The University of the State of New York

The State Education Department
State Review Officer
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No. 12-015

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:
Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq.,[1] 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Sinai Elementary School at Joseph Kushner Hebrew Academy (Sinai) for the 2010-11 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-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 school 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

[1] By letter dated April 23, 2012, the district indicated that Mr. Fong had been substituted as counsel in this matter.

between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record shows that the student exhibited moderate to severe expressive language delays, as well as delays in pragmatic language and oral motor skills (Parent Ex. C at p. 1). He occasionally demonstrated off task behaviors such as scripting and protesting (id. at pp. 5, 6). The student also presented with fine and gross motor deficits (id. at pp. 7, 8). As a young child, the student received services through the Early Intervention Program (EIP) and Committee

on Preschool Special Education (CPSE) (Tr. pp. 206-07).[2] He attended the same nonpublic special education school up through age eight (Tr. pp. 206-07, 221). During the 2009-10 school year, the student was taught using applied behavior analysis (ABA) and verbal behavior (VB) and received instruction in a 1:1 setting throughout the entire day (Parent Ex. C at p. 4).

In January 2010, a social worker from the district conducted a classroom observation of the student at the nonpublic school (Dist. Ex. 1). Based on her observation, as well as consultations with the student's teacher and parent, she completed a "Functional Behavioral Assessment Worksheet" detailing interfering behaviors exhibited by the student (Dist. Ex. 2).

The CSE convened on January 20, 2010 for the student's annual review and recommended that he continue to be found eligible for special education and related services as a student with autism (Parent Ex. C at p. 1).[3] The CSE further recommended that the student be placed in a 6:1+1 special class in a specialized school and receive related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling (id. at pp. 1, 21). In addition, the CSE recommended that the student receive adapted physical education, special education transportation, and extended school year services (id. at pp. 1, 7). At the time of the CSE meeting, the parent's advocate and staff from the nonpublic school disagreed with the staffing ratio recommended by the CSE, as they wanted the student to have 1:1 instruction (Tr. pp. 32, 41).

By letter dated February 4, 2010, the district notified the parent of the particular school to which the student was assigned (Parent Ex. D). In a response dated March 15, 2010, the student's mother indicated that she had visited the particular public school identified by the district and concluded that it was not appropriate for the student because the functional levels of the students assigned to the class were below that of her son, the behavior support plan she observed did not "exhibit positive features," and sensory activities were not available throughout the entire day (id.). The parent further indicated that the student would remain where he had been unilaterally placed and that she would request an impartial hearing for tuition reimbursement (id.).

The parent reported that toward the end of the 2009-10 school year, she had determined that the student had "reached his limit" at the nonpublic school and that he required a less restrictive environment (Tr. p. 208). With the help of staff from the nonpublic school, in or around June 2010, the parent began to look at different programs for the student (Tr. pp. 208, 219).

By letter dated June 22, 2010, the district provided the parent with notice of a second public school to which it was assigning the student, beginning on July 6, 2010 (Dist. Ex. 4; Parent Ex.

[2] The student's mother testified that the student was diagnosed as having a pervasive developmental disorder-not otherwise specified (PDD-NOS), and his IEP reflects that he was diagnosed with PDD and an autism spectrum disorder; however, the hearing record does not include documentation of these diagnoses from the primary source (Tr. pp. 206-07; Parent Ex. C at pp. 1, 5).

[3] 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]).

E).[4] In a response dated July 12, 2010, the parent indicated that she had attempted to contact the district to observe the second public school site identified by the district, but that it was "locked closed" and as a result the parent requested that the district "please advise" (id.). Also on July 12, 2010, the parent signed a contract enrolling the student in Sinai, beginning in September 2010, for the 2010-11 school year (Parent Exs. I; K).[5] The parent also paid a registration fee and a portion of the student's 2010-11 school year tuition (Parent Exs. J at p. 1; K).

In a response to the parent's July 2010 request, the district advised by letter dated July 13, 2010 that the summer school program for the second assigned school had moved to a different location (Dist. Ex. 5). The district provided the parent with a telephone number and the names of two people and requested that she contact one of them to schedule a site visit (id.). In or around July 2010, the parent visited the summer school program at the corrected location identified by the district (Tr. p. 230; Answer Ex. 1 at p. 3).[6] Following her visit, the parent reportedly sent the district a letter rejecting the district's recommended program and advising the district that she would be enrolling the student in Sinai and would request an impartial hearing to obtain tuition reimbursement (see Answer Ex. 1 at p. 3).

On or about August 5, 2010, the district sent the parent a letter designated "second request" that indicated the same assigned school and location for the summer school program that was identified in its July 13, 2010 letter (Parent Ex. F; Dist. Ex. 7; see Tr. p. 8). In a response dated August 11, 2010, the parent indicated that she had attempted to visit the second assigned school, but that it was closed and she was unable to observe the program (Parent Ex. F). On or about August 18, 2010, the parent sent a "10 day notice letter" to the district stating that the district had not replied to her letter indicating that she was unable to observe the assigned school and advising the district that she intended to enroll the student in Sinai for the 2010-11 school year and reserved

[4] The hearing record contains multiple copies of the letter from the district to the parent dated June 22, 2010, each with various notations (Dist. Exs. 4; 6; 7; Parent Exs. E; F). One letter identified the second assigned school, but provided the parent with the wrong location for the student's summer school program (Dist. Ex. 4; Parent Ex. E). A second letter identified the assigned school as well as the corrected location for the student's summer school program and also included a handwritten notation indicating that it was a "change of site" (Dist. Ex. 6). The hearing record does not clearly indicate when the second letter was sent to the parent; however, it appears to have been sent at some point following the parent's July 12, 2010 request for guidance. A third letter identified the assigned school and corrected location for the student's summer school program, and included a handwritten notation at the bottom stating "2nd Request 8/5/10" (Dist. Ex. 7; see Tr. pp. 7-12). The parent's August 11, 2010 reply appears to be written on a fourth copy of the June 22, 2010 letter (Parent Ex. F), which included a handwritten notation of "2nd Request" that was at a different place than on the third letter (compare Dist. Ex. 7, with Parent Ex. F). In addition, there are other discrepancies. The first letter included a stamped message that stated "Placement Offer for September 2010-11 School Term" and on the line below it "beginning July 06, 2010" (Dist. Ex. 4; Parent Ex. E). In the second and third letters, the word "beginning" was missing, and in the fourth letter the stamped message was altogether absent (Dist. Exs. 6; 7; Parent Ex. F).

[5] The Sinai program is a 10 month program (Tr. p. 131). Sinai has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[6] The parent testified that when she went to the visit the summer school program, at the corrected location identified by the district, the class was on a trip and she was unable to observe the class (Tr. p. 217). It is unclear from the hearing record whether the parent visited the summer school program in July or August 2010 (see Tr. pp. 216-17, 219-20; Answer Ex. 1 at p. 3).

the right to submit an impartial hearing request as further circumstances necessitated (Parent Ex. G).

A. Due Process Complaint Notice

By due process complaint notice dated July 8, 2011, the parent requested an impartial hearing seeking, among other things, tuition reimbursement for Sinai for the 2010-11 school year (Answer Ex. 1 at pp. 1, 4).[7] The parent maintained that the district denied the student a free appropriate public education (FAPE) for the 2010-11 school year because, in pertinent part, the district failed to timely notify the parent of the public school to which the student was assigned; the student required 1:1 support to address his academic, social, and emotional needs; and the behavioral intervention plan (BIP) developed by the January 2010 CSE was insufficient to address the student's social and emotional needs without 1:1 support in the classroom and the token economy and modeling provided for in the BIP would be insufficient to decrease the student's maladaptive behaviors (id. at pp. 2-3). In addition, the parent argued that the other students in the classroom were far below her son with respect to academic and social levels (id. at p. 3). The parent also reiterated that although she was unable to visit the assigned school, she visited the summer school program at the corrected location identified by the district and concluded that ABA was "not being used in a way that her son would succeed" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 4, 2011 and concluded on November 9, 2011, after three hearing dates (Tr. pp. 1, 74, 156). In a decision dated December 9, 2011, the IHO found that the district failed to offer the student a FAPE for the 2010-11 school year (IHO Decision at pp. 12, 15). Among other things, the IHO determined that the IEP adequately described the student's needs, included goals relating to the student's areas of need, and that the parent participated meaningfully in the CSE process (id. at p. 12). The IHO also found that the district had shown that the student did not require 1:1 teacher support and that the district could implement the student's IEP at the assigned school (id. at pp. 12, 15). However, the IHO concluded that the district failed to offer the student a FAPE because it failed to notify the parent of the location of the assigned school until July 13, 2010, after the start of the 12-month school year, and therefore did not offer the student a timely "placement" (id. at p. 12).

The IHO next found that the parent's unilateral placement at Sinai was not appropriate for the student because the school did not provide a sufficient amount of speech-language, OT, and PT related services, did not offer parent training, and was too far from the student's home (IHO Decision at p. 13). The IHO also found that the out-of-school related services that the parent obtained did not address the lack of related services at Sinai (id.). In addition, the IHO found that Sinai failed to develop a BIP sufficient to meet the student's behavioral needs until well into the school year (id.). The IHO also addressed equitable considerations and found that the parent had failed to cooperate with the CSE because, among other reasons, she did not object to anything in the IEP with the exception of the student-to-teacher ratio, which she raised at the January 2010

[7] The copy of the July 8, 2011 due process complaint notice contained in the hearing record (Parent Ex. A) is missing page 2, the district attached a complete copy of the due process complaint notice to its answer and cross-appeal (Answer Ex. 1).

CSE meeting (id. at pp. 14-15). Accordingly, the IHO denied the parent's request for tuition reimbursement (id. at p. 15).

IV. Appeal for State-Level Review

This appeal by the parent ensued. The parent alleges that the IHO properly determined that the district failed to offer the student a FAPE because it did not provide the student with a timely placement for the 2010-11 school year, but that she erred in finding that the district's program was otherwise appropriate. Specifically, the parent contends that the district did not show that the CSE's recommended recommendation for a 6:1+1 special class placement would provide sufficient support for the student because the student had only previously been educated in 1:1 or 2:1 settings. The parent also argues that ABA, which is an appropriate methodology for the student, was not used in the particular classroom and that the district failed to prove that TEACCH would be appropriate.[8] The parent next asserts that the district failed to provide proof regarding the specific classes that the student could have been placed in and how the student would have been grouped with other students in the classroom. The parent argues that the IHO also erred in finding that the unilateral placement at Sinai was not appropriate because, among other reasons, the student's needs were addressed through speech language, OT, and PT at the school, sufficient parent training was available, and the student's behavioral needs were addressed before and after the class-wide behavior program was developed. The parent further asserts that the supplemental home-based services the parent obtained for the student were appropriate for the summer and they addressed the student's needs and generalized skills to the home. The parent lastly contends that the IHO erred in her determination regarding equitable considerations because the parent cooperated sufficiently with the CSE, provided timely notice of her intent to unilaterally place the student, and visited the schools recommended by the district to the extent that she was able.

The parent requests that the portions of the decision determining that the unilateral placement was not appropriate and that equitable considerations did not favor reimbursement be reversed and that the district be ordered to pay the student's 2010-11 tuition at Sinai and certain home services.

The district submitted an answer and cross-appeal, requesting that the IHO's decision be affirmed except for the finding that the district failed to offer the student a FAPE during the 2010-11 school year. The district contends that the IHO correctly held that Sinai was inappropriate because it only provided a 10-month program, it lacked sufficient related services, did not offer parent training, and did not provide the student with an appropriate BIP until December 2010 or later. The district also argues that the IHO correctly held that equitable considerations did not favor granting tuition reimbursement to the parent. The district also contends that, contrary to the parent's contention, the hearing record contains testimony from the assigned school's psychologist regarding the specific classes that the student could have been placed in and what the grouping would have been.

In its cross-appeal, the district argues that the IHO erred in finding that the district did not offer the student a timely placement because the district's June 22, 2010 notice of the particular

[8] "TEACCH" refers to "Treatment and Education of Autistic and Related Communication Handicapped Children" (see Application of the Bd. of Educ., Appeal No. 11-156).

school to which the student was assigned was timely for the student's program beginning in July 2010. The district further contends that the error as to the school's location would have been corrected had the parent accepted the program and enrolled the student, and such error did not impede the student's right to a FAPE, deprive the student of educational benefits, or significantly impede the parent's ability to participate in the decision-making process.

The parent answers the cross-appeal and argues that the district denied the parent a meaningful opportunity to participate in the placement process by providing the parent with a notice that contained the incorrect location of the school to which the student was assigned.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346

F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling 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]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). A review of the parent's due process complaint notice reveals that the parent did not raise any issues concerning the district's alleged failure to identify a specific class for the student to attend or prove the class had a seat available (see Answer Ex. 1 at pp. 1-4). Furthermore, the hearing record does not reflect that the parent requested to amend the July 2011 due process complaint notice, that the IHO otherwise authorized an amendment to the July 2011 due process complaint notice, or that the district consented to expand the scope of the impartial hearing to include the resolution of these issues (see Tr. pp. 1-239; Dist. Exs. 1-7; Parent Exs. A-Q).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these issues for the first time on appeal. To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions that limit the issues meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Moreover, the IHO properly did not reach these issues in her decision; accordingly, I find that the parent's arguments concerning the district's alleged failure to identify a specific class for the student to attend and prove the class had a seat available have been raised for the first time on appeal and are, therefore, outside the scope of my review and I decline to consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also IHO Decision at pp. 1-15; Application of a Student with a Disability, Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability,

Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

B. January 2010 IEP—6:1+1 Special Class

Turning to the parent's assertion that a special class placement with a 6:1+1 staffing ratio would be inappropriate for the student,[9] for the reasons set forth below, I find the 6:1+1 special class placement with related services recommended in the IEP by the January 2010 CSE was reasonably calculated to enable the student to receive educational benefits. A review of the recommended program in the IEP reflects that the CSE considered the student's speech-language and behavioral deficits and recommended services and supports that were designed to address the student's needs in these, as well as other, deficit areas.

As noted above, the CSE convened on January 20, 2010 for the student's annual review (Parent Ex. C). Present for the meeting were the district representative who was also a special education teacher, a school psychologist, a social worker, the parent, and an additional parent member (Tr. p. 27; Parent Ex. C at p. 3). In addition, the parent's advocate, along with two teachers and the director from the nonpublic school participated in the meeting by telephone (Tr. pp. 27-28; Parent Ex. C at p. 3).

According to the school psychologist, the narrative description of the student for his January 20, 2010 IEP was provided by the staff of the student's nonpublic school (Tr. p. 36). As such, the present levels of performance were reflective of the student's program at the nonpublic school, which consisted of ABA and VB instruction and 1:1 services for his entire day (Parent Ex. C at p. 4). The IEP stated that the student did well with fast-paced, intermixed instruction with high rates of reinforcement (id.). It noted that the student had shown improvement in following directions in both individual and group instruction; however, he had difficulty following directions of increasing complexity and was reliant on visual prompts in order to successfully complete this skill (id. at pp. 4, 5). The IEP further noted that the student's ability to follow directions involving task completion and traveling was contingent upon his level of attention, which often compromised the success of the tasks (id. at p. 4). The IEP stated that the student's difficulty maintaining focus and engagement in self-stimulatory behaviors continued to impact all areas (id.). The student's instructional levels for academics, based on teacher estimates, ranged from a kindergarten to a mid-second grade level (id.). According to the IEP, the student demonstrated moderate to severe language delays as well as pragmatic language and oral motor delays (id. at p. 5). The student's mean length of utterance was below average and he was unable to use age appropriate syntax and semantics (id.). The IEP noted that the student required moderate verbal and visual prompting in order to demonstrate appropriate play skills (id.). Although the student's pragmatic language skills had improved, he continued to require minimal prompting to be successful with eye contact, joint attention, topic maintenance, and turn-taking skills (id.). The IEP stated that the student required behavioral techniques such as redirection, fast-paced instruction, token economies, and frequent

[9] The character of the parent's claim differs slightly from the allegation in the parent's due process complaint notice, wherein the parent asserted that the recommended staffing ratio would not have been "ample" to address the student's speech-language or behavioral difficulties and that any progress the student had made was a result of a 1:1 teacher to student ratio during the entire school day, as well as task analysis and individual prompting in all academic and related service areas (Answer Ex. 1 at p.1).

reinforcement breaks to eliminate off-task behaviors, such as scripting and protesting, and to attend to the task at hand (id.).

