The University of the State of New York

The State Education Department
State Review Officer
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No. 12-052

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

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, 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 the cost of their son's tuition at the Rebecca School[1] for the 2011-12 school year. The parents cross-appeal from the IHO's determination that the student was not entitled to home-based services. 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

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

hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The hearing record reflects that the student has a diagnosis of Angelman Syndrome (Dist. Exs. 1 at p. 5; 6 at p. 1).[2] The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[2] Angelman Syndrome is a chromosomal disorder that causes developmental delays and neurological problems (Dist. Ex. 6 at p. 1).

The student received home-based and center-based services through the early intervention program and the Committee on Preschool Special Education to address global delays (Dist. Ex. 6 at p. 1). The student began attending the Rebecca School in September 2010 in an 8:1+3 classroom where he also received support from a 1:1 paraprofessional and related services including occupational therapy (OT), physical therapy (PT), speech-language therapy and adapted physical education (Tr. p. 182; Dist. Ex. 2 at p. 1). The student also received home-based services including OT, PT, speech-language therapy, and special education itinerant teacher (SEIT) services during the 2010-11 school year (Tr. pp. 297, 361-62, 397, 399, 402, 520-21).

On May 25, 2011, the CSE met for an annual review of the student's program and to develop his IEP for the 2011-12 school year (Dist. Ex. 1). The resultant IEP reflected that the student was eligible for special education programs and services as a student with multiple disabilities and recommended that the student be placed in a 12-month 6:1+1 special class in a specialized school (id. at p. 1). The May 2011 CSE also recommended that the student receive the assistance of a full-time 1:1 health paraprofessional and related services including individual speech-language therapy, OT, and PT (id. at p. 15).

The hearing record reflects that during the May 2011 CSE meeting, the student's mother requested home-based services for the student, that the CSE did not have evaluative information indicating that the student required home-based services, and that the CSE decided to request new evaluations to determine the student's need for home-based services and indicated that such services would be provided if recommended by the evaluators (Tr. pp. 34-35, 71, 84-85, 592; see Dist. Exs. 2; 3; 6).

On June 2, 2011, the parents signed an enrollment contract with the Rebecca School for the 2011-12 school year (Dist. Ex. 8 at p. 4). Also on June 2, 2011, the parents signed an addendum to the enrollment contract, which included a schedule of payments for the 2011-12 school year and parental obligations (Dist. Ex. 9 at pp. 1-2).

On June 16, 2011, a speech-language evaluation was conducted to assess the student's present performance level and determine the need for continued speech-language services (Dist. Ex. 4 at p. 1). The evaluator recommended that the student receive speech-language therapy to assist in development of a communication system (id. at p. 4).

In a final notice of recommendation (FNR) dated June 17, 2011, the district summarized the recommendations made by the May 25, 2011 CSE and identified the particular school to which the district assigned the student (Dist. Ex. 7). The FNR listed an address for the assigned school, as well as the name, address, and telephone number of the individual to contact in order to arrange a visit of the assigned school (id.). By letter to the district dated June 20, 2011, the student's mother indicated that she had not received an FNR and expressed her interest in visiting the "program/placement" that was offered before the end of the school year (Parent Ex. C at p. 1; see Tr. p. 574). In the June 20, 2011 letter, the parent further informed the district that if it did not offer the student an appropriate program in a timely manner she would have no alternative but to enroll the student at the Rebecca School and seek tuition reimbursement (Parent Ex. C at p. 1).

On June 22, 2011, an OT evaluation of the student was conducted (Dist. Ex. 5 at p. 1). The evaluator recommended school-based individual OT five times per week for 30-minute sessions to address motor and sensory deficits that hindered the student's ability to complete activities of daily living such as dressing, feeding, and hygiene (id. at p. 4).

A. Due Process Complaint Notice

In a due process complaint notice dated June 22, 2011, the parents asserted, among other things, that the student was denied a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2011-12 school year (IHO Ex. I at p. 2). The parents' assertions included that for the 2011-12 school year, the CSE failed to recommend an appropriate program for the student, failed to offer a placement for the student, and failed to offer an appropriate placement for the student (id. at pp. 2-4). The parents asserted that the May 2011 CSE's recommendation of a 6:1+1 special class in a specialized school with a full-time paraprofessional was "contrary to the opinions of the professionals who [had] direct knowledge of the [student's] needs" (id. at p. 2). In addition, the parents asserted that the CSE was unable to provide the parents with information about the proposed program; that the size of the proposed classroom was inappropriate for the student; and that the student-to-teacher ratio was inappropriate for the student (id. at pp. 2-3). The parents also asserted that the CSE did not properly consider the programs available within the district pursuant to the continuum of services by failing to consider a nonpublic school placement; that the student's mother voiced her concern at the CSE meeting that the proposed program was inappropriate; that the parents' concerns were ignored, depriving them of meaningful participation; and that the CSE failed to offer home-based services for the student (id. at pp. 2-3). As relief, the parents sought an order awarding them the cost of the student's tuition at the Rebecca School for the 2011-12 school year, among other things (id. at p. 4).

B. Interim Order on Pendency

An impartial hearing convened on August 10, 2011, and a hearing was conducted regarding the issue of the student's pendency (stay put) placement (Tr. pp. 3-6). The parties agreed that pendency was to be determined by a prior September 28, 2010 IHO decision (Tr. pp. 3-6; IHO Ex. II at p. 2; see Parent Ex. A). In an interim order on pendency dated September 26, 2011, the IHO determined that the student was entitled to pendency pursuant to the provisions of the prior September 28, 2010 IHO Decision (IHO Ex. II at pp. 2-3). The district was directed to provide home-based SEIT services; related services authorizations (RSAs) for speech-language therapy, OT, and PT; and a 1:1 health paraprofessional during the school day until a final determination on the merits of the case was rendered or the case withdrawn (id.).

C. Impartial Hearing Officer Decision

The impartial hearing continued on October 11, 2011 and concluded on December 19, 2011, after four days of testimony (Tr. pp. 11-614). The IHO found that the district developed a valid IEP with appropriate recommendations for the student's program and services (IHO Decision at p. 12). However, the IHO further found that the district failed to offer the student a FAPE based upon the student's mother's testimony that she never received the FNR, and her June 20, 2011 letter to the district indicating that an FNR had not been received (id.). The IHO noted that the district presented testimony indicating that standard office procedures were followed in mailing the FNR to the parent, but cited the parent's testimony, the June 20, 2011 letter, and the lack of response from the district to the parent's letter in support of her finding that the district failed to offer the student a FAPE (id.). The IHO further found that the district did not present any evidence to rebut the parent's evidence, and did not present witnesses or provide any explanation for not responding to the parent's June 20, 2011 letter (id.). The IHO concluded that by not receiving an FNR, the student was effectively denied a placement (id.). In addition, the IHO found that the parents' due

process complaint notice properly raised the issue as to the appropriateness of the assigned school. Noting that the district did not present any witnesses or evidence to support the appropriateness of the assigned school because of its assertion that the parents did not raise the issue in their due process complaint notice, the IHO found it unnecessary to address the issue based upon her finding that the FNR was not received by the parent and the CSE did not respond to the parent's letter requesting the FNR (id.).

As to the appropriateness of the Rebecca School, the IHO found that the parents established that the Rebecca School was providing an appropriate education with appropriate related services, that the student was making progress, and the fact that the Rebecca School did not provide a 1:1 paraprofessional did not render the placement inappropriate (IHO Decision at p. 13). As to equitable considerations, the IHO found that the equities favored the parents regarding their request for payment of the Rebecca School tuition, finding that they cooperated with the district in trying to obtain a placement but were not offered one (id.).

Regarding the parents' request for home-based services, the IHO found that the parents failed to present sufficient credible evidence of the need for the home-based services in order for the student to derive meaningful educational benefit (IHO Decision at p. 13). In addition, the IHO found that the parents' failure to object to the IEP's recommended program, which did not include the home-based related services, indicated a lack of good faith by the parents regarding the request for home-based services (id. at p. 14).

As relief, the IHO ordered the district to pay the student's tuition costs at the Rebecca School for the 2011-12 school year; ordered the district to continue to provide the related service of a 1:1 health paraprofessional at the Rebecca School for the 12-month school year; and ordered the district to continue to provide special education transportation for the student (id. at pp. 15-16).

IV. Appeal for State-Level Review

The district appeals, asserting that it offered the student a FAPE. The district specifically asserts that the IHO erred in crediting the parent's claim that she did not receive the FNR and finding that the student was effectively denied a school placement. In support of its claim, the district asserts that it established that it mailed an FNR on June 17, 2011; that New York law provides a presumption of mailing and receipt by an addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed; that the presumption was not rebutted; and that the IHO improperly relied upon the parent's denial of receipt of the FNR. In addition, the district asserts that the IHO improperly relied upon the parent's June 20, 2011 letter, which asserted that the parent had not received an FNR. Next, the district asserts that the IHO improperly found that the parents raised the issue of the appropriateness of the assigned school in the due process complaint notice and even if it had been properly raised, the student would not have attended a district program.

In addition, the district asserts that the Rebecca School was not an appropriate placement because there was no objective evidence that the student had made any progress in the time that he had been there; that the student needed a 1:1 paraprofessional and a 1:1 paraprofessional was not included in the Rebecca School tuition; that there was no evidence that the Rebecca School's program was tailored to meet the student's individual needs; that the Rebecca School provided less related services than recommended by the CSE; and that the combined Rebecca School and home-

based program was not appropriate. The district also asserts that the IHO improperly considered the parents' request for home-based services as the due process complaint notice did not request funding for such services and even if the issue had been properly raised, the parents' combined program of the Rebecca School and home-based services was not appropriate. Moreover, the district asserts that equitable considerations preclude an award of tuition at the Rebecca School because the parents did not object to the lack of home-based services on the May 2011 IEP and the parents did not complete the evaluations of the student to determine if he required such services. The district also contends that the IHO improperly ordered the district to continue the 1:1 paraprofessional.

In an answer, the parents assert that they overcame the presumption that a placement recommendation was sent on June 17, 2011; that the CSE's proposed 6:1+1 classroom with a health paraprofessional would not have provided the student with enough support; that the IHO correctly reached the issue of the appropriateness of the assigned school; that the CSE failed to offer an appropriate program and placement for the 2011-12 school year; and that the district did not show that the assigned school would have provided the student with a FAPE, that it would have implemented the IEP, or that it could have provided appropriate functional grouping. The parents also assert, among other things, that the district failed to follow the procedural requirements for parental participation; that the parents were not provided with the additional OT and speech-language evaluations until the impartial hearing; that the district did not schedule a PT evaluation at a time that was reasonable, and that there was no evidence that the student was evaluated within the past three years.[3]

As a cross-appeal, the parents assert that the IHO erred in determining that the student was not entitled to home-based services. The parents also assert that the IHO erred in determining that they engaged in inequitable conduct by not stating that the IEP denied the student a FAPE at the CSE meeting as the CSE should have been aware prior to the meeting that the parents believed that the student required home-based services and that the student was receiving such services. As relief, the parents request that the district provide the home-based services ordered by the IHO in the interim order on pendency.

The district answers the parents' cross-appeal. Regarding the equities, the district asserts that the finding of inequitable conduct and lack of cooperation should extend to the parents' request for payment of tuition at the Rebecca School, not just the home-based services. As to the parents' claim for home-based services, the district asserts that the due process complaint notice asserted that the student was entitled to home-based services only pursuant to pendency, and the assertion that the student was otherwise entitled to home-based services was raised for the first time in the parents' cross-appeal and is, therefore, outside the scope of review on appeal. The district further asserts that the student does not require home-based services to receive a FAPE.

[3] The district replies to the parents' answer. Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case the parents did not proffer any additional evidence in their answer. None of the allegations in the district's reply respond to procedural defenses submitted with the answer. Accordingly, the reply is beyond the scope of State regulations and will not be considered on appeal (see 8 NYCRR 279.6).

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 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][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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. Final Notice of Recommendation

I will first address whether the district is entitled to benefit from a presumption of mailing to establish that it mailed the FNR and that the FNR was received by the parents. New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (Nassau Ins. Co., 46 N.Y.2d at 829-30; In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires… in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (Nassau Ins. Co., 46 N.Y.2d at 829-30).

In the case at hand, the hearing record contains a photocopy of the June 17, 2011 FNR (Dist. Ex. 7). A review of the hearing record reflects that the parents' address as indicated on the FNR is the same as the address for the parents listed on the May 2011 IEP, and is also the same address indicated on the parent's June 20, 2011 letter to the district and the parents' June 22, 2011 due process complaint notice (although the apartment number is omitted in the June 2011 letter and due process complaint notice) (see Dist. Ex. 1 at p. 1; Parent Ex. C at p. 1; IHO Ex. I at p. 1). In addition, I note that the parties do not assert that the June 17, 2011 FNR is improperly addressed. In considering whether the hearing record contains adequate testimony by one with personal knowledge of the regular course of business, I note that the district's special education placement and program officer (program officer) testified that part of her responsibilities include supervising clerical employees with responsibilities for processing the FNRs; that once notification is received of the assigned school, an FNR is "generated" by a clerk; and that the clerk places the form in an envelope and takes it to the mailroom (Tr. pp. 142-45). The program officer's testimony also indicates that the date on the FNR, June 17, 2011, indicates the date that the form was mailed to the parent (Tr. p. 146). In addition, the program officer's testimony indicates that the address on the FNR is the same address indicated on the student's May 2011 IEP and that the CSE is asked to verify the address at CSE meetings (id.). The hearing record further reflects that after the clerk generates the FNR, addresses the envelope and takes it to the mailroom, an employee in the mailroom stamps the envelope with the postage based upon the weight of the envelope and takes the mail to the post office mailbox every day (sometimes twice per day) (Tr. pp. 145, 150). The hearing record also reflects that the program officer had no record indicating that the June 17, 2011 FNR was undeliverable (Tr. pp. 146-47).

Upon review of the hearing record, I find that the copy of the FNR, coupled with the program officer's testimony, establishes that the FNR was prepared, that the FNR reflected the parents' proper address, that the FNR was mailed, and that copies of the FNR were retained for record keeping purposes (Tr. pp. 144-47, 150; Dist. Ex. 7). I find that this evidence gives rise to a presumption of mailing and receipt (see Nassau Ins. Co., 46 N.Y.2d at 829).

Moreover, I note that the hearing record reflects that the FNR had been mailed on June 17, 2011, just three days before the parent's June 20, 2011 letter and that the parents filed a due process complaint notice on June 21, 2011 (see IHO Ex. I). I further note that in the district's July 13, 2011 response to the parents' due process complaint notice, the district asserts that on June 17, 2011 an FNR was issued to the parents (see Pet. Ex. 1 at p. 3).

I am not persuaded by the parents' assertion that the presumption of mailing has been rebutted as a result of the student's mother's testimony that she did not receive the FNR and the parent's June 20, 2011 letter (see Tr. pp. 573-77; Parent Ex. C). I am also not persuaded by the parents' assertion that the presumption of mailing has been rebutted because the district did not respond to the student's mother's June 20, 2011 letter (see Tr. p. 576), as such has no bearing on whether the FNR was properly addressed or physically mailed by the clerk. I find that there was no testimony or evidence rebutting that standard office practice was followed, nor was there evidence showing that the procedure followed was done with such carelessness that it would be reasonable to assume that the FNR was not mailed (Nassau Ins. Co., 46 N.Y.2d at 829-30). Accordingly, the parent's claim that she did not receive the FNR and the parent's June 20, 2011 letter are insufficient to rebut the presumption of mailing.

B. May 2011 IEP - 6:1+1 Special Class

The IHO found that the district developed a valid IEP with appropriate recommendations for the student's special education program and services for the 2011-12 school year (see IHO Decision at p. 12). To the extent that the parents assert in a cross-appeal that a special class placement with a 6:1+1 staffing ratio was inappropriate for the student, for the reasons set forth below, I find that the 6:1+1 special class placement with a 1:1 health paraprofessional and related services recommended in the May 2011 IEP was reasonably calculated to enable the student to receive educational benefits.[4]

The hearing record reflects that the student is nonverbal and primarily communicates by using gestures, vocalizations, facial expressions, signs, and pictures (Dist. Ex. 2 at p. 1). The student also presents with motor impairments (id.). The hearing record further reflects that, based upon a private June 17, 2008 psychological evaluation, and administration of the Wechsler Preschool and Primary Scale of Intelligence – Third edition (WPPSI-III), the student's intellectual functioning is in the extremely low range and that his full scale IQ is in the extremely low range (Dist. Ex. 6 at p. 4). The student's overall thinking and reasoning abilities are greater than less than 0.1% of students his age (id.). His adaptive behavior composite on the Vineland Adaptive Behavior Scales is in the low range of functioning, with difficulties in receptive/expressive communication, daily living skills, socialization skills, and gross/fine motor skills (id. at p. 5).

The hearing record reflects that the May 2011 CSE based its recommendation for a 6:1+1 special class in a specialized school, related services including five 30-minute individual speech-language therapy sessions, four 30-minute individual OT sessions, and four 30-minute PT sessions per week, and the assistance of a 1:1 health paraprofessional, in part, on information provided in a May 2011 interdisciplinary report from the student's teacher and therapists from the Rebecca School (Tr. pp. 31-32; Dist. Exs. 1 at pp. 1, 3-5, 15; 2 at pp. 1-11). The interdisciplinary report included the student's educational/functional emotional developmental levels as well as progress reports from the student's speech-language therapist, occupational, and physical therapists (Dist. Ex. 2 at pp. 1, 4-5). The CSE also considered a June 2008 private psychological evaluation (Dist. Ex. 6). The 2008 psychological evaluation included intellectual findings and information regarding adaptive behavior, which included language and communication skills, self help and daily living skills, socialization skills, and gross and fine motor skills (id. at pp. 2-5). In addition, the hearing record reflects that the CSE considered a November 2010 classroom observation report of the student (Tr. pp. 31-33, 42, 51; see Dist. Ex. 3). Moreover, testimony by the special education teacher who participated at the May 2011 CSE meeting reflects that discussion with the student's classroom teacher from the Rebecca School and the parent during the CSE meeting contributed to the development of the academic, social/emotional, and health and physical present levels of performance (Tr. pp. 35-36, 46-47).

Regarding the student's needs pertaining to mobility, safety, feeding, and toileting, the hearing record reflects that a 1:1 health paraprofessional was recommended to provide the student with assistance, and also to aid the student's participation in and attention to classroom activities

[4] I note that the parents do not cross-appeal the IHO's finding that the district developed a valid IEP with appropriate recommendations for the student's program and services (see IHO Decision at p. 12), but rather the cross-appeal narrowly focuses on the IHO's findings regarding home-based services (see Cross-Appeal at pp. 12-15). Nevertheless, I will briefly review whether the district developed a valid IEP with the appropriate recommendations for the student's program and services.

(Tr. pp. 50, 457-58, 60-64; Dist. Ex. 1 at pp. 3-5, 15). The district's special education teacher who attended the CSE testified that at the end of the meeting, the CSE changed the student's program recommendation from the 12:1+4 program recommended on his 2010-11 IEP to a 6:1+1 program for the 2011-12 school year as they believed that the student required and would benefit from a quiet, less busy environment with fewer people (Tr. pp. 69-70; Dist. Ex. 1 at pp. 2, 4, 14; see Dist. Ex. 2 at p. 1). The frequency of the student's related services including OT, PT, and speech-language therapy were continued (Tr. p. 70; Dist. Ex. 1 at p. 15). A review of the student's May 2011 IEP indicates that the academic, social/emotional, and health and physical present levels of performance were consistent with the evaluative information available to the May 2011 CSE (see Dist. Exs. 1 at pp. 3-5; 2; 3; 6).

In reviewing the appropriateness of the student's May 2011 IEP, and considering the parents' claim below that the student requires home-based services, I note that State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Although a CSE must consider parents' suggestions or input offered from privately retained experts, the CSE is not required to merely adopt such recommendations for different programming (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]).

In light of the IEP's description of the student's present levels of performance, which on appeal the parents do not contest the accuracy thereof, and a review of the evaluative information available to the CSE, I find that the IHO's finding that district developed a valid IEP with appropriate recommendations for the student's program and services is supported by the hearing record and that the district's recommended placement in a 6:1+1 special class with the 1:1 paraprofessional and related services would have addressed the student's instructional needs and were reasonably calculated to confer educational benefit (Rowley, 458 U.S. at 206-07).

C. Home-Based Services

The parents assert that the student requires home-based speech-language therapy, PT, OT and SEIT services to meet his needs.[5] Upon review of the hearing record, I find that the information that was before the May 2011 CSE does not support a finding that the student required home-based services in order to receive educational benefits. A review of the evaluative information before the CSE reflects that home-based services were not recommended in those evaluations (see Dist. Exs. 2; 3; 6). The hearing record further reflects that the CSE did not have reports from the student's current home-based providers, but agreed to request new evaluations to determine the student's need for home-based services and to provide the services if the evaluations recommended them (Tr. pp. 34-35, 71, 84, 592). The hearing record reflects that the district requested evaluations be completed in the areas of OT, PT, and speech-language therapy, as well

[5] At the time of the impartial hearing, the student was receiving the following home-based services pursuant to the IHO's September 26, 2011 interim order on pendency: (1) SEIT services (16 hours per week); (2) individual speech-language therapy four times per week for 30 minute sessions; (3) individual OT four times per week for 60 minute sessions; (4) individual PT three times per week for 60 minute sessions (IHO Ex. II at p. 3).

as a psychological evaluation (Tr. p. 71).[6] The requested speech-language evaluation was conducted on June 16, 2011 and the requested OT evaluation was conducted on June 22, 2011; however, the PT evaluation and the psychological evaluation were not completed (Dist. Exs. 4; 5). The hearing record reflects that the PT evaluation was not completed due to a scheduling conflict with the parents and that the psychological evaluation was not completed because the student's mother indicated to the evaluating agency when she was contacted that she was having a private evaluation conducted (Tr. pp. 73-76, 593). The hearing record further reflects that the CSE did not receive a psychological evaluation from the parent (Tr. p. 76). Testimony by the special education teacher for the CSE indicated that the results of the speech-language and OT evaluations did not include a recommendation for home-based services (Tr. pp. 72-73; see Dist. Exs. 4; 5).

Moreover, in this case, the parents assert that the student requires home-based services to generalize the skills learned at school (see IHO Ex. I at p. 3). Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). Upon review of the hearing record, as discussed below, I find that the student's home-based program focused on generalization of skills that the student learned at school, which weighs heavily against a finding that the home-based program was designed to address the student's educational needs in his school-based program.

I note that testimony by the student's home-based speech-language pathologist indicated that she believed that the home component was necessary in order for the student to be able to function in the home and that her work with the student was "strictly" for the student to be able to participate at home (Tr. p. 405). Likewise, the student's home-based physical therapist testified that the home component was necessary to help the student's mother work with him at home (Tr. p. 389). Her testimony also indicated that there is no carry over or generalization of skills to the home setting and that it was "two environments . . . [s]chool environment and home environment" (Tr. pp. 366, 389). Similarly, testimony by the student's classroom teacher at the Rebecca School indicated that she believed that the home-based SEIT services that the student received were necessary for carry over so that the student could generalize the skills he was learning (Tr. p. 467). Consistent with this, testimony by the student's home-based SEIT provider indicated that she believed the student needed the home SEIT services in order to carry over what he does at school to what he does at home (Tr. p. 536). I further note that no progress reports or evaluative reports were provided by the parents' home-based providers to the CSE or at the impartial hearing. In addition, I note that testimony of the director of the Rebecca School indicated that she believed the student would receive educational benefits at school with the amount of school-based speech-language therapy, OT, and PT that he was receiving (Tr. pp. 208-09).

Accordingly, upon review of the hearing record, I find that the district offered the student an appropriate educational program that would address the student's significant needs during the school day and that the evidence does not establish that the student required the additional home-

[6] Testimony by the special education teacher assigned to the CSE indicated that the evaluations were requested through the district's "central office for contractual services" and would be completed by an outside agency that contracts with the district (Tr. pp. 74-75, 112-13).

based services in order for the student to receive educational benefits. 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). While I can understand that the parents may believe these services were desirable for their son, it does not follow that the district must be made responsible for them. The IDEA 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, 873 F.2d at 567 [citations omitted]).

D. Assigned School

I will now consider the district's assertion that the IHO improperly found that the parents raised the issue of the appropriateness of the assigned school in the due process complaint notice. The parents assert that the statement in the due process complaint notice that "[t]he CSE failed to offer an appropriate placement for the [s]tudent for the 2011-12 school year" referred to the assigned school (see IHO Ex. I at p. 4) and sufficiently raised the issue for the impartial hearing. Initially, I note that an assertion in the due process complaint notice that the assigned school is inappropriate for the student is inconsistent with the main claim of the parents' case, which is that the district failed in its obligation to provide the student with an assigned school at all. Moreover, upon review of the allegation in the due process complaint notice cited by the parents, even if I were to interpret "appropriate placement" to mean the assigned school, I find that the general allegation fails to articulate meaningful facts to support a denial of a FAPE (see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]; 8 NYCRR 200.5[i][1]).[7] As a result, the allegation at issue in the due process complaint notice fails to provide an awareness and understanding of a specific problem with the assigned school (see S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]; see also Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135).

Moreover, regarding challenges to an assigned school, such challenges involve implementation claims, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). 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

[7] The IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). In pertinent part, a due process complaint notice shall include the name and address of the student and the name of the school which the student is attending, a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem, and a proposed resolution of the problem (20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]; 8 NYCRR 200.5[i][1]).

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]). 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. Thus, the district was not required to establish that the assigned school was appropriate.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year must be reversed. The hearing record contains evidence showing that the May 2011 IEP recommending a 6:1+1 special class placement with a 1:1 paraprofessional and related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision is modified, by reversing that portion which determined that the district failed to offer the student a FAPE for the 2011-12 school year.

Dated: **Albany, New York**
May 23, 2012

STEPHANIE DEYOE
STATE REVIEW OFFICER