The University of the State of New York

The State Education Department
State Review Officer
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No. 12-021

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Diane da Cunha, Esq., of counsel

Law Offices of George Zelma and David Berlin, attorneys for respondents, David Berlin, Esq., of counsel

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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

As a young child the student was diagnosed as having a pervasive developmental disorder – not otherwise specified (PDD-NOS) and received services through the Early Intervention Program and Committee on Preschool Special Education (CPSE) (Dist. Exs. 8 at p. 1; 10 at p. 10; see Tr. pp. 429-30). In July 2010, he began attending a 6:1+3 special class where he was supported by a 1:1 behavior management paraprofessional and received related services of speech-language therapy and occupational therapy (OT) (Tr. pp. 52-54; Dist. Exs. 2 at p. 1; 5; 6; 7; 12). In addition he received 10 hours a week of special education itinerant teacher (SEIT) services (Dist. Exs. 2 at p. 1; 5; 7; 12).

On February 10, 2011, the CPSE met for an annual review of the student's program (Dist. Ex. 13). Due to the severity of the student's delays, the CPSE recommended continuation of the

student's eligibility for special education and related services as a preschool student with a disability and placement in a 6:1+3 center-based special class with the support of a 1:1 behavior management paraprofessional and related services of speech-language therapy and OT (id. at pp. 1, 14, 16). In addition, the CPSE recommended that the student continue to receive 10 hours a week of SEIT services (id. at p. 1). The CPSE suggested that the student's behavior "required" highly intensive supervision and attached a behavioral intervention plan (BIP) to the proposed IEP (id. at pp. 4, 17). The CPSE recommended that the student receive his IEP services on a 12-month basis (id. at p. 1). The February 10, 2011 IEP reflected the names of the agencies assigned to provide the student's center-based preschool program and SEIT services.

On or about March 26, 2011, the parents notified the district that they were withdrawing the student from the center-based preschool program due to concerns regarding the methods employed by the school to restrain the student (Tr. pp. 181-82, 450; see Parent Ex. D). The student continued to receive SEIT services in accordance with his February 2011 IEP (Tr. pp. 182, 188).

On May 27, 2011, the CSE met to determine the student's eligibility for school-age special education services and to create the student's IEP for the 2011-12 school year (Dist. Ex. 1; see also Parent Ex. A). The CSE determined that the student was eligible for special education and related services as a student with autism, and recommended that he be placed in a 6:1+1 special class in a special school (Dist. Ex. 1 at pp. 8, 11).[1] The CSE further recommended that the student receive the related services of OT, speech-language therapy, a crisis management paraprofessional, and adaptive physical education and created a BIP for the student (id. at pp. 2, 8, 11, 16). The CSE also recommended that the student receive services on a 12 month basis (id. at p. 9).

By letter dated June 13, 2011, the parents notified the district that they were withdrawing the student from the district's schools due to the district's failure to offer an appropriate school that could address the student's needs (Parent Ex. D). According to the parents, the school psychologist advised them during the May 2011 CSE meeting that a classroom on the fifth floor of the building that they were having their CSE meeting in would be recommended for the student, that there was no elevator in the building, that classroom staff was using methods that were unfamiliar to the school psychologist, and that the school psychologist concluded "[y]ou won't want to send [the student] here" (id.). The student attended the May 2011 CSE meeting, and, therefore, the parents concluded that the school psychologist based his opinion on "his observation of [the student's] challenges and [the] need for [an] appropriate placement" (id.). The parents further advised the district in their June 2011 letter that they would be unilaterally placing the student at the Rebecca School starting on July 1, 2011 and seeking payment of the student's tuition from the district (id.). The parents also notified the district that while the student continued to receive his SEIT services at home since being withdrawn from his preschool placement, he has not been receiving OT or speech-language therapy (id.).

In a letter dated June 20, 2011, the district summarized the recommendations made by the May 2011 CSE and identified the particular school to which it assigned the student for the 2011-12 school year (Parent Ex. E).

[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On June 23, 2011, the parents paid a $500 non-refundable deposit to the Rebecca School for the 2011-12 school year (Parent Ex. G at p. 5). The Rebecca School is a nonpublic 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).

On June 24, 2011, the district sent the parents a Nickerson letter, advising the parents that it was unable at that time to identify an appropriate placement site for the student (Parent Ex. F). The letter further stated that the parents had "the legal right to place your child in an appropriate special education program" at any State "approved private day school" and receive payment from the district for the tuition and transportation costs (id.). According to the hearing record, the letter contained an attached list of State-approved nonpublic schools (id.).[2]

On June 24, 2011, the parents signed an enrollment contract with the Rebecca School for the student's tuition for the school year commencing July 5, 2011 and ending June 22, 2012 (Parent Ex. G).

A. Due Process Complaint Notice

The parents filed a due process complaint notice on July 5, 2011, in which they requested an impartial hearing to adjudicate their claim for payment of the student's tuition costs at the Rebecca School for the 2011-12 school year (Parent Ex. B). The parents sought a determination that district denied the student a free appropriate public education (FAPE) for the 2011-12 school year (id. at p. 6). The parents asserted that the district's recommended program was inappropriate for the student because he required a 12-month program in a small, self-contained classroom at a nonpublic school (id. at pp. 3-5). The parents also asserted that the assigned school was inappropriate because the classroom was located on the fifth floor of a large school building that lacked an elevator (id. at p. 4). In addition, the parents asserted that the Rebecca School was an appropriate placement for the student and that equitable considerations supported an award of tuition costs to the parents (id. at pp. 5-7).

The district filed a response to the due process complaint notice on July 18, 2011, asserting that it had offered the student a FAPE for the 2011-12 school year (Parent Ex. C).

B. IHO Decision

An impartial hearing convened on October 31, 2011 and concluded on December 5, 2011, after three hearing days (Tr. pp. 1, 162, 209). In a decision dated December 20, 2011, the IHO first determined that the issuance of the Nickerson letter by the district four days after it sent its June 20, 2011 notice identifying the school to which it assigned the student constituted an admission by the district that the program at the assigned school was inappropriate, and that since no other placement was offered by the district thereafter, the district had failed to meet its burden of proof that it had offered the student an appropriate placement for the 2011-12 school year (IHO Decision at pp. 8-9).

The IHO next addressed the appropriateness of the Rebecca School (IHO Decision at pp. 9-13). The IHO determined that the student's needs, as set forth in the May 2011 IEP, were being

[2] The attachment with the list of approved schools was not made part of the hearing record.

met at the Rebecca School, and therefore the Rebecca School was an appropriate placement (id. at p. 13). The IHO noted that the director and the student's then-current teacher at the Rebecca School described the student's program at the Rebecca School, including his sensory diet, OT sessions, and speech therapy (id. at pp. 11-13). The Rebecca School director further testified that the student had made progress at the Rebecca School in that he remained regulated for longer periods of time, used more vocalizations and gestures when communicating, was able to attend for longer periods of time, and his self-injurious behavior decreased (id. at p. 11).

With regard to equitable considerations, the IHO determined that the parents cooperated with the district and provided notice to the district that they would be placing the student at the Rebecca School (IHO Decision at pp. 13, 14). Based on these findings, the IHO ordered the district to pay the student's tuition at the Rebecca School for the 2011-12 school year (id. at p. 15).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision. In its appeal, the district asserts that the IHO erred in finding a denial of a FAPE based upon the issuance of the Nickerson letter. Specifically, the district asserts that the due process complaint notice did not raise any issue concerning the Nickerson letter and therefore was an inappropriate basis for the IHO to determine that the district failed to offer the student a FAPE. The district also asserts that the Nickerson letter was irrelevant because it was issued on June 24, 2011 after the parents had advised the district by letter dated June 13, 2011 that they were withdrawing the student from the district's schools. According to the district, the IHO should have limited her decision to allegations raised in the due process complaint notice, which were that the assigned school was inappropriate because the classroom was located on the fifth floor of a large school building with no elevator, and that the district did not offer the student a 12-month program. Regarding these allegations by the parents, the district first asserts that the student never attended the district's assigned school and therefore the parents' assertions were speculative, and alternatively were without merit as there was no evidence that the student could not climb stairs and accommodations could have been provided to address any concerns that may have arose. Second, the district asserts that the May 2011 CSE offered the student a 12-month program that started in September pursuant to New York State Education law because the student was transitioning from a preschool program to a school age program. According to the district, the student's February 2011 IEP developed by the CPSE provided a program for July and August 2011 that was rejected by the parents except for the SEIT services.

The district also argues that the IHO erred in finding the Rebecca School an appropriate unilateral placement because it was only a 10-month program and the student required a 12-month program. Furthermore, the district asserts that contrary to the student's needs, the Rebecca School did not provide the student with OT during the summer, did not provide a 1:1 crisis paraprofessional during the student's bus ride, and that the student endured a long bus ride to and from the Rebecca School. Regarding equitable considerations, the district contends that the parents had no intention of having the student attend a public school, and therefore they are not entitled to an award of tuition costs.

As relief, the district requests annulment of the IHO's decisions that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate

placement, and that equities favored the parents. The district further requests reversal of the IHO's award of the student's tuition at the Rebecca School for the 2011-12 school year.

In their answer, the parents deny the district's allegations with respect to the contested issues. The parents assert that the district's June 20, 2011 notice of placement was superseded by the issuance of the Nickerson letter. The parents also assert they withdrew the student from the preschool center based program after his mother observed school staff physically restraining the student and that the district was aware that the student had not been attending school since March 2011 and required a summer program, but that the district chose to do nothing to address the student's needs for an appropriate program. The parents also assert that the assigned school was inappropriate because the student would have to walk up and down five flights of stairs through a large school with approximately 600 students, and the student would become over-stimulated from the noise and activity, resulting in tantrums and self-injurious behavior.

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 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. Nickerson Letter

The district asserts that the IHO erred in determining that it had failed to offer the student a FAPE based upon the issuance of the June 24, 2011 Nickerson letter. As further described below I agree that the IHO's decision must be reversed on this point.

A "Nickerson letter" is a remedy for a systemic denial of FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dept. of Educ., 785 F.Supp.2d 28, 44 [S.D.N.Y. 2011]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. Aug. 25, 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092; see also Tr. pp. 146-47). In this case, there is no dispute that the district issued the Nickerson letter (Parent Ex. F), but there is no evidence in the hearing record to explaining why (see, e.g., Tr. p. 147). Although the IHO treated the issuance of the Nickerson letter as an admission of a denial of a FAPE, I am hard pressed to see how the issuance of this court ordered remedy for a denial of a FAPE constitutes a basis, in and of itself, for finding a denial of a FAPE. Furthermore, the student's evaluations are not in dispute, nor is the timeliness of the district's offer of an IEP and the assignment of the student to a particular school (Tr. pp. 8-12; Parent Ex. B). By virtue of its issuance, the evidence regarding the Nickerson letter shows that the parent became entitled to send the student to a state-approved non-public school in addition to the public school placement offered by the district, but discussion of the Nickerson letter is of only marginal relevance to the parents' claims in their due process complaint notice that the district failed to offer the student a FAPE.

I further note that jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]). No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal. Consequently, neither the impartial hearing officer, nor I for that matter, have jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of

Educ., 2011 WL 1131492, *17 n.29 (E.D.N.Y. Jan. 21, 2011); W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. Apr. 15, 2010]; see M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents rights to enforce the Jose P. consent order]; Levine v. Greece Cent. School Dist., 2009 WL 261470, *9 [W.D.N.Y. 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson (436 F.3d 52 [2d Cir. 2006]) and Jose P. to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators]; Application of a Student with a Disability, Appeal No. 10-115; see also R.E. v. New York City Dep't of Educ., 2011 WL 924895, *12 [S.D.N.Y. Mar. 15, 2011]; E.Z.-L., 763 F. Supp. 2d at 594; Dean v. School Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]). In view of the forgoing, I find that the impartial hearing officer should have ruled on the allegations of wrongdoing by the district that the parent identified in their due process complaint notice.

B. 12-Month Program

Next, I will address the parties' dispute about whether the district offered the student a program in July and August 2011. According to Education Law § 4410(1)(i) a child is a "preschool child," and thus the responsibility of the CPSE for programming purposes, "through the month of August of the school year in which the child first becomes eligible to attend school pursuant to section thirty-two hundred two of this chapter."

The IEP developed on February 10, 2011 indicated that the student was eligible for summer services through the CPSE (Dist. Ex. 13 at p. 1). In March 2011 the parents notified the district's preschool administrator that they were withdrawing the student from the preschool center-based program (Tr. pp. 181-84, 450, see Parent Ex. D). The principal of the preschool center-based program testified that her school would have had a summer program available for the student (Tr. p. 51). She also testified that in April 2011 she was told by the district to discharge the student (Tr. p. 84). Although the parent removed the student from the preschool, the evidence shows that the student continued to receive 12-month SEIT services in accordance with his February 2011 IEP through August 2011 (Tr. pp. 189, 323, 336, 348). The hearing record also shows that the CSE recognized the student's need to receive a 12-month program, and that this was annotated on the student's May 2011 IEP (Dist. Ex. 1 at p. 9). Under the circumstances of this case in which the parents removed the student from the preschool center-based program, did not challenge the February 2011 IEP or the CPSE's actions in their due process complaint, the student otherwise actually received SEIT services in accordance with the applicable February 2011 IEP, and the May 2011 IEP continued the notation of the student's need for 12-month services, I decline to find a denial of a FAPE for the 2011-12 school year due to the alleged lack of summer services in a school-aged program.

C. Assigned School

I will now consider the parties contentions regarding the appropriateness of the assigned school. In this case, a meaningful analysis of the parents' claim that the assigned school was inappropriate would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that 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. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; 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]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 CFR 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20). Further, the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]). The hearing record demonstrates that the district, prior to the start of the new school year, provided the parents with notice of the location where the district sought to implement the May 2011 IEP (Parent Ex. E). The hearing record also demonstrates that the proposed classroom conformed to the CSE's educational placement recommendation, and that the parents did not assert in their due process complaint notice that a 6:1+1 special class placement was inappropriate. The essence of the parents' complaint was that the proposed classroom was located on the fifth floor of a large school building that had no elevator, and, the assigned school was in a public school setting (Parent Ex. B at p. 5). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP; however, they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420).

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 and thereby precludes the student from the opportunity to receive educational benefits (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]). However, 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]).

In this case, the parents rejected the IEP and enrolled the student at the Rebecca School prior to the time that the district became obligated to implement the student's IEP. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless does not support the conclusion that the district would have deviated from the IEP in a material way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see 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]), or that the assigned school threatened the student's health in a manner that would have undermined his ability to learn (A.S., 414 F. Supp. 2d at 178; L.K., 2011 WL 127063, at *9). The

preschool administrator confirmed that the assigned school was on the fifth floor of a building that housed two schools; the assigned school, which enrolled approximately 40 students and a kindergarten through eighth grade school, which enrolled approximately 600 students (Tr. pp. 135, 140, 142). The school building did not have a working elevator (Tr. pp. 140, 447). The evidence also shows that the student did not have gross motor delays and that he was able to navigate stairs, although he tended to move quickly on them (Tr. pp. 150, 250, 265-66, 277, 301, 425). However, the hearing record also shows that the student was sensitive to noise, that it could provoke the student's anxiety, and that at times it served as a trigger for the student's self-abusive behaviors (Tr. pp. 156-57, 272, 331, 445; Dist. Ex. 6 at p. 1).

The school administrator acknowledged that the student's mother expressed concerns with respect to the student's ability to navigate four flights of stairs in a school with so many students where there was so much noise and activity, but that he did not agree with them (Tr. p. 143). He testified that he advised the student's mother regarding her concerns which could be raised with a placement officer, who would work with her to identify options for other schools (Tr. pp. 142-45). The preschool administrator also testified that the student would never be alone in the assigned school, would always be accompanied by his paraprofessional, and the paraprofessional would address any issues the student had with crowds or noise (Tr. pp. 150-51, 158).

Based on the foregoing, there is no showing in the hearing record that the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded him from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P., 2010 WL 1049297, at *2). Although one can understand the parents' preferences for a school with an elevator and a small student population,[3] their preferences expressed after the CSE meeting in this instance do not equate to a violation of the district's obligation to offer the student the basic floor of opportunity through an IEP that was reasonably calculated to enable the student to receive educational benefits (see Grim, 346 F.3d at 379).

VII. Conclusion

Having determined that the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and it is not necessary to address the remaining Burlington/Carter factors such as the appropriateness of the parent's placement of the student at Rebecca School or the extent to which equitable considerations support the parents or the district (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F. v. New York City Dept. of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]). I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

[3] In view of his testimony, the parents' description of the school psychologist's statements regarding the assigned school described above may be viewed similarly as ideals regarding the particular school setting and not an opinion that CSE intentionally designed a program it knew to be inadequate to address the student's needs (see Tr. p. 143; Parent Ex. D).

IT IS ORDERED that the impartial hearing officer's decision dated December 20, 2011 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to pay for the student's tuition costs at the Rebecca School.

Dated: **Albany, New York**
February 27, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER