



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-059

**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, Brian J. Reimels, Esq., of counsel

The Law Offices of Steven L. Goldstein, attorneys for petitioners, H. Jeffrey Marcus, 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 them for the costs of the student's tuition at the Rebecca School for the 2012-13 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**

I was appointed to conduct this review on October 29, 2014. The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.<sup>1</sup> At the time of the impartial hearing, the student was enrolled in the Rebecca

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<sup>1</sup> Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolve the issues presented in this appeal.

School (Tr. pp. 279, 394). On February 14, 2012, the CSE convened for an annual review of the student's program and to develop an IEP for the 2012-13 school year (Dist. Exs. 1 at pp. 1, 10; 4).<sup>2</sup> For the 2012-13 school year, the February 2012 CSE recommended a 12-month placement for the student in a 6:1+1 special class in a specialized school, with related services comprised of speech-language therapy, occupational therapy (OT) and counseling (Dist. Exs. 1 at pp. 7-8; 4 at p. 1).

In a letter dated June 15, 2012, the parents advised the district that they rejected the February 2012 IEP, and notified it of their intent to unilaterally place the student in the Rebecca School for summer 2012 (Parent Ex. G). By final notice of recommendation (FNR) dated June 21, 2012, the district summarized the contents of the February 2012 IEP and identified the particular public school site to which the student had been assigned to attend for the 2012-13 school year (Dist. Ex. 5). In a letter dated June 25, 2012, the parent acknowledged receipt of the June 2012 FNR, and advised the district that she planned to visit the assigned public school site; however, "based on experience," she thought that the district failed to offer the student a free appropriate public education (FAPE) and that the February 2012 IEP was not appropriate (Parent Ex. F at pp. 1, 3). The parent further described her familiarity with the assigned public school site, as well as her concerns with whether it could provide the student with a safe and appropriate environment (*id.* at pp. 2-3). In a letter to the district dated August 16, 2012, the parents' attorney reiterated the parents' objections to the February 2012 IEP, and advised that the student would remain at the Rebecca School for the balance of the 2012-13 school year (Parent Ex. D). He further advised that they planned to request an award of tuition reimbursement for 2012-13 school year and that a formal request for an impartial hearing would follow (*id.* at p. 2). In a due process complaint notice, dated September 10, 2012, the parents alleged that the district failed to offer the student a FAPE for the 2012-13 school year (*see* Parent Ex. A).

On September 25, 2012, an impartial hearing convened and concluded on January 30, 2013, after four days of testimony (Tr. pp. 1-487). In a decision dated March 8, 2013, an IHO concluded that the district did not provide the student with a FAPE for the 2012-13 school year, that the Rebecca School constituted an appropriate unilateral placement and that equitable considerations supported the parents' request for relief; however, he denied their request for an independent educational evaluation (IEE), additional services and a Nickerson letter (IHO Decision at pp. 36-46).<sup>3</sup> As relief, the IHO directed the district to reimburse the parents for any tuition costs paid to the Rebecca School, and to pay the balance of any monies owed directly to the Rebecca School for the 2012-13 school year (*id.* at p. 45).

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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 in this proceeding (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>3</sup> Since neither party appeals the IHO's finding that the Rebecca School constituted an appropriate unilateral placement and his determination to deny the parents' requests for an IEE, additional services, and a Nickerson letter, the IHO's determinations are final and binding upon the parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

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

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and parents' answer thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal pertains to the procedural and substantive appropriateness of the February 2012 IEP. The parents additionally argue the merits of certain claims that the IHO did not address, which include the following allegations: 1) the district's failure to advise the parents with an assigned public school site prior to the beginning of the 2012-13 school year; 2) the February 2012 CSE was not properly composed; 3) the annual goals were designed to be implemented in the Rebecca School; 4) the February 2012 CSE omitted the provision of parent counseling and training in the IEP; 5) the February 2012 CSE failed to incorporate the necessary transition support services in the IEP; 6) the district predetermined the February 2012 IEP; and 7) the district failed to provide the parents with prior written notice.<sup>4</sup>

#### 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. Mam aroneck Union Free Sch.

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<sup>4</sup> Recent district court decisions have reviewed the scope of a respondent's right to cross-appeal issues that were not addressed by the IHO (F.B. v. New York City Dep't of Educ., 2013 WL 592664, at \*14 [S.D.N.Y. Feb. 14, 2013] [acknowledging the lack of uniformity within the district courts as to whether a respondent must cross-appeal, but remanding to the SRO issues not addressed by the IHO]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*9-\*10 [S.D.N.Y. Nov. 27, 2012] [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also D.N. v. New York City Dep't of Educ., 2012 WL 6101918 [S.D.N.Y. Dec. 10, 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). However, these decisions do not suggest that such bald assertions such as the parents' claim that the district failed to provide prior written notice to the parents—as set forth in their answer—provide a basis upon which the SRO is required to construct legal or factual arguments on a party's behalf when the party has not elected to do so in order to resolve issues that the IHO did not address (see Application of the Dep't of Educ., Appeal No. 12-177). Accordingly, I decline to consider the parents' claim that the district failed to provide prior written notice, which was not developed during the impartial hearing or on appeal.

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. February 2012 CSE Process**

#### **1. February 2012 CSE Composition**

##### **a. District Representative**

The parents assert that the lack of duly qualified district representative and properly qualified special education teacher rendered the February 2012 CSE improperly constituted and contributed to a denial of a FAPE. As more fully explained below, there is no evidence in the

hearing record to suggest that there was any procedural deficiency with regard to the composition of the February 2012 CSE that rose to the level of a denial of a FAPE to the student.

State and federal law require the attendance of a district representative at the CSE meeting (see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; 8 NYCRR 200.3[a][1][v]). Such a member of the CSE is described as a representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist, provided that such individual meets the above statutory qualifications (8 NYCRR 200.3[a][1][v]).

In the instant matter, the hearing record reflects that the following individuals attended the February 2012 CSE meeting: a district representative, who also served as a school psychologist, a district special education teacher, a district social worker, the parent, a Rebecca School social worker, a social work intern also from the Rebecca School, and an additional parent member (Tr. pp. 38-40, 398-99; Dist. Exs. 1 at p. 13; 4 at p. 1). Additionally, the student's teacher from the Rebecca School participated in the February 2012 CSE meeting via telephone (Tr. p. 39; Dist. Exs. 1 at p. 13; 4 at p. 1). The hearing record further indicates that in this instance, the district representative ran the February 2012 CSE meeting and posed the questions to the meeting participants (Tr. pp. 399-400). Although there was no testimony from the district representative that would have illustrated the extent of his qualifications to serve in that capacity, the hearing record suggests that the February 2012 CSE engaged in a two-hour discussion about the student's proposed program and alternative programs (Tr. p. 399; Dist. Ex. 4 at p. 4). In view of the foregoing, there is nothing in the hearing record to suggest that the district representative lacked sufficient qualifications, which in turn (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]).

### **b. Special Education Teacher**

The parents also maintain that the district special education teacher lacked the proper qualifications to serve in her role. In the instant case, there is no evidence to show that the district special education teacher who took part in the February 2012 CSE would not have been responsible for implementing the February 2012 IEP; however, even assuming that this alone constitutes a violation of the IDEA, the hearing record lacks any evidence to show that this violation impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606, 646-47). This is particularly so given that during the February 2012 CSE meeting, the student's special education teacher at the Rebecca School discussed the student's needs, present levels of performance, management needs, the student's need for a 12-month program

and annual goals and short-term objectives with the CSE (Tr. pp. 62-65, 67-68, 72-73, 75, 77, 108, 335-36; Dist. Ex. 1 at pp. 1-2). Moreover, the hearing record reflects that the CSE considered a December 2011 Rebecca School progress report, prepared in part by the student's Rebecca School teacher (Tr. pp. 336-37; Dist. Exs. 2; 4 at p. 1). As the student's Rebecca School teacher and the Rebecca School social worker—who were directly acquainted with this student's particular needs—were able to fully participate in the February 2012 CSE meeting, and given that the CSE had adequate evaluative information to recommend an appropriate program for the reasons stated below, the participation of a district special education teacher who would not have been able to execute the IEP did not rise to the level of a denial of a FAPE in this instance (A.H., 394 Fed. App'x at 720-21; see R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at \*6 [S.D.N.Y. Mar. 26, 2014]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*7 [S.D.N.Y. Dec. 8, 2011]).

## 2. Predetermination

Turning next to the parents' allegations that the district impermissibly predetermined the student's program, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] [noting that "predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at \*7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at \*6-\*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506-07 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D.-S., 2011 WL 3919040, at \*10-\*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process" (Dirocco v. Bd. of Educ., 2013 WL 25959, at \*18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (Dirocco, 2013 WL 25959, at \*18).

Here, the evidence in the hearing record, and in particular, the parent's testimony reflects a pattern of active and meaningful parent participation and further suggests that the district afforded the parent input in the development of the February 2012 IEP (Tr. pp. 65-66, 75, 400-

06, 409; Dist. Exs. 1 at p. 11; 4 at p. 4). According to the parent, the February 2012 meeting lasted at least two hours (Tr. p. 399). The hearing record further indicates that the student's Rebecca School teacher voiced his disagreement with the recommendation for a 6:1+1 special class placement for the student (Tr. pp. 300-01). In addition, the February 2012 CSE provided the parent with a copy of the meeting minutes following the meeting (Tr. p. 85).

To the extent that the parents asserted that the February 2012 CSE predetermined the recommendation to place the student in a 6:1 +1 special class placement, the hearing record shows that the February 2012 CSE considered, but opted against placement of the student in a special class within a community school, having determined that it would not offer the student the support he required on a 12-month basis (Dist. Ex. 1 at p. 11). Additionally, the February 2012 CSE concluded that placement in a 12:1+4 special class within a special school constituted an overly restrictive to address the student's academic, social/emotional and language needs (id. at p. 12). Although the district social worker testified that the parent did not request that the student remain at the Rebecca School for the 2012-13 school, nor did the parent request that the student's placement recommendation be deferred to the Central Based Support Team (CBST), the parent testified that she suggested to the district representative that the student continue his enrollment at the Rebecca School (Tr. pp. 105-06, 401). Ultimately, however, the February 2012 remained committed to decision to place the student in a 6:1+1 special class placement – because it was appropriate to meet the student's needs (Tr. pp. 79-80). Therefore, once the district determined that the 6:1 +1 special class placement within the district was appropriate, it was under no obligation to consider a more restrictive placement—such as a placement outside of the district (cf. B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*9 [E.D.N.Y. Mar. 31, 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*15 [S.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"). Based upon the foregoing, the parents' assertions are not supported by the evidence in the hearing record and must be dismissed.

## **B. February 2012 IEP**

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

Contrary to the IHO's findings, the district asserts that the February 2012 IEP adequately described the student's present levels of academic achievement and functional performance, the sensory and physical needs, and the information reflected in the student's December 2011 Rebecca School progress report, which was in part prepared by the student's Rebecca School teacher who participated in the February 2012 CSE meeting. A review of the evidence in the hearing record supports the district's claims, and therefore, the IHO's findings must be reversed.

Among the other 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 NYC RR 200.1[ww][3][i]). 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, a review of the evidence reveals that the February 2012 CSE considered the following evaluative information in the development of the February 2012 IEP: a December 2011 Rebecca School Interdisciplinary Transition Program Report of Progress Update, in addition to input from the student's teacher (Tr. pp. 41-42, 102-03; Dist. Exs. 2; 4 at p. 1). Additionally, the February 2012 CSE discussed the student's previous IEP; however, it was not before it at the time of the CSE meeting (Tr. p. 105).

The district social worker testified that although the Rebecca School did not assign the student a grade level to correspond to these subjects, based on information from the student's teacher regarding the student's skills, the February 2012 CSE noted the student's instructional levels in reading (second grade) and mathematics (second grade) (Tr. pp. 44, 47-50; Dist. Ex. 1 at p. 10). Furthermore, as reflected in the December 2011 Rebecca School report, the student could read and write words associated with preferred objects or people (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 2). The February 2012 IEP also indicated that the student could identify letter sounds, and that he was developing an increased interest in books (see id.). Additionally, also in accordance with the December 2011 Rebecca School report, the February 2012 IEP reflected that the student read short passages and could illustrate an accurate picture of events he had experienced (see id.). The February 2012 IEP further reflected, consistent with the December 2011 Rebecca School report, that the student needed help to make the connection of letter sounds to form words and that the student needed to broaden his exposure to new literature (see id.).

In mathematics, the February 2012 IEP indicated that the student needed to add and make change with his money, consistent with the goals of the student's program at the Rebecca School, which had a particular focus on math in relation to his daily living (Dist. Exs. 1 at p. 1; 2 at p. 3). Likewise, the February 2012 IEP also contained information with respect to the activities of daily living (ADL) skills that the February 2012 CSE gleaned from the December 2011 Rebecca School report, which included that the student needed to increase his independence with daily living skills throughout the community (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 12). Additionally, and in accordance with the December 2011 Rebecca School report, the February 2011 IEP revealed that the student enjoyed cooking and taking walks in the community; however, the February 2012 IEP also indicated that the student needed to learn basic information about staying safe in the community (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at pp. 3-4).

Regarding the student's speech-language needs, the February 2012 IEP reflected, consistent with the December 2011 Rebecca School report, that the student communicated verbally, mostly with short phrases or single words (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 1). According to the December 2011 Rebecca School report, as indicated in the February 2012 IEP, the student's communication skills had shown an increase in the ability to stay engaged and focused on activities for 20 minutes without taking a break (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at pp. 1, 12). As reflected in the February 2012 IEP, the Rebecca School report also indicated that the student's ability to stay connected and maintain a meaningful back and forth interaction depended on his level of motivation; however, the IEP also noted that the student had made real gains in his ability to interact with others and participate in a range of activities (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 12, 14). The December 2011 Rebecca School report also reflected that the student maintained 12 to 15 circles of communication around a wider array of activities, such as making a larger variety of snacks, engaging in shared problems solving to find material, exploring toys, or asking an adult to read a book to him and independently comment on the pictures in the book (Dist. Ex. 2 at p. 12). Furthermore, the December 2011 Rebecca School report described the student's ability to maintain three to five verbal circles of communication with his peer given moderate support as "emerging" (id. at p. 13). Additionally, the December 2011 Rebecca School report reflected that the student was spontaneously opening circles of communication more frequently by independently requesting an activity in a session or by sharing a past experience with the therapist (id.). Consistent with the December 2011 Rebecca School report, the February 2012 IEP reflected that the student needed to expand the length of his utterances (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at pp. 1, 14).

In the area of social/emotional development, the February 2012 IEP indicated, as set forth in the December 2011 Rebecca School progress report, that the student sought attention from staff members and peers at school (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 2). The February 2012 IEP further noted, consistent with the December 2011 Rebecca School report, that the student needed to foster his initiation appropriately with others (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 1). However, the February 2012 IEP also reflected, per the Rebecca School report, that the student was very aware of others around him and their emotional state, and that he made appropriate comments that were related to other peers in the classroom (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 2). The February 2012 IEP further indicated that the student needed to remain engaged in an activity until completion (Dist. Ex. 1 at p. 1; see Dist. Ex. 2 at p. 1).

Regarding the student's health and physical development, according to the February 2012 IEP, the student had made significant improvement in the area of motor planning (Dist. Ex. 1 at p. 1). Furthermore, despite the parents' claims that the February 2012 IEP did not adequately detail the student's sensory needs, in accordance with the December 2011 Rebecca School report, the February 2012 IEP revealed that the student had made significant improvements in his ability to attend to various types of sensory input (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p. 10). The February 2012 IEP further noted that, with verbal support and moderate tactile and visual assistance, the student could tie his shoes (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p. 11). Moreover, as per the February 2012 CSE meeting minutes, which reflected the CSE's discussion, the February 2012 IEP indicated that the student was sensitive to loud noises (compare Dist. Ex.

1 at p. 1, with Dist. Ex. 4 at p. 4). Additionally, and as reflected in the December 2011 Rebecca School report, the February 2012 IEP noted that the student could tolerate eight to ten minutes on the inclined treadmill with less retreating than in the past (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 2 at p. 10).

Additionally, there is no support in the hearing record for the parents' claims that the February 2012 IEP failed to include sufficient information regarding the student's diagnosis of Pediatric Acquired Neurological Disorder Associated with Strep (PANDAS) (Tr. p. 406; Dist. Ex. 1 at p. 2). According to the district social worker, the February 2012 CSE derived the information regarding the student's physical development from the parent (Tr. pp. 65-66). Although the parent testified that she raised concerns about the student's condition with the February 2012 CSE, and that the CSE failed to carefully consider her concerns, there was no documentary evidence before the February 2012 CSE describing the student's condition; rather, the parent agreed to submit documentation regarding the student's medical needs, but the hearing record reflects that at no time did she forward such documentation to the CSE (Tr. pp. 112-13, 409-10; Dist. Ex. 4 at p. 5). Furthermore, as reflected in the February 2012 IEP, and consistent with CSE meeting minutes and testimony from the district social worker, at the time of the February 2012 CSE meeting, the student no longer took antibiotics to treat the PANDAS disorder (Tr. pp. 65-66; Dist. Exs. 1 at p. 2; 4 at p. 5). Moreover, consistent with the discussion at the February 2012 CSE meeting, the February 2012 IEP reflected that although the student had a diagnosis of a seizure disorder, the student had not suffered a seizure in several years (Tr. pp. 66, 97; Dist. Ex. 1 at p. 1). Likewise, the student's Rebecca School teacher, who took part in the February 2012 CSE meeting, testified that during the 2011-12 school year, the student had not suffered a seizure, nor had he exhibited any symptoms associated with PANDAS (Tr. p. 325). Lastly, also in accordance with the February 2012 CSE meeting minutes, the resultant IEP reflected that the student had a number of food allergies, including allergies to dairy, soy, all nuts and gluten (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 4 at p. 5).

Based upon the foregoing, a review of the evidence in the hearing record demonstrates that the February 2012 IEP accurately described the student's present levels of academic achievement, social development, and physical development—and in particular, the student's sensory and fine motor needs—and that the description of the student's needs was consistent with the evaluative information available to the February 2012 CSE (see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see also P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 512 [S.D.N.Y. 2013] [holding that an IEP need not specify in detail every deficit arising from a student's disability so long as the CSE develops a program that is "designed to address precisely those issues"]). Accordingly, the IHO's finding that the February 2012 IEP's present levels of performance were insufficient and inappropriate must be reversed.

## **2. Annual Goals**

The district next asserts that the February 2012 IEP included appropriate annual goals and short-term objectives that addressed the student's deficits pertaining to academics, ADLs, OT, speech and language and counseling. As explained more fully below, the hearing record supports the district's contention.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The parents contend that the annual goals contained in the student's February 2012 IEP were inappropriate because, they were taken directly from draft goals provided by Rebecca School report, and were designed for implementation in a DIR model.<sup>5</sup> However, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the goals and objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]). In this instance, the February 2012 IEP contained 11 annual goals and 40 short-term objectives designed to address the student's needs with respect to academics, ADLs, OT, speech and language, and within the social/emotional domain (Dist. Exs. 1 at pp. 3-7; 4 at pp. 2-4). Regarding the development of the annual goals and short-term objectives, the district social worker explained that the student's Rebecca School teacher provided the goals to the February 2012 CSE, and that the CSE reviewed them with the parent and the teacher, and discussed them to determine if the goals remained appropriate (Tr. pp. 74-75, 108; Dist. Ex. 4 at pp. 2-4).<sup>6</sup> Regarding appropriateness, the student's Rebecca School teacher confirmed that at the time that the CSE drafted the February 2012 IEP, the IEP included skills on which the student needed to

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<sup>5</sup> Important but noticeably absent from the parents' allegations is that the goals, in fact, were not capable of being implemented in a 6:1+1 special class.

<sup>6</sup> To the extent that the IHO concluded that the February 2012 IEP's annual goals were not appropriate because the February 2012 CSE discussed them at the meeting but the district typed them into the document following the meeting, this does not rise to the level of a denial of a FAPE, because "there is no requirement in the IDEA or case law that the IEP's statement of goals be typed up at the CSE meeting itself, or that parents or teachers have the opportunity to actually draft the goals by hand or on the computer themselves, or that the goals be seen on paper by any of the CSE members at the meeting" (*E.A.M. v. New York City Dep't of Educ.*, 2012 WL 4571794, at \*8 [S.D.N.Y. Sept. 29, 2012], quoting *S.F. v. New York City Dep't of Educ.*, 2011 WL 5419847, at\*11 [S.D.N.Y. Nov. 9, 2011]).

work (see Tr. pp. 328-32).

With regard to the parents' assertion that the February 2012 IEP goals did not include baselines of the student's then-current functioning, appropriate methods of measurement, or target levels against which to measure the student's progress, State regulations do not require "baseline" functioning levels to be included in IEP goals. Furthermore, the parents assert no harm to the student as a result of these alleged deficiencies. Additionally, the IEP reflected that the student's progress toward meeting the goals would be reflected in reports issued at the same time that school report cards were issued and each goal contained criteria for mastery (e.g., with 80 percent success on eight out of ten opportunities), indicating target levels against which to measure the student's progress over the course of the 2012-13 school year (Dist. Ex. 1 at pp. 3-7). In view of the foregoing, the hearing record reflects that the annual goals and short-term objectives targeted the student's identified areas of need and provided sufficient information to guide a teacher in instructing the student and measuring his progress.

### **3. Consideration of Special Factors—Interfering Behaviors**

The district also alleges that the IHO erred to the extent that he concluded that the lack of a BIP from the February 2012 IEP contributed to a denial of a FAPE, in light of the student's sensory needs. Conversely, the parents maintain that the February 2012 CSE had an obligation to conduct an FBA and develop a BIP for the student in light of the student's sensory needs and anxiety. As stated more fully below, the hearing record supports the district's claim.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior and shall consider whether the child needs assistive technology devices and services (20 U.S.C. § 1414[d][3][B][i], [v]; 34 CFR 300.324[a][2][i], [v]; see 8 NYCRR 200.4[d][3][i], [v]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3], [6]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*13-\*16 [E.D.N.Y. Mar. 31, 2014]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

I first turn to the district's assertion that the student did not require a BIP and the February 2012 IEP adequately addressed his sensory needs. In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the

student to receive a [F APE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, the "student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

Here, it is undisputed that the February 2012 CSE did not conduct an FBA or develop a BIP for the student (Dist. Ex. 1 at p. 2). However, there was no information before the February 2012 CSE that suggested that the student engaged in behaviors that interfered with his learning or that of others (Tr. pp. 71-72, 109; see Dist. Ex. 2). On the contrary, the student's teacher testified that during the 2011-12 school year, the Rebecca School had not conducted an FBA for the student, nor did the student have a BIP in place (Tr. pp. 323-24). Likewise, at the time of the February 2012 CSE meeting, neither the student's teacher nor the parent requested the creation of a BIP for the student (Tr. pp. 71-72).

Although the IHO determined that the student required a BIP in light of his sensory needs, there was no evidence in the hearing record to suggest that at the time of the February 2012 CSE meeting, the student's sensory needs interfered with his learning (IHO Decision at p. 34; Dist. Ex. 2).<sup>7</sup> On the contrary, the district social worker did not recall the student's teacher advising the CSE that the student made any loud noises when the student's sensory system became overwhelmed (Tr. p. 110). In any event, a review of the February 2012 IEP reveals that it addressed the student's sensory needs. More specifically, according to the February 2012 IEP, the student had made significant improvements in his ability to attend to various types of sensory input (Dist. Ex. 1 at p. 2). The February 2012 IEP also cautioned that the student was sensitive to loud noises, and further called for the provision of sensory input and breaks (*id.*). Finally, the February 2012 IEP included an annual goal that targeted improvement of the student's ability to use sensory information to understand and effectively interact with people and objects in school and home environment (*id.* at p. 4). Corresponding short-term objectives addressed the student's engagement in the therapeutic activities with a peer for 10-15 minutes, during and following vestibular input, improvement of the student's ability to attend to various types of sensory input by anticipating in sensory activities (treadmill, swinging, trampoline, etc.) for five to 10 minutes without retreating from the task, and wearing specialized headphones while listening to modulated music on the therapeutic listening protocol for a 10-15 minute interval (*id.*).

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<sup>7</sup> The IHO further found that the Rebecca School addressed the student's needs by allowing him to have breaks when necessary and by keeping the classroom as quiet as possible; however to the extent that the IHO relied on information not before the February 2012 CSE, such reliance is impermissible in view of the Second Circuit's adoption of the prospective IEP analysis principle in *R.E.* (*R.E.*, 694 F.3d 167). Moreover, evidence of the alleged appropriateness of a private school placement does not establish that the program offered by a school district is inappropriate (*Application of the Dep't. of Educ.*, Appeal No. 11-141, *Application of a Student with a Disability*, Appeal No. 08-043; see e.g., *M.B. v. Arlington Cent. Sch. Dist.*, 2002 WL 389151, at \*8 [S.D.N.Y. Mar. 12, 2002]; *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1037 [3d Cir. 1993]; *Application of a Child with a Disability*, Appeal No. 06-062; *Application of a Child with a Disability*, Appeal No. 06-054).

In the present case, the hearing record supports the district's contention that the student did not require an FBA or a BIP at the time of the February 2012 CSE meeting, that the CSE properly considered special factors related to the student's behavior that impeded his learning, and that the February 2012 IEP appropriately addressed the student's behavioral and sensory needs.

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

The district also maintains that the February 2012 CSE's recommendation to place the student in a 6:1+1 special class was appropriate to meet the student's special education needs, because it would have provided him with a 12-month school year, and the additional adult support he required in his academic and social areas.

Consistent with the student's needs as identified in the evaluative data reviewed by the February 2012 CSE, the 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 (Dist. Ex. 1 at pp. 7-8). State regulations provide that a 6:1+1 special class placement is designed for the instruction of students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]).

According to the district social worker, the February 2012 CSE recommended placement of the student in a 6:1+1 special class within a specialized school, because it would offer him more adult support in academic and social areas, and within the specialized school, the student received programming on a 12-month basis (Tr. pp. 79-80). The February 2012 CSE further determined that the student required a 12-month program in order to have all of his activities reviewed and reinforced, because the student needed "that kind of reinforcement," and based on his teacher's opinion that the student required a 12-month program for consistency (Tr. pp. 69-70). Additionally, according to the CSE meeting minutes, the student had increased his ability to initiate with adults and peers (Dist. Ex. 4 at p. 1). Furthermore, the February 2012 CSE recommended the provision of related services comprised of two 45-minute sessions per week of individual speech-language therapy, three 45-minute sessions per week of speech-language therapy in a dyad, three 45-minute sessions per week of individual OT, two 45-minute sessions of OT in a group of three and two 45-minute sessions per week of counseling on an individual basis (Dist. Ex. 1 at pp. 7-8; 4 at p. 1).<sup>8</sup>

In addition, contrary to the IHO's conclusion, the hearing record reflects that the February 2012 IEP contained specific information regarding accommodations and strategies for the student based on his special education needs (IHO Decision at p. 32; Dist. Ex. 1 at p. 2). Specifically, the February 2012 CSE incorporated the following management needs into the IEP,

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<sup>8</sup> The February 2012 IEP appears to contain a typographical error with regard to the provision of speech-language therapy; however, in this instance, even assuming that this error constituted a procedural violation, the hearing record does not support a finding that it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefit upon which to conclude that the district did not offer the student a FAPE for the 2012-13 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii] M.H., 2011 WL 609880, at \*11).

which included the following environmental and human or material resources needed to address the student's needs, visual and verbal cues, direction and refocusing, use of a written schedule and sensory input and breaks (Dist. Ex. 1 at p. 2). The hearing record further indicates that the February 2012 CSE created the management needs based on suggestions from the student's teacher and the Rebecca School transition plan (Tr. pp. 67-69).

In view of the foregoing, the hearing record demonstrates that the February 2012 CSE recommendation to place the student in a 6:1+1 special class placement in a specialized school was reasonably calculated to meet the student's special education needs, and the IHO's finding that a 6:1+1 special class placement was not appropriate, must be reversed.

### **5. Parent Counseling and Training**

Turning next to the parents' claim that the omission of parent counseling and training from the February 2012 IEP resulted in a denial of a FAPE to the student, State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4 [d][2][v][b][5]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). State regulations further provide for the provision of parent counseling and training for the parents of students with autism to enable them "to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided a "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR ] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 1, 2014]).

In this instance, it is undisputed that the February 2012 CSE did not include a provision for parent counseling and training in the resultant IEP (Dist. Ex. 1). In any event, I find that although the February 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (F.L., 553 Fed. App'x at 7; M.W., 725 F.3d at 141-42; R.E., 694 F.3d at 191).

## 6. Transition Services

The district next asserts that the February 2012 IEP contained appropriate services that would address the student's transition needs upon graduation. As more fully explained below, a review of the hearing record supports the district's contention.

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401 [34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1 [fff]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401 [34][B]-[C]; 8 NYCRR 200.1 [fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414 [d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4 [d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). As recently noted by one district court, "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6, \*9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovey, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

In this case, the district social worker testified that the student's Rebecca School teacher and therapists created the February 2012 IEP's measurable postsecondary goals (Tr. p. 72). Moreover, a review of the transition plan in the June 2011 IEP demonstrates that it incorporated the required areas, and reflected the student long-term goals for living, working and learning as

an adult (Dist. Ex. 1 at p. 2).<sup>9</sup> Specifically, the February 2012 IEP reflected the student's plan to receive education/training for future employment, be employed with maximum supports, and to live independently with maximum adult support (*id.* at pp. 1-2). Transition needs incorporated into the February 2012 IEP provided that the student's school would refer him to ACCES-VR, where he would learn vocational/career skills (*id.* at p. 2).

To further support the student's needs related to transitioning in post-secondary activities, the February 2012 CSE created annual goals with corresponding short-term objectives to assist the student in developing skills related to post-secondary activities (see Dist. Ex. 4 at pp. 3-5). For example, the February 2012 CSE developed an annual goal related to academics, with two corresponding short-term objectives that targeted the student's needs pertaining to mathematics skills within the community setting, which included improvement of the student's ability to present a cashier with the correct dollar denominations and combining \$1.00 and \$5.00 bills to create amounts up to \$20.00 (*id.* at p. 3). In addition, the February 2012 IEP included an annual goal related to the student's ADL skills, with corresponding short-term objectives that addressed the following skills: his ability to gather ingredients needed to complete a recipe, when read a list by a staff member; his ability to follow a sequence of three steps as part of a recipe or experiment after it has been modeled by a staff with one redirection; the student's ability, when provided with visuals, to identify strangers vs. non-strangers; the student's ability to identify community helpers by identifying their occupation, telling what they do in the community and how to identify them (clothing, uniform) when provided with visual; his ability to recognize the location of his peers while in the community and stay with them, with staff prompting; and the

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<sup>9</sup> To the extent that the parents claim that the February 2012 CSE's failure to include a provision for transitional support services in the IEP contributed to a denial of a FAPE, the hearing record does not contain evidence indicating that such services were required pursuant to State regulation, which requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). To the extent that it could be argued that there was any change at all in the restrictiveness of the settings between the Rebecca School and the public school program, such change from a nonpublic school to a special class in a specialized public school—with no change in access to regular education peers—would appear to have been minimal, which further diminishes a need to recommend transitional support services in the student's IEP. Second, there is no suggestion that the State regulation regarding transition support services for teachers was intended for certified special education teachers of highly intensive special class settings, such as the 6:1+1 special class placement recommended in this case. Instead, it is much more likely that an individual with such experience would be the provider of transitional support services to another teacher having either less familiarity or formal training in working with a student with autism (e.g., a regular education teacher). Finally, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (*A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013]; *F.L. v. New York City Dep't of Educ.*, 2012 WL 4891748, at \*9 [S.D.N.Y. Oct. 16, 2012], *aff'd*, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; *A.L. v. New York City Dep't of Educ.*, 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; *E.Z.L. v. New York City Dep't of Educ.*, 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], *aff'd sub nom. R.E.*, 694 F.3d 167; see *R.E.*, 694 F.3d at 195).

student's ability to guide a member of the staff to a preferred destination, with staff support (*id.* at pp. 3-4). Lastly, the February 2012 IEP included another annual goal related to the student's ADL needs designed to improve the student's independence in activities of daily living for functional school and home participation, with a corresponding short-term objective that targeted the student's ability to complete a 3-4 simple meal prep activity with minimal verbal and visual support within a 3-minute session (*id.* at p. 5).

Based on the above information, the hearing record supports a finding that, as a whole, the February 2012 IEP adequately set forth the student's transition needs and goals consistent with State regulation.

### **C. Challenges to the Assigned Public School Site**

#### **1. Transmittal of February 2012 IEP**

Next, the IHO found that, to some degree, the parent rebutted the presumption of mailing the IEP and he further concluded that the district's failure to provide the parents with a copy of the February 2012 IEP hindered their ability to participate in the development of the IEP. Conversely, the district maintains that a review of the evidence in the hearing record supports a finding that it complied with the standard mailing procedure for IEPs, and that the parents did not offer sufficient evidence to rebut the presumption of mailing. As explained more fully below, the IHO's finding must be reversed.

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at \*6). There is no legal authority requiring districts to produce an IEP at the time that the parents demand; districts must only ensure that a student's IEP is in effect at the beginning of each school year and that the parents are provided with a copy (34 CFR 300.322[f], 300.323[a]; 8 NYCRR 200.4[e][1][ii]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

In this particular instance, on June 21, 2012, the district issued an FNR prior to the beginning of the 2012-13 school year (Dist. Ex. 5). However, through their attorney, in a letter to the district dated June 15, 2012, the parents had rejected the February 2012 IEP and indicated that they planned to enroll the student in the Rebecca School for summer 2012, prior to the time that the district became obligated to implement the February 2012 IEP (Parent Ex. G; 20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). Furthermore, the hearing record suggests that the parent actively participated in the February 2012 CSE meeting and further reveals that the CSE provided her with a copy of the CSE meeting minutes at the end of the meeting (Tr. pp. 85, 398-405). Although the district social worker indicated that she did not witness the February 2012 IEP being placed in the mailbox, she described the district's standard procedure for mailing IEPs and explained that the individual who typed the IEP, in this case, the

district special education teacher, finalized it and mailed it to the parents via first class mail within two to three weeks of the CSE meeting (Tr. pp. 85-86, 90-91). In view of the foregoing, even assuming for the sake of argument that the district committed a procedural violation by delaying transmittal of the finalized copy of the IEP, the evidence in the hearing record does not give rise to a conclusion that such a delay impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at \*2; Application of the Dep't. of Educ., Appeal No. 13-032; Application of the Dep't of Educ., Appeal No. 10-070).

## 2. Methodology at Assigned Public School Site

With respect to the parents' challenges and the IHO's findings as to the assigned public school site and, in particular, questions regarding the educational methodology employed in the proposed 6:1+1 special class placement, 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., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; 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]; 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"]).

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., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2014]) 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, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2013]). 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>10</sup> When the Second Circuit spoke 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 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., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on claims regarding implementation of the February 2012 IEP because a retrospective analysis of how the district would have implemented the student's February 2012 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 prior to the time the district became obligated to implement the February 2012 IEP (see Parent Exs. D; G). Therefore, the district is correct that the issues raised and the arguments asserted by the parent 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 a parent 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 in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[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 parent's claims (K.L., 530 Fed.

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<sup>10</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). 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 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 14 01[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79 [2d Cir. Mar. 4, 2013]). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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., 584 F.3d at 420 [the 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.

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 claims that the assigned public school site would not have properly implemented the February 2012 IEP and the IHO's findings on this issue must be reversed.<sup>11</sup>

## VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at the Rebecca School was an appropriate placement or whether equitable considerations support the parents' request for tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; M.L., 2014 WL 1301957 at \*8).

### THE APPEAL IS SUSTAINED.

**IT IS ORDERED THAT** the IHO's decision, dated March 8, 2013, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and which directed the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year.

**Dated: Albany, New York  
November 6, 2014**

**KRISTEN G. CASEY  
STATE REVIEW OFFICER**

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<sup>11</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 996 F. Supp. 2d 269, 271 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir. Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).