With respect to the student's social emotional performance, the IEP indicated that the student required reminders in the form of visual supports, key phrases, a consistent schedule of reinforcement for appropriate behaviors, and a strict implementation of an OT prescribed sensory diet in order to learn new skills and comply with behavioral guidelines (Parent Ex. C at p. 6). The IEP indicated that the student's current behavior plan was implemented to decrease maladaptive behaviors including non-contextual speech, anxiety, forceful contact, and elopement behaviors (id.). According to the IEP, the student was able to model his peers spontaneously during social interactions and play situations and was able to learn new skills by watching and echoing peers' behaviors (id.). He was able to remain appropriate for at least thirty minutes while near his peers, with only occasional reminders to maintain desirable behaviors (id.). With respect to the student's health and physical development, the IEP noted that the student presented with low tone in his trunk, deficits in bilateral coordination, static and dynamic balance, and motor planning, and that these deficits impacted the student's fine motor and gross motor performance (id. at p. 8). The IEP stated that the student also had difficulty with sensory processing that impeded the advancement of age appropriate skills and affected his school performance (id.). The IEP noted that the student had begun medication at home to address his anxiety (id.).

The January 2010 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school (Parent Ex. C at p. 1). In addition, the CSE recommended that the student receive related services of individual speech-language therapy for five 30-minute sessions per week, individual OT for five 30-minute sessions per week, individual PT for two 30-minute sessions per week, individual counseling for one 30-minute session per week, and counseling in a dyad for one 30-minute session per week (id. at p. 21). The CSE also recommended the student for adapted physical education, special education transportation, and 12-month extended school year services (id. at pp. 1, 7). To address his management needs, in addition to related services, the CSE recommended environmental modifications and human/material resources of repetition and rephrasing, positive reinforcement, and a small structured class (id. at pp. 5-7).

The student's IEP indicated that his behavior required highly intensive supervision and a behavior plan, which the CSE developed and attached to the IEP (Tr. p. 39; Parent Ex. C at pp. 6, 22). The BIP indicated that strategies including positive reinforcement of appropriate behaviors, distraction strategies, a token economy, and modeling would be employed to address the student's targeted behaviors (id. at p. 22). The recommended IEP included goals and objectives related to improving the student's reading comprehension, vocabulary, math skills, receptive and expressive language, social and leisure skills, safety and community skills, pragmatic language, play skills, coping skills, sensory processing, bilateral coordination and upper extremity control, manual dexterity, and visual motor skills (id. at pp. 9-18).

The school psychologist recalled that at the time of the January 2010 CSE meeting, the parent's advocate and teachers from the nonpublic school objected to the district's recommended 6:1+1 special class ratio and recommended that the student receive 1:1 instruction (Tr. pp. 32-33). According to the school psychologist, 1:1 instruction was the philosophy of the nonpublic school and the nonpublic school staff never agreed with a staffing ratio that was more than 1:1 (Tr. p. 41).

In determining that the program recommendation was appropriate for the student, the school psychologist testified that the CSE used the information that it had, including the classroom observation, and spoke with the student's parent, teacher, and director (Tr. p. 30). She explained that the CSE's recommended program would provide the student with an opportunity to be in a group of students, in a small classroom environment, and to have appropriate supervision and academic support (Tr. p. 30). She noted that during the review, the CSE learned that the student had started to display an interest in other people, particularly children, and therefore the CSE decided to introduce counseling (Tr. pp. 30-31). The school psychologist opined that a counselor would help the student learn how to socialize appropriately (Tr. p. 31).

I note that State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Although a CSE must consider parents' suggestions or input offered from privately retained experts, the CSE is not required to merely adopt such recommendations for different programming (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]). The IDEA does not require the district to offer the student what some may view as the "best opportunities" for the student (Watson, 325 F. Supp. 2d at 144) or "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132).

In light of the IEP's description of the needs and abilities of the student, which on appeal the parent does not contest is inaccurate, I find that the district's recommended placement in a 6:1+1 special class along with the goals and objectives, environmental modifications and human/material resources, and related services would have addressed the student's instructional needs and were reasonably calculated to confer educational benefit (Rowley, 458 U.S. at 206-07). Accordingly, I find that the parent's challenge to the adequacy of the IEP is without merit.

C. Implementation of IEP—Assigned School

Turing to the parent's challenges to the implementation of the student's IEP, the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009], 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., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34

CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parent rejected the IEP and unilaterally placed the student prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student would have been provided with an appropriate educational methodology upon the implementation of his IEP in the proposed classroom.

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 6:1+1 special class at the assigned district school was capable of providing the student with a suitable educational methodology and functional grouping in a timely manner, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at * 14 [E.D.N.Y. Mar. 30, 2012]; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

1. Educational Methodology

Assuming for the sake of argument that the parent had opted to enroll the student in the public school, the parent asserts that ABA was key to the student's success both in and out of the classroom and that the district did not offer any evidence that the TEACCH methodology used in the recommended classroom would meet the student's needs. 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, although the hearing record suggests that the student demonstrated progress when instructed using ABA, it did not establish that the student could only make progress when instructed using ABA. I note that the school psychologist for the assigned school characterized the TEACCH program as "extremely structured" and very specific to the needs of the child (Tr. pp. 53, 69). She reported that related services staff pushed-in to the classroom as necessary to support a student's needs (Tr. pp. 64-67). The school psychologist further indicated that in addition to TEACCH, the teacher of the proposed class used visual cues, structure, and positive behavior interventions, including a reward system (Tr. p. 70). In view of the foregoing, I find the parent's concerns regarding the methodology at the assigned school, had the district been required to

implement the student's IEP, are not supported by the preponderance of the evidence contained in the hearing record.

2. Functional Grouping

Turning to the parent's assertion on appeal that the district failed to establish that the student would be suitably grouped academically and socially in the public school, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of 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[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, had the parent decided to enroll the student in the public school, the hearing record shows that the student could have been grouped in compliance with State regulations with students with needs similar to those of the student. The school psychologist of the assigned school testified that the class she had in mind for the student included students from seven to ten years of age who ranged academically from kindergarten to the third grade level (Tr. pp. 59-60, 63). At the time the student's IEP was developed he was approximately seven and a half years old and, based on teacher estimates, was functioning academically between a kindergarten and second grade level (Parent Ex. C at p. 4). In addition, the school psychologist testified that several of the students in the assigned class were verbal, as was the student (Tr. p. 63; Parent Ex. C at p. 5). I also find the parent's dissatisfaction with a witness's testimony regarding class profiles and the overall number of available classrooms containing 6:1+1 special class placements available at a specific point in time unavailing. A class profile may be a useful tool for demonstrating how a district student has been grouped upon the implementation of the student's IEP; however, the Second Circuit has determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194).

3. Public School Site Selection

The district argues that the IHO erred in finding a denial of a FAPE on the basis that it did not provide the parent with timely notice of the public school to which it was assigning the student. To meet its legal obligations, 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; Tarlowe, 2008 WL 2736027, at *6 [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"]).

Although the district offered the parent the opportunity to visit the assigned school, neither the IDEA nor State regulations confer upon parents the right to visit a recommended school and classroom.[10] The U.S. Department of Education's Office of Special Education (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013).

In general, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116, 300.327, 300.501[c]). The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]).

In this case, the evidence shows that after recommending a 6:1+1 special class placement in the IEP, the district sent the parent a notice dated February 4, 2010 identifying the assigned school (Parent Ex. D at p. 1). The parent visited the assigned school, rejected it as inappropriate on or about March 15, 2010, and advised the district that she was unilaterally placing the student and that an impartial hearing to seek reimbursement for the student's private school tuition would be requested (id.). For reasons that are not clear, the evidence showing the district's initial efforts to implement the IEP, assign the student to a public school site, and the parent's rejection of a public school placement in March 2010 are not addressed in the IHO's analysis. However, these efforts are not disputed by the parties and this evidence weighs against a finding that the district failed to timely offer the student a public school site.

Thereafter, even though the parent had rejected the district's offer and indicated that she was unilaterally placing the student, the district nevertheless sent a second notice dated June 22,

[10] Nothing in this decision, however, is intended to discourage districts from offering parents the opportunity to view school or classroom placements as such opportunities can only foster the collaborative process between parents and districts. If parents visit a particular classroom and, at that point, have new concerns, the IDEA and the Education Law contemplate that the collaborative process for revising the IEP will continue—that the parents will ask to return to the CSE and share those concerns with the objective of improving the student's IEP.

2010, identifying a second school for implementing the student's IEP, with a projected start date for services of July 6, 2011 (Parent Ex. E at p. 1). The hearing record evinces the parent's attempt to visit the second public school site and the district's subsequent notice informing the parent that the second assigned school's summer program had moved to a different location (Tr. pp. 215-16; see Dist. Ex. 5; Parent Ex. E at p. 1). It has been held that a district's notice which contains an incorrect location of the public school to which the student has been assigned is not a per se procedural violation, and is unavailing as a claim for a deprivation of a FAPE, especially where there has been no prejudice to the student in any material respect (see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *9 [S.D.N.Y. Oct. 28, 2011] citing A.S. v. New York City Dep't of Educ., No. 10–CV–9, slip op. at 18–19 [E.D.N.Y. May 25, 2011] [rejecting the parents' claim based upon a deficient notice and further noting that the mistake on the notice was not discovered until during the hearing]). In summer 2010, the parent actually visited the summer school program at the corrected location identified by the district and subsequently rejected the district's second offer as well (Tr. p. 230; Answer Ex. 1 at p. 3).

Based on the foregoing, I find that the parent was permitted input into the development of the IEP and the district demonstrated that it was capable of having an IEP "in effect" in compliance with the IDEA insofar as the evidence shows that the district sent to the parent timely notice of the school site to which it had assigned the student—not once, but twice—the first being on February 4, 2010 (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]).[11] While the parent rejected the district's efforts and refused to send her son to the public school and the district thereafter offered another site on June 22, 2010, I decline to find that the fact that the district offered the student a second option resulted in a failure to implement the student's IEP such that the district denied the student a FAPE. Although the June 22, 2010 notice contained the incorrect location for the summer school program, under the circumstances of this case where the parent had previously decided to unilaterally place the student and the district promptly corrected the error in the second notice, the evidence does not support that the mistake in any way 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 benefits (A.C, 553 F.3d at 172; T.Y., 584 F.3d at 416, 419-20 [holding that a parent's right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school or classroom]). Although the parent had some concern with and was allowed input with respect to the student's IEP, to a greater extent she sought to hold a veto over the district's selection of the particular school site and classroom which is "a power the IDEA clearly does not grant [her]" (Dzugas-Smith v. Southold Union Free Sch. Dist., 2012 WL 1655540, at * 27 [E.D.N.Y. May 9, 2012], quoting T.Y., 584 F.3d at 420).[12]

[11] The district offered to implement the IEP within a reasonable time insofar as the January 20, 2010 IEP indicated a projected initiation date of February 3, 2010 and the district sent the parent notice of the school site on February 4, 2010 (Parent Exs. C at p. 3; D).

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

Accordingly, I decline to find a denial of a FAPE on the basis that the district failed to timely implement the student's IEP due to inadequate notices by the district.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. The hearing record contains evidence showing that the January 2010 IEP recommending a 6:1+1 special class placement with related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parent's claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D.-S., 2011 WL 3919040, at *13; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision is modified, by reversing that portion which determined that the district failed to offer the student a FAPE for the 2010-11 school year.

Dated: **Albany, New York**
May 15, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER