



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-090

**Application of the XXXXXXXXXXXXXXXXXXXXXXXXXXXX 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, Diane da Cunha, Esq., of counsel

Susan Luger Associates, Inc., Special Education Advocates, attorneys for respondents, Michelle Siegel, 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 pay for the costs of the student's tuition at the Rebecca School for the 2011-12 school year. The appeal must be sustained in part.

### **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**

The student had been attending the Rebecca School since September 2006 (see Tr. p. 277).<sup>1</sup> On April 29, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (Parent Ex. B at pp. 1-2). Finding the student eligible for special education as a student with autism, the April 2011 CSE recommended a 12-

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<sup>1</sup> 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).

month school year program in a 6:1+1 special class placement in a specialized school (*id.* at pp. 1, 12).<sup>2</sup> The April 2011 CSE also recommended related services consisting of: five 45-minute sessions per week of individual speech-language therapy; five 45-minute sessions per week of individual occupational therapy (OT); two 45-minute sessions per week of individual physical therapy (PT); one 45-minute session per week each of individual and small group (2:1) counseling; and a full-time 1:1 crisis management paraprofessional (*id.* at p. 14). The April 2011 CSE also developed a behavior intervention plan (BIP) and a transition plan for the student (*id.* at pp. 15-16).

In a final notice of recommendation (FNR) dated June 14, 2011, the district summarized the 6:1+1 special class and related services recommended in the April 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 16).

On June 17, 2011, the parents signed an enrollment contract with the Rebecca School for the student's attendance during the 12-month 2011-12 school year (Parent Ex. M at pp. 1, 6).

In a letter to the district dated June 17, 2011, the parents indicated that the April 2011 CSE "hadn't recommended any new program/placement" and, as such, they "had no choice" but to sign the enrollment contract with the Rebecca School for the 2011-12 school year (Parent Ex. G). However, the parents stated that if the district offered "an appropriate program and/or placement" for the student, they would consider enrolling the student (*id.*). Otherwise, the parent notified the district of their intention to unilaterally place the student at the Rebecca School and seek tuition reimbursement (*id.*). The parent also requested that the district "arrange for busing" in the event the student attended the Rebecca School (*id.*).

By letter dated July 12, 2011, the parents informed the district that, in response to receiving the FNR, they attempted to reach the assigned public school site to schedule a visit (Parent Ex. I). However, the parents indicated that they had not yet reached staff and, therefore, requested "some suggestions as to how . . . to get in touch with [the] school" (*id.*). Until they could visit the assigned public school site, the parents informed the district of their intention to continue the student's enrollment at the Rebecca School and seek tuition reimbursement for the 2011-12 school (*id.*).

The hearing record reflects that the parents visited the assigned public school site on July 25, 2011, accompanied by their advocate (Tr. pp. 226, 230, 497; Parent Ex. J). By letter to the district dated July 29, 2011, the parents rejected the assigned public school site because: the staff could not assure the parents that there would be an immediate seat available for the student; the program would not be individualized to meet the student's unique needs; the school did not "utilize an interdisciplinary approach"; the school did not utilize a "case manager" or "liaison between the family and school" and did not "offer parent education or workshops"; the school did not have a sensory gym and, generally, did not provide an environment suited to the student's sensory needs; and the "school wide behavior plan [was] in a state of flux" and, therefore, would

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

not address the student's behavioral needs (Parent Ex. J). The parents indicated that they would "consider any additional programs/placements" that the CSE might recommend for the 2011-12 school year but would continue the student's unilateral placement at the Rebecca School until an appropriate program was offered (id.).

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

By due process complaint notice dated August 22, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at pp. 2, 5). Specifically, the parents asserted that the April 2011 CSE deprived them the opportunity to meaningfully participate in the development of the student's IEP by ignoring their concerns, as well as the suggestions and recommendations of the professionals who worked directly with the student (id. at pp. 2-3). The parents also asserted that the April 2011 CSE failed to recommend parent training and counseling, develop an appropriate transition plan, and conduct a functional behavioral assessment (FBA) (id. at pp. 2, 3). The parents also asserted that April 2011 CSE failed to recommend an appropriate level of services for the student and, in particular, that a 6:1+1 special class placement with a full time 1:1 paraprofessional was not appropriate (id. at p. 3).

The parents also raised claims challenging the district's assigned public school site, including that the staff could not assure the parents that the school had a seat for the student, the teaching methodology utilized was not appropriate for the student, the school did not have a case manager to act as a liaison between the family and the school, the school did not offer parent education or workshops, the school was too noisy, there was no sensory gym, and the behavior management plan utilized by the school was not appropriate for the student (Parent Ex. A at pp. 3-4).

Finally, the parents asserted that the Rebecca School was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of an award of tuition reimbursement (Parent Ex. A at pp. 4-5). For relief, the parents requested that the IHO order the district to make direct payment of the student's tuition costs at the Rebecca School and to provide the student with roundtrip transportation to and from the Rebecca School (id. at p. 5). In addition, the parents requested an order directing the district to provide for additional home-based speech-language therapy to remedy the district's alleged failure to provide such services from July through August 2011 (id.).

### **B. IHO Decision**

An impartial hearing convened on September 16, 2011 and concluded on February 17, 2012, after five days of proceedings (Tr. pp. 1-602). Initially, by interim decision dated October 11, 2011, the IHO ordered that effective August 22, 2011, the student's pendency placement included ten hours weekly of home-based speech-language therapy, as well as roundtrip special education transportation to and from the Rebecca School (Interim IHO Decision at p. 4). In a final decision dated March 26, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate

unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 20-25).

With regard to the process of formulating the IEP, the IHO found that the April 2011 CSE was properly composed and "the parents had a meaningful opportunity to participate in the meeting" (IHO Decision at p. 20). The IHO found that the April 2011 CSE properly considered the district's psychoeducational evaluation, in addition to a classroom observation, Rebecca School progress reports, and the input from the parents and a Rebecca School teacher (*id.*). The IHO observed that no procedural violation existed as a result of the district's failure to conduct further tests as part of the psychological evaluation (*id.* at pp. 20-21). The IHO also found that the April 2011 IEP reflected the results of evaluations and established annual goals related to the student's needs (*id.* at p. 20). The IHO also found that the April 2011 CSE had sufficient information to formulate a "functional behavioral plan" (*id.*). Next, the IHO determined that, "[t]o the extent that the [t]ransition plan failed to include the results of a functional vocational assessment, it did not deprive the [s]tudent of any educational opportunities" (*id.*).<sup>3</sup>

However, the IHO determined that the April 2011 CSE's recommendation for a 6:1+1 special class placement with a full time paraprofessional was not appropriate for the student (IHO Decision at p. 21). The IHO reasoned that the 6:1+1 special class setting did not offer a sufficient number of teachers to address the student's special needs and, on the other hand, that the 1:1 paraprofessional "would inhibit the [s]tudent's ability to generalize his skills[,] as he would be reliant on one individual to assist him," and "undermine the overriding objective to enable the [s]tudent to become more independent" (*id.*).

Additionally, the IHO determined that the district would not have been able to implement the student's April 2011 IEP had he attended the district's assigned public school site (IHO Decision at pp. 21-22). The IHO determined that the assigned public school site could not address the student's needs because it did not have a sensory gym and "would not have been able to provide the [s]tudent with a quiet place as needed," and, as such, would not be able to accommodate the student's frequent deregulation and sensitivity to noise (*id.* at p. 21). The IHO also determined that, because the student required significant support to enter a large crowded room, it was doubtful that he could have entered the lunchroom at the assigned public school site (*id.*). The IHO also found that "it did not appear that the school could accommodate" the student's need to access a microwave, which the student required since he would not eat unless his food was hot (*id.*). In addition, the IHO noted that proposed classroom at the assigned public school site utilized applied behavior analysis (ABA) methodology, with which the student had not shown success in the past (*id.* at p. 22). The IHO also determined that the student would not have been appropriately grouped with the other students in the proposed classroom, by age or by functioning level, and that, given the independence of the other students, it was "doubtful that just a [1:1] paraprofessional would have been able to keep [the student] on task, regulated and engaged" (*id.*). The IHO also noted that the record did not demonstrate "how either a teacher

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<sup>3</sup> In her analysis, the IHO made various findings which were adverse to the parents (*see* IHO Decision at pp. 20-21). However, the parents did not assert a cross-appeal in their answer. Therefore, the IHO's determinations, which were adverse to the parents, are final and binding on the parties and will not be addressed (*see* 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). In any event, based on my independent review of the hearing record, I see no reason to disturb the IHO's findings with respect to these issues.

and/or the [1:1] paraprofessional would have been able to teach, pre-teach[,] and breakdown subjects repeatedly at the frequency that the [s]tudent require[d]" in order to receive benefit (id.).

The IHO also determined that the parents satisfied their burden to establish that the Rebecca School was an appropriate unilateral placement for the 2011-12 school year (IHO Decision at pp. 22-23). Specifically, the IHO found that the Rebecca School offered an intense special education program that provided the student with assistance using a variety of special education measures (id. at p. 22). In addition, the IHO determined that the student had made academic, social, and behavioral progress at the Rebecca School (id. at pp. 22-23).

With regard to equitable considerations, the IHO determined that the parents did not exhibit any conduct which would warrant a denial or reduction of an award of the cost of the student's tuition (IHO Decision at p. 23). In particular, the IHO found that the parents availed themselves to the CSE "for evaluations, meetings[,] and to visit programs" (id.). Although delayed, the IHO noted that the parents provided consent for evaluations after the district explained "the matter" (id.). Furthermore, the IHO found that the parents "in all likelihood" provided a private psychological report to the district in advance of the April 29, 2011 CSE meeting and that, although it "may have been prudent of the parents to have mentioned the . . . report" during the CSE meeting, the district's ability to develop the April 2011 IEP was not impeded thereby (id. at p. 24). The IHO also found that, by not promptly responding or by failing to respond to correspondence, the parents "did not prevent the district from developing an appropriate IEP or making a proper placement recommendation," noting that the parents had rejected "the same program placement in the past" (id. at p. 23). The IHO also noted that, during the year prior, the parents had experienced financial and marital stress, of which fact the district had been advised (id.). Furthermore, the IHO observed that, because the parents' predominant language was not English, such a language barrier may have been a factor in the parents' ability to communicate with the district (id.). The IHO also found that the parents visited the assigned public school site in good faith and that, if appropriate, the parents would have accepted the district's recommended program and enrolled the student at the public school site (id. at pp. 23-24). Finally, the IHO found that the parents had demonstrated that they were legally obligated for but financially unable to afford the balance owed for the Rebecca School, warranting relief in the form of direct payment of the balance (id. at p. 24).

Consequently, the IHO ordered the district to pay for the costs of the student's tuition at the Rebecca School for the 2011-12 school year (IHO Decision at p. 24). Referring back to the student's pendency placement, the IHO also ordered the district to continue to provide special education transportation for the student but determined that the hearing record did not demonstrate that the student continued to require the home-based speech-language therapy (id. at pp. 24-25).

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

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief.

Specifically, the district asserts that the IHO erred in concluding that the 6:1+1 special class placement with a 1:1 paraprofessional was not appropriate to meet the student's special education needs. The district asserts that the IHO's concerns over the student becoming too reliant on the 1:1 paraprofessional were baseless, as the student would have also received instruction from and interacted with the classroom teacher and paraprofessional, as well as the speech-language therapy, OT, PT, and counseling providers.

The district also argues that the IHO erred in her findings relative to the assigned public school, asserting that, since the parents rejected the April 2011 IEP and the assigned public school site, many of the IHO's determinations were speculative. Specifically, with respect to the IHO's determination that the assigned public school site failed to offer a sensory gym or quiet space, the district asserts that it does not have to replicate the Rebecca School's facilities and that, in any event, the public school site had sensory equipment in the OT room and in the classroom and, when needed, the student would have been provided with a quiet area, either in the assistant principal's or the guidance counselor's office. The district also asserts that the IHO erred in determining that it was doubtful the student could have entered the cafeteria at the assigned public school site, arguing that the hearing record demonstrated the student's ability to enter a large room like an auditorium and take trips to a grocery store and a restaurant. Further, the district asserts that the student would have received support while entering the cafeteria or would have been permitted to eat lunch in an office if necessary. With respect to the student's access to a microwave, the district argues that the April 2011 IEP did not require such an accommodation but that there was no suggestion that the student, with his paraprofessional, would not have been able to use one of the kitchens to heat his food. Next, the district asserts that, contrary to the IHO's finding, the methodology used should be left to the teacher and that the teacher in the assigned classroom utilized the Treatment and Education of Autistic and Related Communication-Handicapped Children (TEACCH) methodology, not ABA. Finally, the district asserts that State regulations do not require a particular chronological age range for students over 16 years of age and that, in any event, the student would have been appropriately grouped by age and functional level with the other students in the assigned classroom.

The district also alleges that the IHO erred in finding the Rebecca School to be an appropriate unilateral placement for the student because the hearing record was not clear that the student's progress over six years was attributable to the Rebecca School and the school did not provide the student with sufficient related services. The district also asserts that the student's home-based speech-language therapist and staff at the Rebecca School did not communicate or coordinate with each other. In addition, the district argues that the Rebecca School did not prepare the student for post-secondary transition.

As for equitable considerations, the district asserts that the parents unreasonably refused to sign the attendance sheet for the April 2011 CSE meeting and refused to consent to having the student evaluated at the Rebecca School until both parties' attorneys were involved. The district also asserts that the parents delayed the CSE meeting for months by not responding to notices and by not making themselves available for CSE meetings. As an alternative, the district asserts that, if it is responsible for any tuition reimbursement, the parents have failed to demonstrate that

they were legally obligated for but unable to afford the student's tuition at the Rebecca School. Consequently, the district seeks an order reversing the IHO's decision in its entirety.

In an answer, the parents respond to the district's petition by denying the allegations therein and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch.

Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. April 2011 IEP—6:1+1 Special Class and 1:1 Paraprofessional**

The district asserts that the IHO erred in finding that the April 2011 CSE's recommendation for a 6:1+1 special class placement with a 1:1 crisis management paraprofessional was not sufficient not meet the student's needs. In particular, the district argues that the IHO incorrectly concluded that the student required another teacher in the classroom and that a full time 1:1 crisis management paraprofessional would hinder the student's ability to generalize his skills and to become more independent.

At the time of the April 2011 CSE meeting, the student demonstrated significant deficits in: cognition; academic achievement; sensory processing and regulation; attention/focusing; social interaction; motor planning and sequencing; and receptive, expressive and pragmatic language skills (see Dist. Exs. 8 at pp. 1-8; 11 at pp. 2-5; Parent Ex. B at pp. 3-5). The student's behaviors included rigidity, limited tolerance for frustration, difficulty transitioning, sensitivity to light and sound, and, when dysregulated, a tendency to leave an area, bang objects, yell, or rock back and forth (see Dist. Exs. 8 at pp. 2-3, 5-8; 9 at pp. 1-2; Parent Ex. B at pp. 4-5). The student also suffered from seasonal allergies, which exacerbated his behaviors (see Tr. pp. 67, 69, 477-78; Parent Ex. B at p. 5). The December 2010 progress report from the Rebecca School indicated that the student's inability to remain regulated interfered with his ability to attend to classroom activities, make transitions, and to process and respond appropriately to language (Dist. Ex. 8 at pp. 2, 5, 6).

The evidence in the hearing record shows that, consistent with the student's needs, which were also identified in the April 2011 IEP, and in conformity with State regulations, the April 2011 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school (see Parent Ex. B at pp. 1, 12). State regulations provide that a 6:1+1 special class placement is designed for 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]). To address the student's management needs, in addition to the recommended

related services of OT, PT, speech-language therapy, and counseling, the April 2011 CSE recommended environmental modifications and human/material resources, including: (1) multi-sensory input; (2) verbal prompts and visual cues; (3) movement breaks every 30 minutes; (4) provision of choices; (5) a visual timer; (6) co-regulation in the form of a slow even tone of voice while providing deep pressure; (7) hand squeezes; and (8) access to a quiet space (Parent Ex. B at pp. 3-5, 14). Moreover, recognizing the intensity of the student's management needs, the April 2011 CSE also recommended that he be provided with a full-time 1:1 crisis management paraprofessional (*id.* at pp. 4, 14; *see* Tr. p. 53). The CSE also developed annual goals and short-term objectives that targeted the student's interfering behaviors and developed a BIP for the student (Parent Ex. B at pp. 8, 16).<sup>4</sup>

In addition to recommending the student for placement in a small, highly structured environment, the April 2011 CSE developed annual academic goals and short-term objectives designed to address the student's deficits in reading, writing, and math (Parent Ex. B at pp. 6-7). The CSE developed two annual counseling goals with corresponding short-term objectives that addressed improving the student's ability to participate in two-way purposeful communication and to express his feelings and emotions and recommended provision of one 45-minute individual and one 45-minute group (of two) counseling session per week (*id.* at pp. 11, 14). The April 2011 CSE also developed annual goals and short-term objectives that targeted the student's deficits in expressive, receptive, and pragmatic language skills and recommended provision of five 45-minute sessions of individual speech-language therapy per week (*id.* at pp. 9-10, 14). With regard to the student's difficulties with sensory processing and motor delays, the April 2011 CSE developed annual goals and short-term objectives related to improving the student's sensory processing and regulation, motor planning and sequencing skills, and visual-spatial skills (handwriting) (*id.* at pp. 8-9). To assist the student in achieving these goals, the CSE recommended the provision of five 45-minute sessions of individual OT per week (*id.* at p. 14). Lastly, the CSE recommended the student for a 12-month school year in order to prevent regression of skills (*id.* at p. 1; *see* Tr. pp. 53-54).

Although the IHO determined that the recommended 6:1+1 setting did not have sufficient teachers to address the student's special education needs (IHO Decision at p. 21), a review of the hearing record does not support such a finding; rather, the evidence demonstrates that the type and level of additional support required by the student could have been appropriately provided by a 1:1 paraprofessional. The district school psychologist testified that, during the course of the April 2011 CSE meeting, the student's then-current Rebecca School teacher indicated that the student's behaviors seriously interfered with instruction (Tr. pp. 56-57). The district school psychologist further testified that, generally, the CSE would recommend a crisis management paraprofessional for students "whose behavior seriously interfere[d] with instruction and

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<sup>4</sup> The hearing record reflects that the Rebecca school staff agreed to provide the CSE with annual goals relating to PT after the April 2011 CSE meeting ended; however, the Rebecca social worker indicated that the student had been discharged from PT in spring 2010, as he had met his goals (Tr. pp. 58-59, 281-82; Dist. Exs. 7 at p. 2; 15 at pp. 1-2). In an email dated May 12, 2011, the district school psychologist informed the parent of this, gave the parent the option to terminate the PT services based on the report of the Rebecca School physical therapist, or have the district school psychologist generate PT annual goals and submit them to the parent for her approval (Dist. Ex. 14 at p. 1). The district school psychologist testified that she did not receive a response from the parent and did not change the IEP because she could not make changes outside of a CSE meeting (Tr. pp. 60-61).

require[d] additional adult support" (id.). In contrast, the student's Rebecca School teacher, who attended the April 2011 CSE meeting testified that she did not believe a crisis management paraprofessional was appropriate for the student because the function of a crisis paraprofessional was to prevent crisis and to assist a student who becomes aggressive, which she opined the student did not require (Tr. p. 351). She indicated that the student required someone to "sustain him when he . . . ha[d] a difficult time" (id.).

The hearing record demonstrates that, the recommendation for the provision of a full-time 1:1 behavioral management paraprofessional for the student was based on evaluative information that was before the April 2011 CSE . For example, according to the December 2010 Rebecca School update report, the student required verbal prompts, access to sensory objects, hand squeezes and deep (sensory) input in order to stay regulated and attend to classroom activities, (Dist. Ex. 8 at p. 2). The report reflected that, when dysregulated, the student had difficulty expressing his wants and needs appropriately and would sometime physically leave the area, yell, or jerk his body back and forth (id.). When this occurred, the student responded to the provision of "deep input and a slow even toned voice" (id. at pp. 2, 6). The report also reflected that when the student wanted an object that a peer was holding, he responded to simply modeling an appropriate way to ask for the object (id. at p. 2). The student's Rebecca School teacher indicated in the report that, with regard to academics, the student needed only moderate support to answer complex questions, was able to respond to "why" and "how" questions when provided with verbal and written choices, and was working on sequencing steps for a recipe or science experiment and measuring with just "minimal staff support" (id.). The student's occupational therapist and speech-language therapist also reported that the student responded to the provision of visual and verbal strategies such as setting a timer, providing frequent reminders, or giving the student a five-minute warning that the session would be ending soon, in order to transition in a timely manner (id. at p. 5, 6). Other strategies that the student was reported to respond to included: moderate prompting and encouragement; visual (picture), verbal and tactile cues to assist him to comprehend and participate; moderate reminders and cueing to look at and identify safe crossing signals in order to cross the street; break down of transitions into smaller steps and provision of additional time to process them; verbal scaffolding or guided questions to assist him in expressing his wants and needs when frustrated; and verbal and gestural cues when following directives in louder environments (id. at pp. 5-7).

Based on the student's behavioral needs, the hearing record shows that the student did not require an additional teacher but, rather, that the recommended 1:1 crisis management paraprofessional would have provided the appropriate supports. Additionally, with regard to the IHO's determination that the student would become reliant on the assistance of his 1:1 paraprofessional, which she found would inhibit the student's ability to generalize his skills and would serve to undermine the student's ability to become more independent (IHO Decision at p. 21), the hearing record reflects that the April 2011 IEP recommended a special education program and related services that would allow the student to receive instruction from and interact with a variety of different individuals, including a 1:1 paraprofessional, a classroom teacher, a classroom paraprofessional, a speech-language therapist, an occupational therapist, a physical therapist, as well as a counselor (see Parent Ex. B at pp. 12, 14). Considering the frequency of related services and, therefore, the frequency of contact with providers, in addition to classroom staff, the hearing record does not support the conclusion that the student's contact with a 1:1

paraprofessional would inhibit his ability to generalize skills or undermine his ability to become more independent.

Based on the foregoing, the hearing record reveals that the April 2011 CSE's recommendations for a 6:1+1 special class placement with a full-time 1:1 crisis management paraprofessional and related services were reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

## **B. Assigned School**

The district contends that the IHO's conclusions with respect to the assigned public school site were speculative but that, in any event, the district could have properly implemented the student's April 2011 IEP at the assigned school. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has 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" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2014 WL 53264 [2d Cir. Jan. 8, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 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 a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. 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]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City

Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012] [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]), I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. 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 to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>5</sup>

As explained most recently, [i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP. M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]) Instead, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a

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<sup>5</sup> The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 2014 WL 53264, at \*6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parents cannot prevail on their claims that the district would have failed to implement the April 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's April 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Ex. J). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the April 2011 IEP.

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, as further explained below, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, deviation from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).<sup>6</sup>

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<sup>6</sup> However, I decline to review in the alternative various of the IHO's findings relating to the assigned public school site which were not raised in the parent's due process complaint notice, including that: a) the student would not have had access to a microwave at the public school site; b) the student would not have been appropriately grouped with the other students in the proposed classroom; and c) the student would likely not have been able to enter the large, crowded lunchroom (IHO Decision at pp. 21-22; see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint"]).

## **1. Methodology**

With regard to the parties' assertions concerning the methodology utilized at the assigned public school site, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used is usually a matter to be left to the student's teacher (Rowley, 458 U.S. at 204; M.H., 685 F.3d at 257; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v. New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; L.K. v. Dep't of Educ., 2011 WL 127063, at \*11 [E.D.N.Y. Jan. 13, 2011]).

In this case, although the IHO found that the proposed classroom utilized ABA, the hearing record reflects that the assigned classroom primarily utilized the TEACCH methodology (compare IHO Decision at p. 22, with Tr. p. 136). The teacher from the proposed classroom testified that the classroom was physically arranged in accordance with the TEACCH methodology, including separate areas for sensory, work stations, a 1:1 instruction area, a break area, and an area for whole group instruction (Tr. p. 136). She indicated that, in accordance with TEACCH methodology, everything in her classroom was color coded or labeled with a word or picture to make it clear to students where they should sit and work and that each student also utilized an individual schedule (Tr. pp. 136-37). The teacher testified that she also included ABA in her daily schedule, which involved a 1:1 instruction period with data collection, during which she worked with students on a specific skill (Tr. p. 136). Although the hearing record shows that student had been unsuccessful using ABA in a different school prior to beginning at the Rebecca School in 2006, the student's Rebecca School teacher testified she had not implemented ABA with the student and, as such, did not know if the student could currently utilize ABA successfully (Tr. pp. 261, 293, 354). Furthermore, there is nothing in the hearing record that indicates the student was unable to learn utilizing the TEACCH methodology. Therefore, the fact that the assigned school would have used the TEACCH and ABA methodologies instead of the Developmental Individual Differences Relationship-based model (DIR), primarily utilized by the Rebecca School, does not contribute to a finding that the district would have failed to properly implement the student's April 2011 IEP.

## **2. Sensory Issues**

The district also asserts that the IHO erred in finding that the assigned public site school could not address the student's sensory needs because it did not offer a sensory gym and would not have been able to provide the student with a quiet place as needed (IHO Decision at p. 21). On the contrary, the hearing record reflects that the student's need for a quiet place could have been met at the assigned public school site, in that the student would be provided access to either the office of the assistant principal or the counselor and would be accompanied by his 1:1 paraprofessional (Tr. pp. 156, 184).

With regard to the lack of a sensory gym in the assigned school, the teacher of the proposed classroom testified that, although the school did not have a sensory gym, sensory equipment was located in the OT/PT room on the first floor of the school (Tr. pp. 207-09). She testified that her students used the OT/PT room when they needed to "cool off" and students

would go there to use various sensory equipment, depending on their sensory needs (Tr. p. 219). She also indicated that she was provided with sensory equipment from the OT/PT room and that her classroom contained a sensory corner, equipped with a variety of sensory materials for students who required sensory input, including bean bags, squeaky balls, bouncing balls to sit on, and weighted vests (Tr. pp. 155-56, 208, 218). She further testified that the occupational therapist in the school trained the paraprofessionals to apply pressure to students who needed it and that the sensory corner was utilized for this purpose (Tr. pp. 155, 218).

In view of the foregoing evidence which was examined in the alternative, there is no basis to conclude that, if the student had enrolled in the assigned public school site and the district been required to implement his IEP, that the district would have deviated from the April 2011 IEP in a material or substantial way and thereby denied the student a FAPE.

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE, the necessary inquiry is at an end and there is no need to reach the issues as to whether the Rebecca School was an appropriate unilateral placement for the student or whether equitable considerations support the parents' requested relief and the necessary inquiry is at an end (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated March 26, 2012, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2011-12 school year; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated March 26, 2012, is modified by reversing that portion which ordered the district to pay for the costs of the student's tuition at the Rebecca School for the 2011-12 school year and provide transportation for the student to and from the Rebecca School.

**Dated:**           **Albany, New York**  
                          **March 31, 2014**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**