



# The University of the State of New York

The State Education Department

State Review Officer

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No. 12-087

**Application of the [REDACTED]  
[REDACTED] 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, Cynthia Sheps, Esq., of counsel

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, Jaime Chlupsa, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be sustained.

### **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 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**

According to the hearing record, the student had received diagnoses of an autism spectrum disorder, global developmental delay, feeding disorder, and childhood apraxia of speech (Tr. pp. 285-86; Dist. Exs. 4 at p. 4; 11 at p. 2; Parent Ex. H at p. 1). The hearing record also indicates that the student experienced difficulties with sensory regulation, for which he sought sensory stimulation from adults, and appeared to know how to read (Tr. pp. 211-12, 273-74; Dist. Ex. 10 at pp. 1, 4, 6). Although the hearing record describes the student as nonverbal,

with "severe" receptive and expressive language delays, it also notes that he was learning to use an augmentative and alternative communication (AAC) device, and primarily communicated through use of vocal approximations, gestures, and modified simple sign language (Tr. pp. 208-09; Dist. Exs. 4 at pp. 1-2, 4-5; 6 at p. 2; 10 at pp. 7-8). Additionally, the hearing record reflects that the student presented with low muscle tone, gross and fine motor difficulties, and that he exhibited sensitivity to loud noises and various food textures (Tr. pp. 260-61, 282, 308; Dist. Ex. 10 at pp. 1, 6-9).

The student attended the Rebecca School since the 2009-10 school year and, for the 2011-12 school year, attended an 8:1+3 self-contained class at the school and received related services consisting of occupational therapy (OT), physical therapy (PT), speech-language therapy, counseling, and music therapy (Tr. pp. 246, 310, 333; Dist. Ex. 10 at p. 1). 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 student's eligibility for special education 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]).

On April 29, 2011, the CSE convened for an annual review to develop the student's IEP for the 2011-12 school year (Dist. Ex. 4). The CSE recommended a 12-month special education program consisting of, among other things, a 6:1+1 special class in a specialized school; a full-time 1:1 transitional paraprofessional; related services consisting of speech-language therapy, OT, and PT, each 5 times per week for 30 minutes per session in a 1:1 setting, and counseling, twice per week for 30 minutes per session in a 1:1 setting; and various modifications within the classroom environment addressing the student's academic, social/emotional, and health/physical management needs (Dist. Exs. 4 at pp. 1-7, 18, 20; 6).

In early May 2011, the student's parents signed an enrollment contract with the Rebecca School and remitted a nonrefundable deposit to reserve the student's seat for the 2011-12 school year (Tr. pp. 315-17; Parent Exs. I; J).

By final notice of recommendation (FNR) dated June 4, 2011, the district summarized the recommendations made by the April 2011 CSE and notified the parents of the particular public school site to which it had assigned the student (Parent Ex. B). The student's father visited the assigned school on June 15, 2011 (Tr. pp. 293-98, 300-309; Parent Ex. A at p. 2).

By letter to the district dated June 17, 2011, the parents rejected the assigned public school as "wholly inappropriate to meet [the student's] needs or provide him with the support that he requires" and stated the reasons for their objections (Parent Ex. A at p. 2). They also informed the district that they intended to place their son at the Rebecca School for the 2011-12 school year at public expense, and sought transportation services from the district (id. at pp. 1-2). On the same day, the parents also remitted a second nonrefundable deposit to the Rebecca School for the student's 2011-12 school year (Parent Ex. J). On July 5, 2011, the student began the 2011-12 school year at the Rebecca School (Parent Ex. I at pp. 1, 5).

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

On July 7, 2011, the parents filed a due process complaint notice, alleging, among other things, that the district denied the student a free appropriate public education (FAPE) during the 2011-12 school year on both substantive and procedural grounds (Parent Ex. C at pp. 2-4).<sup>1</sup> The parents alleged, among other things, that: (1) the April 2011 CSE reviewed insufficient evaluative information to develop the student's IEP; (2) the April 2011 CSE ignored input from the student's special education teacher from the Rebecca School, who recommended that the student required a "smaller, more supportive environment in order to benefit educationally;" (3) the student's present levels of performance were based upon teacher observation only and failed to reference any evaluations or testing; (4) the recommended 6:1+1 special class setting was inappropriate for the student because it was too large and did not provide him with adequate individual support and the 1:1 transitional paraprofessional was insufficient to provide such support; and (5) the student's IEP lacked a recommendation for parent counseling and training (id. at pp. 2-3). Relative to the implementation of the IEP at the assigned public school site, the parents contended that the student would have been required to transition to a different school building after the conclusion of the summer program; that the assigned school was too large and overwhelming for the student and it would overly stimulate him and posed safety concerns due to alleged insufficient security; that the assigned school lacked any transitional paraprofessionals, a sensory gym, or a feeding program; and that the assigned school's lunch room was too large for the student (id. at p. 3).

The parents also alleged that the Rebecca School constituted an appropriate placement for the student for the 2011-12 school year because it addressed his academic and social needs and its program was reasonably calculated to enable the student to receive educational benefits (Parent Ex. C at p. 4). According to the parents, there were no equitable considerations which would bar their request for tuition reimbursement and the parents further alleged that they cooperated during the CSE review process (id.). The parents sought an order from an IHO directing the district to fund the student's tuition costs at the Rebecca School for the 2011-12 school year (id.).

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

On September 22, 2011, the parties proceeded to an impartial hearing, which concluded on December 19, 2011, after four days of proceedings (Tr. pp. 1-340). In a decision dated March 14, 2012, the IHO found, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate placement for the student for the 2011-12 school year, and that equitable considerations supported the parents' request for the costs of the student's tuition at the Rebecca School for the 2011-12 school year (IHO Decision at pp. 19-23).

Specifically, the IHO found that the April 2011 CSE developed the student's IEP without adequate and appropriate evaluative material, and that this failure "deprived the student ... of educational opportunity" (IHO Decision at pp. 18-19). According to the IHO, the hearing record lacked any evaluations concerning the nature, frequency, and amount of related services to be

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<sup>1</sup> The due process complaint notice was admitted into evidence during the impartial hearing as both "Dist. Ex. 1" and "Parent Ex. C." For the purposes of this decision, I will refer to Parent Ex. C when referencing the due process complaint notice.

provided to the student (id. at p. 18). The IHO credited the father's testimony, which asserted that the CSE did not discuss any options other than the recommended 6:1+1 special class and that the CSE ignored his contention that a 6:1+1 special class failed to provide the student with adequate individual support (id. at p. 20). The IHO further found that the district's recommendation of a 6:1+1 special class placement was inappropriate because the student required "intense supervision and instruction" in order to avoid engaging in inappropriate behaviors and that the student required individual instruction in order to progress academically (id.). However, the IHO found that the individual instruction "need not solely be provided by a special education teacher" (id.). The IHO also found the April 2011 IEP deficient because it did not address the student's inabilities to tolerate noise and sensory stimuli or specify how the student's feeding program could be implemented at the assigned school (id. at pp. 20-21). Relative to the assigned school, the IHO determined that: the student would not have been suitably grouped for instructional purposes in his assigned summer 2011 class; the assigned school's mixture of general education and special education students together in a large building "provided too much stimulus for the student;" and the assigned school's sensory gym "could not have provided the sensory diet the [s]tudent required" (id.).

Relative to the student's placement at the Rebecca School, the IHO found that the student benefited from the school's developmental individual difference relationship-based (DIR) teaching model and that the Rebecca School addressed the student's academic, social/emotional, sensory processing, and feeding needs (IHO Decision at pp. 22-23; see Tr. p. 192). The IHO also concluded that the student's father fully cooperated with the CSE during the review process and credited the father's testimony that he would have considered placing the student in a public school (IHO Decision at p. 23). Accordingly, the IHO ordered the district to pay the costs of the student's tuition at the Rebecca School for the 2011-12 school year (id.).

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

The district appeals, arguing, among other things, that the district offered the student a FAPE for the 2011-12 school year, that the Rebecca School was not an appropriate placement for the student for the 2011-12 school year, and that equitable considerations favor the district and preclude granting the parents' request for relief. Specifically, the district contends that: (1) the parents were afforded the opportunity to meaningfully participate in the development of the student's IEP during the April 2011 CSE meeting; (2) the April 2011 CSE considered sufficient evaluative information in developing the student's April 2011 IEP; (3) the recommendation of a 6:1+1 special class with a 1:1 transitional paraprofessional and related services was appropriate for the student; (4) the April 2011 IEP contained appropriate sensory supports to address the student's sensory deficits and needs; (5) the hearing record lacks evidence that the student required a feeding program in order to receive educational benefits; and (6) the IHO's determinations relative to the assigned public school site were speculative, insofar as the student was not educated under the April 2011 IEP. However, the district asserts that, had the student attended the assigned public school site, it would have been appropriate for him because the hearing record lacks evidence that the student required a sensory gym in order to receive educational benefits and the student would have been suitably grouped in the assigned 6:1+1 special class.

The district contends that the Rebecca School was not appropriate for the student because it did not meet the "student's need for an intensive program of related services," and because the student was not progressing at the Rebecca School. The district also argues that equitable considerations preclude granting the parents' request for relief because the parents never intended to enroll the student in a public school placement. The district seeks reversal of the IHO's decision in its entirety.

The parents answer the district's petition, countering, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate placement, and that equitable considerations favor the parents' request for relief. Specifically, the parents assert that: (1) the parents were denied the opportunity to meaningfully participate in the development of the student's 2011-12 IEP; (2) the April 2011 CSE failed to consider appropriate evaluative information in developing the student's 2011-12 IEP; (3) the April 2011 IEP did not address the student's sensory deficits and needs; (4) the student required a feeding program and his feeding needs were not addressed by the April 2011 IEP; and (5) relative to the assigned public school site, the lack of a sensory gym would have deprived the student of a FAPE because he did, in fact, require a sensory gym in order to receive educational benefits, and the student would not have been suitably grouped for instructional purposes in the assigned 6:1+1 special class.

The parents also allege that the district failed to appeal portions of the IHO's findings, including that: the April 2011 CSE did not review evaluations that supported the CSE's recommendation to increase the student's related services; the student had made academic gains that were not reflected in the March 31, 2009 psychoeducational evaluation report; the April 2011 IEP failed to address the student's sensitivity to noise; the assigned school's lunchroom lacked sufficient support to address the student's noise sensitivity; and "the size of the [assigned school's] lunch room and the hallways and ... the mix of general education [students] and [special education students] in a large building provided too much stimulus for the [s]tudent" (IHO Decision at pp. 18-21). The parents assert, therefore, that the district is barred from raising these issues on appeal. In its reply, the district argues that it did, in fact, appeal from these determinations in its petition, and consequently, should not be barred from raising these issues on appeal.

## **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., 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., 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], aff'd, 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, 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, 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. Dep't 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. Scope of Review**

The parents have alleged that the district failed to raise in its petition certain findings of the IHO and, therefore, that such determinations should be deemed final and binding on the district and should not be reviewed on appeal. A party appealing must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" (see 8 NYCRR 279.4). I find that the

district's petition is sufficiently pled. The district challenges the adverse findings of the IHO relating to the sufficiency of the evaluative materials considered by the April 2011 CSE, the April 2011 IEP's treatment of the student's sensitivity to noise, and the appropriateness of the assigned school given this sensitivity. While the district, in asserting its appeal of these issues, may not have quoted verbatim the IHO's findings identified by the parents, the petition clearly encompasses these aspects of the decision.

## **B. Parental Participation**

The district argues that the parents were afforded the opportunity to meaningfully participate in the development of the student's IEP and that the IHO erred in crediting the father's testimony that the April 2011 CSE did not discuss "class size except 6:1:1" and failed to "listen to him" (see IHO Decision at p. 20). The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation."]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's April 2011 IEP. The student's father and the student's social worker from the Rebecca School attended the CSE meeting in person and the student's teacher from the Rebecca School participated via telephone (Tr. p. 40; Dist. Ex. 4 at p. 3).<sup>2</sup> Additional attendees included the district representative, who also participated as the special education teacher, the school psychologist, and an additional parent member (Tr. pp. 40-41; Dist. Ex. 4 at p. 3).

The minutes of the April 2011 CSE meeting reflect that draft pages of the April 2011 IEP were reviewed and IEP goals were discussed and developed at the CSE meeting, with the participation of the student's father and the teacher from the Rebecca School (Dist. Ex. 6; see also Tr. pp. 58-59, 62-63, 247-48). The district representative testified that the father had copies of the written reports reviewed by the April 2011 CSE before the meeting started and that he "was a very active participant" during the meeting and "contributed to developing [the student's] goals" (Tr. pp. 43-45, 48; see Dist. Ex. 6 at p. 1).<sup>3</sup> Moreover, the hearing record reflects that the

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<sup>2</sup> According to the hearing record, the student's mother did not attend the April 2011 CSE meeting (see Tr. p. 40; Dist. Exs. 4 at p. 3; 6 at p. 1).

<sup>3</sup> According to the minutes of the April 2011 CSE meeting, the district mailed a copy of the December 13, 2010 classroom observation report to the parent on December 16, 2010, but, at the time of the April 2011 CSE meeting, the parent maintained that he had not received the report (Dist. Ex. 6 at p. 1). However, the minutes further reflect that the parent was given a copy of the classroom observation report at the April 2011 CSE

April 2011 CSE discussed the father's concerns regarding his son's transfer from his 8:1+3 special class at the Rebecca School to a district 6:1+1 special class and that, in order to accommodate the parent's desire for additional support for the student, the CSE recommended a full-time 1:1 transitional paraprofessional (see Tr. pp. 50-51, 83; Dist. Exs. 4 at pp. 3, 17-18, 20; 6 at p. 2).

Further, the hearing record reflects that the April 2011 CSE was in consensus that the student required a 12-month program (see Dist. Ex. 6 at p. 1). Consistent with the April 2011 IEP, the district representative noted that the CSE considered other placement options for the student, including either a 12:1+1 or a 8:1+1 special class in a specialized school for the student, which were rejected as insufficiently supportive for the student because the student-to-teacher ratios were too large for the student to progress and achieve his IEP goals (Tr. p. 65; see Dist. Ex. 6 at p. 2). The CSE also considered a 6:1+1 special class in a specialized school without a 1:1 transitional paraprofessional, but, as set forth above, based on the concerns of the father, ultimately rejected this option as being insufficiently supportive for the student (id.). Based upon my review of the totality of evidence in the hearing record, I find that the parents were afforded an opportunity to participate in the IEP development process and does not support the IHO's finding that the April 2011 CSE did not "listen" to the father's concerns or discuss the student's placement (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]; see also Carlisle Area School 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]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

### **C. April 2011 IEP**

#### **1. Evaluative Information and Present Levels of Performance**

Next, I will review the district's allegation that the IHO erred in finding that the district failed to establish that the April 2011 IEP "was developed with the adequate and appropriate evaluative material" (IHO Decision at p. 19). I will also consider the parents' allegation that the student's present levels of performance contained in the April 2011 IEP were deficient because his listed instructional levels in reading, math, and writing were based upon teacher observation, and did not reference any evaluations or testing (Parent Ex. C at p. 2; see Dist. Ex. 4 at p. 4). An independent review of the information considered by the April 2011 CSE, as detailed below, reflects that the CSE had before it adequate evaluative information relative to the student to enable the CSE to develop the student's April 2011 IEP.

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 need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted

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meeting and after reviewing the report indicated it was "consistent" (id.).

in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*9-\*10 [S.D.N.Y. Sept. 29, 2012]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). 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]; see Application of the Dep't of Educ., Appeal No. 07-018). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, the hearing record reflects that the April 2011 CSE considered a March 31, 2009 psychoeducational evaluation report (Dist. Ex. 11), a December 13, 2010 classroom observation report, (Dist. Ex. 9), and a December 20, 2010 Rebecca School interdisciplinary progress report (Dist. Ex. 10) in developing the student's 2011-12 IEP (Tr. pp. 41-42; Dist. Ex. 6 at p. 1).

The district representative testified during the impartial hearing that the psychoeducational evaluation report the April 2011 CSE reviewed was approximately two years old at the time of the CSE meeting,<sup>4</sup> and that due to the student's communication deficits, administering standardized testing may not be as important as the classroom teacher's observations of the student's skills (Tr. p. 47). She further explained that standardized test administrations do not allow modifications; however, teachers are able to observe what kinds of modifications students respond to, which allows them to determine functional levels (Tr. p. 48). According to the district representative, because the student was attending the Rebecca School,

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<sup>4</sup> The March 31, 2009 psychoeducational evaluation report the April 2011 CSE reviewed was still timely under State regulations (8 NYCRR 200.4[b][4]; see 20 U.S.C. § 1414[a][2][B]; 34 CFR § 300.303[b][2]) and nothing in the hearing record reflects that the student's educational needs warranted a reevaluation or that the parents disagreed with the student's academic management needs or requested a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]).

the CSE relied on the Rebecca School teacher's observation to determine his current academic functioning levels and it was not necessary to conduct updated standardized testing (Tr. pp. 47-48, 70-71).

Furthermore, while permissible, there is no requirement under federal or State regulations that an IEP contain specific references to criterion referenced testing, achievement testing or diagnostic testing. 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]). Although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see Application of the Dep't of Educ., Appeal No. 11-137; Application of a Student with a Disability, Appeal No. 11-043). Nor is there any support for the proposition that "teacher estimates" or "teacher observations" cannot, as the parents suggest, be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at \*10; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011]). In fact, such a viewpoint from a student's current teacher may be highly relevant when developing the written statement of the student's performance. Accordingly, I decline to find under the circumstances of this case that it was inappropriate for the April 2011 CSE to rely upon information from the student's Rebecca School teacher for determining the student's functioning levels.

According to the March 31, 2009 psychoeducational evaluation report, which was prepared by a district school psychologist at the time the student was aging out of his preschool program, the student displayed behaviors and social/emotional skills associated with a diagnosis of autism (Dist. Ex. 11 at pp. 1-2, 6). The evaluating school psychologist noted that administration of formal testing was attempted, but the student's short attention span, "severe" speech-language delays, and cognitive, social, and emotional delays prevented his participation in any formal testing (id. at p. 3). Instead, the evaluating school psychologist indicated that she relied on behavioral observations during the testing session, classroom activities, the student's responses during testing, his classroom teacher's report, and a parent interview (id.). Behavioral observations of the student reflected in the psychoeducational evaluation report included that the student "seemed to be able to respond" to his name and that he maintained eye contact with the evaluator (id. at p. 2). During testing, the student displayed some interest in the testing materials, although his attention span was short and he experienced difficulty focusing his attention on an object or activity for more than a few minutes (id.). The student also exhibited difficulty responding to the evaluator's limit setting, refocusing, and prompting and remaining in his seat, as he tended to be in constant motion, getting up from his chair and attempting to initiate activities of his own choosing (id.). The evaluating school psychologist noted that the student appeared more comfortable and "somewhat more motivated" manipulating materials rather than making verbal responses; that he focused "somewhat better" on tasks with clearly defined endings, such as completing puzzles; and that he experienced difficulty processing information presented orally and visually, requiring repetition of tasks and questions several times (id.). Although the evaluating school psychologist reported that the student exhibited difficulty interacting reciprocally during testing, the student communicated using nonverbal means such as by taking an adult by the hand and leading them to needed objects, and greeting adults by waving

(id.). The report also indicated that the student used gestures and sounds to express his wants and needs (id. at pp. 2-3). Results of the Vineland-II Adaptive Behavior Scales Survey Interview Form completed by the student's father indicated that the student exhibited moderately low communication skills, moderately low daily living skills, low socialization skills, and adequate motor skills (id. at pp. 1, 4). The evaluating school psychologist concluded that evaluation results also indicated that the student's "severe receptive and expressive language delays, impairment in the area[s] of social interaction, attention and sensory processing problems appear to be impeding the [student's] optimal intellectual, academic, and social functioning . . ." (id. at p. 6).

The December 13, 2010 classroom observation was conducted by the same district school psychologist who participated in the April 2011 CSE (compare Dist. Ex. 4 at p. 3, and Dist. Ex. 6 at p. 1, with Dist. Ex. 9 at pp. 1, 3). During the 30-minute observation, the student participated in a regularly scheduled "push in" movement group led by an occupational therapist (Dist. Ex. 9 at p. 1). The classroom observation report indicated that there were a total of five students and three staff members in the classroom, and that the student's classroom teacher was not present during the observation (id.). According to the report, the student responded to requests and frequently needed verbal and/or physical prompts or 1:1 support to complete poses that were involved in the motor group activities, and that he demonstrated his awareness of the class schedule on request, by pointing to the next activity noted on the schedule and uttering a verbal approximation of the name of the activity (id. at pp. 1-3). The classroom observation report also indicated that the assistant teacher from the student's class at the Rebecca School, who primarily worked with the student during the movement group, advised that the student's behavior during the observation was "typical" for him (id. at p. 3).

According to the December 20, 2010 Rebecca School interdisciplinary progress report, which was written by the members of the student's interdisciplinary team, the student's typical school day consisted of movement group, morning meeting, reading, snack, math, visual spatial activities, handwriting, lunch, sensory play, individual academics, and individual "floortime" sessions (Dist. Ex. 10 at pp. 1, 15).<sup>5</sup> The progress report indicated that the student received speech-language therapy, OT, music therapy, counseling, and adaptive physical education; that the student's "passions" included music, anticipation games, such as chase and crashing games, ball play, and books; that he easily transitioned between classroom activities and therapies; and that he communicated in school through the use of gestures, simple modified signs, approximations, and a communication book (id. at pp. 1, 5-10).<sup>6</sup>

Relative to the student's social/emotional functioning, the progress report indicated that the student paid attention to adults and had begun to attend to peers (Dist. Ex. 10 at p. 1). The report further indicated that the student typically arrived at school in a calm, regulated state,

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<sup>5</sup> According to the hearing record, "floortime" is an intervention used in the DIR teaching model and is defined as "an overriding way of looking at a student with neuro-developmental delays in relating and communicating" (Tr. pp. 192-93). The Rebecca School program director testified that "during a floortime intervention or session you're really targeting where the [student's] developmental sort of strengths and holds are" (Tr. p. 236).

<sup>6</sup> The hearing record reflects that by the time of the April 2011 CSE meeting, the student had switched from using a communication book to an AAC device (see Tr. pp. 208, 219, 221-22; Dist Exs. 6 at p. 2; 10 at pp. 2, 7).

although he sought sensory input throughout the day from familiar adults in the classroom (id.). The student's classroom teacher indicated that, when dysregulated, the student tended to point out what was "wrong" in his environment and "whine" and further commented that he tended toward dysregulation when a limit was set by an adult in the classroom, but was usually able to "re-regulate" within five minutes when adult support was provided in a calm and reassuring voice (id.). She further indicated that the student was able to remain engaged in a variety of structured and unstructured activities, including group reading activities, for 20 to 30 minutes, and in highly motivating interactions with familiar adults in the classroom, for 30 to 40 minutes, even when he was challenged by a familiar adult; however, she noted that the student struggled to maintain regulation and engagement when upset or frustrated (id.). The progress report also indicated that, although he did not initiate interactions with peers, the student was able to maintain engagement with peers during highly motivating activities with adult support for 10 to 15 minutes, responded to interactions initiated by a preferred peer, and maintained these interactions for approximately ten communication exchanges (id. at pp. 1-2). The progress report noted: that the student was capable of shared social problem solving but tended to attempt to solve his "problem" in the immediate environment on his own; that he usually responded to adult suggestions to help him when given tasks that required assistance; that he demonstrated "emerging" capacities for both establishing logical connections between ideas and for pretend play, but relative to the latter, indicated that he had yet to demonstrate pretend or symbolic play with objects other than acting out a story with pictures and props; and that he did not exhibit the ability to identify his emotions or the emotions of others (id. at p. 2).

Academically, the progress report described the student as a "fluent reader" who was able to read a variety of texts (Dist. Ex. 10 at p. 3). Results of formal testing targeting word reading efficiency identified the student as a sight word reader, with the ability to use decoding skills (id.). Relative to comprehension, the progress report noted: that the student was able to read stories with a familiar adult in the classroom and correctly answer simple "wh" questions related to the stories when given a choice of two options; that he was able to tell the sequence of events in a story and all the key characters after a few readings; and that he possessed the ability to follow three-step directions, to attend to and follow along with stories read by the teacher, to follow along with a different version of the story being read, and to act out stories read in class by playing a variety of characters; however, the progress report indicated that when he was unsure of an answer, the student had difficulty maintaining his engagement in the reading activity (id.). Relative to fluency, the progress report indicated that the student followed along with text and used his finger to point to words (id. at p. 4; see Tr. pp. 45-46). In math, the progress report described the student's abilities related to 1:1 correspondence, measurement, and time and space (Dist. Ex. 10 at pp. 4-5). The progress report further indicated that the student worked on adapted living skills specific to packing/unpacking his backpack in school, brushing his teeth, exhibiting independence at meal time, and transitioning from pureed foods to solid foods, and, relative to OT, speech-language therapy, counseling, and music therapy, the student's various related service providers reported communication and sensory behaviors and difficulties generally consistent with his classroom teacher's description of the student (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 10 at pp. 5-10).

The progress report also contained long and short-term goals developed by Rebecca School staff to address the student's needs in functional, emotional, and communication/interactional development, academics, OT related skills (motor planning, visual-

spatial and perceptual, functional control for fine motor tasks, postural control) for both home and school, pragmatic language, receptive and expressive language, oral-motor skills promoting feeding and speech skills, counseling related skills (developing reciprocity, collaboration, flexibility and spontaneity during play with counseling related service provider, and becoming more purposeful and effective in communicating wants and needs), and music therapy related skills (interpersonal engagement and two-way purposeful interaction) (Dist. Ex. 10 at pp. 11-14).

In view of the foregoing evidence, I find that the hearing record shows that the evaluative data considered by the April 2011 CSE and the direct input from the student's special education teacher from the Rebecca School and the father provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his 2011-12 IEP (J.F. New York City Dep't of Educ., 2012 WL 5984915, at \*7 [S.D.N.Y. Nov. 27, 2012]; S.F., 2011 WL 5419847, at \*9-\*10; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*8 [S.D.N.Y. Oct. 12, 2011]). Accordingly, the IHO's findings that the April 2011 CSE lacked sufficient evaluative data must be reversed.

## **2. 6:1+1 Special Class with a 1:1 Transitional Paraprofessional**

The district asserts that the April 2011 CSE's recommendation of a 6:1+1 special class with a full-time 1:1 transitional paraprofessional and related services was appropriate for the student and the IHO erred in finding that the April 2011 CSE's recommendations provided insufficient support for the student. I have conducted an independent review of the evidence in the hearing record and find that the April 2011 CSE's recommendation of a 6:1+1 special class, a full time 1:1 transitional paraprofessional, and related services was appropriately designed to address the student's special education needs.

Consistent with the student's needs as identified in the evaluative data reviewed by the May 2011 CSE, and in conformity with State regulations, the May 2011 CSE recommended that the student be placed in a 12-month special education program consisting of a 6:1+1 special class in a specialized school with the assistance of a full time 1:1 transitional paraprofessional (Dist. Ex. 4 at pp. 1-3, 20). State regulations provide that a 6:1+1 special class placement is designed to address 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]).

The district representative testified that because of the student's sensory seeking, under-responsive and nonverbal behavior, and distractibility, the student required a small, structured classroom (Tr. pp. 50, 67). In addition to the 6:1+1 classroom, the April 2011 IEP provided additional supports to the student by recommending various strategies aligned to the student's unique academic, social/emotional, and health/physical needs (see Dist. Ex. 4 at pp. 4-5). The April 2011 CSE identified the student's academic management needs for redirection, repetition, visual cues and verbal prompts, sensory support, and augmentative communication (Dist. Ex. 4 at p. 4; see Tr. pp. 54-56). The April 2011 CSE also identified the student's social/emotional management needs for co-regulation with an adult using a calm and measured voice, sensory supports and movement breaks throughout the day, brushing protocol, use of a chew tube, and repetition of directions (Dist. Ex. 4 at p. 5; see Tr. p. 56). To address the student's health/physical management needs, the April 2011 CSE recommended continuation of OT and

PT, support to expand the student's repertoire of foods, oral input through use of chew tube and brushing and joint compression, and use of his voice output augmentative communication device (Dist. Ex. 4 at p. 7). In addition, the CSE recommended that the student participate in the alternative assessment because of his "significant global delays," whereby he would be assessed through teacher observation, teacher-made materials, class participation, and student portfolio (id. at p. 20). The April 2011 CSE also recommended special education transportation that included limited travel time and air conditioning, consistent with an April 15, 2011 request for medical accommodations report signed by the student's physician (Dist. Ex. 20 at pp. 1-2; Parent Ex. H).

I also note the issuance of a guidance document by the Office of Special Education in January 2012 entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," which indicated that with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented (see <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (id.).

Consistent with the student's needs, the April 2011 CSE recommended a 1:1 transitional paraprofessional to address the student's behaviors (Dist. Ex. 4 at p. 3). Although at the impartial hearing, the parents maintained that the student required intensive 1:1 instruction to receive educational benefits, I agree with the IHO that there is nothing in the hearing record to suggest that the student would not be adequately supported by a 1:1 paraprofessional working under the direction of the special education teacher to provide support with the student's behaviors (see IHO Decision at p. 20).<sup>7</sup> The district representative testified that, in response to the father's concerns, the April 2011 CSE recommended the 1:1 transitional paraprofessional in order to provide more adult support and create a student-to-adult ratio more similar to the student's class at the private school for the 2010-11 school year (Tr. pp. 50-51).<sup>8</sup> She elaborated that the 1:1 transitional paraprofessional would help the student to join group activities using his communication device and would work with the student on transitioning to the district school, as specifically set forth in the goals on the IEP (Tr. pp. 53, 71; Dist. Ex. 4 at p. 17). She also noted that the 1:1 transitional paraprofessional could implement the student's management strategies, such as redirection and repetition (Tr. p. 67).

Based upon the foregoing, I find that the evidence contained in the hearing record supports that the district's recommended 6:1+1 special class in a specialized school with a 1:1 transitional paraprofessional and related services was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

### **3. Sensory and Feeding Needs**

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<sup>7</sup> The parents did not assert a cross-appeal requesting review of this adverse finding of the IHO (see Answer).

<sup>8</sup> The hearing record reflects that the student's class at the Rebecca School for the 2010-11 school year was an 8:1+3 special class (Dist. Ex. 10 at p. 1; see Tr. p. 84).

Relative to the student's sensory needs, the April 2011 IEP noted that the student "seeks out sensory input throughout the day" and provided for "sensory support" through co-regulation with an adult employing a calm and reassuring voice, movement breaks throughout the day, and continuation of OT and PT (Dist. Ex. 4 at pp. 4, 6-7). Although the IHO found that "there was no mention of the [s]tudent's need for sensory input for his jaw and face on the April 29, 2011 IEP," (IHO Decision at p. 21), the health/physical management needs section of the IEP noted that the student "[m]ay benefit from oral input in the [form] of a chew tube" (Dist. Ex. 4 at p. 7). According to the district representative, the CSE included sensory support as an academic management need in the student's April 2011 IEP "so generally to make him more available for academic activities.... [I]f he became ... frustrated, and if you give him a massage, give him a break, ... he will come back ready to start a new activity, or continue the one he didn't want to do" (Tr. pp. 54-55; Dist. Ex. 4 at pp. 4, 6). The April 2011 CSE recommended a brushing protocol for the student, which the Rebecca School teacher used to provide the student with sensory input (Tr. p. 56; Dist. Ex. 4 at p. 6). Additionally, the CSE recommended that the student receive OT and PT services in part to address his sensory needs (Tr. p. 52; Dist. Ex. 4 at p. 20). The district representative also testified that the CSE, with input provided by the father and the Rebecca School teacher and social worker, developed the OT goals contained in the student's IEP because "[they] help him to be regulated, and ... children on the [autism] spectrum, they're usually very sensory seeking, and so they do have visual-spatial issues, so ... achieving those goals will make him more regulated, and make him more available for learning academic skills" (Tr. p. 62; see Dist. Ex. 4 at pp. 13-14). Based upon the foregoing evidence, I find that, contrary to the finding of the IHO, the hearing record demonstrates that the April 2011 sufficiently addressed the student's sensory needs so as to offer the student a FAPE for the 2011-12 school year.

Turning next to the student's feeding needs, according to the hearing record, the December 20, 2010 Rebecca School interdisciplinary progress report described the student as under-responsive to sensory input and indicated, among other things: that he disliked having a messy face and hands during mealtimes; that, with adult encouragement, he displayed flexibility and tolerance for novel tactile input and more varied food textures; and that oral motor input, such as use of a "chewy tube," helped the student's focus (Dist. Ex. 10 at p. 6). The progress report also indicated the student participated in an oral motor "cool down" group that incorporated brushing, joint compression, and oral motor input to calm, focus, and promote enhanced body awareness and regulation (id.). The progress report included a section authored by the student's speech-language pathologist at the Rebecca School, indicating that the student's speech-language therapy sessions focused in part on increasing and improving overall oral motor skills and feeding skills (id. at p. 7). The student's speech-language pathologist further indicated: that the student presented with difficulties in motor planning and programming motor movements for production of speech and feeding; that he displayed an immature chew pattern, groping movements, and overall difficulty dissociating his articulators; and that, specific to oral motor and feeding skills, the student tolerated oral motor exercises, including the use of a chewy tube, as needed throughout his day (id. at p. 8). She also noted that the student had recently made progress in independent cup drinking and in decreasing his overall rigidity with food choices, when provided with maximum support from the related service provider (id.). According to the speech-language pathologist, the student displayed strong food preferences—favoring soft foods, such as mashed potatoes or "melttable solids," such as goldfish crackers—

and experienced difficulty eating a variety of tastes and textures (*id.*). However, the speech-language pathologist also cited the student's "steady progress over the past few months" in becoming more flexible in eating new foods, such as graham crackers and cranberry sauce, and foods with harder textures, such as carrots, when provided with verbal support and encouragement, including reminders to chew appropriately and eat safely (*id.*). The speech-language pathologist indicated that future therapy sessions addressing feeding skills would focus on increasing awareness, strength, coordination, and range of motion within the student's oral mechanism, and on developing the student's tolerance of a variety of tastes and textures under closely monitored circumstances to ensure his safety (*id.* at p. 9).

The district representative acknowledged that the April 2011 IEP did not include a recommendation of a feeding program for the student, but testified that the April 2011 CSE discussed the student's feeding disorder during the CSE meeting and, consistent with the speech-language pathologist's and occupational therapist's notes included in the Rebecca School report, the student's April 2011 IEP indicated that, among other conditions, the student had received a diagnosis of a feeding disorder and that his diet was limited "due to sensory concerns and rigidity" (Tr. pp. 67-68, 78-79; Dist. Ex. 4 at pp. 7, 18). The health/physical management needs noted on the student's IEP included support to expand the student's repertoire of foods, use of a chew tube for oral input, brushing, and joint compression, and also recommended speech-language therapy five times per week (Dist. Ex. 4 at pp. 7, 18, 20). The April 2011 IEP also contained an annual speech-language therapy goal with associated short-term objectives aligned with the student's oral motor and feeding needs that addressed improving his oral motor skills by tolerating oral motor exercises for 10 minutes per therapy session and tolerating and tasting 10 new foods of various textures with moderate adult support across two consecutive weeks (*id.* at p. 16). The student's management needs as identified in the April 2011 IEP included sensory support and use of a chew tube, brushing, joint compression, and support to expand his repertoire of foods (*id.* at pp. 4, 6-7).

I also note that in her decision, the IHO found the April 2011 IEP deficient because "the IEP did not specify how the feeding program could be implemented in a large noisy cafeteria with 100 to 150 [students]" (IHO Decision at p. 21). However, a CSE is not required under the IDEA or State or federal regulations to include on an IEP an explanation of how a particular aspect of a recommended program is to be implemented; rather, this is a matter left to the assigned public school staff, and I decline to find that the absence of such an explanation in the April 2011 IEP constitutes a basis for finding the IEP inappropriate (see Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*11 [W.D.N.Y. Sept. 26, 2012]). Based upon the foregoing evidence, I find that, contrary to the finding of the IHO, the hearing record demonstrates that the April 2011 sufficiently addressed the student's feeding needs so as to offer the student a FAPE for the 2011-12 school year.

#### **D. Assigned School**

I will next address the parties' contentions regarding the district's choice of the assigned public school site. Initially, the district correctly argues that the IHO erred in reaching the parents' contentions about the assigned public school site since such analysis would require the IHO—and an SRO—to determine what might have happened had the district been required to implement the student's April 2011 IEP. Generally, challenges to a district's assignment of a

student to a particular public school site or classroom delves into the implementation of the IEP, and failing to implement 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),<sup>9</sup> and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88).

In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*15-\*16 [S.D.N.Y. Oct. 6, 2012]; Ganje, 2012 WL 5473491, at \*15 [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at \*16 [S.D.N.Y. Nov. 16, 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Public Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at \*19 [N.D.Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented); but see E.A.M., 2012 WL 4571794, at \*11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Therefore, 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 the IEP (R.E., 694 F.3d at 186-88; 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]; but see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at \*13-\*16 [S.D.N.Y. March 26, 2013]; B.R. v. New York City Dep't of Educ., 2012 WL 661046, at \*5-\*6 [S.D.N.Y. Dec. 26, 2012]).

In this case, the parents rejected the IEP and unilaterally placed the student prior to the time that the district became obligated to implement the student's IEP (see Parent Ex. A). Thus, the district was not required to establish that the student would have been provided with appropriate grouping or that the assigned school staff would have been able to address the student's sensory and feeding needs 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 as further described below

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<sup>9</sup> 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. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

nevertheless shows that the 6:1+1 special class at the assigned district school was capable of providing the student with suitable functional grouping and addressing his sensory and feeding needs, 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; Van Duyn, 502 F.3d at 822; see D. D-S, 2011 WL 3919040, at \*13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502 [S.D.N.Y. 2011]; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at \*3 [S.D.Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

### 1. Sensory Needs

The IHO found that the school to which the district assigned the student was inappropriate because "the proposed [school] building's [sensory] gym could not have provided the sensory diet the [s]tudent required" (IHO Decision at p. 21). During the impartial hearing, the intake coordinator of the assigned school testified that there were two locations,<sup>10</sup> which she referred to as the "main site" and the "off site;" she indicated that the main site housed the assigned 6:1+1 special class for summer 2011, because it was a climate-controlled building with air conditioning,<sup>11</sup> and that the assigned 6:1+1 special class moved to the off-site location for the balance of the regular school year beginning in September 2011 (Tr. pp. 99-100, 104, 110-13, 120-21, 157, 167). The intake coordinator further indicated that although the main site was, in fact, equipped with a sensory gym, which included a swing, a tunnel, a therapy ball, lights, puzzles, and mats, the off-site location was not (Tr. pp. 93, 116, 126). However, the classroom teacher of the assigned 6:1+1 special class testified that, at the off site location, the student's occupational therapist would address the student's sensory needs and explained that he collaborated with the student's occupational therapist when planning lessons for his students in the assigned 6:1+1 special class (Tr. pp. 143-44, 167-68). Additionally, as indicated above, the April 2011 IEP provided the student with sensory supports, the use of co-regulation strategies provided by an adult, movement breaks throughout the day, and a brushing protocol to meet the student's sensory needs (Dist. Ex. 4 at p. 6).

The IHO also found that "the mix of general education [students] and [special education students] in a large building provided too much stimulus for the [s]tudent," and that the assigned school "was devoid of any support service to address the [s]tudent's intolerance for noise in the large cafeteria" (IHO Decision at pp. 20-21); however, the classroom teacher testified that, in the

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<sup>10</sup> The United States Department of Education has clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).

<sup>11</sup> I note that the hearing record reflects that an air conditioned environment was recommended for the student by his doctors (see Tr. pp. 104, 133; Parent Ex. H).

event the student became "overwhelmed" or "over-stimulated" during the lunch period at the assigned school, he would have been escorted back to his classroom (Tr. p. 172).

In summary, I do not find support in the hearing record for IHO's finding that the assigned school lacked the requisite resources to address the student's sensory needs. Although I can fully appreciate that the parents may have preferred a school with sensory equipment more similar to the sensory equipment available at the Rebecca School, I find that the hearing record does not support a finding that, had the student attended the assigned public school site, the district was obligated to provide the same equipment that the private school provided or that the district was incapable of addressing the student's sensory needs sufficiently to enable him to receive educational benefits.

## **2. Feeding Needs**

The parents contend that the assigned school was inappropriate for the student because it lacked a formal feeding program to address the student's needs. However, while the assigned school lacked a formal "feeding program," the intake coordinator testified that "[i]f a [student] has a feeding disorder, it is addressed by the [student's] speech teachers and individual guidance is given to the classroom staff" (Tr. pp. 94, 126). The special education teacher of the 6:1+1 special class testified that parents were able to provide food for students with special food repertoire needs, and that paraprofessionals assisted students during the assigned school's "instructional lunch and breakfast" by showing the students how to sit, use utensils, and to pace themselves appropriately, and to not eat excessively (Tr. pp. 131-33, 142-43, 169). As previously described above, the April 2011 IEP provided the student with support to expand his repertoire of foods, use a chew tube for oral input, and also recommended speech-language therapy five times per week to in part, address an annual speech-language therapy goal with associated short-term objectives aligned with the student's oral motor and feeding needs (*id.* at pp. 6-7, 16, 18, 20). In view of the foregoing, Based on the circumstances described above, I find that had the parents enrolled the student in the public school and triggered the district's responsibility to provide the student special education services in conformity with the student's IEP, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way.

## **3. Assigned 6:1+1 Special Class—Functional Grouping**

I now consider the IHO's finding that "[t]he student could not have been appropriately grouped for academics in the proposed class during the summer of 2011" (IHO Decision at p. 20). State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the

students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

Here, the classroom teacher of the assigned 6:1+1 special class testified that on the first day of the summer 2011 program, the assigned 6:1+1 special class consisted of three students,<sup>12</sup> between six and seven years of age, all of whom were classified as students with autism, and that the assigned classroom was staffed by himself and two paraprofessionals (Tr. pp. 133-34, 136, 163, 166). In describing their general levels of functioning, the classroom teacher testified that two students were "very low" and one student was "in the medium category," but estimated that, on the first day of the summer 2011 program, two of the students were functioning at pre-kindergarten level and one student was at kindergarten level in English language arts (ELA), while in math, he estimated that two of the students were functioning below pre-kindergarten level, while the other student was "around" pre-kindergarten or kindergarten level (Tr. pp. 137, 164-65). He further testified that two students were nonverbal and used symbols to communicate, while one student was able to verbally request his wants and needs, such as using the bathroom or the computer (Tr. pp. 138-39). Socially, the classroom teacher testified that one student did not socialize, one student engaged in computer use, and one student "loved to play," "knows exactly what he wants," and "could socialize a bit with the rest of the kids" (Tr. p. 139). Relative to daily living skills, he testified that all three students ate independently but received instructional breakfast and lunch daily, and stated that at least two of the students received related services of OT, PT, and speech-language therapy as of the first day of the summer 2011 program (Tr. pp. 139-40 143, 165). Although acknowledging that he never personally met the student, the classroom teacher also testified that, based upon his review of the student's April 2011 IEP, the student "would have functioned like two of the [students] in that classroom on the lower spectrum" and that "the two other students [were] on his academic performance and his grade level – around the same age. So that's what makes him an appropriate candidate for [the

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<sup>12</sup> The classroom teacher testified that "later on in the program," there were additional students attending the assigned 6:1+1 special class, but the hearing record does not contain information describing the students who joined the assigned 6:1+1 special class after the first day of the summer 2011 program; when describing a typical day in the assigned 6:1+1 special class, the unit coordinator testified that during the "morning circle," there were eventually five boys in the class who were broken into small groups depending on their functioning levels (Tr. pp. 155-57).

assigned 6:1+1 special] classroom" (Tr. pp. 142, 159). I further note that, per the teacher observations listed in the student's April 2011 IEP, the student's reading comprehension and listening comprehension were estimated at the first to second grade level, and that his math computation skills were estimated at the first grade level (Dist. Ex. 4 at p. 4). In consideration of the foregoing, I find that the hearing record demonstrates that, contrary to the finding of the IHO, had the parents elected to place the student in the assigned 6:1+1 special class, the district was capable of grouping the student with other students of similar needs and abilities.

## **VII. Conclusion**

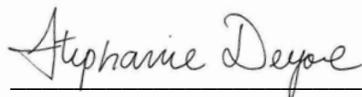
In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year must be reversed, as it is not supported by the hearing record. I find that the hearing record demonstrates that the April 2011 CSE considered appropriate evaluative data in developing the student's 2011-12 IEP, that the student's present levels of performance as described in the April 2011 IEP were adequate, and that the district's recommended program, consisting of a 6:1+1 special class in a specialized school, a full-time 1:1 transitional paraprofessional, and related services, was reasonably calculated to enable the student to receive educational benefits, and thus, the district has offered the student a FAPE in the LRE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). It is therefore unnecessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parent's claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at \*12; D. D-S, 2011 WL 3919040, at \*13).

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

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated March 19, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to reimburse the parents for the student's tuition at the Rebecca School for the 2011-12 school year and to directly fund the remainder of the student's tuition at the Rebecca School for the 2011-12 school year.

**Dated:** Albany, New York  
May 23, 2013

  
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**STEPHANIE DEYOE**  
**STATE REVIEW OFFICER**