The University of the State of New York

The State Education Department
State Review Officer
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No. 12-110

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of George Zelma, attorneys for petitioners, George Zelma, Esq., of counsel

Courtenaye Jackson-Chase Special Assistant Corporation Counsel, attorney for respondent, Neha Dewan, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2011-12 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that the Rebecca School constituted an appropriate unilateral placement for the student for that year. The appeal must be dismissed. 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 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has a history of developmental delays and has reportedly received diagnoses of a communication disorder, not otherwise specified and a pervasive developmental disorder, not otherwise specified (Parent Ex. D at p. 3; see Tr. pp. 351-52; Parent Ex. H at p. 2). As a young child, the student received services through the Early Intervention Program (EIP) including special instruction, speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Tr. pp. 352-53). At or around age five the student transitioned to a 12:1+1 special class in the public school (Tr. pp. 353-54). According to the student's father, the student's public school teacher

reported that the student had difficulty transitioning and that she did not have the skills necessary to work with him (Tr. pp. 354-55). The public school teacher, along with the school psychologist, reportedly suggested that the parents look for a private setting for the student (Tr. pp. 355-56). Based on the staff's recommendations, the parents began to explore private school settings and in September 2010 decided to place the student at the Rebecca School, where he has remained since that time (Tr. pp. 355-57).

A CSE meeting was held for the student on March 9, 2011 to develop an IEP for the 2011-12 school year (Parent Ex. D at p. 1). At the request of the student's father, the CSE recommended that the student's classification be changed from speech and language impairment to autism (Tr. p. 38; Dist. Ex. 5). In addition, the CSE recommended that the student be placed in a 6:1+1 special class in a specialized school and receive related services of speech-language therapy, OT, PT, and counseling; along with the support of a 1:1 crisis management paraprofessional (Parent Ex. D at pp. 1, 18-19). The CSE also recommended that the student be provided with a 12-month program, adapted physical education, and special education transportation (id. at pp. 1, 5, 18). The March 9, 2011 IEP indicated that the student's behavior seriously interfered with instruction and that a behavior intervention plan, which was attached to the IEP, had been developed (id. at pp. 4, 20). At the time of the CSE meeting, the student's father and the Rebecca School teacher disagreed with the staffing ratio of the recommended placement, asserting that the student required an 8:1+3 staffing ratio, like that of the Rebecca School (Tr. pp. 41-42; see Dist. Ex. 5 at p. 2).

On May 4, 2011, the parents signed a contract enrolling the student in the Rebecca School for the 2011-12 school year, starting on July 5, 2011 and ending on June 22, 2012 (Parent Ex. K at pp. 1, 4).

In a Final Notice of Recommendation (FNR) dated June 15, 2011, the district summarized the recommendations of the March 9, 2011 CSE and notified the parents of the particular public school to which the student was assigned for the 2011-12 school year (Dist. Ex. 4). By letter dated June 24, 2011, the student's father indicated that he had visited the public school identified by the district in the FNR and concluded that it was not appropriate for the student because there were lots of materials around the classroom, which would be distracting to the student; the classroom lacked sensory supports and equipment that were essential to the student; and the OT, PT, and nurse shared a small space in a computer classroom, which would have been distracting and disruptive to the student (Dist. Ex. 6 at p. 1). The student's father also asserted that students in the recommended program were sometimes required to switch classrooms, which would be challenging and overwhelming for the student, and that the student would not have sufficient time for lunch (id. at p. 2). Lastly, the student's father asserted that the student required a higher staff to student ratio than the recommended program would provide (id.). The student's father advised the district that he was rejecting the March 9, 2011 IEP and assigned school placement and indicated that he would continue to enroll the student in the Rebecca School for the 12-month 2011-12 school year and seek reimbursement from the district for tuition and transportation (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 11, 2011, the parents requested an impartial hearing (Parent Ex. A). The parents asserted that the district failed to offer the student a FAPE and that the student required a private placement to meet his educational needs and was making

progress at his current placement at the Rebecca School (id. at pp. 3, 5). The parents also asserted that the particular school and class the student was assigned to by the district was inappropriate for the student because the classroom contained materials that would be too distracting for the student and the classroom did not contain sufficient sensory supports or equipment to meet the student's needs (id. at p. 3). The parents also contend that the assigned school's OT and PT areas were insufficient to meet the student's need because they were not isolated from other students who would be using computers in the room during the student's OT and PT sessions which would be overly disruptive and distracting for the student (id.). The parents also asserted that the assigned school required students to switch classrooms during the day, which the student was "incapable of handling" and that the time allotted between lunch and classes was not long enough for the student to properly transition (id.).

The parents asserted that the Rebecca School was appropriate for the student and was required for the student to benefit educationally because it met the student's sensory needs, provided appropriate instruction and the student progressed therein, among other reasons (Parent Ex. A at pp. 4-5). Lastly, the parents asserted that equitable considerations favored the parents and that they fully cooperated with the CSE in developing the student's IEP (id. at p. 5). For relief, the parents requested direct payment or reimbursement for the student's Rebecca School tuition and for the cost of related services (id. at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on January 3, 2012, and continued on an additional hearing date, concluding on February 14, 2012 (Tr. pp. 1-431). In a decision dated April 18, 2012, the IHO found that the program set forth in the student's March 9, 2011 IEP, consisting of a 6:1+1 class with OT, PT, speech-language therapy and a 1:1 paraprofessional, offered the student a FAPE and denied the parents' request for tuition at the Rebecca School (IHO Decision at pp. 8-9, 11). Concerning the parents' assertions with respect to the assigned school, the IHO found that distractions in the classroom would have been accommodated by the teacher and that there was no evidence in the hearing record showing that noise levels at the assigned school were so severe that the student could not have learned or made progress there (id. at p. 8). The IHO also found that the student's sensory needs would have been met, and that although not every specific sensory device employed by the Rebecca School was available, enough appropriate equipment was present (id. at pp. 8-9). The IHO also found that the student's transition needs could be accommodated by the teacher at the assigned school and that there was no evidence in the hearing record showing that the student's use of the stairs posed such a safety risk that the assigned school could not be considered appropriate (id.).

The IHO went on to make findings regarding the appropriateness of the parents' private placement and equitable considerations, finding that the Rebecca School was appropriate and offered instruction specially designed to meet the student's unique needs, but that equitable considerations did not favor the parents because they did not timely inform the district of their intention to remove the student from public school and unilaterally place the student at public expense (id. at pp. 9-10). Specifically, the IHO found that the parents' due process complaint notice was submitted on July 1, 2011, only seven days after their June 24, 2011 letter notifying the district of their intention to privately place the student at the Rebecca School (id. at p. 10).

Accordingly, the IHO found that had the parents' requested relief been awarded, it would have been reduced for equitable reasons (id.).

IV. Appeal for State-Level Review

The parents appeal, contending that the IHO erred in finding that the district offered the student a FAPE during the 2011-12 school year, and erred in finding that that equitable considerations did not support their claims. Specifically, the parents argue that the student's severe sensory needs could not have been met in the proposed 6:1+1 placement and that the CSE should have considered placing the student at the Rebecca School or another nonpublic school placement, but failed to do so. The parents further argue that the district failed to meet its burden to prove that it offered the student a FAPE, that the IHO erred in shifting the burden of proof to the parents, and that the IHO did not "measure the [district's] proof by the legal standard that a placement must be reasonably calculated to confer educational benefits." On appeal the parents also reiterate their claims regarding the assigned school and contend that the assigned school was too noisy and crowded, that transitioning from class to class and using four flights of stairs was not appropriate for the student and that the noise and number of people in the school's cafeteria would not be appropriate for the student. The parents also assert that the IHO properly concluded that the Rebecca School was an appropriate placement because the student made progress at the school, the school met the student's sensory needs, allowed the student to stay regulated, and was the least restrictive environment (LRE) for the student. The parents also assert that the IHO erred in finding that the parents' notice to the district of their intention to unilaterally place the student was insufficient because the parents provided notice more than ten days before the start of the summer term at the Rebecca School. Lastly, the parents assert that they proved that they were unable to pay the student's tuition at the Rebecca School in advance and request an order providing for direct funding by the district.

The district answers the parents' petition, arguing, among other things, that the IHO correctly determined that the district offered the student a FAPE for the 2011-12 school year, and that equitable considerations favored the district. In a cross-appeal, the district contends that the IHO erred in finding that the parents' unilateral placement at the Rebecca School was appropriate. More specifically, the district contends that the CSE could not have considered placing the student at the Rebecca School because the Rebecca School is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities. The district also contends that because the parents rejected the program offered by the district prior to the time at which the district was required to implement the program, the district is not required to show that the assigned school was appropriate or to speculate on what might have happened had the program been implemented at the assigned school. Nevertheless, the district contends that the assigned school was appropriate and that it would have addressed the student's sensory needs, would not have been over stimulating or unsafe for the student and would have made any needed accommodations in regard to transitions and using the cafeteria. In its cross-appeal, the district contends that the Rebecca School was not appropriate for the student because the school did not provide sufficient related services and did not provide a behavior intervention plan (BIP) for the student and that progress alone is not sufficient to support a finding that the school was appropriate for the student. The district next contends that the parents have not shown an inability to pay the tuition at the Rebecca School because they did not introduce enough evidence about their financial capacity. Lastly, the district contends that the IHO correctly found that equitable considerations

weighed against providing the parents' requested relief because they failed to provide adequate notice of their intention to unilaterally place the student, and because the timing of the parents' contract with the Rebecca School showed that the parents never seriously considered a public placement and did not fully cooperate with the CSE.

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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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. New York City Bd. 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 and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 R.E., 694 F.3d at 184-85; 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. IHO Decision - Burden of Proof and Legal Standard

Initially, I will address the parents' argument that the IHO misallocated the burden of proof to the parent regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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., 2010 WL 3398256, at *7). Although the IHO did not specifically identify which party bore the burden of proof in her decision to describe her conclusion that the district offered the student a FAPE (see IHO Decision at pp. 6-10), a review of the IHO's decision in its entirety and of the complete impartial hearing transcript, taken together, demonstrates that the IHO properly placed the burden on the district to prove that it offered the student a FAPE. Even if the IHO had allocated the burden of proof to the parents, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was equipoise (Schaffer, 546 U.S. at 58).

Moreover, I have independently examined the evidence in the entire hearing record (see 34 CFR 300.514[b][2]), and as discussed more fully below, I find that regardless of which party bore the burden of proof, the evidence in the hearing record demonstrates that the district offered the student a FAPE for the 2011-12 school year. Accordingly, I decline to reverse the IHO's decision on the ground that she misallocated the burden of proof.

Additionally, I find the parents' argument that the IHO did not "measure the [district's] proof by the legal standard that a placement must be reasonably calculated to confer educational benefits" to be unconvincing. The IHO set out the correct standard in her decision, identified the facts and evidence upon which she based her conclusion, and referred back to that standard after reaching her conclusion that the recommended program was reasonably calculated to afford the student a meaningful benefit (IHO Decision at pp. 6-9).

B. March 2011 IEP

1. Consideration of a Nonpublic School Program

Turning to the parents' contention that the CSE should have considered placing the student at the Rebecca School or another nonpublic school placement, I find that in the circumstance where a CSE finds that an appropriately developed IEP can be implemented in a public school setting, it need not consider placing the student in a nonpublic school program. As an initial matter, I note that it has been held that:

> The law requires the district to evaluate the child's needs and to determine what is necessary to afford the child a FAPE. If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school.

(W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148-49 [S.D.N.Y. 2006]; see R.H. v. Plano Independent Sch. Dist., 607 F.3d 1003, 1014 -1015 [5th Cir. 2010] [holding that the IDEA makes removal to a private school setting the exception, not the default]; see also Connors v. Mills, 34 F. Supp. 2d 795, 798 [N.D.N.Y.1998] [finding that the IDEA favors placing students in the least restrictive environment which often is the student's public school]).

Thus when determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]).

In this case, as the district correctly points out, 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 (see 8 NYCRR 200.1[d], 200.7) and State regulations require a CSE to consider placing a student in an approved private school only after it has determined that, among other things, "that the nature or severity of the student's disability is such that appropriate public facilities for instruction are not available" (see 8 NYCRR 200.6[j]). Here, testimony from the district's special education teacher who attended the March 2011 CSE meeting indicates that the CSE did not consider the Rebecca School because it had determined that the student's needs could be met in a public school setting (Tr. p. 51). Further, as set forth in detail below, I find that the student's individual education needs could be met in the recommended public school setting in the 6:1+1 special class in a special school, such that considering a placement in a nonpublic school was not necessary and the CSE did not err in failing to do so.

2. 6:1+1 Special Class in a Specialized School with 1:1 Paraprofessional Services

In developing the student's program for the 2011-12 school year, the March 2011 CSE considered an October 2010 observation of the student at the Rebecca School, conducted by a school psychologist for the district, and a December 2010 Rebecca School interdisciplinary report

of progress (Tr. pp. 35-38; Dist. Exs. 2; 3). The CSE also considered input from the student's father and the Rebecca School staff (Dist. Ex. 5).

According to the school psychologist, at the time of her October 2010 observation the student's Rebecca School class consisted of the classroom teacher, two teacher assistants, and seven students (Dist. Ex. 3 at p. 1). She noted that the student was assisted by an adult for much of the observation (id. at pp. 1-3). He was often unresponsive and inattentive, and did not comply with some requests made of him (id.). The student did not interact with peers (id.). He was assisted during transitions from one activity to the next and required individual prompting to engage in some of the classroom tasks (id.). The school psychologist noted that when she left the classroom the student was sitting on the floor in the hallway as the occupational therapist attempted to get him to accompany her to the sensory gym (id.). According to the school psychologist, the classroom teacher indicated that the student had been out sick the previous day, that it was not a typical day for the student, and that he was less active than usual (id.; see Tr. pp. 282-83).

In addition to the October 2010 classroom observation, the CSE considered a December 2010 Rebecca School interdisciplinary report of progress when developing the student's March 2011 IEP (Parent Ex. Q; see Tr. pp. 35-38). With respect to the student's functional emotional developmental levels, the Rebecca School teacher reported that the student was a sensory-seeking child who craved tactile input and movement and who also demonstrated limited body awareness (Parent Ex. Q at p. 1). According to the teacher, the student had difficulty remaining seated during lunch, snack, and group activities and was supported in the classroom through his individualized sensory diet (id.). The teacher noted that the student may become dysregulated when a limit is set, during transitions, or after engaging in an overly-exciting physical activity (id.). She stated that when dysregulated, the student may become upset, run around the classroom in a continuous loop, or laugh hysterically, that these episodes lasted for up to five minutes and that it could be difficult to calm down the student (id.). The teacher characterized the student as "very related" and noted that he enjoyed engaging with familiar adults in the classroom but noted that when the student was playing with a toy by himself it could be difficult to engage him (id.). The teacher described the student as verbal and reported that he used primarily one to two word utterances to communicate (id. at p. 2). She noted that the student would also pair his language with gestures and communicate through the use of eye gaze (id.). The teacher also reported that the student could sustain approximately three to five verbal and gestural circles of communication around having his wants or needs met (id.). According to the teacher, the student was able to enter into back and forth interaction when interacting 1:1 with a familiar adult during highly motivating interactions, such as tickle games and drawing (id.). However, she reported that the student did not consistently provide closure during interactions or express that he was finished with an activity (id.). The teacher indicated that the student had emerging capacities with respect to creating symbols and ideas as demonstrated by his use of a tennis racquet as a guitar and a mallet as a microphone (id.). She reported that the student would use four different pieces of paper to represent "the Wiggles" but did not engage in pretend play scenarios using the symbolic Wiggles (id. at pp. 2-3). The interdisciplinary report of progress included "Floortime" goals related to increasing the student's ability to sustain regulation and attention, initiate and maintain a continuous flow, and expand his ideas (id. at p. 9).

With respect to the student's academic abilities the teacher reported that the student was an emergent reader who could read approximately 10 words related to his passions and daily

classroom activities (Parent Ex. Q at p. 3). According to the teacher, an assessment of the student's reading comprehension showed that he was not able to answer fact-based questions at the primary level (id.). The teacher reported that the student demonstrated an emerging ability to answer explicit "who" and "what" questions related to a familiar text when given visual supports and choices (id. at p. 4). She also stated that the student demonstrated auditory comprehension of language though his ability to follow one-step directives (id.). With respect to math, among other things, the teacher reported that the student was able to recognize numbers 1-30, demonstrate 1:1 correspondence up to 10 and perform simple addition for numbers up to 10 (id. at p. 4). She indicated that the student was able to compare objects using the descriptors big/small and to identify the object that did not belong, given a field of three (id.). The teacher explained that visual spatial activities were used to supplement the student's math program and address sequencing, visual tracking, and body awareness (id.). She reported that the student was able to visually track objects and use eye-hand coordination, but that he had difficulty with activities that targeted body awareness (id.). In social studies, the teacher reported that the student showed an interest in his peers by approaching them when they had an object of interest or by engaging in activities of shared interest (id. at p. 5). According to the teacher, the student was able to navigate throughout the school building and was beginning to connect specific floors with specific activities (id.). With respect to personal autonomy skills, the student's teacher reported that the student independently used the bathroom and would wash his hands with minimal prompting from staff (id.). In addition the student was able to pack and unpack his backpack and put his lunch and notebook on the shelf with minimal verbal prompting and gestural support (id.). In science, the teacher reported that the student was eager to join in any type of messy play and was able to answer basic questions regarding color and texture, although he sometimes required choices (id.). The student participated in cooking activities and was beginning to sequence the steps of a recipe, given visual supports (id.). The interdisciplinary report of progress included academic goals in the areas of literacy, math, social studies, science, and visual spatial skills (id. at pp. 9-10).

With respect to related services, the progress report indicated that at the time of the report the student was attending OT three times a week for 30-minutes sessions, twice in an individual setting and once in a "movement group" with two classroom peers (Parent Ex. Q at p. 5). The occupational therapist reported that the student consistently transitioned well to OT sessions but that he occasionally had difficulty leaving the sensory gym and required verbal support (id.). According to the occupational therapist, the student presented with hypo-responsiveness of the vestibular, proprioceptive, and tactile systems, which typically resulted in decreased body/spatial awareness and delayed motor planning skills (id.). She noted that the student had difficulty regulating his body and arousal level and that the student frequently sought out and responded well to heavy movement and crashing activities (id.). She reported that the student was able to tolerate vestibular input in a variety of planes while in a swing, but that when using platform swings the student often fell off due to difficulty maintaining his balance, and benefited from lycra or cloth hammock swings to provide him with increased input to his body (id. at pp. 5-6). The occupational therapist noted that a movement-based sensory diet had recently been implemented for the student and that the student had also started a therapeutic listening program (id. at p. 6). She reported that the student was often clumsy while navigating his environment but that he was successful with routine motor tasks (id.). The occupational therapist also reported that the student presented with mild visual spatial challenges and that the student often held onto a railing or adult for support (id.). However, she also noted that the student was able to draw small detailed drawings, identify all capital letters, and legibly write his name with fair orientation (id. at p. 6). The interdisciplinary

report of progress included occupational therapy goals targeting the student's ability to process and integrate sensory information, as well as his motor planning and sequencing skills and visual motor skills (id. at p. 10).

The progress report also indicated that the student received speech-language therapy, individually twice per week and once per week in a "cooking group" with three other peers (Parent Ex. Q at p. 6). The student's speech-language pathologist reported that the student was primarily a verbal communicator who utilized gestures and verbalizations to express his wants and needs (id.). She noted that the student initiated interactions with staff by moving closer to them or leaning on them and that the student demonstrated a growing interest in peers and would consistently reference objects or activities that his peers were participating in and join the semi-structured activity (id.). The speech-language pathologist reported that the student provided "fleeting" eye contact and employed more purposeful communication in quiet 1:1 settings (id.). With respect to receptive language, the speech-language pathologist noted that the student responded to his name, identified letters and a limited number of sight words, and was able to follow one step directions, depending on his level of engagement (id. at p 7). Among other things, she reported that the student identified and discriminated nouns, verbs, and attributes and responded to yes/no and "what" and "who" questions verbally and/or with gestures (id.). With respect to expressive language, the speech-language pathologist reported that the student's expressive vocabulary included nouns, attributes and verbs (id.). She stated that the student typically verbalized using one to two word utterances during highly preferred activities or while requesting, but noted that the student rarely used gestures or verbalization to comment, except during cooking (id.). The speech-language pathologist reported that although the student's oral mechanism appeared to be intact he exhibited slightly decreased tone, range of motion, strength, and coordination within his oral musculature and that the student sought intra-oral sensory input and allowed facial massage (id.). The interdisciplinary report of progress included speech and language goals related to improving the student's engagement and pragmatic language skills, receptive and expressive language skills, and increasing his oral motor skills (id. at pp. 10-11).

In addition to occupational and speech-language therapies, the December 2010 interdisciplinary report of progress indicated that the student received two 30-minute sessions of individual counseling per week in which the modality used was primarily a "DIR/Floortime" approach (Parent Ex. Q at p. 7). The social worker who provided the student's counseling reported that the student primarily initiated solitary play activities, but had become increasingly receptive to the therapist joining in his play (id.). She noted that the student was most engaged around preferred activities and physical activities and had difficulty cleaning up and transitioning when he was "really" enjoying an activity; however, through the use of reminders and the clean-up song, it had become easier for the student to transition back to class (id. at pp. 7-8). The interdisciplinary report of progress included mental health services goals related to increasing the student's level of shared attention and increasing the student's ability to remain engaged and related (id. at p. 7).

The hearing record shows that the student's father, as well as his teacher and social worker from the Rebecca School participated in the development of the March 9, 2011 IEP (Dist. Ex. 5 at p. 1; Parent Ex. D at p. 2). According to CSE meeting minutes, a draft IEP was reviewed with the members of the CSE and modified based on input from the student's teacher and the student's father (Dist. Ex. 5).

To address the student's communication and socialization delays, as well as significant concerns with distractibility and difficulty with transitions, the CSE recommended that the student be placed in a 6:1+1 special class in a specialized school district with the support of a 1:1 crisis management paraprofessional (Parent Ex. D at pp. 1, 16, 17, 18). In addition, the CSE recommended numerous environmental modifications and human/material resources to address the student's management needs including visual cues and prompts; extra time for processing; reduced distractions; visual schedule to indicate changes in activities and routines; instruction given in concrete and sequential increments; repetition and redirection; sensory tools and breaks throughout activities; use of transitional songs, time warnings, choices, and visual supports; use of deep pressure and joint compression; and modification to seat/chair (id. at p. 3). To address the student's communication deficits, the CSE recommended that the student receive individual speech-language therapy for two 30-minute sessions per week and group speech-language therapy for one 30-minute session per week (id. at p. 18). In addition, to address the student's sensory integration and motor deficits the CSE recommended that the student receive individual OT for two 30-minute sessions per week, group OT for two 30-minute sessions per week, group PT for two 30-minute sessions per week, and adapted physical education (id. at pp. 5, 18). The CSE also recommended that the student receive individual counseling for two 30-minute sessions per week to address his social emotional needs (id. at pp. 18-19). Attached to the IEP was a BIP that described the behaviors that interfered with the student's ability to learn, identified expected behavior changes, and listed strategies that were going to be tried and supports that would be employed to change the student's behavior (id. at p. 20). The March 9, 2011 IEP included annual goals and short-term objectives related to improving the student's reading and math skills, social interactions, expressive and receptive language, pragmatic language, oral motor skills, sensory integration, motor planning, core muscle strength, body awareness, ability to transition, ability to focus on academic tasks, ability to sustain regulation and shared attention, ability to initiate and maintain a continuous flow of interaction, and expansion of ideas (id. at pp. 6-15).

The hearing record shows that the CSE considered the parents' concern regarding the staffing ratio of the recommended special class. The district representative testified that the members of the CSE agreed that both the 12:1+1 and 8:1+1 special class ratios were too large for the student due to his distractibility (Tr. pp. 40-41; Dist. Ex. 5 at p. 2; Parent Ex. D at p. 17). While the district decided on a 6:1+1 special class ratio, the student's father and Rebecca School staff disagreed with this recommendation and asserted that the 8:1+3 ratio found at the Rebecca School was the appropriate ratio for the student (Tr. pp. 40-42; Dist. Ex. 5 at p. 2). According to the district representative, she explained to the student's father and Rebecca School staff that with the addition of the 1:1 crisis management paraprofessional the ratio of the recommended class was "like a 6:1+2," which was comparable to the 2:1 ratio offered by the Rebecca School (Tr. pp. 40-42). She further testified that in addition to the similar ratio, there would be fewer students in the class recommended by the district, which would be less distracting (Tr. pp. 41-43). In addition, the March 9, 2011 IEP reflects, and the district psychologist testified, that the purpose of the 1:1 crisis management paraprofessional was to assist the student with attending, transitions, and regulation (Tr. pp. 43-44; Parent Ex. D at pp. 12-14, 17, 20). While I decline to adopt the district's rationale that the addition of the 1:1 crisis management paraprofessional changed the overall class ratio from 6:1+1 to 6:1+2, I find that the placement recommended by the district was designed to confer educational benefits upon the student.

C. Assigned School

In their petition, the parents raise a number of concerns regarding the appropriateness of the particular public school site to which the student had been assigned. Prior to the start of the 2011-12 school year,[1] on June 24, 2011, the parents advised the district that they would not be sending the student to the district's proposed placement and that they would be sending the student to the Rebecca School (Dist.Ex. 6).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school

[1] 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]).

because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). However, I continue to find it necessary to depart from those cases. The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, 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 the IEP (R.E., 694 F.3d at 186-88; 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 to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP (M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 964 F. Supp. 2d at 286; see R.B., 2013 WL 5438605, at *17; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parents cannot prevail on their claim that the district would have failed to implement the March 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's March 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing (see Dist. Ex. 6; Parent Ex. K). Therefore, the district is correct that the issues raised and the arguments asserted by the

parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K., 2013 WL 6818376, at *13 [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claim that the assigned public school site would not have properly implemented the March 2011 IEP.

Additionally as discussed below, I note that the hearing record in its entirety does not support the conclusion that had the student actually attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (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] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007).

1. Distractibility, Safety and Sensory Needs

The parents assert on appeal that the assigned school's classrooms contained materials that would have been too distracting for the student and also lacked the sensory supports and equipment needed to address the student's needs.

According to the hearing record, in June 2011 the student's father, along with the student's Rebecca School teacher and social worker, visited the assigned school identified in the district's FNR dated June 15, 2011 (Tr. pp. 290; 365; Dist. Ex. 4). The student's Rebecca School teacher testified that the classrooms were large and overstimulating and that they lacked sensory equipment (Tr. p. 291). She further observed that the space where the student would have received OT and PT was shared by the nurse and a computer room, as well as the therapists (id.). She reported that this room lacked sensory equipment as well (id.). Based on the visit, the student's Rebecca School teacher concluded that the student's sensory needs could not be met at the assigned school (Tr. p. 292). The student's father testified to having similar concerns regarding the assigned school and its ability to address the student's needs (Tr. p. 366). In addition, he stated that the assigned school had no elevator and use of the stairs would be dangerous for the student given his core muscle weaknesses and lack of body awareness (Tr. pp. 369-70).

I find that the concerns expressed by the parents are speculative in nature, as the student's IEP reflects the student's sensory needs and provides for OT and many of the sensory supports described by the Rebecca School teacher (compare Tr. pp. 292-96 with Parent Ex. D at pp. 4, 5, 11, 14, 18, 20). Similarly, the IEP provided a 1:1 paraprofessional in part to aid the student during

transitions which mitigates the concern that stairs or other impediments in the assigned school would have posed a safety hazard (Parent Ex. D at pp. 12, 17, 20). Moreover there is no evidence that the district would have materially deviated from the student's IEP during its implementation. In addition to the claims above, the student's father also expressed concern regarding the noise level and number of people in the cafeteria, noting that the amount of people around could be "a little dangerous for [the student] and a safety issue" (Tr. p. 371; see Tr. pp. 348-49). I find that this claim is also speculative and note that the teacher at the assigned school detailed several examples in which the school had accommodated students who had difficulty eating in the cafeteria (Tr. p. 151).

With respect to the district's ability to implement the March 9, 2011 IEP, the teacher of the assigned class testified that she was certified in special and general education, had worked since November 2004 with autistic children in a 6:1+1 special class setting and had taken TEACCH and functional behavior assessment training through the district (Tr. pp. 123-25). The teacher testified that she had experience working with students with behavior intervention plans (Tr. p. 135). According to the teacher of the assigned class during summer 2011 she had sensory manipulatives in her classroom and other tools, such as a weighted vest, were available through the occupational therapist (Tr. pp. 129-30). The teacher reported that in addition to herself there was a paraprofessional in her room whose duties included assisting during group instruction and supporting students during independent work (Tr. pp. 131-32). The teacher of the assigned class testified that if the student's distractibility was the result of classroom materials that modifications would be made, such as taking materials down or placing the student's seat in a way that he did not have materials physically in front of him (Tr. p. 137). The teacher testified that she had the space available to provide sensory breaks to students (Tr. p. 139). She testified that she believed that the student's needs could have been met, and his goals would have been addressed in her classroom (Tr. pp. 145-152).

For all the foregoing reasons, I note that even if the implementation of the IEP was required to be considered, the hearing record establishes that the district could have implemented the student's IEP without deviation in a material or substantial way.

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 or whether the equities support the parents' claim for the tuition costs at public expense (Burlington, 471 U.S. at 370; MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). 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 DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 24, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER