



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-051

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, Ilana A. Eck, Esq., of counsel

Law Offices of George Zelma, attorneys for respondents, George Zelma, 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') daughter and ordered direct payment of their daughter's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be sustained. The cross-appeal must be dismissed.

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 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 student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (Tr. p. 159; Dist. Ex. 1 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In September 2010, the student was unilaterally placed by her parents at the Rebecca School (Tr. p. 427; Parent Ex. G at p. 1).¹ On May 24, 2011, the CSE convened to conduct the student's annual review and to develop her IEP for the 2011-12 school year (Dist. Ex. 1 at p. 1). The May 2011 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school in addition to the provision of a 1:1 crisis management paraprofessional and related services (id. at pp. 1, 16-17).

¹ The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 151, 216, 486; see 8 NYCRR 200.1[d], 200.7).

In a final notice of recommendation (FNR) to the parents dated June 11, 2011, the district summarized the recommendations in the May 2011 IEP and notified them of the school to which the student was assigned for the 2011-12 school year (Dist. Ex. 3). On June 21, 2011, the parents visited the public school site (Tr. pp. 434-35, 461; see Parent Ex. G). By letter dated June 24, 2011 to the district, the parents advised they did not believe that the assigned school was appropriate for the student and that she continued to require a private placement because of her "severe sensory and behavioral issues, and her educational needs" (Parent Ex. G at p. 1). The parents further informed the district that they planned to continue the student's enrollment at the Rebecca School for the 12-month 2011-12 school year, and would seek the costs of the Rebecca School tuition and crisis and transportation paraprofessionals to be provided at public expense (id. at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2011, the parents requested an impartial hearing (Parent Ex. A). The parents requested as relief, among other things, the student's tuition at the Rebecca School to be provided at public expense (id. at p. 6). They also invoked the student's right to remain in her pendency (stay-put) placement at the Rebecca School (id.). Although the parents stated generally in their due process complaint notice that there were "procedural and substantive defects" in the development of the May 2011 IEP, they did not assert any specific defects regarding the IEP, but raised allegations regarding the public school site to which the district had assigned the student (compare Parent Ex. A at pp. 4-5, with Parent Ex. A at p. 2). Specifically, the parents raised the following allegations regarding the assigned school and classroom: (1) the proposed classroom had too much stimuli, which could become distracting for the student; (2) the proposed classroom was not safe for the student; (3) the proposed classroom lacked sensory equipment; (4) the proposed classroom lacked a space for the student to rest; (5) the assigned school was very large and overly stimulating; (6) the assigned school lacked a sensory gym; and (6) the lunchroom contained up to 100 students, which was inappropriate for the student (Parent Ex. A at p. 2). In addition, the parents asserted that the Rebecca School was an appropriate placement for the student, and that equitable considerations favored their claim for relief, because they had cooperated with the district (id. at pp. 4-5).

B. Impartial Hearing Officer Decisions

On October 28, 2011, the parties proceeded to an impartial hearing, which ended on December 19, 2011, after three days of testimony (Tr. pp. 1-507). In a December 5, 2011 "amended" interim decision, the IHO determined that the Rebecca School, various related services, and special transportation including a paraprofessional constituted the student's pendency placement (Amended Interim IHO Decision at pp. 7-8).² The IHO's interim decision was subsequently appealed (see Application of the Dep't of Educ., Appeal No. 12-008; see also 8 NYCRR 279.10[d]). In a decision dated March 1, 2012, this SRO reversed the IHO's December 5, 2011 interim decision to the extent that she concluded that the Rebecca School was the student's pendency placement, and the undersigned further determined that under pendency the student had the right to attend a 6:1+1 special class in a specialized school based on the student's November 2008 IEP (Application of the Dep't of Educ., Appeal No. 12-008).

In a final decision on the merits dated February 3, 2012, the IHO granted the parents' request for the costs of the student's tuition at the Rebecca School, including the related services,

² The IHO rendered her original interim order on pendency on November 8, 2011 (Interim IHO Decision).

for the period of September 12, 2011 through June 30, 2012 (IHO Decision at p. 21). Initially, the IHO found that the district failed to establish that it offered the student a free appropriate public education (FAPE) during the 2011-12 school year (*id.* at p. 17). Although the IHO acknowledged that the district convened a CSE and relied on information from a classroom observation conducted by the district, as well as input from the parents and Rebecca School personnel to develop the IEP, the IHO concluded that these efforts were insufficient because the IEP failed to accurately reflect the student's needs including the use of the "quiet room that [was] bare" for sensory breaks, instruction in the 1:1 setting of the quiet room, "the nature and degree of [the student's] neurological disorder," or her sensory needs (*id.* at pp. 15, 17). Moreover, while the IHO noted that both parties agreed standardized testing would not have yielded any new information about the student as she was unable to attend to such testing, the IHO disagreed with the parties and found that "some skills level testing" could have been administered to reflect the student's skills (*id.* at p. 14). Next, the IHO concluded that the classroom described by the district at the impartial hearing was contrary to what was indicated in the May 2011 IEP regarding the student's needs (*id.* at p. 15). Additionally, the IHO found that the May 2011 IEP failed to provide the student with a quiet room, for sensory breaks or for the provision of 1:1 instruction (*id.*). Under the circumstances, the IHO determined that the district's program would increase the student's anxiety (*id.*). Regarding the assigned school, the IHO found that it lacked a sensory gym, which would not have been available in either summer 2011 or September 2011 (*id.*). Moreover, although she determined that the May 2011 IEP prescribed a higher amount of related services than offered at the Rebecca School, the IHO found that in the environment of the specific district school site, the student would not be regulated enough to attend to any of the recommended related services sessions and be open to learning (*id.* at pp. 15-16).

Next, the IHO considered the appropriateness of the Rebecca School, by separately considering whether the unilateral placement met the student's unique needs during the times period of summer 2011 and the period from September 2011 through June 2012 (IHO Decision at pp. 18-19). The IHO found that the unilateral placement was appropriate for the student during the period of September 2011 through June 2012, but she concluded that the Rebecca School was not appropriate during summer 2011 because the Rebecca School failed to furnish the student with 1:1 paraprofessional services (*id.* at p. 18). She determined that given the severity of the student's disability, safety concerns were not addressed without the support of the 1:1 paraprofessional, and the student could not be sufficiently regulated in order to attend to learning (*id.*). Lastly, the IHO found that equitable considerations favored the parents' claim for relief, and, as relief, she awarded of the costs of the student's tuition at the Rebecca School for the period of September 2011 through June 2012 (*id.* at pp. 19-21).

IV. Appeal for State-Level Review

The district appeals and requests reversal of the IHO's decision. As a threshold matter, the district argues that the IHO erred in raising a number of issues sua sponte that were not included in the parents' due process complaint notice. The district further maintains that its recommendation for placement in a 6:1+1 special class in a specialized school, combined with a 1:1 paraprofessional and related services offered the student a FAPE for the 2011-12 school year. Specifically, the district contends that the May 2011 IEP addressed the student's sensory and behavioral needs. Furthermore, the district alleges that it could implement the student's IEP at the assigned school, and the school could fulfill the student's management needs and her related services needs. Notwithstanding the IHO's finding that a sensory gym was not available to the student at the public school site, the district maintains that had the student attended the assigned school, she could have

had access to a sensory gym. Next, the district alleges that the parents failed to establish that the Rebecca School was an appropriate placement for the student. The district also asserts that equitable considerations preclude the parents' request for relief.

In an answer, the parents request that the IHO's decision be upheld to the extent that she determined that the district denied the student a FAPE for the 2011-12 school year. The parents deny the district's claim that the IHO made findings regarding issues not enumerated in their due process complaint notice, and further assert that they afforded the district ample notice of those issues. They further maintain that the district deprived the student of a FAPE, and that the evidence did not show that the assigned school could implement the May 2011 IEP. Regarding the Rebecca School, the parents cross-appeal the IHO's decision to the extent that she did not find that it was an appropriate placement for the student during summer 2011 due to the absence of 1:1 paraprofessional services. With regard to this, the parents allege that they should not be held accountable for the district's failure to provide the student with a related services authorization (RSA) for 1:1 paraprofessional services at the Rebecca School for summer 2011. In any event, they allege that the Rebecca School was an appropriate placement for the student during summer 2011, as well as for the remainder of the school year. Finally, the parents assert that equitable considerations favor their request for relief.

In an answer to the parents' cross-appeal, the district maintains that the IHO properly denied the parents' request for tuition reimbursement for summer 2011 due to the Rebecca School's failure to provide the student with an essential related service, namely, 1:1 paraprofessional services. In any event, to the extent that the parents' claim in their cross-appeal that the failure to provide the student with paraprofessional services during summer 2011 was the result of the district's failure to issue her an RSA for the service, the district further submits that it offered the student a FAPE, and as a result, there is no basis upon which to predicate an award of relief.

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. Scope of Impartial Hearing

As an initial matter and as the district noted, in reaching her conclusion that the district failed to offer the student a FAPE, the IHO ruled on several issues in her decision that were not raised in the parents' due process complaint notice. 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]). Additionally, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised sua sponte.

In this case, as discussed above, although the parents did not challenge the adequacy of the IEP in their due process complaint notice, in reaching her determination that the district denied the student a FAPE, the IHO nevertheless reached a number of findings related to adequacy of the May 2011 IEP and its development, including that: (1) the IEP did not provide for the use of a quiet, small, bare room for the student to address her sensory needs or where 1:1 instruction could be provided; (2) the IEP did not describe the nature or degree of the student's neurological disorder or her sensory needs; (3) additional "skills level testing" could have been administered to reflect the student's skills; and (4) the proposed program would increase the student's anxiety (compare IHO Decision at pp. 14-17, with Parent Ex. A). The IHO also found, sua sponte, that although the IEP recommended more related services than what the student received at the Rebecca School, the student would not have been regulated enough in the district's school environment to attend to any of the sessions and be open to learning (compare IHO Decision at pp. 15-16, with Parent Ex. A).

Here, the parents did not assert any of the issues identified above in their July 1, 2011 due process complaint notice (Parent Ex. A). Further, the hearing record does not reflect that they requested, or that the IHO authorized a further amendment to the due process complaint notice to include these additional issues. Thus, the IHO should have confined her determination to the issues raised in the parents' due process complaint notice and erred in reaching the issues set forth above (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-

*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of the Dep't of Educ., Appeal No. 11-156). Consequently, the IHO's determinations with respect to these issues must be reversed and the remaining claims on appeal pertain only to the implementation of the IEP at the assigned school.

B. May 2011 IEP—6:1+1 Special Class Placement

Even assuming for the sake of argument that the parents had raised the claim in their due process complaint notice that the IEP was deficient because a 6:1+1 special class was inappropriate for the student, I have reviewed the hearing record in this case and find that the evidence supports a determination that the May 2011 IEP addressed all of the student's needs, particularly her sensory and behavioral needs. The student reportedly has received diagnoses of autism and mental retardation³ (Parent Ex. K at p. 1). In addition, she exhibits severe global delays and deficits related to cognition, self-regulation, language processing, attention, activities of daily living (ADL) skills, social skills, and academics as well as delays with respect to her fine and gross motor skills (Tr. pp. 160, 197-98; Dist. Exs. 1; 4-5). Specifically, the student's cognitive abilities were significantly below average and her academic skills were at the prekindergarten level (Dist. Ex. 1 at p. 3; Parent Ex. K). In addition, the student often verbally expressed herself with brief and repetitive scripts (Dist. Ex. 5 at p. 1). Although her peer interactions were limited, at the time of the May 2011 CSE, she was developing a greater awareness and interest in peers (id. at p. 2). Additionally, the student engaged in behavior related to pica by mouthing/eating inedible items (Tr. p. 160; Parent Ex. K at p. 1).⁴

The May 2011 CSE was attended by the parents, a district special education teacher who also participated as the district representative, a school psychologist, a Rebecca School social worker, the parents' advocate, and by telephone, the student's classroom teacher at the Rebecca School (Dist. Ex. 1 at p. 2).⁵ The hearing record indicates that the May 2011 CSE reviewed a December 2010 classroom observation of the student at the Rebecca School, a December 2011 Rebecca School progress report, and the student's November 2009 IEP (Tr. pp. 158-59; Dist. Exs. 1; 4-5). The May 2011 CSE gleaned information regarding the student's needs in the areas of sensory regulation, attention, language processing, social skills, academics, and ADL skills in addition to fine and gross motor skills from the evaluative material before it and incorporated that information into the resultant IEP (compare Dist. Ex. 1 at pp. 1-19, with Dist. Exs. 1; 4-5). Based

³ I note that although the student's 2009 psychological evaluation indicates that the student has received a diagnosis of mental retardation, the term mental retardation is no longer used in State regulations, and the term has been replaced with the term intellectual disability which has the same definition (see 8 NYCRR 200.1[zz][7]; see also Parent Ex. K at p. 1).

⁴ According to the assistant principal of the assigned school, pica is described as eating inanimate objects and inappropriate things, as well as putting things in the mouth that should not be there and are often dangerous (Tr. p. 48).

⁵ The hearing record reveals that the district afforded all of the members of the CSE an opportunity to participate in the May 2011 meeting (Tr. pp. 159, 179, 467-68, 502; Dist. Ex. 2). The parents requested that the May 2011 CSE defer the student's placement recommendation to the Central Based Support Team (CBST) for a nonpublic school (Tr. pp. 182-83 501-02; Dist. Ex. 2). Although the CSE rejected the parents' request, the district school psychologist advised the parents of their right to present the CSE with additional evaluative material for review and consideration to support their request (Tr. p. 194).

on the information before it, the May 2011 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with a 1:1 crisis management paraprofessional due to the student's need for individual support throughout the day in order to maintain her safety and health (Tr. pp. 160, 178; Dist. Ex. 1 at pp. 1, 16-17). The school psychologist characterized a 6:1+1 special class as a small and supportive classroom that tended to be language-based and language-rich and also offered significant support to students (Tr. p. 160). The CSE also recommended related services consisting of the provision of three 45-minute sessions of 1:1 occupational therapy (OT) per week, one 45-minute session of group OT per week, three 45-minute sessions of 1:1 speech-language therapy per week, and two 45-minute sessions of 1:1 physical therapy (PT) per week in addition to the provision of a special transportation paraprofessional (Dist. Ex. 1 at p. 16).

A review of the May 2011 IEP reflects that it addressed the student's sensory regulation, academic, and social/emotional needs in numerous ways (Dist. Ex. 1). Specifically, the IEP indicated that the student lacked a full awareness of others in her environment (Dist. Ex. 1 at p. 4; see Tr. p. 167). In addition, the IEP reflected that the student's behavior seriously interfered with instruction and required additional adult support (Dist. Ex. 1 at p. 4). The IEP also indicated that the student required 1:1 support throughout the school day due to safety concerns related to her impulsivity and placing inedible items into her mouth (Tr. p. 160; Dist. Ex. 1 at p. 15). The school psychologist who participated in the CSE meeting testified that given the student's severe, global delays combined with her need for a very significant amount of support throughout the school day, the recommendation for a 6:1+1 special class with a 1:1 crisis management paraprofessional could address the student's needs (Tr. pp. 160, 221).

The district's school psychologist further emphasized that the student had strong sensory needs, requiring support throughout the school day in order to maintain a calm and regulated state in order to be available for learning (Tr. pp. 166, 197). Moreover, she noted that the student required additional time to process information so that the student could more fully understand what was happening in her environment (id.). As a result, the May 2011 CSE added a number of environmental modifications and human/material resources to the student's IEP (Tr. p. 198; Dist. Ex. 1 at pp. 3-4). For example, to address the student's needs related to sensory regulation and social/emotional functioning, the May 2011 CSE incorporated sensory supports into the IEP such as a brushing protocol, movement throughout the day, space to move, sensory breaks, verbal redirection, and adult narration of events in a slow and calm voice (Dist. Ex. 1 at p. 4). According to the May 2011 IEP, the student required extensive oral motor input to remain regulated, because she often attempted to use her mouth to explore her surroundings (id.). Although the school psychologist acknowledged that the May 2011 CSE did not delineate specific sensory materials in the IEP, she explained that the CSE intentionally kept the IEP somewhat "fluid," in order to address variations in the student's needs (Tr. pp. 218-19). Additionally, to address the student's academic needs, the May 2011 CSE recommended several strategies including the use of repetition, visual and verbal prompts, sensory breaks, high affect instruction, as well as the provision of additional processing time (Tr. p. 165; Dist. Ex. 1 at p. 3).

The May 2011 IEP also described the student's physical development including her difficulties in the areas of body awareness, muscle tone, gradation of movements, motor planning, overall strength, balance, coordination, and endurance (Tr. p. 169; Dist. Ex. 1 at p. 5). To address the student's sensory regulation needs as well as her fine and gross motor deficits, the May 2011 CSE recommended participation in a 6:1+1 adapted physical education class as well as the provision of OT and PT (see Tr. p. 169; Dist. Ex. 1 at p. 5). In addition, the May 2011 CSE

recommended 1:1 speech-language therapy to address the student's delays in the areas of oral motor skills, communication, and language (Tr. p. 171; Dist. Ex. 1 at p. 16).

Lastly, having determined that the student's behaviors seriously interfered with instruction and required additional 1:1 support, the May 2011 IEP called for the development of a behavioral intervention plan (BIP) to address the needs on which the student's 1:1 paraprofessional should work and, in addition, created specific goals within the body of the IEP to address the student's behaviors (Tr. pp. 167-69).⁶ The May 2011 CSE drafted a BIP to address the student's impulsivity, her tendency to place inedible items in her mouth, her need for constant movement, throwing items, and limited attention span (Tr. pp. 168-69; Dist. Ex. 1 at p. 19). According to the BIP, the classroom environment needed to be organized in a manner that was not overstimulating (Dist. Ex. 1 at p. 19). The BIP further directed that the classroom environment should also be clean and clear to discourage the student from putting items in her mouth (*id.*). The BIP also provided strategies to allow the student movement around the classroom and giving the student space, while not following her (*id.*). In addition, the student's BIP called for the provision of verbal prompts to the student, directing her to put things down when finished with them, as well as prompts regarding what the student could put in her mouth (*id.*). Adult narration, soothing music, dim lighting, high affect engagement, in addition to sensory supports including oral motor input and brushing were also incorporated into the BIP as strategies designed to change the student's interfering behaviors (*id.*). Additional supports incorporated into the BIP designed to help the student change her behaviors included the assistance of a special education teacher and a 1:1 crisis management paraprofessional as well as the provision of OT, speech-language therapy, and PT (*id.*).

Based on the foregoing, given the amount of sensory and 1:1 support built into the May 2011 IEP, the evidence shows that the recommended 6:1+1 program combined with the provision of a 1:1 crisis management paraprofessional was reasonably calculated to provide the student with educational benefits and therefore, offered her a FAPE during the 2011-12 school year.

C. Assigned School

In their due process complaint notice, the parents raised a number of concerns regarding the appropriateness of the particular school to which the student had been assigned. The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).⁷ The IDEA and State regulations also 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 at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special

⁶ Although the propriety of the BIP and the functional behavioral assessment (FBA) are not at issue in this matter, the hearing record reflects that all CSE members participated in the development of the BIP (Tr. pp. 168, 223-24, 227; Dist. Ex. 2 at p. 2). The school psychologist also testified that the CSE conducted an informal FBA in which all members participated (Tr. p. 223). The school psychologist described an FBA, as "a cooperative effort," which could not be completed in one observation and required information from different settings, to which the district did not have access in this case (Tr. pp. 223-24). She noted that the parents and the student's Rebecca School teacher provided the CSE with information, and stated that there was no disagreement with regard to the function of the student's behavior (Tr. p. 224).

⁷ In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

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. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In addition, 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). 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 Dep't 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]).

In order to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; 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]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063).⁸ Additionally, the United States Department of Education (USDOE) has also 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]).

In this case, the district correctly argues that these issues are in part speculative insofar as the parents did not accept the recommendations of the CSE or the programs offered by the district and instead enrolled the student in a private school of their choosing. Consequently the district was not required to demonstrate the proper implementation of the student's IEP at the public school site and there is no basis for concluding that it failed to do so. Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student actually attended the

⁸ The Second Circuit has established that "'educational placement' refers to the type of educational program on the continuum—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., 2011 WL 4001074, at *11 [S.D.N.Y. Aug. 19, 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]; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). 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 C.F.R. § 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; A.L., 2011 WL 4001074, at *11).

assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; DD-S. v. Southold Union Free Sch. Dist., 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])).

Even assuming for the sake of argument that the student had attended the district's assigned school, I have reviewed the evidence and as discussed below, the parents' concerns regarding the implementation of the IEP are not adequately supported by the evidence in the hearing record.

1. School Building

Despite the IHO's finding to the contrary, the hearing record does not support the conclusion that the public school site was too large and overly stimulating for the student; rather, it depicts the assigned school as a supportive and structured environment that could implement the student's IEP. The special education teacher of the classroom the student was recommended to attend testified that in July 2011, she was teaching a 6:1+1 special class with five students, three of whom were assigned 1:1 paraprofessionals (Tr. pp. 93-94). According to the special education teacher, the students ranged in age from 15 to 16 years old and were described as low functioning (Tr. p. 94). She noted that she frequently worked with students on a 1:1 basis, in particular, to assess their skills (Tr. p. 100). The special education teacher also testified that she regularly collaborated with parents and related service providers to address the students' needs (Tr. pp. 102-04). Specifically, she explained that parents could contact her anytime, and the special education teacher further noted that she met with some parents every two weeks (Tr. p. 103). The assigned school also employed a "crisis teacher," who periodically "check[ed] about the students" (Tr. pp. 117-18).⁹

Regarding the parents' contention that the assigned school constituted an overly stimulating environment for the student, the assistant principal testified that upon admission, the assigned school could assess the student to determine where she functioned in terms of instruction, and that staff also took into consideration how students responded to structure (Tr. pp. 76-77). She described the assigned school's classroom techniques as "incredibly structured" and further noted that the classes followed routines (Tr. p. 77). Moreover, the assistant principal testified that staff at the assigned school were able to determine if a classroom was overstimulating for a student based on the frequency of "acting out behaviors" and whether the students experienced difficulty following the routines of the classroom (Tr. pp. 78-79). Under these circumstances, staff at the assigned school examine the physical structure of the room and consider whether routines are clearly defined, such that students understand the expectations (*id.*). The assigned principal testified that staff also reflects upon what could be "setting the student off or just disrupting her day" and try to adjust accordingly (Tr. p. 79).

Additionally, notwithstanding the parents' claims that the lunchroom contained too many students, which was not appropriate for the student, the hearing record reveals that staff at the

⁹ While the hearing record indicated this individual was available to assist students, it did not specifically indicate how she interacted with particular students.

assigned school could provide the student with adequate adult support during lunch. The students in the assigned class attended lunch with 76 other students (Tr. p. 48). During lunch, students were supervised by teachers, a crisis intervention teacher, 1:1 paraprofessionals, and a school administrator (Tr. pp. 48-50). The assistant principal described the purpose of having the 1:1 paraprofessionals at lunch, because they were the first resource and the individuals who knew the students and their individual needs best (Tr. p. 50). She emphasized that it was important for the paraprofessionals to monitor students when they were eating because the paraprofessionals knew if a student experienced difficulty when eating or exhibited a behavior that could interfere with a student's ability to sit in the cafeteria and function appropriately (*id.*).

Based on the foregoing, the hearing record does not support the conclusion that the district would have deviated from the student's IEP because the assigned school was too large or overly stimulating for the student and it further indicates that the assigned school was capable of appropriately supporting the student during lunch.

2. Safety Concerns/Pica-Related Behavior

Regarding the student's needs related to pica, the student's Rebecca School teacher stressed the importance of a 1:1 paraprofessional in order to maintain her safety (Tr. pp. 314, 318). According to the school psychologist who attended the CSE meeting, the student's pica-related concerns were addressed in both the IEP and BIP as well as through the provision of a 1:1 crisis management paraprofessional (Tr. pp. 168-69, 219; Dist. Ex. 1 at pp. 16, 19). In addition, the public school had a behavior support team, made up of professional staff including the psychologist and related services providers, who provided students with assistance regarding behavior (Tr. pp. 111-12). In particular, the special education teacher testified that the assigned school's behavior support team could work with the student to address her behavior related to pica (Tr. p. 128). The special education teacher further testified that she had students who engaged in pica behaviors (Tr. p. 126). Finally, the special education teacher also organized her classroom in such a fashion so that there was nothing around the students and nothing hanging from the ceiling (Tr. pp. 122, 128, 131).

The assistant principal at the assigned school also had experience working with students with needs related to pica, and she noted that such students typically had 1:1 paraprofessionals assigned to them (Tr. pp. 47, 54). To address pica-related concerns, the assigned school was "very cautious" regarding items in the classroom and the assistant principal testified that many items were locked up or put away (*id.*). The assigned school also distributed a special alert list throughout the school in order to inform teachers and staff throughout the school which students engaged in pica, and to increase awareness of these students' needs (Tr. pp. 47-48). Lastly, the assistant principal described how she could address pica-related concerns with the student's teacher, which included reviewing the student's IEP with the teacher, considering "what pica would mean in terms of instruction," and how the teacher would need to structure her day in order to keep the classroom safe and move the student along to reach her outcomes (Tr. pp. 54-55). In view of the foregoing, the hearing record illustrates how the public school site was capable of implementing the student's IEP, could address her pica-related behavior and maintain her safety.

3. Sensory Equipment

Lastly, although the parents claim that the assigned school would not address the student's sensory needs, the evidence in the hearing record indicates otherwise. The district's school psychologist testified that the student required sensory input throughout the school day to be

available for learning (Tr. p. 197). The special education teacher testified that she could provide the student with sensory breaks, space to move within the classroom, and incorporate movement throughout the day (Tr. p. 111). In addition, students were also provided with a symbol to ask for a break, and the special education teacher asked students if they needed a break (*id.*). When a student needed a break, she took them out of the class (*id.*). Regarding the provision of sensory breaks, the special education teacher described how she communicated with parents to learn what the student liked to help "break" her behavior (Tr. pp. 107-08). The special education teacher also described the use of a brushing protocol to address the students' sensory needs (Tr. p. 111). In addition, the hearing record reveals that a sensory gym was in use at the assigned school to address student's needs under the supervision of the occupational therapists (Tr. pp. 82, 84, 133).¹⁰ The assistant principal explained that at the time of the impartial hearing, teachers and paraprofessionals from the assigned school were scheduled to attend an upcoming training session regarding the sensory gym to ensure its consistent use (Tr. pp. 46-47, 82). She also noted that subsequent to the training, the occupational therapists would continue to manage the sensory gym (Tr. p. 47). In addition, the assigned school offered adapted physical education to students (Tr. p. 50). Finally, as stated above, both the IEP and BIP were also designed to address the student's sensory processing needs (Dist. Ex. 1 at p. 19).¹¹ Under the circumstances, the hearing record demonstrates that the assigned school had the resources to address the student's sensory needs.

In view of the foregoing evidence, there is no basis to conclude that if the student had been enrolled in the public school and the district been required to implement her IEP, that the district would have thereafter failed to implement the May 2011 IEP in a material or substantial way and thereby denied the student a FAPE.

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of the Rebecca School during summer

¹⁰ Despite the IHO's finding that in summer 2011 the assigned school did not have a sensory gym, review of the evidence reveals that in spring 2011, a sensory room had been opened at the assigned school (compare IHO Decision at p. 15, with Tr. pp. 46-47).

¹¹ Further review of the hearing record suggests that in addition to meeting student's needs related to sensory regulation and pica, the assigned school could implement the student's May 2011 IEP (Tr. pp. 40-41, 44-46, 50-53, 96, 99-101). The special education teacher provided small group and 1:1 instruction to the students (Tr. pp. 96, 100). Students within the assigned class learned vocational and related skills such as cleaning, cooking, ADLs, and social skills (Tr. pp. 99, 101, 118). The special education teacher of the assigned class also provided differentiated instruction and materials to the students based on their individual functioning levels (Tr. p. 41). The special education teacher at the assigned school stated that the student's academic abilities and social/emotional functioning were similar to the students within the assigned class (Tr. pp. 106-08). Students at the assigned school were assessed using a task and skills-based assessment designed for students who were more accurately evaluated using non-standardized procedures (Tr. pp. 40-41, 68-69). The assistant principal also testified that the assigned school could fulfill the student's related services mandates (Tr. p. 44). Parent counseling and training was offered on a monthly basis at the assigned school in addition to the opportunity to meet individually with the parent coordinator to address familial needs (Tr. pp. 44-46). With respect to the student's transition plan, the assistant principal testified that the assigned school worked on community integration, independent learning skills, and self-advocacy to assist students to become independent (Tr. pp. 50-52; Dist. Ex. 1 at p. 18). Upon review of the student's transition plan included in the May 2011 IEP, she stated that it included items on which the assigned school worked during the instructional day (Tr. p. 52). Additionally, a transition linkage coordinator at the assigned school provided assistance to parents and students to evaluate prospective placements for students when they turned 21 years old, based on the individual needs of the students (Tr. pp. 52-53).

2011 or balance of the school year, or whether the equities support the parents' claim for the tuition costs at public expense (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).¹² I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
June 08, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

¹² Regarding the parents' cross-appeal of the IHO decision to the extent that they request reimbursement for the Rebecca School, the district correctly argues that absent a determination that there was a denial of a FAPE, no basis existed upon which to predicate an award of relief in the form of tuition reimbursement (see 34 CFR 300.148[a]; Application of a Student with a Disability, Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 08-078). Accordingly, the cross-appeal is dismissed.