to attend the Rebecca School since that time (see Tr. pp. 315, 370; Parent Ex. B at p. 2).

During the 2008-09 school year, the student attended the Rebecca School in a "2:1 ratio classroom with four other children" and received OT, physical therapy (PT), speech-language therapy, art therapy, music therapy, drama therapy, and adaptive physical education (Dist. Ex. 7 at p. 1). In December 2008, the student's providers at the Rebecca School completed a multidisciplinary progress report that reviewed the student's functional emotional developmental capacities in six areas of functioning as well as described the student's progress in his academic instruction, OT, speech-language therapy, and creative arts therapies (Dist. Ex. 7). The providers concluded that although the student had made progress throughout his program, he continued to demonstrate difficulties with sensory and emotional regulation, initiation and engagement with others, motor planning and sequencing, and with age appropriate play and self-sufficiency, which are all directly affected by his ongoing sensory needs (id. at p. 8). The progress report recommended the student's continued placement at the Rebecca School and included goals in the areas of DIR/Floortime, OT, PT, speech-language therapy, and academics (id. at pp. 9-10).

On March 19, 2009, a district special education teacher conducted a 45-minute classroom observation of the student at the Rebecca School during snack, morning meeting, and yoga (Dist. Ex. 8 at pp. 1-2). According to the report, the student followed directions to come to the rug for morning meeting, was attentive, and was able to independently participate in some morning meeting activities (id. at p. 1). The student demonstrated the ability to follow routine classroom activities, appropriately initiated conversation with a peer, noticed and inquired as to the absence of another peer, and identified his mood as happy (id. at p. 2). The observer noted that the student did not join in singing, but successfully performed all of the yoga movements as directed (id.). According to the observer, the student ignored a teacher assistant's repeated questions regarding whether the student wanted a snack (id.). The student's teacher indicated that the student was very competitive and liked games and races (id.). She further indicated that the student responded well to firm routines, often reminded teachers of the next activity, asked for help when needed, had some sight word recognition although he needed to improve his decoding skills, and had difficulty generalizing things out of context (id.).

On May 1, 2009, the CSE convened for the student's annual review and to develop an IEP for the 2009-10 school year (Tr. p. 50; Dist. Ex. 3 at p. 1). The meeting was attended by the district representative who also participated as the district special education teacher, the district school psychologist, the parent and her attorney, and the student's Rebecca School special education teacher participated by telephone (Tr. p. 50; Dist. Ex. 3 at p. 2). The resultant IEP indicated that the student was eligible for special education programs and services as a student with autism and recommended a 12-month 6:1+1 special class in a specialized school with related services of three 30-minute individual OT sessions per week, three 30-minute individual speech-language therapy sessions per week, and two 30-minute speech-language sessions per week in a group of three (Dist. Ex. 3 at pp. 1, 12). The IEP reflected that the student's academic management needs included provision of a reward system, sensory tools, and sensory breaks (id. at p. 3). The IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher and that behavioral support would also be provided through OT and speech-language therapy (id. at p. 4). The student's

social/emotional management needs reflected that the student was "very attention seeking" and may repeat himself often, that he may need teacher facilitation to express himself when frustrated, and that he should have access to sensory materials throughout the day (id.). The IEP contained annual goals and short-term objectives in the areas of reading; math; writing; receptive, expressive, and pragmatic language skills; and emotional and self-regulation skills (id. at pp. 6-9).

The May 1, 2009 CSE meeting minutes reflected that the CSE reviewed an observation report, the student's present levels of academic and social/emotional performance, the student's health and physical development, and the student's goals for the upcoming 2009-10 school year (Dist. Ex. 4 at p. 1). The minutes reflected that the CSE discussed the student's borderline cognitive functioning, sensory integration difficulties, that he interacted with others through physical action, and that he was easily overwhelmed when uncertain (id.). The minutes reflected that the student's academic instructional levels were discussed with the teacher and that the CSE created academic goals with "teacher input and parental involvement" (id.). According to the minutes, the parent was asked if she wanted to add anything to the reading and writing goals and she responded that the student pressed hard on his paper when writing (id.). The hearing record further indicates that the parent requested that the student's speech-language therapy be increased to five times per week and requested a change in the language used to describe the student in the present level of social/emotional performance section of the IEP from "aggressive" to "overly physical" (Tr. pp. 71, 103, 391; Dist. Ex. 3 at p. 4). At the May 2009 CSE meeting, the parent also requested that the student remain in the Rebecca School (Dist. Ex. 4 at p. 1; see Tr. pp. 72-73).[2]

By letter dated June 4, 2009, the district notified the parent of the particular school at which the proposed 6:1+1 special class placement was located and summarized the recommendations made by the May 2009 CSE in the student's IEP (Dist. Ex. 5).[3] In September 2009, the parent visited the assigned school and met with a counselor, teacher, and administrator (Tr. pp. 395-96). According to the parent, the teacher advised her that the student's OT and speech-language therapy would be provided in the classroom and the administrator informed the parent that the school would only be able to provide the student with three sessions of speech-language therapy, not the five sessions that were set forth on his May 2009 IEP (Tr. pp. 397, 399-400).

By letter dated September 17, 2009, the parent, through her attorney, advised the district that she was continuing the student's placement at the Rebecca School for the 2009-10 school year and that she would seek tuition payment from the district (Parent Ex. B). Among other things, the parent noted the progress the student had made at the Rebecca School and asserted that the district's program was inappropriate because the student would be "aging out"[4] of the

[2] The hearing record reflects that the parent signed an enrollment contract with the Rebecca School for the 2009-10 school year on the same day as the CSE meeting, May 1, 2009 (Dist. Ex. 16 at pp. 1-2).

[3] The parent testified that she did not receive this letter until September 2009 (Tr. pp. 394, 423).

[4] The parent testified that she was concerned that the student would not be able to attend the assigned school for more than one year because it did not serve students beyond the student's age (Tr. pp. 398-99).

assigned school after a year or two years of attendance and would not receive his related services at the assigned school (id. at pp. 2-3).

The parent requested an impartial hearing by due process complaint notice dated October 9, 2009 (Dist. Ex. 1). The due process complaint notice stated that the parent was challenging the district's failure to develop an appropriate program for the student's 2008-09 and 2009-10 school years (id. at p. 1). According to the parent, the district's recommended program was inappropriate because (1) the CSE did not develop a behavior intervention plan (BIP) when the student's behavior seriously interferes with instruction and requires additional adult support, (2) the CSE did not recommend music therapy, art therapy, or therapeutic recreation as related services; (3) the student would age out of the assigned school after one or two years, and (4) the district would not be able to provide the student with his related services at the assigned school (id. at pp. 2-4). The parent alleged that the student made academic progress at the Rebecca School and requires the DIR/Floortime model used by the Rebecca School, as well as music therapy, art therapy, and dramatic play (id.). As relief, the parent sought payment of the student's tuition at the Rebecca School for the 2009-10 school year and provision of transportation (id. at p. 4). On or about October 13, 2009, the district filed an answer to the due process complaint notice, asserting that it offered a placement reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 2).

On December 3, 2009, a prehearing conference was held to clarify the issues in the due process complaint notice and schedule hearing dates (Tr. pp. 1-10; see 8 NYCRR 200.5[j][3][xi]). Among other things, it was determined that the claims asserted in the due process complaint notice related to the 2009-10 school year, but that the parent could present evidence related to prior years to the extent relevant (Tr. pp. 3-7).

The impartial hearing continued over the course of four, nonconsecutive hearing dates in spring 2010 (Tr. pp. 12, 120, 239, 435). By decision dated September 21, 2010,[5] the impartial hearing officer dismissed the district's argument that the parent was precluded from seeking an award of tuition reimbursement from a for-profit institution like the Rebecca School (IHO Decision at p. 11). The impartial hearing officer further dismissed the district's claim that the parent was precluded from raising assertions in her due process complaint notice that were not made at the CSE meeting (id.). He further denied the district's request to dismiss the case on the ground that the parent was effectually seeking the district to pay the student's tuition directly to a private school (id. at p. 12).

With regard to the district's recommended program for the 2009-10 school year, the impartial hearing officer determined that the district failed to meet its burden to show that the assigned school would have been able to implement the May 2009 IEP because the hearing record demonstrated that the district may have provided some of the student's related services outside of school at a "center" (IHO Decision at pp. 13-14). The impartial hearing officer further noted that the district did not present the testimony of an administrator from the assigned school, a speech-language therapist, or an occupational therapist to rebut the parent's allegation and

[5] The impartial hearing officer's decision was corrected on October 25, 2010 (IHO Decision at p. 18). Although the original decision is not contained in the hearing record, the decision indicates that corrections were only made to the exhibit list (id.).

explain how the student's related services would have been delivered (id.). With regard to the appropriateness of the Rebecca School, he determined that the program was designed to meet the student's special education needs and that the hearing record contained "objective evidence" of the student's progress at the Rebecca School (id. at pp. 15-16). The impartial hearing officer further determined that the equities favored the parent because she did not do anything to frustrate the CSE process (id. at p. 18). He further noted that equities do not prevent the parent from entering into an enrollment contract with a private school before a CSE meeting (id.). Finding for the parent, the impartial hearing officer awarded the parent tuition at the Rebecca School for the 2009-10 school year (id.).

This appeal by the district ensued. The district argues that the parent cannot seek an award of tuition to the Rebecca School because it is a for-profit institution and requests reconsideration of prior State Review Officer's decisions that hold otherwise. The district further asserts that it offered the student a free appropriate public education (FAPE) for the 2009-10 school year. In response to the parent's claim that the district failed to develop a BIP, the district asserts that the student's teacher at the Rebecca School advised the May 2009 CSE that the student's behaviors did not necessitate development of a BIP because his behaviors did not seriously interfere with instruction. The district also contends that the teacher of the recommended class testified that she is experienced dealing with students who demonstrate behaviors similar to the student's behaviors. Regarding the parent's allegation that the student would age out of the assigned school after one year, the district asserts that the Individuals with Disabilities Education Act (IDEA) does not require a district to offer a placement that would be appropriate for more than one school year and the hearing record indicates that the student does not have any difficulty with transitioning. As to the impartial hearing officer's determination that the district did not rebut the parent's allegation that it would not be able to provide the student with his related services at the assigned school, the district refers to the testimony of the teacher of the recommended class who stated that the students receive related services at the school. The district also asserts that in the event that it could not provide related services at the assigned school, then the student would receive a related services authorization (RSA) and the issuance of an RSA does not amount to a denial of a FAPE.

The district further alleges that the parent failed to prove that the Rebecca School is appropriate for the student. According to the district, the hearing record reflects that the Rebecca School does not focus on academics and the parent did not provide objective evidence that the student made progress at the Rebecca School. The district further asserts that the student is not functionally grouped at the Rebecca School and does not receive sufficient speech-language therapy. In addition, the district asserts that equities favor the district because the parent failed to provide adequate notice that she was reenrolling the student at the Rebecca School, signed the enrollment contract the same day as the May 2009 CSE meeting, and never intended to place the student in public school. The district further alleges that the impartial hearing officer erred in awarding the parent the full costs of the student's tuition as a remedy when the parent only paid a $500 deposit toward the student's tuition. As relief, the district requests that the impartial hearing officer's September 21, 2010 decision be vacated.

The parent filed an answer. The parent asserts that the for-profit status of the Rebecca School is irrelevant to the parties' dispute. The parent further contends that the district failed to

offer the student a FAPE and failed to demonstrate that it would be able to implement the student's May 2009 IEP. According to the parent, the district's assigned school was inappropriate for the student because it could not provide the student with his recommended related services and the district did not rebut this allegation. The parent further alleges that the district's assigned school was inappropriate because the classroom teacher has no specific training in the DIR methodology used by the Rebecca School and the student would age out of the school after one year. In addition, the parent alleges that the district did not recommend counseling as a related service and the student requires additional adult support to address his behavior. The parent further contends that she presented proof that the Rebecca School can meet the student's special education needs, that the student has made progress at the Rebecca School, and that the district used reports written by the Rebecca School to develop the student's IEP. Lastly, the parent asserts that the equities favor the parent because she cooperated with the district, signed the enrollment contract with the Rebecca School only to reserve a seat for the student in the event that the district failed to offer an appropriate placement, and the district did not raise in its answer to the parent's due process complaint notice that the parent submitted an untimely notice of unilateral placement. The parent alleges that the impartial hearing officer properly directed the district to pay the student's tuition at the Rebecca School for the 2009-10 school year and requests that the impartial hearing officer's decision be upheld.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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 C.F.R. §§ 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).

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]). 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; 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 C.F.R. § 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Returning to the arguments in the instant case, the district argues that the impartial hearing officer erred in determining that the IDEA and its implementing regulations do not bar the parent from seeking tuition reimbursement at a for-profit institution like the Rebecca School (IHO Decision at p. 11). I disagree with the district's contention and note that the district has previously asserted this same legal argument that has been rejected in prior State Review Officer decisions, which I decline to reconsider (see Application of a Student with a Disability, Appeal No. 09-085; Application of a Student with a Disability, Appeal No. 09-080; see also A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 215 n.16 [S.D.N.Y. 2010]). The district offers no persuasive argument for departing from the reasoning set forth in Application of a Student with a Disability, Appeal No. 09-085 or Application of a Student with a Disability, Appeal No. 09-080.

The district further argues that the impartial hearing officer erred in finding that it failed to meet its burden to show that the assigned school would have been able to implement the May 2009 IEP and provide the student with his related services.[6] In order to show a violation of the IDEA based on a failure to implement an IEP, "a material failure" must be shown (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; Application of the Bd. of Educ., Appeal No. 10-013; Application of a Student with a Disability, Appeal No. 10-008; Application of a Student with a Disability, Appeal No. 09-130; Application of a Student with a Disability, Appeal No. 09-088). Here, the student did not attend the district's assigned school for the 2009-10 school year and therefore it is speculative to ascertain the degree to which the district would have implemented or failed to implement the student's IEP during the 2009-10 school year. Notwithstanding the speculative nature of the parent's claim, I find that the hearing record contains sufficient evidence that the district would have been able to provide the student with the related services set forth on his May 2009 IEP and therefore decline to find a denial of a FAPE based on a material failure to implement the student's IEP.

To support her allegation that the district would not be able to provide the student with his related services, the parent cites to an exhibit entitled "Special Education Service Delivery Report," which includes data as of December 31, 2009 indicating that some of the students at the district's assigned school were awaiting provision of their related services (Parent Ex. A). While this exhibit may indicate that the assigned school has not been able to provide some of its students with their related services, it does not prove that the district would be unable to provide the student with speech-language therapy and OT at the assigned school (see M.S. v. New York City Dep't of Educ., 2010 WL 3377667, at *7 [E.D.N.Y. Aug. 25, 2010]).[7] The parent further contends that when she visited the assigned school, she was advised that the district would only be able to provide the student with three of his five sessions of speech-language therapy and that his related services would be provided in the classroom, instead of a separate location as

[6] In concluding that the district failed to offer the student a FAPE, the impartial hearing officer did not address in his decision the parent's allegations that the district failed to develop a BIP, failed to recommend certain related services, and failed to recommend an appropriate school because the student would soon age out of the district's recommended program (IHO Decision at pp. 13-14). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In this case, the district is not aggrieved by the impartial hearing officer's decision not to address the parent's other allegations and, furthermore, the parent did not cross-appeal any aspect of the impartial hearing officer's decision. Therefore, these issues are not properly before me and I decline to address them.

[7] According to the hearing record, the assigned school has seven different sites (Tr. p. 230). While the student's recommended placement was at one of the school's seven sites, the "Special Education Service Delivery Report" provides statistics that are compiled from all seven sites of the assigned school and does not contain data specific to the site that the student was assigned (Tr. pp. 229-30; Parent Ex. A).

indicated on his IEP (Tr. pp. 397, 399-400; see Dist. Ex. 3 at p. 12). According to the parent, she was told that she would have to bring the student to a center to receive the rest of his related services (Tr. p. 399). However, the hearing record indicates that contrary to the parent's claims, the district established that it could implement the student's May 2009 IEP and, more specifically in this case, that it was highly likely that the student would have received his related services as set forth on his IEP had he attended the district's program for the 2009-10 school year.

The district called the teacher of the recommended class as a witness who stated that all of the students in her class who were recommended to receive speech-language services were receiving speech-language services pursuant to their IEP mandates at the assigned school (Tr. pp. 178-79, 207, 210). She further testified that speech-language therapy is provided in a pull-out setting, although there are instances where the teacher may invite the speech-language therapist to join a group activity in the class (Tr. p. 179). With regard to OT, the teacher testified that all of the students in her class who were recommended to receive OT were receiving OT at the frequency mandated on their IEPs (Tr. pp. 207-08). She further indicated that the OT services that her students were receiving were provided in a pull-out setting in a separate location (Tr. pp. 178-79). The teacher testified that OT has never taken place within the classroom during the six years that she has taught there (Tr. pp. 208-09).

Furthermore, testimony by the district school psychologist indicated that RSAs were used in situations where the district was not able to provide students with their mandated related services (Tr. p. 97). The school psychologist indicated that through an RSA, a student's related services could be delivered "after school, outside of school, elsewhere" and that it is a "remedy for shortage" (Tr. pp. 97-98). A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

> [S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html, Question 5; see http://www.emsc.nysed.gov/resources/contractsforinstruction/). Thus, I decline to find a material failure to implement the student's IEP when the hearing record indicates that the student

has never attended the district's program, that the remainder of the students in the assigned class are receiving their speech-language therapy and OT, and that the district would issue RSAs to the student for the provision of speech-language therapy and OT if the assigned school could not provide such services due to a shortage of providers.

Having determined that there is sufficient evidence in the hearing record to demonstrate that the district was able to implement the student's IEP and that it was highly likely that the district would have provided the student with the related services in the manner set forth in his May 2009 IEP had the student attended the district's program for the 2009-10 school year, I will annul the impartial hearing officer's determination that found a denial of a FAPE solely on the ground that the assigned school would not be able to provide the student with his related services. I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my decisions herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision dated September 21, 2010 is annulled to the extent that it found a denial of a FAPE and ordered the district to pay for the student's tuition costs at the Rebecca School for the 2009-10 school year.

Dated: **Albany, New York**
December 20, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER