



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-020

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Susan Luger Associates, Inc., attorneys for petitioners, Lawrence D. Weinberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to direct respondent (the district) to pay for the costs of their son's tuition at the Rebecca School for the 2011-12 school year. 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, at least one psychologist, and school district representatives (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 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received diagnoses of a pervasive developmental disorder and autism (Dist. Exs. 4 at p. 2; 16 at p. 2). The student began attending the Rebecca School in October 2009 (Tr. p. 235; see Dist. Ex. 4 at p. 2). The Rebecca School has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

In preparation for the student's annual review, a district special education teacher assigned to the CSE completed an observation of the student in his classroom at the Rebecca

School on December 13, 2010 (Tr. p. 153; Dist. Ex. 5).¹ The CSE convened on April 13, 2011 to develop an IEP for the student for the 2011-12 school year (Parent Ex. B at p. 1). The CSE recommended that the student be placed in a 12-month 6:1+1 special class in a specialized school and receive the assistance of a full-time 1:1 "transitional" paraprofessional (id. at pp. 1, 16).² The CSE also recommended related services including individual and group speech-language therapy, individual occupational therapy (OT), and individual and group counseling services (id. at p. 16).

In a letter dated May 24, 2011, the student's mother informed the district that she intended to sign a contract with and tender a deposit to the Rebecca School in order to ensure a placement for her son there for the 2011-12 school year (Parent Ex. F). The parent further stated that "if an appropriate program and/or placement" was offered by the district "in a timely manner," she would enroll the student in the district's program (id.). However, she indicated that if an appropriate program or placement was not offered, the parent intended to seek tuition reimbursement at public expense (id.). On June 3, 2011 the parents signed a contract enrolling the student in the Rebecca School for the 2011-12 school year (Parent Ex. E at pp. 1-6). By final notice of recommendation dated June 15, 2011, the district summarized the recommendations made by the April 2011 CSE and notified the parents of the particular school to which the student was assigned for the 2011-12 school year (Dist. Ex. 3). The student's mother visited the school with an advocate on June 24, 2011, and following the visit she wrote a letter to the district bearing the same date in which she indicated the reasons she believed the assigned school was not appropriate for her son (Tr. pp. 577-78; Parent Ex. H at pp. 1-2). In the letter, the student's mother reiterated her intent to enroll the student in the Rebecca School for the 2011-12 school year and seek tuition reimbursement at public expense if an appropriate placement was not offered by the district (Parent Ex. H at p. 2). The student's mother also requested busing for the student to and from the Rebecca School (id.).

A. Due Process Complaint Notice

The parents filed a due process complaint notice on July 15, 2011, in which they requested an impartial hearing to adjudicate their claim for payment of the student's tuition costs at the Rebecca School for the 2011-12 school year (Parent Ex. A). The parents asserted that the April 2011 CSE was not properly constituted and that the district's recommended program was inappropriate for the student because the IEP's recommendations were contrary to the opinions of the professionals who had "direct" knowledge of the student's needs, the recommended student to teacher ratio was not appropriate, the goals and objectives in the IEP did not address all of the student's needs, and parent counseling and training was requested but refused and should have been reflected on the IEP (id.). The parents also asserted that they did not have a meaningful

¹ The hearing record reflects that the district's special education teacher assigned to the CSE who observed the student also served as the district representative at the student's April 13, 2011 CSE meeting (Parent Ex. B at p. 2).

² The district special education teacher who attended the April 2011 CSE meeting reported that the transitional paraprofessional was recommended for the student for "transitional purposes" in order to aid the student in transitioning from one activity to another and to transition from the private school setting into a public school setting (Tr. p. 163; Parent Ex. B at p. 16).

opportunity to participate in the development of the student's IEP, that the recommended 6:1+1 placement was not the student's least restrictive environment (LRE) and that the CSE should have considered a less restrictive program (*id.* at p. 3). The parents asserted that the assigned school was inappropriate because the size of the proposed classroom was inappropriate, the school was unsafe and would be overwhelming for the student, and the teaching methods used by the school were inappropriate for the student in that applied behavior analysis (ABA) and DIR/Floor Time were not employed and there was not enough emphasis on language and social skills (*id.* at pp. 3-4). The parents also asserted that the district's assignment of the student to a particular public school in which the IEP was to be implemented was untimely (*id.*). In addition, the parents asserted that the Rebecca School was an appropriate placement for the student and that equitable considerations supported their claim for the costs of the student's tuition at the Rebecca School (*id.* at p. 5). The parents also sought the "cost of related services and/or RSAs" and a paraprofessional for the student on the bus (*id.*).

The district filed a response to the parents' due process complaint notice dated July 26, 2011, asserting that it offered the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 8).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 4, 2011 and concluded on November 15, 2011, after four hearing days (Tr. pp. 1, 213, 329, 529). In a decision dated December 16, 2011, the IHO found that the district offered the student a FAPE, that the parties agreed on the description of the student and his needs contained in the April 2011 IEP, and that the district's recommended program was "well designed" and reasonably calculated to offer the student educational benefits (IHO Decision at pp. 7-8, 13). Regarding the parents' contention that the April 2011 IEP did not include parent counseling and training, the IHO found that the parents did not demonstrate a need for parent counseling and training such that the lack of it on the IEP invalidated the IEP and thereby denied the student a FAPE (*id.* at p. 10). Regarding the parents' argument that they were denied meaningful opportunity to participate in the development of the student's IEP, the IHO found that the parents participated in the IEP meeting and contributed to the discussion and that their concerns were heard (*id.* at pp. 7-8). The IHO also determined that the CSE did not predetermine the recommended 6:1+1 placement simply because the district's special education teacher who attended the April 2011 CSE had recommended a 6:1+1 placement at recent CSE meetings she had attended for other students (*id.* at p. 11). The IHO also found that the parents' concerns regarding the assigned school were not supported by the hearing record (*id.* at pp. 9-12). Regarding the parents' contention that the district failed to offer a timely placement, the IHO noted that the district had identified an assigned school and class on June 14, 2011, prior to the IEP's projected start date of July 1, 2011 (*id.* at p. 3). The IHO also found that the provision of a transitional paraprofessional was reasonable in order to help the student acclimate to the new setting, and that speculation that the paraprofessional would foster dependence was unfounded (*id.* at pp. 10-11). Lastly, the IHO found that the lack of sufficient related services providers at the assigned school was "troubling," but that the argument was speculative and that even if it were proven, the remedy of a private placement at public expense would not be warranted (*id.* at pp. 12-13). Accordingly, the IHO denied the parents' request for the costs of tuition at the Rebecca School for the 2011-12 school year (*id.* at pp. 4, 13).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in concluding that the district offered the student a FAPE for the 2011-12 school year. Specifically, the parents argue that the goals in the April 2011 IEP were not appropriate because the student had achieved many of the goals before the start of the 2011-12 school year. The parents argue that the 6:1+1 student-to-teacher ratio recommended in the student's IEP would not have provided enough support for the student and that the 1:1 transitional paraprofessional would not be appropriate for the student for a variety of reasons. The parents also argue that the assigned school was inappropriate for the student because, among other reasons, the lunchroom at the assigned school would be overwhelming for the student, the school would not have provided all of the required related services, the district failed to show that a transitional paraprofessional would have been available to the student, and because ABA was used in the classrooms, which was inappropriate for the student. The parents also argue that the IHO erred in determining that some of their contentions were speculative, erred by placing the burden of proof on the parents, and erred by finding that the witnesses from the Rebecca School lacked credibility because they had a financial interest in the result of the hearing. Lastly, the parents argue that the Rebecca School was an appropriate placement for the student and that equitable considerations support the parents' claims.

In its answer, the district responds to the parents' allegations and asserts that the IHO properly concluded that the district offered the student a FAPE for the 2011-12 school year. Specifically, the district contends that the April 2011 IEP included current and adequate goals to address the student's needs and deficits and that the provision of the 1:1 transitional paraprofessional was appropriate. The district also contends that the use of ABA at the assigned school was appropriate, that the assigned school would have provided the student with a transitional paraprofessional pursuant to his IEP, and that the assigned school would have accommodated the student's regulation and behavioral needs at lunch. The district further argues that the IHO should not have reached the issue of related services at the assigned school because the parents failed to allege this issue in their due process complaint notice. The district argues that the IHO correctly found that some of the parents' concerns were speculative, did not shift the burden of proof to the parents, and did not discredit the testimony of the witnesses from the Rebecca School. The district further contends that the Rebecca School was not an appropriate placement, and that equitable considerations did not favor the parents. The district seeks to dismiss the parents' petition.

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 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 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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 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 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 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; 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 accurately reflects the results of evaluations to identify the student's needs (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for

the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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]). 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 11; 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 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. Scope of Impartial Hearing

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, at *8 [S.D.N.Y. Mar. 10, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of the Bd. of Educ., Appeal No. 11-143; Application of the Bd. of Educ., Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-038; Application of a Student with a Disability, Appeal No. 11-008). In this case, I find that the parents' due process complaint notice may not be reasonably read as asserting claims that the particular school to which the student had been assigned was incapable of providing the student's related services or that the provision of a 1:1 transitional paraprofessional would not have been appropriate for the student (see Parent Ex. A). Additionally, there is no indication in the hearing

record that the district agreed to expand the scope of the impartial hearing or that the parents requested that the IHO add such claims to the list of issues to be decided (see Tr. p. 207). Accordingly, the IHO should not have reached or decided these issues these issues.

B. IHO Decision – Evidentiary Burden

Turning next to the parents' contention that the IHO erred by incorrectly placing the burden of proof upon the parents to show that the program offered by the district was not reasonably calculated to provide the student with a FAPE, a review of the hearing record and IHO decision show that the IHO properly placed that burden upon the district. The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to this case (see Application of the Bd. of Educ., Appeal No. 08-016). In general, a misapplication of the burden of persuasion is reversible error (see M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 459 [8th Cir. 2008]). Here, the IHO set forth the appropriate standard, noting on two separate occasions in his decision that the district had the burden to prove that it offered an appropriate program (IHO Decision at pp. 5, 10). The IHO then set forth the district's arguments regarding the program recommended in the April 2011 IEP, and the facts supporting those contentions, and concluded that the proposed placement was reasonably calculated to afford educational benefits to the student (id. at pp. 8-10, 13). Although the parents correctly point out that the IHO also noted what sort of proof would be required of the parents in order to show that the district's proposed program was inappropriate, I find that the language pointed to by the parents may also have been a discussion of what might have rebutted the district's evidence, rather than a holding in the case or a misapplication of the burden (IHO Decision at pp. 9-10). Assuming, for the sake of argument that the IHO misapplied the burden of proof, I have nevertheless independently examined the hearing record and, as more fully described below, I find that the evidence is sufficient to support the IHO's ultimate determination that the district offered the student a FAPE.

C. April 2011 IEP

1. Annual Goals and Short-term Objectives

I will next consider the parties' claims regarding the adequacy of the annual goals listed in the May 2010 IEP. As discussed below, a review of the hearing record shows that the annual goals and short-term objectives contained in the April 2011 IEP were detailed, measurable, and designed to meet the student's needs as indicated at the time of the CSE meeting.

Although the parents contended in their due process complaint notice that the goals contained in the April 2011 IEP did not address the student's needs and more specifically, contend on appeal that the student met many of the goals on the IEP before the 2011-12 school year began, the hearing record demonstrates that at the time the goals were formulated at the April 2011 CSE meeting, they were appropriate. The hearing record reflects that the CSE

developed the goals contained in the student's IEP based on goals that were reflected in the December 2010 progress report from the Rebecca School (Tr. pp. 138-39, 316-17; compare Parent Ex. C at pp. 11-14 with Parent Ex. B at pp. 6-13). The district representative who attended the April 2011 CSE meeting testified that the CSE reviewed all of the student's academic and related services goals during the meeting and that she personally discussed the student's academic goals with the student's teacher from the Rebecca School to ensure their appropriateness (Tr. pp. 139-40). She testified that in some instances she clarified a vague goal making it more measurable by including a percentage of mastery level (Tr. p. 139). I note that in many instances the short term objectives on the student's IEP included higher levels of mastery criteria than those in the May 2011 progress report from the Rebecca School and as such, contrary to the parents' contentions on appeal, had not been met at the time of the May 2011 Rebecca School progress report (compare Parent Ex. B at p. 6, with Parent Ex. D at pp. 9, 10). The hearing record also reflects that the CSE read the goals over the telephone to the classroom teacher from the Rebecca school, that the teacher agreed with the academic goals that were developed for the IEP, and that neither the Rebecca School teacher nor the parents asked for any other goals to be added (Tr. pp. 139-40, 315-16). A careful review of the goals reveals that they contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, gauge the need for continuation or revision, and contained adequate evaluative criteria (see Parent Ex. B at pp. 6-13). Moreover, as contemplated by the IDEA, both parties were free to seek amendment of the IEP in order to address changing circumstances or consider new information such as the May 2011 progress report from the Rebecca School and revise the goals, if the student were to attend the district's recommended placement.

2. 6:1+1 Special Class Placement

Upon review of the hearing record, I find that a 6:1+1 special class with an additional 1:1 transitional paraprofessional was reasonably calculated to enable the student to receive educational benefits. Based on information provided by the Rebecca School in the December 2010 progress report, as well as information provided by the Rebecca school CSE members during the development of the present levels of performance sections of the student's April 2011 IEP, and consistent with the district's March 2010 psychoeducational evaluation, at the time of the April 2011 CSE meeting the student was demonstrating significant deficits in academics; sensory regulation; attention; pragmatic, receptive, and expressive language; and social interaction (Dist. Ex. 4 at pp. 1-2; Parent Exs. B at pp. 3, 4; C at pp. 1-9). With regard to academics, the student was described as having skills ranging from a kindergarten to first grade level and as requiring academic management needs including redirection, repetition, visual and verbal cues, movement breaks and sensory input (Parent Ex. B at p. 3). He also required both group and individualized activities, and structured academic activities (Parent Ex. C at pp. 1, 4). With regard to sensory regulation and attending, the student seeks sensory input throughout the day and responds to the support of a calm and soothing voice, increased time to process, and clear limit setting when dysregulated (Parent Exs. B at p. 4; C at pp. 1, 6). Although the student initiated interactions with adults and responded to adults' interactions, he required adult support to sustain interactions with peers (Parent Exs. B at p. 4; C at p. 2). The student also exhibited deficits in his ability to generalize skills across multiple environments, new settings, and with multiple communicative partners (Parent Ex. C at pp. 7, 8).

Testimony by the district representative indicated that a 6:1+1 class is a "very structured program" where students are usually divided into different stations based on interest and ability, and that students usually work with "intensive adult supervision" (Tr. pp. 141-142). She testified that the CSE recommended a 6:1+1 class for the student for the 2011-12 school year because he needs a "less distractible environment" with a small number of students due to his attention difficulties, and the CSE believed that in a more structured setting with fewer students the student could benefit more academically (Tr. p. 142; see Tr. p. 158). She further testified that the CSE recommended a 6:1+1 class with the 1:1 transitional paraprofessional because the two adults in the classroom plus the student's 1:1 transitional paraprofessional would provide the student with an appropriate level of adult supervision to meet his needs (Tr. pp. 142-43).

The teacher in the assigned 6:1+1 class provided a description of a typical day in a 6:1+1 classroom, which demonstrates the intensive level of support provided in the 6:1+1 setting set forth on the student's IEP (Tr. pp. 71-73).³ She indicated that a variety of instructional formats are utilized including discrete trial, small group (of two students), and whole group instruction where a student's needs with regard to sensory, academic and social skills would be addressed (see id.). The teacher of the assigned class also indicated that informal teacher assessments are utilized during the summer to determine where to begin working with the students so that she is better able to work with them moving forward (Tr. p. 68). She testified that students' IEPs are utilized and that students are grouped according to similar academic level (Tr. pp. 68-69). She also testified that modeling, prompting, and prompt fading are employed to shape students' behavior and that the students are taught skills in a variety of environments, using different staff and varied language (Tr. pp. 86-88). To address students' attentional needs, the teacher testified that a reinforcement assessment is completed to determine what motivates a student to work and that schedules, redirection, the use of breaks, and instruction provided in "bits and pieces" are also employed to address students' attentional deficits (Tr. p. 79). A school-wide behavior system for the autistic population that provides feedback to students for inappropriate behavior and reinforcement and rewards for appropriate behavior is also utilized in the 6:1+1 setting (Tr. pp. 82-83). The teacher in the assigned classroom further testified that students' dysregulation is addressed utilizing sensory materials available within the classroom such as various textured balls, cushions and other items to sit or stand on, and weighted balls as well as additional equipment provided by the occupational therapists (Tr. pp. 80-81). She also indicated that a communication notebook between the home and the teacher is utilized daily in the 6:1+1 special classes which allows parents to communicate their questions or concerns regarding a student (Tr. pp. 88-89).

With regard to the paraprofessional, the CSE meeting minutes reflect that the 1:1 transitional paraprofessional was suggested during the meeting in response to concerns raised by the social worker from the Rebecca School and the student's mother that the 6:1+1 special class placement would not provide adequate support to the student, and the meeting minutes also reflect that the student's mother agreed with this recommendation (Dist. Ex. 2 at p. 2).⁴

³ Testimony by the teacher in the assigned school indicated that there are one or two other classes at her school that the student could be appropriately placed other than her own class (Tr. p. 108).

⁴ The student attends an 8:1+3 class at the Rebecca School (Tr. pp. 345-46).

In light of the evidence above, I find that the 6:1+1 special class with an additional 1:1 transitional paraprofessional was reasonably calculated to provide the student with educational benefits and that the parents' contention that a 6:1+1 special class placement is inappropriate for the student is without merit (Rowley, 458 U.S. at 206-07; Cerra., 427 F.3d at 192). Consequently, the parents' claims that the IEP was inappropriate for the student must be dismissed.

D. Assigned School

As discussed above, the parents assert several challenges to the assigned school. The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (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 School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at the Rebecca School prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student would have been provided with an appropriate lunchroom environment upon the implementation of his IEP in the proposed classroom.

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 6:1+1 special class at the assigned district school would have provided the student with a suitable lunchroom environment and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9

[S.D.N.Y. Aug. 19, 2011]). The hearing record reflects that the students in the assigned class attend lunch in the cafeteria and sit together at their own table with a paraprofessional from their classroom (Tr. pp. 74-75, 114-15). According to the teacher of the assigned class, if the student had attended the assigned school his 1:1 transitional paraprofessional would also have accompanied him to the cafeteria (see Tr. pp. 76-78). The teacher testified that all of the nine or ten autistic classes at the assigned school, approximately 60 students, attend lunch during the first lunch period and are accompanied and supervised by one paraprofessional from each class, three speech therapists, three occupational therapists, one physical therapist, three "cluster teachers," and a unit coordinator (Tr. pp. 99, 100-102). Testimony by the teacher of the assigned class indicated that if a student became overwhelmed by noise in the lunch area and needed to be removed, either the paraprofessional for the student's class or another adult could accompany the student (Tr. pp. 75-76). Based on the above, the hearing record does not support that, had the student attended the proposed public school building, that the lunch environment would have resulted in the district substantially or materially deviating from the provision of services recommended on the student's IEP.

With regard to the parents' concerns related to the methodology used in the assigned school,⁵ although an IEP must provide for specialized instruction in a student's areas of need, the IDEA does not explicitly require a CSE to specify methodology on an IEP and, in many cases, the precise teaching methodology to be used by a student's teacher is generally a matter to be left to the teacher (Application of a Student with a Disability, Appeal No. 12-017; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46; Matter of a Handicapped Child, 23 Ed. Dept. Rep. 269).

In the instant case, the district representative confirmed that the CSE did not make a recommendation with regard to methodology in the student's IEP (Tr. p. 192; see Parent Ex. B). The district representative testified that the CSE does not dictate the specific methodology that should be utilized for a student, but rather leaves this to the discretion of the student's teacher who will adapt to whatever methodology works for a particular student (id.). The district representative explained that district teachers are familiar with several methodologies utilized for students with autism including the Treatment and Education of Autistic and Communication related handicapped Children (TEACCH), DIR, and ABA (Tr. pp. 192-93).⁶ She further testified that in the district, teachers employ a combination of methodologies that work for a given student (Tr. p. 192). In light of the above, I am not persuaded that the assigned school's teaching methodology would have been inappropriate for the student or resulted in a material or substantial deviation from the student's IEP.

⁵ In their due process complaint notice, the parents contended that the assigned school was inappropriate in that it did "not employ ABA or DIR/Floor time-two methodologies that have helped [the student] make progress" (Dist Ex. 7 at p. 4). However, at the impartial hearing, the parents' counsel stated that the claim in the due process complaint notice was a typographical error with respect to ABA (Tr. pp. 206-07).

⁶ DIR stands for Developmental, Individual Differences, Relationship-based Approach (see Tr. p. 156).

VII. Conclusion

After reviewing the hearing record, I agree with the IHO's determination that the district offered the student a FAPE for the 2011-12 school year. I find that the evidence contained in the hearing record supports a finding that the April 2011 CSE appropriately identified the student's areas of need and that the special education programs and services recommended in the IEP, including placement in a 6:1+1 special class with a 1:1 transitional paraprofessional, addressed the student's needs and were reasonably calculated to enable the student to receive educational benefits. Thus, I find that the district offered the student a FAPE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Having reached this determination, it is not necessary to reach the issue of whether the Rebecca School is an appropriate placement for the student; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions; including the contention that the IHO erred in making adverse credibility determinations, and find that I need not address them in light of my determinations.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 30, 2012


JUSTYN P. BATES
STATE REVIEW OFFICER