



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-134

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

#### **Appearances:**

H. Jeffrey Marcus, Esq., Law Offices of H. Jeffrey Marcus, PC, for petitioners

Gail M. Eckstein, Esq., for Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, for respondent

## **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 (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Rebecca School for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that year. The appeal and cross-appeal are each sustained in part.

### **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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 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**

In a prior proceeding involving the student whose educational program is at issue in this appeal, an SRO found that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 and 2011-12 school years and awarded relief including public funding for the costs of the student's tuition at the Rebecca School for the 2011-12 school year (Application of the Dep't of Educ., Appeal No. 12-135).

The parties' familiarity with the underlying facts, procedural history, and issues presented for review is assumed. On May 3, 2012, a CSE convened to conduct an annual review and develop an IEP for the student for the 2012-13 school year (Dist. Ex. 2). Finding the student eligible for special education and related services as a student with autism, the CSE recommended that the

student receive 12-month school year services consisting of placement in a 6:1+1 special class in a specialized school, together with related services of speech-language therapy, occupational therapy (OT), and counseling (*id.* at pp. 1, 11-12).<sup>1</sup>

By final notice of recommendation dated June 13, 2012, the district informed the parents of the particular public school site to which the student had been assigned to attend for the 2012-13 school year (Dist. Ex. 7). By letter dated June 14, 2012, the parents notified the district that they were unilaterally placing the student at the Rebecca School for the 2012-13 school year and seeking public funding therefor (Parent Ex. D). The parents asserted that they had not yet received the final notice of recommendation, and that the program recommended by the May 2012 CSE was not appropriate (*id.*; *see* Tr. pp. 310-11).<sup>2</sup> Shortly thereafter, the parents received the final notice of recommendation and the student's father visited the assigned public school site on three separate occasions; finding certain aspects of the recommended program and assigned school that in his opinion made the program and school inappropriate to meet the student's needs and deviated unacceptably from the discussion held at the May 2012 CSE meeting (Tr. pp. 306-07, 311-23).

On June 22, 2012, the student's father executed a release over the parents' claims regarding the student's placement for summer 2012, in consideration of which the district agreed to fund the student's placement at a private summer camp (Dist. Ex. 3). Several days later, by agreement of the parties, the May 2012 IEP was amended to reflect this placement (Dist. Ex. 2 at p. 11; *see* Tr. pp. 9-10, 43-45, 333).<sup>3</sup> On August 14, 2012, the parents executed a contract for the student's attendance at the Rebecca School for the 2012-13 school year (Parent Ex. Q), and the student attended.

#### **A. Due Process Complaint Notice**

By due process complaint notice dated October 22, 2012, the parents requested an impartial hearing (Parent Ex. B). Initially, the parents contended that the May 2012 CSE was not properly composed (*id.* at p. 3). Regarding the June 2012 IEP, the parents asserted that "the CSE recommended the exact same program which was recommended and proved unsuccessful in the past" (*id.* at p. 3). Specifically, the parents contended that the IEP did not accurately reflect or describe the student's needs (*id.*). The parents also argued that the IEP contained annual goals that were overly vague and immeasurable, and were not appropriate to meet the student's needs (*id.*). With respect to the assigned public school site, the parents asserted that the school "was very large and would likely be very intimidating" to the student (*id.* at pp. 2-3). The parents also expressed concern regarding the other students with whom the student would have been grouped and the facilities available at the public school, particularly the equipment and spaces allocated for related services (*id.*). The parents contended that the Rebecca School constituted an appropriate placement for the student and requested public funding for the cost of their unilateral placement

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<sup>1</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal.

<sup>2</sup> The parents sent an identical letter dated June 15, 2012 (Parent Ex. W; *see* Tr. p. 324).

<sup>3</sup> The hearing record does not include a copy of the IEP prior to its amendment in June 2012. However, the parties agree that no aspect of the IEP was changed other than the recommendation for placement at the private summer camp.

of the student (*id.* at p. 4). The parents also invoked the student's right to remain at the Rebecca School at district expense pursuant to a prior unappealed SRO decision (*id.*).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on December 21, 2012 and concluded on April 10, 2013 after four days of hearing (Tr. pp. 1-354).<sup>4</sup> In a decision dated June 21, 2013, the IHO found that the district failed to offer the student a FAPE and the Rebecca School was an appropriate unilateral placement, but equitable considerations precluded the parents' request for relief (IHO Decision). Initially, rather than address the issues raised by the parents in their due process complaint notice, the IHO found that the May 2012 IEP was superseded by an IEP dated June 26, 2012, which had not been submitted into evidence (*id.* at pp. 10-11). Because the superseding IEP had not been offered into evidence, the IHO held that it would be "speculative and improper" to assume that it was identical to the May 2012 IEP and found that the district had failed to establish that the June 2012 IEP was appropriate to meet the student's needs (*id.* at p. 12). The IHO next found that the Rebecca School provided instruction designed to meet the student's unique needs and that the student had made progress at the Rebecca School (*id.* at pp. 13-14). However, the IHO found that the contract the parents signed with the Rebecca School was "illusory" because the cost of the student's tuition depended on the outcome of the impartial hearing (*id.* at pp. 14-19). In addition, the IHO found that the parents did not provide adequate notice to the district of their concerns with the program developed for the student (*id.* at p. 18). Accordingly, the IHO denied the parents' request for public funding of the costs of the student's tuition at the Rebecca School.

### **IV. Appeal for State-Level Review**

The parents appeal, contending that the IHO erred in determining that equitable considerations did not support their request for relief. Initially, while the parents agree with the IHO's conclusion that the district failed to offer the student a FAPE, they note that the IHO "failed to analyze and address any of the . . . arguments raised" by the parents in their post hearing memorandum and reassert a number of the arguments raised in their due process complaint notice, arguing that they constitute independent grounds on which to uphold the IHO's decision. The parents also state that the IHO erred in finding that the June 2012 IEP was not entered into evidence.

With regard to the composition of the May 2012 CSE, the parents assert that the CSE did not include a special education teacher of the student who could have implemented the IEP and that the district did not establish that the district representative had knowledge of the resources available in the district, the authority to commit district resources, or the ability to ensure that the services in the IEP would have been provided. The parents also argue that the district presented no evidence that the CSE considered any evaluative information other than a Rebecca School progress report. In addition, the parents contend that the present levels of performance section of the IEP did not reflect the results of the most recent evaluative data available to the CSE and that

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<sup>4</sup> The IHO issued an interim order on pendency, dated January 3, 2013, memorializing the parties' agreement that the district was obligated to fund the costs of the student's tuition at the Rebecca School subsequent to the filing of the due process complaint notice, based on the prior unappealed SRO decision involving this student (IHO Interim Decision at p. 3; Tr. pp. 14, 19).

the recommendations in the IEP did not comport with the evaluative data. With regard to the annual goals contained in the IEP, the parents assert that they did not address all of the student's needs, were impermissibly vague, lacked baselines and benchmarks, and were designed to be implemented using the methodology and student-to-teacher ratio employed at the Rebecca School. Furthermore, the parents argue that the recommendation for placement in a 6:1+1 special class was not supported by the evaluative information available to the CSE and that the student required a two-to-one student-to-teacher ratio. The parents also assert that the CSE failed to develop a plan to transition the student from the Rebecca School to a district public school placement.<sup>5</sup> The parents lastly contend that the district did not offer the student a FAPE because it failed to establish that the student's needs could have been met at the assigned public school site.

The parents assert that their unilateral placement of the student at the Rebecca School was appropriate to meet the student's needs and that equitable considerations support their request for public funding of the student's Rebecca School tuition. In particular, the parents contend that they cooperated with the CSE and timely notified the district of their concerns and intent to unilaterally place the student at public expense. The parents also argue that the IHO erred in finding that they did not assume the financial obligation associated with the costs of the student's education at the Rebecca School. For relief, the parents request reimbursement for that portion of the student's tuition already paid to the Rebecca School, and direct funding of the balance.

The district answers, denying the parents' material allegations and interposing a cross-appeal challenging the IHO's determinations that the district did not offer the student a FAPE and that the Rebecca School was an appropriate unilateral placement to meet the student's needs. Initially, the district asserts that the IHO erred in finding that the district did not meet its burden of establishing that it offered the student a FAPE because the June 2012 IEP was not entered into evidence. The district also responds to the additional grounds on which the parents assert the IHO should have found it failed to offer the student a FAPE. In particular, the district asserts that to the extent the May 2012 CSE was not properly composed based on the absence of a special education teacher of the student, such procedural violation did not rise to the level of a denial of a FAPE inasmuch as the parents and Rebecca School staff were able to actively participate in the CSE meeting. The district also argues that the parents' claim regarding the qualifications of the district representative must fail because the parents do not assert in what manner the district representative was not qualified to serve. The district further argues that the CSE properly relied on the Rebecca School progress report, rather than older evaluative information, and that it had

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<sup>5</sup> This claim will not be further addressed, as it was not raised in the due process complaint notice and the district objected when it was raised at the impartial hearing (Tr. pp. 81-82). In addition, the IDEA does not require that a "transition plan" be developed when a student moves from a private school to public school environment (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E. v. New York City Dep't of Educ., 694 F.3d 167 [2d Cir. 2012]; see R.E., 694 F.3d at 195; see also Dep't of Educ. v. C.B., 2012 WL 1537454, at \*5-\*6 [D. Haw. May 1, 2012]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]). Similarly, the parents have cited to no relevant authority for the proposition that the district was required to develop goals to assist the student in transitioning from the Rebecca School to a public school placement under the circumstances presented here, where the IEP included goals to address the student's social/emotional needs and her ability to remain engaged and regulated (Dist. Ex. 2 at pp. 4, 10-11).

sufficient information to develop an IEP that addressed the student's needs. With regard to the present levels of performance contained in the IEP, the district asserts that they were consistent with the available evaluative information and discussion at the May 2012 CSE meeting, and accurately reflected the student's needs as of that time. The district further asserts that the annual goals contained in the IEP addressed the student's areas of need, were measurable, and were sufficient to guide instruction. The district also contends that, based on the evaluative information available to the CSE, the recommendation for a 6:1+1 special class, together with related services, was appropriate to meet the student's needs, despite recommendations for other student-to-teacher ratios. To the extent the parents challenge the assigned public school site, the district argues that such challenges are speculative where, as here, the student never attended the public schools pursuant to the June 2012 IEP. In any event, the district asserts that the hearing record establishes that the assigned school was appropriate to meet the student's needs.

With regard to the unilateral placement of the student at the Rebecca School, the district asserts that the parents did not establish that the related services provided to the student were sufficient to meet her needs or that the student had made progress as a result. The district also contends that the IHO properly determined that equitable considerations did not favor the parents' request for relief because the parents did not provide adequate notice of their intention to unilaterally place the student and did not incur a financial obligation to the Rebecca School.

In an answer to the cross-appeal, the parents generally deny the district's material allegations. The parents concede that the IHO erred in finding that the June 2012 IEP was not entered into evidence; however, they reassert the additional bases on which they claim the district failed to offer the student a FAPE. In answer to the district's cross-appeal with regard to the appropriateness of the unilateral placement, the parents assert that the hearing record contains evidence that the Rebecca School addressed the student's specific needs.

## **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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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]), 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]).

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, 369-71 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252; 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. Preliminary Matters**

Initially, to the extent the IHO held that the parents could not assert a claim for tuition reimbursement because they had not incurred a financial obligation to the Rebecca School, this holding is reversed for substantially the reasons stated by other SROs in cases decided by this IHO (see Application of a Student with a Disability, Appeal No. 12-230; Application of a Student with a Disability, Appeal No. 12-217; Application of a Student with a Disability, Appeal No. 12-166; Application of a Student with a Disability, Appeal No. 12-152; Application of a Student with a Disability, Appeal No. 12-063; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 449-61 [2d Cir. 2014]). Additionally, while the IHO determined that the district failed to establish that it offered the student a FAPE because it did not submit the relevant IEP into evidence, the parties now agree that this was error. In the interests of administrative efficiency and because the hearing record is sufficient for a determination of the issues raised by the parents in their due process complaint notice and reiterated on appeal, I proceed to the merits of the parents' claims rather than remanding this matter for resolution by the IHO.<sup>6</sup>

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<sup>6</sup> To the extent the parents rely on the district's purported failure to establish the appropriateness of the recommendations made by the CSE on a number of their claims, State law provides that the district "shall have the burden of proof, including the burden of persuasion and burden of production, in any . . . impartial hearing" but is silent with regard to which party bears the burden of proof on appeal (Educ. Law § 4404[1][c], [2]). I have conducted a full review of the hearing record and find that the evidence is not in equipoise, such that it is irrelevant which party bears the burden in this matter. Nonetheless, when requesting that an SRO reach a particular determination with respect to any issue either not reached or adversely decided by an IHO, parties are well-advised to provide reasoning to support their claims and not rely solely on the burden of proof, which is rarely dispositive.



## B. CSE Composition

Addressing the composition of the May 2012 CSE, the parents contend that the district representative and special education teacher at the meeting were not adequately qualified to serve in those roles.

The IDEA and federal and State regulations require that a CSE include "a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" (8 NYCRR 200.3[a][1][v]; see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]). The parents assert that the district did not establish that the district representative at the May 2012 CSE meeting was familiar with the programs and resources available in the district, that he "had the authority to commit District resources[,] or that he was able to ensure that the services set out in the IEP would actually have been provided." Inasmuch as the IDEA and implementing regulations contain no requirement with regard to the latter two of these allegations, they will not be further addressed. Additionally, the hearing record does not support the parents' argument that the district representative was not familiar with the resources available in the district. The district representative, who also served as the school psychologist at the May 2012 CSE meeting, testified that he had been employed by the district for 18 years, and had served on the CSE for the last 4 years (Tr. pp. 40-41). In addition, the district representative had served as a school psychologist at both the elementary and secondary levels (Tr. p. 42). He further testified regarding the CSE's program recommendation, discussing the basis for a 6:1+1 special class recommendation and specifically contrasting it with other special class options available in the district (Tr. pp. 67-70). The district representative's testimony indicates that he was aware of the resources available in the district, and the parents have pointed to no area in which his knowledge was purportedly deficient (see Tr. pp. 40-90).

With regard to the special education teacher member, the CSE is required to include "not less than one special education teacher of the student" (8 NYCRR 200.3[a][1][iii]; see 20 U.S.C. § 1414[d][1][B][iii]; 34 CFR 300.321[a][3]). Although the parents concede that the student's then-current Rebecca School classroom teacher was present, they contend that the CSE was required to include a teacher who was "qualified to provide special education in the type of public school program in which the CSE proposed to place the student, [or] who was likely to implement the student's IEP." However, this specific argument was not raised in the parents' due process complaint notice, nor advanced during the impartial hearing, and the hearing record reflects that the CSE included a district special education teacher (Dist. Ex. 2 at p. 19; Tr. p. 47).<sup>7</sup> Accordingly, the hearing record supports a finding that the CSE was properly composed.

Nonetheless, even assuming that the district representative and special education teacher did not adequately fulfill the criteria to serve on the CSE, the parents do not allege with any particularity how such a deficit significantly impeded their ability to participate in the development of the student's educational program or deprived the student 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]). Absent some argument for

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<sup>7</sup> State Education Department records reveal that the teacher, at the time of the CSE meeting, was State-certified to teach students with disabilities (see "Certificate Holder Lookup," Office of Teaching Initiatives, available at <http://eservices.nysed.gov/teach/certhelp/CpPersonSearchExternal.jsp>).

how these purported deficiencies in the composition of the CSE harmed the student or the parents' ability to participate in the May 2012 CSE meeting, the hearing record does not support a finding of a denial of a FAPE on this basis (see A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]). In particular, the student's father, a Rebecca School social worker, and the student's then-current classroom teacher (by telephone) all participated in the CSE meeting, and their input is reflected in the IEP (Dist. Exs. 2 at pp. 1-2; 4; 6).

### **C. Present Levels of Performance**

Initially, although the parents assert on appeal that the May 2012 CSE improperly relied solely on a Rebecca School progress report from December 2011 in developing the present levels of performance, no such claim was raised in their due process complaint notice and cannot be considered now.<sup>8</sup> However, this should not be taken as an endorsement of the district's inexplicable failure, for the third consecutive year, to properly document the materials considered by the CSE (see Application of the Dep't of Educ., Appeal No. 12-135). The district is strongly cautioned to comply with its obligation to provide the parents with prior written notice, which requires the district to provide a description of each evaluation procedure, assessment, record, or report that was used in the development of the student's IEP (20 U.S.C. § 1415[b][3], [c][1]; 34 CFR 300.503; 8 NYCRR 200.5[a]) within a "reasonable time" prior to the date for implementation of the IEP (8 NYCRR 200.1[oo]), on forms mandated for such purposes by the Commissioner of Education (available at <http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>). Furthermore, if the district has not provided the parent with prior written notice regarding the matters raised in the due process complaint notice, it is required to provide a response to the due process complaint notice containing much of the information required to be included in a prior written notice (20 U.S.C. § 1415[c][2][B][i][I]; 34 CFR 300.508[e][1]; 8 NYCRR 200.5[i][4][i]).

Where a district fails to adequately document the materials considered by the CSE in derogation of its obligations under State and federal regulations, the district must be held responsible for the content of all evaluative materials in existence at the time the IEP was developed (see Plumas [CA] Unified Sch. Dist., 55 IDELR 265 [OCR 2010] [noting that "[d]ocumentation of the information the District considers when making a placement decision is an important step in the evaluation process, so that parents can have the opportunity to review the record and understand what information the District utilized when evaluating the Student"]). In this case, the evaluative materials in existence at the time of the May 2012 CSE meeting included a January 2009 psychological evaluation report, a February 2009 psychosocial evaluation report, an August 2010 psychosocial evaluation report, an August 2010 psychological evaluation report, and the December 2011 Rebecca School progress report (Parent Exs. I-M; Dist. Ex. 5).<sup>9</sup> In

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<sup>8</sup> To the extent the district school psychologist who served as the district representative at the May 2012 CSE meeting testified that the CSE "had a comprehensive progress report from the Rebecca School that had been submitted to us by the school prior to the meeting" (Tr. p. 48), the failure to comply with the procedural requirements regarding obtaining multiple sources of evaluative data does not rise to the level of a denial of a FAPE if the IEP adequately reflects the student's needs (D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]).

<sup>9</sup> Other than their cover pages, Parent Exhibits I and J are identical (compare Parent Ex. I at pp. 2-3, with Parent Ex. J at pp. 2-3).

addition, participants at the CSE meeting included the student's father, Rebecca School classroom teacher, and a Rebecca School social worker, and district staff took notes reflecting their input (Dist. Exs. 2 at p. 19; 4; 6; see Tr. pp. 49, 50).

An IEP is required to include a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). The parents assert that the IEP failed to reflect the student's reading comprehension skills, math skills, sensory needs, and allergies. Accordingly, it is necessary to determine whether the student's needs, as reflected in the evaluative material available at the time of the CSE meeting, were appropriately documented on the June 2012 IEP. A review of these materials indicates that although the CSE may not have discussed all of the evaluative materials, they were adequately reflected in the IEP.

The hearing record reflects that the student exhibited global developmental delays across multiple domains (Parent Exs. I-M; Dist. Exs. 4-6). Generally, the student presented with significant communication delays in receptive, expressive, and written language, including an inability to communicate verbally or respond to standardized test questions, although she could mimic language inconsistently (Parent Exs. I at pp. 2, 3; K at pp. 1-3; L at p. 2; M at pp. 2, 4).

With regard to the student's reading comprehension skills, the December 2011 Rebecca School progress report indicated that the student had become more attentive to stories read to a group of students, would occasionally hold a book properly, was emerging in her ability to comprehend text read aloud, and was "working on identifying emotionally relevant and meaningful pictures and words . . . when presented in a field of two" (Dist. Ex. 5 at pp. 2-3). The notes taken by district staff at the May 2012 CSE meeting reflect that the student was able to follow along with stories that were read to her, and was able to recognize her name and answer basic comprehension questions when presented with two choices (Dist. Exs. 4; 6 at p. 2). The IEP also reflected this information, including the student's ability to listen to a story being read aloud for increasing periods of time and comprehend stories that were read to her, as well as that she was currently "working on identifying emotionally relevant and meaningful pictures and words . . . when presented in a field of two" (Dist. Ex. 2 at p. 1). Inasmuch as the hearing record contains no evidence that the student was exhibiting additional reading comprehension skills to such an extent that it was necessary for them to be included to provide an accurate view of the student's abilities, the failure to provide any greater precision with regard to the student's reading comprehension skills did not violate State or federal regulations. With respect to math, the hearing record indicates that the student was unable to count by rote or use one-to-one correspondence to count (Parent Ex. M at p. 4). The December 2011 Rebecca School progress report indicated that the student was working on identifying numbers and understanding what numbers signified, and showed emerging comprehension of the numbers one, two, and three (Dist. Ex. 5 at p. 3). Parroting the progress report, the IEP reflected that the student's math skills were extremely limited, indicating that she "show[ed] emerging comprehension of numbers one, two, and three" (Dist. Ex. 2 at p. 1). For the same reasons as with regard to the student's reading skills, the hearing record does not support a finding that the failure to provide additional detail regarding the student's math skills constituted a denial of a FAPE. Accordingly, although it might have been best for the CSE to more thoroughly elucidate the student's academic abilities, the information contained in the IEP indicated that the student was functioning at an extremely low level in academics and, under the circumstances, the

failure to provide greater detail did not rise to the level of a denial of a FAPE (P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]).

Turning to the student's sensory needs, the evaluative information indicates that the student demonstrated stereotyped motor movements and was impulsive (Parent Exs. I at p. 3; K at p. 2). The December 2011 Rebecca School progress report indicated that the student sought sensory input throughout the day, "by standing on her head, jumping on the trampoline and walking around the classroom" (Dist. Ex. 5 at p. 1). In addition, the student became "dysregulated" when limits were set or she was unsure what to do, leading to behaviors including loud vocalizations, standing on her head, kicking, and elopement (id.). The IEP reflects exactly this information (Dist. Ex. 2 at p. 2). Although the parents argue that the IEP failed to include information regarding the student's need for a sensory diet and what sorts of sensory input were most effective at addressing the student's need, the Rebecca School progress report indicated that its "staff has not yet been able to identify a co-regulating strategy that works consistently at this time" (Dist. Ex. 5 at p. 1). In any event, the IEP reflects, consistent with the notes taken by district staff at the CSE meeting, that the student "require[d] a lot of sensory input throughout the day," indicating that she was "currently receiving brushing and lotion every two hours, in addition to have the ability to take breaks when she feels the need to . . . use the trampoline or another movement activity" (Dist. Ex. 2 at p. 2; see Dist. Ex. 4). The IEP further indicates, consistent with the Rebecca School progress report, that the student enjoyed sensorimotor play, which led to her being more engaged in OT and increased her interactions with peers (Dist. Ex. 2 at p. 2; see Dist. Ex. 5 at pp. 4-5). In an apparent omission, the IEP does not reflect that the student would go to a quiet room, with a low light environment and sensory support, when she became severely dysregulated (Dist. Ex. 4). However, considering that the IEP indicated the student required a great deal of sensory input, specified particular interventions used successfully with the student, and provided annual goals to address the student's needs relating to sensory input and regulation (Dist. Ex. 2 at pp. 2, 4, 6-7, 10), the hearing record supports a finding that the district adequately detailed the student's need for sensory input.

Finally, the parents contend that the IEP does not adequately reflect the severity of the student's allergies. The evaluative information in existence at the time of the CSE meeting reflected that the student had allergies to eggs, dairy, fish (particularly salmon), peanuts (and peanut butter), and flowers, but was not currently taking medication to address her allergies (Parent Ex. L at p. 1; Dist. Exs. 4; 6 at p. 2). The IEP specifically indicated that the student "has food allergies to eggs, dairy, fish, peanuts, and flowers" (Dist. Ex. 2 at p. 2). The failure to include that the student had "once" been hospitalized as a result of a severe allergic reaction (Parent Ex. L at p. 1), standing alone, is insufficient to constitute a denial of a FAPE (see P.G., 959 F. Supp. 2d at 511-12). In addition, the information available to the CSE did not clearly state what, if any, modifications were necessary to accommodate the student, nor do the parents now assert what more information was necessary to reflect the student's needs relating to her allergies, beyond contending that the IEP failed to indicate what steps should be taken to avoid allergic reactions. Accordingly, based on the information in existence at the time of the May 2012 CSE meeting, the district did not deny the student a FAPE by not providing additional details regarding her allergies on the IEP (L.K. v. Dep't of Educ., 2011 WL 127063, at \*9 [E.D.N.Y. Jan. 13, 2011]; see Application of a Student with a Disability, Appeal No. 12-098). However, it would be appropriate for the district to conduct an evaluation of the extent to which the student's allergies and her needs relating thereto affect her ability to receive educational benefits and, if it determines that the student does not require additional accommodations to address her needs related to her allergies,

to provide the parents with appropriate notice thereof (20 U.S.C. § 1415[b][3], [c][1]; 34 CFR 300.503; 8 NYCRR 200.5[a]).

#### **D. Annual Goals**

The parents argue that the annual goals contained in the June 2012 IEP were improperly taken directly from a Rebecca School progress report, were vague, lacked baselines, and did not include evaluation criteria. The parents also contend that the goals required a smaller student-to-teacher ratio and could not be implemented in a 6:1+1 special class. Similarly, the parents assert that the goals were reliant on the use of the DIR model of instruction used at the Rebecca School and could not be implemented with other methodologies. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability, to enable the student to be involved in and make progress in the general education curriculum, and meet each of the student's other educational needs that result from the student's disability (20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). For students who take the New York State alternate assessment, the IEP must include short-term instructional objectives or benchmarks between the student's present levels of performance and the annual goal (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. § 1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

Initially, to the extent the parents assert that the goals lacked baselines, neither the IDEA nor State or federal regulations require that this be an element of the annual goals contained in a student's IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572 [2d Cir. 2014]). With regard to the alleged vagueness of the goals and the lack of evaluation criteria, although I agree with the parents that the annual goals themselves are vague and provide little guidance with regard to the manner in which the student's progress was to be measured, courts generally have been reluctant to find a denial of a FAPE on the basis of deficient annual goals where the corresponding short-term objectives cure the defect by providing sufficient specificity to evaluate the student's progress (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*10-\*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]). Although the annual goals should themselves have included the required elements, each of the annual goals included in the IEP contained between two and five corresponding short-term objectives identifying specific subordinate elements of the annual goal to be worked on and providing the evaluative criteria (e.g., 2 out of 3 activities, 1 out of 3 opportunities), evaluation procedures (e.g., teacher/provider observations, class activities, teacher made materials), and schedule (e.g., 1 time per quarter) by which the student's progress would be measured (Dist. Ex. 2 at pp. 4-11). Although not perfect, the goals, as elaborated upon by the short-term objectives, are sufficient to guide a teacher in providing the student with instruction and any deficiencies do not rise to the level of a denial of a FAPE (B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at \*11 [S.D.N.Y. Dec. 3, 2014]; N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359-63 [E.D.N.Y. 2014]; R.B., 2013 WL 5438605, at \*13-\*14).

Despite the parents' claim that the annual goals in the June 2012 IEP were not appropriate because they were intended for implementation in conjunction with the use of a particular methodology, under the IDEA and State and federal regulations a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability for a particular methodology, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). There is nothing in the hearing record to indicate that the June 2012 IEP annual goals could not be implemented in a setting that used a model other than DIR/Floortime (see Dist. Ex. 2 at pp. 4-11; cf. R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. 2014]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*12 [S.D.N.Y. Mar. 19, 2013]). The assertion that the terminology used in the goals was incompatible with the techniques used by methodologies employed in the district's public schools is not supported by the hearing record. The IEP and annual goals do not require the use of any particular methodology. As noted by the district school psychologist, although the goals were based on what the student was working on at the Rebecca School in a program utilizing a specific methodology, the goals were structured to address the student's identified areas of need and did not require use of any particular methodology to be implemented (Tr. pp. 78, 80, 87-90). While it would have been preferable for the CSE not to phrase the goals in jargon specific to the methodology used at the Rebecca School, the concepts underlying the goals are consistent with the tenets of specially designed instruction and are commonly used by teachers engaging in responsive special education instruction, regardless of methodology.<sup>10</sup> Similarly, to the extent the parents contend—and witnesses from the Rebecca School testified (Tr. pp. 123-24, 197-99)—that the annual goals could not have been implemented in a greater student-to-teacher ratio than 2:1, nothing in the language of the goals requires such a ratio and the conclusory testimony that these goals could not be implemented in a 6:1+1 special class is not convincing.

Next, turning to the May 2012 CSE's use of the December 2011 Rebecca School progress report to develop the annual goals, there is no authority cited for the proposition that a CSE cannot incorporate annual goals into a student's IEP that were developed by the student's nonpublic school teachers and/or providers (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013] [noting that the parent cited "no authority for the proposition that drawing goals from a teacher's progress report is a violation of the statute or regulations"]). Overall, the evidence in the hearing record supports a finding that the annual goals and short-term objectives in the IEP targeted and appropriately addressed the student's identified areas of need (see, e.g., D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-60 [S.D.N.Y. 2013]).

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<sup>10</sup> While a review of the hearing record indicates the district was aware of the parents' concern that the public school would not use the same methodology that had been successful with the student at the Rebecca School (Tr. pp. 85-86, 119-20; Dist. Ex. 6 at pp. 1, 4), and it is understandable for parents to want what is best for their child, the hearing record does not indicate that the use of any other methodology with the student would be inappropriate.

## E. 6:1+1 Special Class

The parents argue that the recommendation for a 6:1+1 special class placement was not reasonably calculated to enable the student to receive educational benefits. A review of the hearing record does not support this reading of the evidence. During the 2011-12 school year, the student attended the Rebecca School in an 8:1+3 special class (Dist. Ex. 5 at p. 1) and the hearing record indicates that at the time of the May 2012 CSE meeting, the student had made progress with respect to her ability to remain engaged in group activities (Dist. Exs. 4; 6 at pp. 2-3; see Dist. Ex. 2 at p. 1). In addition, of the evaluation reports and updates cited by the parents, only one, dated January 27, 2009, made any recommendation with regard to an appropriate student-to-teacher ratio, recommending that the student continue to attend a 6:1+2 special class, which she was then attending as a preschool student (Parent Ex. M at p. 7).<sup>11</sup> The other reports reference this recommendation (Parent Exs. I at p. 2; K at pp. 1-2; L at p. 1), but none specifically recommend that the student continue in the same program. Rather, the most current evaluation report as of the May 2012 CSE meeting, dated August 12, 2010, recommended that the student "attend a small and highly structured academic environment where the expectations are clear and the distractions are minimal" (Parent Ex. K at p. 5), without specifying a particular student-to-teacher ratio or the assistance of a 1:1 paraprofessional. Inasmuch as State regulations provide that a 6:1+1 special class is designed for "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]), a 6:1+1 special class necessarily implicates the provision of individualized attention and intervention to a high degree (cf. R.E., 694 F.3d at 194), and the CSE's recommendation was in accord with the available evaluative information. Although the Rebecca School social worker who attended the May 2012 CSE meeting testified that both she and the student's Rebecca School teacher disagreed with the recommendation for a 6:1+1 special class, believing "strongly" that the 8:1+3 ratio at the Rebecca School "was more preferable" and "more appropriate" (Tr. pp. 120, 122-23), and while the parents preferred a smaller student-to-teacher ratio because it would provide their child with additional individual attention, the district is required to provide the student with an appropriate program, not one that provides all that loving parents might desire (Rowley, 458 U.S. at 198-99; Walczak, 142 F.3d at 132). Furthermore, "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits" (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 368-70 [E.D.N.Y. 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*10-\*11 [S.D.N.Y. Mar. 31, 2014]). The only reason the parents identify on appeal for challenging the CSE's recommendation for a 6:1+1 special class is that no evaluation specifically recommended such a placement, but the ultimate determination of a student's placement is delegated to the CSE, not private evaluators (see, e.g., M.L., 2014 WL 1301957, at \*11; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [E.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). So long, as here, the recommendation is reasonably calculated to address the student's needs, it is of no moment that no evaluator specifically recommended the type of placement recommended by the CSE. Further, once the CSE determined that a 6:1+1 special class could meet the student's needs, it was not obligated to

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<sup>11</sup> That report also indicated that the student had only mastered skills taught to her using a specific methodology which is not used at the Rebecca School (Parent Ex. M at p. 4; see Tr. pp. 148-51).

consider placement in a classroom with a smaller student-to-teacher ratio (B.K., 12 F. Supp. 3d at 359).

#### **F. Assigned Public School Site**

With regard to the parents' challenges to the assigned public school site, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself, as "[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 R.B., 589 Fed. App'x at 576; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding 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'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding 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"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that the IDEA confers no rights on parents with regard to school site selection]; 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]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]).<sup>12</sup> Here, the parents rejected the recommended program in June 2012, prior to the time the June 2012 IEP was scheduled to be implemented (Parent Exs. D; W; see Dist. Ex. 2). Accordingly, as the student never attended the assigned public school site pursuant to the June 2012 IEP, any conclusion that the district would not have implemented the student's IEP based on the parents' observations during a visit to the assigned public school site would necessarily be based on impermissible speculation (R.B., 589 Fed. App'x at 576).

#### **VII. Conclusion**

Upon review, any deficiencies in the conduct of the May 2012 CSE meeting and the June 2012 IEP do not rise to the level of a denial of a FAPE, individually or taken as a whole. I have considered the parties' remaining contentions and find that I need not address them further in light of the determinations made herein.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

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<sup>12</sup> The Second Circuit has also held that although a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]). The district is required to implement the written IEP and parents are within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).



**IT IS ORDERED** that the decision of the impartial hearing officer dated June 21, 2013, is modified, by reversing so much thereof as held that the parents did not have standing to request public funding for the costs of the student's tuition at the Rebecca School and found that the district failed to offer the student a FAPE for the 2012-13 school year; and

**IT IS FURTHER ORDERED** that the district, when next it convenes a CSE to develop an IEP for the student shall, within a reasonable time thereafter, provide the parents with prior written notice, on the form prescribed for such use by the Commissioner of Education, in accordance with State and federal regulations, including providing a description of each evaluation procedure, assessment, record, or report that was used in the development of the student's IEP, and explaining the basis for the recommendation.

**Dated:**            **Albany, New York**  
                         **February 26, 2015**

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**NICHOLAS A. STEINBOCK-PRATT**  
**STATE REVIEW OFFICER**