



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-098

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the NEW YORK CITY DEPARTMENT OF EDUCATION

Appearances:

Greenberg Traurig, LLP, attorneys for petitioner, Caroline J. Heller, Esq., and Lauren C. Harrison, Esq., of counsel

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for funding for her son's tuition costs at the Rebecca School for the 2010-11 school year. Respondent (the district) cross-appeals those parts of the impartial hearing officer's decision which found that the parent's unilateral placement was appropriate and that equitable considerations favored the parent's request. The appeal must be dismissed. The cross-appeal must be dismissed.

Background

At the time of the impartial hearing, the student was attending an ungraded 8:1+3 special class at the Rebecca School, which the student has attended since April 2007 (Tr. pp. 296, 358).¹ The Rebecca School is a private school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and

¹ This student was the subject of an earlier appeal to this office (see *Application of a Student with a Disability*, Appeal No. 11-006), which annulled an impartial hearing officer's determination that the district failed to offer the student a free appropriate public education (FAPE) and ordered the district to pay for the student's tuition at the Rebecca School for 2009-10 school year (*id.*). The parties' familiarity with the facts underlying that case and the student's educational history is presumed and will not be repeated here in detail.

related services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

As relevant to this appeal, review of a December 2009 interdisciplinary progress report from the Rebecca School revealed that at that time, the student attended a 9:1+4 classroom and received occupational therapy (OT), physical therapy (PT), speech-language therapy, art therapy, and adapted physical education (Parent Ex. R at pp. 1, 15). In addition, the student participated in music therapy in his classroom (*id.* at p. 1). Among other things, the report indicated that the student sought out adults when he initiated play and particularly enjoyed pretend play with adults whereby he assumed the role of his favorite television characters/personalities and enforced rules when his adult counterpart was "too silly" in various ways (*id.*). The report described the student as tending to enjoy physical play including tickle games and chase games that often involved imaginative ideas and role-playing (*id.*). In addition, the student was described as a nurturing "caretaker" of his peers when they were upset or hurt (*id.*). The report stated the student was "a friend to all," and noted his tendency in situations to inform others of what they did that upset a peer, with the motivation to help everyone get along (*id.*). The report noted that the student was usually able to transition between activities and environments within the school with ease (*id.*). In general, the student presented with an under aroused sensory system and responded well to "up-regulating sensory input" that included tickles, bouncing, and running with peers; although his endurance for some of these activities needed improvement (*id.*). The report indicated the student's communication had expanded as he increased his engagement with people around him; he asked questions throughout the school day, and initiated communication with peers and adults in a variety of contexts and for a variety of purposes (*id.*). The report indicated the student required "significant processing time during most interactions," but with such support he could usually communicate his desires (*id.*). The report noted that the student had difficulty altering his play ideas and actions in response to the emotions of others and despite the ineffectiveness of his original strategy, thereby often engaging in familiar repetitive play (*id.*). At the time of the December 2009 report, the student was working on developing his functioning across a range of emotions, specifically when frustrated or confused (*id.*). Following the aforementioned description of the student, the report mentioned that he had asthma and was severely allergic to seafood for which he had an Epi-Pen in the classroom (*id.*). In addition, the report offered details in regard to the student's education/functional emotional developmental levels, academic curriculum, OT, PT, speech-language therapy, and mental health services (*id.* at pp. 1-10). Overall, the report indicated that the student made progress in his ability to relate and communicate since starting school in September 2009 (*id.* at p. 10). The report summarized that the student continued to demonstrate difficulties with functioning across a range of his own emotions and in expanding his engagement and continuous flow of communication with others; difficulties that complicated the student's ability to engage, problem solve, make and connect ideas, think logically, and communicate his wants and needs (*id.*). The report included a recommendation to continue the student's program at that time and indicated specific goals related to the programming areas addressed in the Rebecca School progress note (*id.* at pp. 11-14).

On December 16, 2009, the district conducted a classroom observation of the student at the Rebecca School (Parent Ex. O at p. 1). The observation report included a detailed description of the student's communication and behavior as he interacted with an assistant teacher and at least one peer during play, snack, and math activities (*id.* at pp. 1-2).

The hearing record also includes a May 2010 interdisciplinary progress report update from the Rebecca School (Dist. Ex. 4 at pp. 1, 8; see Parent Ex. R at pp. 1, 15).² The May 2010 report revealed that at that time, the student's classroom had a student-to-teacher ratio of 8:1+4 (Dist. Ex. 4 at p. 1). The report described the student as a "verbal child who communicates in full sentences" (id.). As in the December 2009 report, the May 2010 report noted that the student had asthma and was severely allergic to seafood, for which he had an Epi-Pen in the classroom (id.). The May 2010 update report noted the student's need for verbal cuing to initiate tasks and his continued preference for certain activities, as well as his improvement in OT specific to fine and gross motor skills, shoe tying ability, visual-spatial relations, and ability to engage in novel tasks (id.). Although the student continued to display difficulties with body awareness, the report reflected that he had shown improvement in his ability in this area since the beginning of the school year (id.). The student's OT continued to address his ability to use sensory information to increase engagement with staff and peers, as well as enhance self-regulation and functional participation throughout the day (id. at p. 2). In PT, the student continued to gravitate toward familiar play activities, but was able to participate in novel gross motor tasks introduced to him (id.). At times, the student became upset during structured activities he did not pick or that were challenging for him (id.). PT would continue to address the student's flexibility with activities, general endurance, muscle strengthening, and motor planning (id.). In speech-language therapy, the student made progress in his speech-language therapy goals that primarily focused on his overall pragmatic, receptive and expressive language, and social/emotional skills (id.). With regard to art therapy, although the student was scheduled for two sessions per week in a group of two, his peer's attendance was inconsistent, thereby resulting in the student receiving individual art therapy sessions (id.). The report showed that the art therapy sessions focused on negotiation to assist the student in articulating his specific preferences and to take another person's perspective (id.). Also, the report indicated that the student tended to assume the role of "boss" during sessions where he dictated exactly what he wanted the therapist to do, and would scream if things were not done to his satisfaction (id.). The May 2010 update report also included details related to the student's progress for the goals and objectives relative to each related service and included new goals set by the various providers (id. at pp. 2-7).

In addition to the aforementioned interdisciplinary progress report update (Dist. Ex. 4 at pp. 1-7), another unsigned interdisciplinary progress report update from the Rebecca School dated May 2010 contained the educator's report specific to the student's education/functional emotional developmental levels and academic curriculum (Parent Ex. S). The unsigned progress report update indicated among other things, that since December 2009 the student improved in his ability to self-regulate when emotional and worked through negative emotions with maximum adult support; improved in his ability to say what he wanted using an original idea; improved in his ability to verbally identify a peer's emotion, and with adult support, ask a peer why they were feeling that way; improved in his ability to maintain "circles of communication" with adult support and during moments of frustration or anger; and improved in his ability to answer some fact-based questions with maximum adult support during play (id. at pp. 1-2). The unsigned progress report

² The hearing record contains two copies of the May 2010 interdisciplinary progress report update (Dist. Ex. 4; Parent Ex. R). The district's exhibit included a notation from the educational supervisor at the Rebecca School informing parents that the educator would be submitting his academic and developmental write up by the end of the month (May) in order to get to know "your students and to be able to accurately reflect their progress and future goals" (compare Dist. Ex. 4 at p. 1, with Parent Ex. R at p. 1). Because the exhibits are otherwise similar, the remainder of this decision shall reference the district's exhibit in order to maintain consistency.

included academic progress updates related to literacy (interest in reading, word recognition, comprehension, fluency), math (number sense/1:1 correspondence, money, measurement, time/space), and social studies (id. at pp. 2-4). In addition to the aforementioned goals in the signed progress report update, the unsigned progress report included details related to the student's progress for the educational/DIR/Floortime³ and curriculum goals and objectives, and included new goals for literacy and math set by the educator (id. at pp. 6-8).

The Committee on Special Education (CSE) met on May 26, 2010, to review the student's continued eligibility for special education services and to develop his individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 1). Present at the meeting were the district representative (who also acted as the special education teacher), the school psychologist, the parent, her attorney, an additional parent member, and a social worker from the Rebecca School (id. at p. 2). The student's Rebecca School teacher participated by telephone (id.). The resultant IEP continued the student's classification as a student with autism and recommended placement in a 12-month program consisting of a 6:1+1 special class within a special school, with related services including initiating three weekly 30-minute sessions of individual OT and continuing four weekly 30-minute sessions of individual speech-language therapy, and one weekly 30-minute session of small group (2:1) speech-language therapy (id. at pp. 2, 17). In addition, the May 2010 CSE recommended adapted physical education, program accessibility, and special education transportation (id. at pp. 1, 5).⁴

The May 2010 IEP indicated that the student received diagnoses including a pervasive developmental disorder-not otherwise specified (PDD-NOS), mild mental retardation, and a severe language disorder (Dist. Ex. 1 at pp. 5, 15; Parent Ex. F at p. 1). The IEP also indicated the student was severely allergic to seafood and fish; he could have no seafood or fish in his environment as he could have an anaphylactic response to such exposure; he required an Epi-Pen; and he needed an accessible program because climbing stairs would aggravate his asthma (Dist. Ex. 1 at p. 1; Parent Ex. F at pp. 1-2). The school psychologist indicated that the parent provided the May 2010 CSE with a prescription for a PT evaluation and therapy (Tr. pp. 34-35).⁵ In addition, the hearing record includes prescriptions for OT and limited travel time on a bus with air conditioning due to the student's asthma (Parent Ex. K).⁶ The hearing record further reflects that the school psychologist reviewed both the December 2009 and May 2010 Rebecca School progress report and update prior to the CSE meeting and that both reports were present at the meeting (Tr. p. 27).

³ The acronym "DIR" is defined by the Rebecca School program director as "Developmental Individual Differences Relationship-Based" (Tr. p. 223).

⁴ The hearing record includes a "Waiver of IEP Meeting to Amend IEP After Annual Review" signed by the parent on September 22, 2010, which waived an additional meeting to amend the student's IEP relative to the student's special education transportation needs after the May 2010 annual review had occurred (Dist. Ex. 3).

⁵ The hearing record reflects that the parent brought a prescription for PT dated April 22, 2010 to the May 2010 CSE meeting and that the CSE recommended a PT evaluation be scheduled; upon receiving the evaluation results, the district added one weekly individual 30-minute session of PT to the student's IEP for the 2010-11 school year on November 14, 2010 (Tr. p. 35; see Parent Exs. N at pp. 1-4; U at pp. 1-2; W at pp. 1-7).

⁶ The hearing record reflects that the May 2010 IEP was amended on October 4, 2010 to include special education transportation specific to limited travel time and the student's need to be on a vehicle equipped with air conditioning (Dist. Ex. 1 at p. 1).

In a letter to the student's parent dated June 14, 2010, the district summarized the CSE's recommendations in the May 2010 IEP, and identified the school to which the district assigned the student (Dist. Ex. 5). The letter informed the parent that if the district did not receive a response to its offer by June 28, 2010, the recommended program would be put into effect for the 2010-11 school year (id.). By letter dated June 22, 2010, the parent notified the district that she had concerns over the assigned school's ability to accommodate the student's severe allergy to fish and seafood and that the parent had made an appointment to visit the assigned school on July 13, 2010 (Parent Ex. C). The parent notified the district that she was unilaterally placing the student at the Rebecca School for the 12-month 2010-11 school year and would be seeking "tuition payment" (id.). The parent also requested that the district provide roundtrip transportation to the student on an air conditioned bus (id.).

In a letter dated June 23, 2010, the parent informed the district that she was unable to either accept or reject the district's assigned school by the June 28th date set out in the district's June 14, 2010 letter because the assigned school was unable to give her an appointment to visit the school until July 2010 (Parent Ex. B). The parent therefore requested an extension of time to respond to the offer of the assigned school until after her scheduled 2010 visit (id.). The hearing record reflects that the parent and the student's social worker from the Rebecca School visited the assigned school on July 14, 2010 (Tr. pp. 101, 305, 307; Dist. Ex. 2; Parent Exs. C; Z).

In a letter to the district dated July 21, 2010, the parent rejected the district's assigned school, detailing the reasons she believed that the school was "not tailored to meet [the student's] unique educational needs" and could not "ensure his safety" (Dist. Ex. 6 at pp. 1-3; Parent Ex. D at pp. 1-4). The student subsequently continued attending Rebecca School for the 2010-11 school year (see Parent Exs. P at pp. 1-2; T at p. 1; V).

Due Process Complaint Notice and Response

On February 23, 2011, the parent filed a due process complaint notice requesting an impartial hearing and seeking direct payment of the student's tuition at the Rebecca School for the 12-month 2010-11 school year, reimbursement for the deposit placed by the parent, and "any interest accumulated on a loan withdrawn for the tuition deposit" (Parent Ex. E at p. 5). The parent also sought "time-limited, air-conditioned transportation" to and from the Rebecca School (id.). Specifically, the parent asserted that: (1) the May 2010 IEP did not adequately address the student's health needs because it "failed to mandate a seafood/fish-free environment;" (2) the 6:1+1 program recommendation was insufficient to meet the student's individualized needs and he required additional adult support; (3) the IEP did not recommend PT; (4) the IEP did not acknowledge that both the TEACCH and ABA⁷ methods of instruction had not conferred educational benefit on the student and the IEP did not address methodology at all; (5) the assigned school was not appropriate for the student; and (6) the parent was not provided sufficient time to visit the assigned school in order to evaluate it prior to the start of the school year (id. at p. 2). Additionally, the parent asserted that the assigned school could not have met the student's needs because, among other things, the staff utilized an inappropriate teaching methodology; the gym did not have adequate sensory equipment to meet the student's needs and the student would not have access to the gym on a daily

⁷ While not delineated in the hearing record, it is presumed that ABA stands for "applied behavior analysis," and TEACCH stands for "Treatment and Education of Autistic and related Communication Handicapped Children."

basis; and the student's health needs with regard to his fish and seafood allergy would not be adequately met at the school (id. at pp. 2-4).

On February 28, 2011, the district responded to the parent's due process complaint notice alleging that the assigned school was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 7).

Impartial Hearing and Decision

An impartial hearing convened on May 16, 2011 and concluded on June 13, 2011, after three days of proceedings (Tr. pp. 1-403). In a decision dated July 12, 2011, the impartial hearing officer determined that the district offered the student a free appropriate public education (FAPE) for the 2010-11 school year (IHO Decision at pp. 15, 18). The impartial hearing officer also determined that the Rebecca School was an appropriate unilateral placement for the student and that equitable considerations favored the parent (id. at pp. 16-18).

In determining that the district offered the student a FAPE for the 2010-11 school year, the impartial hearing officer found that the May 2010 IEP "clearly" described the student's special education needs, set forth goals for the student, and described a special education program "to address those needs and those goals" (IHO Decision at p. 15). The impartial hearing officer further determined that the IEP adequately identified the student's allergy and noted that seafood should not be present in his educational environment and that an Epi-Pen should be available (id.). She determined that the IEP also described the student's sensory needs and recommended the use of sensory tools to assist him in maintaining focus, and the IEP explained the educational supports the student required (id.). The impartial hearing officer determined that although the parent argued that the student's needs could not be met in a 6:1+1 program because he required additional adult support, the student's behavioral needs, as described by his Rebecca School teachers, were not severe; therefore, the evidence did not support a finding that the student required a lower student-to-teacher ratio (id.).

The impartial hearing officer also determined that the district's assigned school would have been able to appropriately meet the student's needs because the staff from the school "testified credibly and in detail" how they would address the student's needs as set forth in the IEP (IHO Decision at p. 15). She noted that the witnesses from the assigned school testified that they used sensory materials and explained how they would implement the strategies noted in the May 2010 IEP (id.). She further found that the students in the assigned class were functionally grouped, and that district staff credibly testified how they would address the student's allergies (id.).

Although she determined that the district offered the student a FAPE, the impartial hearing officer found that the Rebecca School was an appropriate placement for the student because it provided an individualized program that addressed the student's academic needs, sensory regulation, and health issues (IHO Decision at pp. 16-17). The impartial hearing officer also noted that the Rebecca School provided needed related services to the student, and the staff testified as to how they addressed his allergies (id.).⁸

⁸ The impartial hearing officer denied the district's argument that reimbursement was barred because the Rebecca School is a for-profit entity (IHO Decision at p. 17).

In addressing equitable considerations, the impartial hearing officer determined that due to the parent's financial situation, equitable considerations supported the direct payment of funds to the Rebecca School in this case (IHO Decision at 18). However, since she had determined that the district had offered the student an appropriate program, the impartial hearing officer denied the parent's request for direct payment of the student's Rebecca School tuition for the 2010-11 school year (id.).

Appeal for State-Level Review

The parent appeals asserting that the impartial hearing officer erred in her determination that the May 2010 IEP adequately met the student's needs. Specifically, the parent alleges that the only people at the CSE meeting with actual knowledge of the student were the Rebecca School staff, and that they told the CSE that the student needed a smaller student-to-teacher ratio than the recommended 6:1+1 class in order for him to learn. The parent also alleges the CSE had no reports or evaluations indicating that the student could learn in a 6:1+1 educational setting; therefore, it had no valid basis upon which the CSE could recommend a 6:1+1 placement. Furthermore, the parent argues that the CSE did not recommend any additional academic support to the student to assist in his transition from the Rebecca School's smaller student-to-teacher ratio classes and that the IEP did not appropriately address the student's allergy.⁹

The parent also argues that the particular school to which the district assigned the student was not appropriate to meet the student's educational and medical needs and would not have been able to properly implement the student's IEP. Specifically, the parent alleges that the assigned school would not have been able to prevent the student from being exposed to allergens; that it did not have enough sensory equipment in its gym and that the student would not have been able to access the gym as frequently as needed; and that the student would likely not be able to receive his speech-language therapy at the school and would have to receive a related services authorization (RSA). Moreover, the parent asserts that the 6:1+1 class at the assigned school was not appropriate because the student's academic levels were not similar to the other students in the recommended class, and the academic ranges of the students in the class exceeded three years. Further, the parent argues that the student required 1:1 support to advance academically and the teaching methodologies used in the class were inappropriate for the student.¹⁰

⁹ In addition to making this allegation under the Individuals with Disabilities Education Act (IDEA), the parent alleges that the district violated Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[1] [1998]) by not accommodating the student's allergy in the May 2010 IEP. However, I remind the parent that New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims (see Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-001; Application of a Child with a Disability, Appeal No. 05-111; Application of the Bd. of Educ., Appeal No. 05-108; Application of the Bd. of Educ., Appeal No. 05-033; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 00-051; Application of a Child with a Disability, Appeal No. 00-010; Application of a Child with a Disability, Appeal No. 99-10). Therefore, I will not address this claim under section 504.

¹⁰ The parent alleges that the impartial hearing officer correctly found that the Rebecca School was an appropriate placement for the student and that the equities favored the parent.

In its answer, the district asserts that the impartial hearing officer correctly determined that it offered the student a FAPE for the 2010-11 school year. Specifically, it argues that the recommended 6:1+1 placement was appropriate given the student's diagnoses and needs; the recommended academic goals were not only appropriate, but they were created from the reports provided by the Rebecca School; the student's PT needs were addressed with the inclusion of PT and OT goals and a request for a subsequent PT evaluation; the lack of a specific methodology on the IEP was appropriate given that the student had not attended the district's schools and his district teacher would best be able to determine, after the student attended the school, which methodology would work for the student; and finally, the student's health issues relating to his allergy were addressed in the IEP.

As to the parent's assertion that the district would not be able to properly implement the student's IEP, the district asserts first that it was not obligated to demonstrate that the students in the assigned class would have been functionally grouped since the student ultimately did not attend the district's class. Moreover, the district asserts that had the student attended the assigned school, his IEP would have been properly implemented, contending, among other things, that the staff at the assigned school was trained in the use of an Epi-Pen, and if the student's classroom teacher and paraprofessional were not, the school nurse would train them; the school would have offered the student the related services mandated in his IEP, and if the school was unable to provide a mandated service, the school would ensure the student received an RSA; the assigned school had an adequate amount of sensory equipment; the students in the assigned class were functionally grouped; and that the use of methodology should be decided by the teacher. The district also asserts that the assigned school would have appropriately addressed the student's allergies. The district further alleges that a State Review Officer does not have the jurisdiction to decide a claim under section 504.

In its cross-appeal, the district asserts that the Rebecca School was inappropriate for the student and that equitable factors do not favor the parent's request. Lastly, the district alleges that the parent is barred from receiving direct funding because she did not present objective evidence of her inability to pay for the tuition.

The parent answered the district's cross-appeal, asserting that the Rebecca School was an appropriate placement for the student given his needs and the 8:1+4 class he was placed in for the 2010-11 school year. The parent also asserts that equitable factors favor an award of tuition and that she is entitled to direct payments from the district to the Rebecca School based on her testimony regarding her financial needs.

Applicable Standards

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR

200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

Discussion

May 26, 2010 IEP

At the outset, I note that the parent does not challenge the accuracy of the present levels of performance or the adequacy of the goals reflected in the May 2010 IEP. The parent asserts that the recommended 6:1+1 placement in the student's May 2010 IEP was inappropriate and was not supported by the evaluative data the CSE had before it or by the information provided by the student's Rebecca School teachers at the meeting. For the reasons set forth below, I agree with the impartial hearing officer that the 6:1+1 placement recommended in the May 2010 IEP was reasonably calculated to enable the student to receive educational benefits.

6:1+1 Placement

A review of the hearing record reveals that the May 2010 CSE had adequate evaluative information available to it in order to determine the student's strengths and needs and support its recommendation for a 6:1+1 placement. Testimony by the school psychologist who attended the May 2010 CSE meeting and who acted as the student's "point person" for the Rebecca School, indicated that she made sure a classroom observation was completed regarding the student and that the CSE obtained the interdisciplinary update reports from Rebecca School for review at the CSE meeting (Tr. pp. 26-27). She noted that prior to the May 2010 CSE meeting, she reviewed the December 2009 interdisciplinary report of progress from the Rebecca School, as well as a May 2010 interdisciplinary progress report update and that the aforementioned reports were available

to the May 2010 CSE at the meeting (Tr. p. 27; Parent Exs. R at pp. 1-15; S at pp. 1-13).¹¹ The school psychologist further indicated that all CSE participants, including the parent and representatives from Rebecca School, were in attendance for the entire meeting and had an opportunity to fully provide their input about the student (Tr. pp. 27-28, 43).

A review of the evidence indicates that the student's present levels of academic achievement and functional performance in the 2010-11 IEP were consistent with the information provided by the student's then-current teachers and related service providers from the Rebecca School (Dist. Exs. 1; 4; Parent Exs. F; I; J; M; N; P: Q-T; W). Testimony by the school psychologist indicated that all of the CSE participants contributed "through[out] the entire IEP process" (Tr. p. 43). Consistent with information from the Rebecca School reports available to the CSE, the minutes of the CSE meeting and testimony by the school psychologist described the student's present levels of performance in detail and discussed the CSE's rationale for making the recommendations that it did for the student (Tr. pp. 34-36; Parent Ex. F at pp. 1-2). Through discussion with the student's teacher from the Rebecca School regarding his estimates of the student's instructional levels, the May 2010 IEP indicated the student's instructional levels for reading decoding (1.5 grade level), reading comprehension (1.2 grade level), and math computation (K.7 grade level), and that academic and social/emotional performance present levels and management needs were identified and agreed upon by all participants, including the parent, and were included in the IEP (Tr. pp. 31-33; Dist. Ex. 1 at p. 3; Parent Ex. F at pp. 1-2). The IEP also included information about the student's academic performance and learning characteristics, communication abilities, social/emotional performance, and health and physical development consistent with, or the same as, the parent's concerns expressed at the CSE meeting and with the details expressed in the aforementioned reports from the Rebecca School (Dist. Ex. 1 at pp. 3-6; Parent Ex. F at pp. 1-2).

In addition, the May 2010 IEP identified and addressed the student's academic and social/emotional management needs (Dist. Ex. 1 at pp. 3-6). In regard to academics, the May 2010 IEP indicated that the student needed use of visual support, modeling, verbal prompting, preferred manipulatives (when being taught), repetition, sensory tools and sensory breaks when needed, and use of up-regulating sensory input to help with the student's hyposensitive sensory profile (under-aroused state) (id. at p. 3). Social/emotional management needs listed on the IEP included access to sensory materials, redirection and visual supports, and use of a bouncy seat to help support the student's upright posture and support his alert attention (id. at p. 4).

With regard to the annual goals and short-term objectives, the school psychologist testified that at the May 2010 CSE meeting, the CSE created academic goals in reading and math as well

¹¹ The hearing record also includes an April 22, 2010 letter addressed "To Whom It May Concern" from the student's developmental/behavioral pediatrician that indicated the student had diagnoses of autism, mild intellectual disability, a severe language impairment, asthma, and an allergy to fish and seafood; that Rebecca School continued to be an appropriate educational setting for the student; that the student required daily medications for his asthma and an Epi-Pen and other medication for his allergies; that the student's school needed to be no farther than 30-45 minutes away from his home; and that the student needed transportation with air conditioning (Parent Ex. I). A medical accommodations form completed by the pediatrician also dated April 22, 2010, contained similar information in regard to the student's asthma and allergies and his need for special transportation (Parent Ex. J at pp. 1-2). I note that the hearing record shows that the concerns voiced in the above described letters were addressed during the May 2010 CSE meeting (compare Dist. Ex. 1 at pp. 1, 3-5, and Parent Ex. F, with Parent Exs. I; J).

as goals that addressed the student's adaptive living skills (Tr. pp. 39-41).¹² She noted that "many of the goals were extrapolated from the [Rebecca School] report," and new goals were developed in conjunction with input from the student's parent, teacher, related service providers, and social worker (Tr. pp. 39, 43). According to the school psychologist, the parent and representatives from the Rebecca School had an opportunity to compare the goals in the reports with the goals included in the draft of the May 2010 IEP (Tr. p. 38). The school psychologist indicated that no one at the May 2010 CSE meeting objected to the goals recommended for the student in the IEP (Tr. pp. 38, 43-44).

Based on the above information, the May 2010 CSE recommended a 12-month 6:1+1 special class in a specialized school (Dist. Ex. 1 at p. 1). The IEP reflected that the CSE considered both a 12:1+1 and 8:1+1 placement and rejected them as insufficiently supportive for the student, stating "[the student] requires a smaller student/teacher ratio in order to achieve his IEP goals" (*id.* at p. 16).¹³ The school psychologist who participated in the May 2010 CSE meeting testified that a 6:1+1 special class provides a structured environment with two adults in the classroom and "a lot of support" for students with developmental delays and specific difficulties with communication and socialization (Tr. pp. 28-29, 44). She further testified that the May 2010 CSE recommended a 6:1+1 class for the student due to his "constellation of disorders," characterized by a PDD, mild retardation and a developmental disorder, and severe language disorders; and that the student's "clustered symptoms," which included communication delays and problems with motor planning, would be addressed in the 6:1+1 environment (Tr. p. 29). Moreover, the school psychologist testified that the student had been "improving and expanding" his ability to respond to his peers and that therefore, a 6:1+1 environment would be appropriate for him given his needs (Tr. p. 53). I also agree with the impartial hearing officer that the hearing record does not reflect that the student's behavioral needs were such that a 6:1+1 environment would not have provided sufficient adult support for the student (IHO Decision at p. 15; Tr. pp. 69-70, 86-92).

In conclusion, the hearing record reflects that the May 2010 IEP reflected the evaluative data that the CSE had before it and that the recommended programs, services and supports in the IEP would have met the student's needs as reflected in the evaluations and gleaned from the participation of the parent, and the student's Rebecca School teacher and social worker. Although the parent argues that the student required a smaller student-to-teacher ratio with more support than a 6:1+1 placement, the hearing record does not show that the student could not have received educational benefits in a 6:1+1 placement with the supports and services recommended in the May 2010 IEP. Based on the above, I agree with the impartial hearing officer that the recommended 6:1+1 program in the May 2010 IEP offered the student a FAPE for the 2010-11 school year.¹⁴

¹² The school psychologist testified that the CSE incorporated goals into the IEP with input from the parent and the student's Rebecca School teacher and social worker (Tr. p. 41).

¹³ The minutes of the May 2010 CSE meeting reflect that at the time of the meeting, the parent, the student's teacher and social worker from Rebecca School, and the parent's attorney expressed that they believed that the student needed more support than a 6:1+1 class (Parent Ex. F at p. 2; *see* Tr. p. 303).

¹⁴ Although in her due process complaint notice, the parent asserted that the May 2010 IEP was inappropriate because it did not provide for a specific methodology or PT, these issues are not raised on appeal; therefore, I will not address them (compare Parent Ex. E, with Pet.).

Allergy and Health Issues

The parent alleges that the May 2010 IEP failed to address the student's seafood allergy and asthma.¹⁵

In this case, there is no evidence that the district failed to consider the health risks associated with the student's allergies. The minutes of the May 2010 CSE meeting indicated that the CSE discussed the parent's primary concerns about the student's asthma and seafood/fish allergies (Parent Ex. F at p. 1). In regard to the student's asthma, severe allergy to fish and seafood, and the need for a "no seafood environment," the May 2010 IEP highlighted the student's condition as a special medical alert on the first page of the IEP and in the health and physical development section of the IEP (Dist. Ex. 1 at pp. 1, 5). Consistent with information from the student's pediatrician, the IEP also indicated the student's need for an accessible program due to his asthma, a nurse on-site to monitor the student's asthma and allergies, and medication and an Epi-Pen as needed because of the potential for an allergic reaction (*id.*).

Based on the foregoing, I find that the May 2010 IEP appropriately addressed the student's allergy and asthma such that the student was not deprived of a FAPE for the 2010-11 school year.

Assigned School

The parent further argues that assuming the 6:1+1 placement recommended by the district were valid, the student's IEP would not have been properly implemented at the district's assigned school. Specifically, the parent asserts that the student would not have been functionally grouped in the recommended class and that the academic ranges of the students in the class exceeded three years. The parent also asserts that the assigned school did not have enough sensory equipment in its gym, that the student would not have been provided with enough access to the gym, and that the district may have had to issue an RSA for the student's speech-language therapy. The parent also asserts that the proposed assigned class utilized the ABA and TEACCH methodologies, rather than the DIR methodology, which would not have met the student's needs. Furthermore, the parent argues that the assigned school could not have addressed the student's needs related to his allergy.

I note that the parent's claims with respect to the assigned school are in part speculative insofar as the parents did not accept the recommendations of the CSE or the programs offered by the district and, therefore, the district was not required to prove that it could implement the May 2010 IEP. Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y.

¹⁵ I note that the parent alleged the same claim during the prior impartial hearing and the appeal regarding the student's 2009-10 school year (Application of a Student with a Disability, Appeal No. 11-006).

v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). Additionally, as discussed below, the parent's concerns are not adequately supported by the evidence in the hearing record.

Functional Grouping

Even assuming for the sake of argument that the student had attended the assigned school, the hearing record does not support the parent's contention that the student would not have been functionally grouped in the recommended class. The parents argue that the students in the proposed classroom that they visited were much higher functioning than the student in this case and that the functional levels of the students in the class spanned more than three years. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]–[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of a Student with a Disability, Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073). The hearing record in this case reveals that the 6:1+1 special class at the assigned school would have provided the student with suitable grouping for

instructional purposes, and therefore, the requirement for the school to provide notice of the range difference would not have been necessary. However, even if the notice were required, the parent has not argued that the lack of the provision of such a notice deprived the student of a FAPE; rather, she erroneously argues that the students in the class had functional levels that spanned more than three years and that this constituted a violation of the State regulations.

Testimony by the assistant principal of the assigned school indicated that had the student attended the school, he would have been in a self-contained 6:1+1 class with a teacher dually certified as a "generalist" and as a special education teacher for students with developmental disabilities (Tr. pp. 80, 117). In addition to the special education teacher, the 6:1+1 classroom consisted of five other students, one paraprofessional assigned to the classroom, and a health paraprofessional who was assigned to a specific student (Tr. pp. 81, 125). According to the assistant principal, as of July 2010, the recommended classroom consisted of five students eligible for special education programs and services as students with autism between the ages of 10 to 12 and in grades four, five, and six (Tr. pp. 83, 126). The assistant principal noted the students' instructional grade levels ranged from 1.5 to 4.7 in reading, and from 1.5 to 4 for math (Tr. pp. 83-84). The May 2010 IEP reflected that the student's reading comprehension and decoding were at the 1.5 and 1.2 levels, respectively, and that his math computation was at a K.7 level (Dist. Ex. 1 at p. 3). The assistant principal testified that the teacher of the assigned class grouped students according to their ability levels and that the teacher would have differentiated instruction for and provided individualized attention to the student as needed (Tr. pp. 93, 95-96). Therefore, the hearing record shows that while he would have been on the low end of the range for reading and the lowest level in the class for math, it does not show that he would not have been functionally grouped in the class as there were students who were functioning on or close to the same level as he was.

Sensory Needs

The parent also contends that the assigned school would not have been able to implement the student's IEP because it did not have enough sensory equipment in its gym and the student would not have had access to the gym on a daily basis.¹⁶

The assistant principal opined that based on her review of the May 2010 IEP, the assigned school would have been able to meet the student's needs (Tr. p. 113). She indicated that the assigned school had a 6:1+1 classroom; that the assigned school was "very effective and very efficient" in working with students with autism; and that the school had a team of related service providers as well as a system in place to reach out and provide resources to meet any unmet related service mandates (*id.*). As for the parent's assertion that the assigned school did not have enough

¹⁶ The parent argues on appeal that the student's speech-language services may not have been provided at the assigned school and would instead, have been provide through an RSA (*see* Tr. pp. 98-100, 113, 128). According to a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents, it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control (<http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; *see* <http://www.p12.nysed.gov/resources/contractsforinstruction/>). Thus, I decline to find that the possible issuance of RSAs to the student for his speech-language or other related services as mandated in his IEP would have denied the student a FAPE (*see* Application of the Dep't of Educ., Appeal No. 11-054; Application of the Dep't of Educ., Appeal No. 10-104; Application of a Student with a Disability, Appeal No. 10-055).

sensory equipment, the assistant principal testified that the student's sensory management needs would have been built into his classroom and reinforced during related services sessions; that the assigned school had two sensory carts to help students with their sensory needs; that sensory equipment was also available in the OT/PT suite, in adapted physical education, and in most of the classrooms (Tr. pp. 89-90, 127). The assigned school also piloted a sensory integration program during the year in question (Tr. p. 90). The assistant principal also testified that the student's recommended academic management needs would have been provided for in the 6:1+1 class (Tr. p. 90).

Based on the foregoing, I find that the student's sensory needs as reflected in the May 2010 IEP, would have been appropriately provided for at the assigned school.

Methodology

The parent asserts that the district's recommended class utilized the TEACCH and ABA methodologies, rather than the DIR/Floortime methodology, which was the only appropriate methodology for the student. Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; 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]; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46). In this case, the evidence hearing record does not support the conclusion that the student could only learn with a specific methodology. Additionally, the school psychologist testified that a teacher may use TEACCH, ABA or DIR, and that the approach to which methodology to use was "eclectic" (Tr. pp. 44-45, 57, 124). The hearing record further shows that the district staff were able to tailor their use of methodology according to the students' needs (Tr. pp. 42, 44, 57). Therefore, I find that the fact that the assigned school would have used the TEACCH and ABA methodologies instead of DIR did not deprive the student of a FAPE.

Allergies and Health Issues

Lastly, the parent asserts that the district would not have been able to address the student's needs related to his seafood/fish allergy at the assigned school.

With regard to the health or safety of a student with a disability, a school district denies the student the benefits guaranteed by the IDEA if it proposes a placement that threatens a student's health in a manner that undermines his or her ability to learn (A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 178; citing Lillbask v. Conn. Dep't of Educ., 397 F.3d 77, 93 [2d Cir. 2005] [noting that Congress did not intend to exclude from consideration any subject matter, including safety concerns, that could interfere with a disabled student's right to receive a FAPE]; L.K. v. Dep't of Educ., 2011 WL 127063, at *9 [E.D.N.Y. Jan. 13, 2011] [finding failure to identify a serious allergy to citrus fruits on a student's IEP did not constitute a denial of a FAPE]).

The assistant principal testified that school personnel followed the district's universal protocols regarding students' allergies; a conversation between the nurses, dietician, parent, and teachers would occur with respect to what the district staff would need to do in order to accommodate the student's allergy, and the school cafeteria did not serve seafood or shell fish (Tr. p. 108). In addition to this student's allergies, the assigned school was experienced in dealing with students with an array of allergies, including allergies to seafood and shellfish, which ranged in degree from mild to severe (Tr. p. 113). Also, the student's teacher and paraprofessional would be notified of all students' allergies (Tr. p. 109). The assistant principal also testified that the students' Epi-Pens are stored on site, and in addition to the two registered nurses, 20 designated staff members were trained in the use of the Epi-Pen, and if the student's teacher and paraprofessional were not already trained, they would have been trained in the use of the Epi-Pen, had the student attended the assigned school (Tr. pp. 111-12). Also, the parents of the students in each classroom are sent a letter with a general statement requesting that they not send the students into school with snacks that contain the known allergens to which students in the classroom are allergic (Tr. p. 111). Finally, the hearing record shows that if a student has a serious enough allergy, that student would eat in the classroom with either his teacher or paraprofessional (Tr. pp. 136-37). Furthermore, the assistant principal testified that the assigned school follows the district's special needs menu, with modifications (Tr. p. 132). The school nurse testified that each month she inspects the menu, and circles each item that any student would be allergic to, and then distributes the menu to the student's teachers and paraprofessionals (Tr. pp. 190-91). The nurse also informs the teacher that under no circumstances should the student with the allergy be anywhere close to the cafeteria when a particular food is being served and that she also stresses hand washing (Tr. p. 191). The nurse further testified that since she collected the menus each month, she was positive that since at least July 2010, there has been no fish served in the school cafeteria (Tr. pp. 198-200).

Therefore, I find that the assigned school could have appropriately addressed the student's allergy.

Conclusion

Having found that the district offered the student a FAPE, I need not reach the issues of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parent's request, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
October 28, 2011**

**JUSTYN P. BATES
STATE REVIEW OFFICER**