The University of the State of New York

The State Education Department
State Review Officer
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No. 13-150

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Law Office of Anton Papakhin, PC, attorneys for respondents, Anton Papakhin, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for the student's tuition costs at the Rebecca School for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, 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

On July 12, 2012, the CSE convened for the student's turning-five meeting and to develop the student's IEP for the 2012-13 school year (Tr. pp. 83-86; Dist. Exs. 1 at pp. 1, 14, 17; 2). The CSE determined the student was eligible for special education services as a student with autism (Dist. Ex. 1 at pp. 1, 14).[1] The CSE recommended a 12-month school year program consisting of, among other things, a 6:1+1 special class in a specialized school (Tr. p. 112; Dist. Ex. at pp. 1,

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

10).[2] The CSE also recommended related services consisting of three 30-minute sessions per week of 1:1 speech-language therapy; three 30-minute sessions per week of 1:1 physical therapy (PT); and three 30-minute sessions per week of 1:1 occupational therapy (OT) (Dist. Ex. 1 at p. 10).

By final notice of recommendation (FNR) dated August 13, 2012, the district summarized the services recommended by the July 12, 2012 CSE and notified the parent of the particular public school site to which the student was assigned and at which her IEP would be implemented for the 2012-13 school year (Parent Ex. C). The FNR provided contact information for an individual who could arrange a site visit for the parent (id.).[3]

On or about October 3, 2012, the parent sent to the district a "Ten Day Notice" letter informing the district that the parent had attempted to observe the public school site and that when she contacted the public school site, "she was informed that there was no available seat for [the student] in the recommended 6:1:1 class" (Parent Ex. D).[4] The letter also indicated that the parent would be requesting an "impartial hearing to obtain tuition directly paid to the school" for the 2012-13 school year (id. at p. 1).

By letter dated November 14, 2012, the parent's educational advocate informed the district that the student was "currently non-attending [sic] school"; that the parent "was advised by personnel [at the public school site] that they don't have classes and would not let her in or suggest any alternative"; that the parent did not believe that the student could be "properly educated" in a public school; that the placement recommendation was untimely and inappropriate; and requested that the CSE issue her a "Nickerson letter" (Parent Ex. O).[5, 6]

In a form dated November 28, 2012 and entitled "Authorization to Attend a Special Education Program as a Comparable Service," the district offered the student a placement to be

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[2] Although the CSE recommended that the student receive extended school year services, the July 12, 2012 IEP indicated a projected implementation date of September 6, 2012; the student received services during July and August 2012 pursuant to an IEP developed by the Committee on Preschool Special Education (Dist. Exs. 1 at pp. 10-11; 8 at pp. 1, 2).

[3] The FNR did not provide a telephone number for the public school site itself (see Parent Ex. C.).

[4] The letter also stated that the parent "has enrolled" the student in the Rebecca School (Parent Ex. D. at p. 1). The hearing record establishes that the student was not yet enrolled in the Rebecca School at the time that the letter was written (see Tr. p. 236; Parent Exs. L; M).

[5] The letter also indicated that the parent "went to observe the program [but was] turned away" (Parent Ex. O at p. 1). There is no evidence in the hearing record that the parent or educational advocate ever attempted to observe the public school site.

[6] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

implemented at a different public school site (Parent Ex. K).[7] On November 29, 2012, in a handwritten notation on the district's November 28, 2012 form, the parent's advocate notified the district that she had previously sent the district a Ten Day Notice letter to inform the district that the student would be attending the Rebecca School and that the parent and advocate did not understand the import of the form (Parent Exs. K; Q at pp. 1-2).[8]

On November 30, 2012, the parent signed an enrollment contract with the Rebecca School (Parent Ex. L at p. 4).[9] The contract indicated that the student would begin attending the Rebecca School on December 13, 2012 (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated January 28, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) (Parent Ex. A at p. 1). With regard to the July 2012 IEP, the parent asserted that the IEP "failed to include appropriate pre-academic goals" and that the speech-language, OT, and PT goals included in the IEP did not reflect the student's "current functioning" or his needs (id. at p. 2-3).

Relative to the public school site recommended by the district, the parent alleged that the August 13, 2012 FNR did not constitute a timely offer of placement and that when the parent contacted an administrator at the recommended public school site, the administrator "informed the parent that there were no more classes and turned her away" (Parent Ex. A at pp. 2-3).

With regard to the parent's unilateral placement of the student at the Rebecca School, the parent asserted that the "Rebecca School is an appropriate and necessary placement" and that she "cooperated with the CSE" and was therefore "entitled to reimbursement for the tuition costs associated with [the student's] placement at Rebecca for the 2012-13 school year and/or direct payment to Rebecca for these tuition costs" (Parent Ex. A at p. 3). The parent also requested transportation to and from the Rebecca School (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was conducted on April 5, May 15, 17, and June 5, 2013 (IHO Decision at pp. 1-2; Tr. pp. 1, 68, 323, 515). In a decision dated July 8, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate placement for the student, that equitable considerations favored tuition reimbursement, and that the student's parent was entitled to direct funding of tuition costs associated with the student's placement at the Rebecca School (see IHO Decision at pp. 12-19).

Relative to the development and content of the July 2012 IEP, the IHO found "no procedural or substantive defects of such magnitude to invalidate the July 12, 2012 IEP" (IHO

[7] The placement offer did not conform to the recommendations in the July 2012 IEP (Dist. Ex. 1; Parent Ex. K).

[8] The district acknowledged that its use of this form to offer the student a public school placement was a clerical error (Tr. pp. 350-51, 381).

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

Decision at p. 14). Thus, the IHO concluded that the "IEP was reasonably calculated to provide [the student] with meaningful educational benefit" (id. at p. 15). In so concluding, the IHO reasoned that the IEP's "goals and objectives were developed from the reports of the providers working with [the student]," with input from CSE members, and that the goals and objectives addressed the student's deficits, were realistic, measurable, and capable of implementation (id.). The IHO also concluded that the recommended 6:1+1 special class would have provided "the structure, small group, and 1:1 attention" that the student required and that the recommended related services appropriately addressed the student's needs (id.).

Despite the IHO's conclusion that the July 2012 IEP was reasonably calculated to provide the student with educational benefits, the IHO concluded that the district failed to make a timely offer of an appropriate placement for the student and consequently failed to offer the student a FAPE for the 2012-13 school year (IHO Decision at pp. 15-16). First, the IHO found that the DOE failed to make a "timely offer of appropriate placement . . . pursuant to the August 8 [sic], 1988 Jose P vs. Sobol Stipulation" (IHO Decision at p. 15; see generally Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], aff'd 669 F.2d 865 [2d Cir. 1982]). The IHO reasoned that because the district failed to offer the student a placement by June 15, 2012, the student was eligible for a placement in an approved nonpublic school program (IHO Decision at p. 15). Moreover, the IHO found that although the student "was receiving pre-school services until mid-August 2012, a timely placement offer was necessary for the parent to make an informed decision about any recommended school" (id.). Next, crediting the parent's testimony at the impartial hearing, the IHO found (1) that the parent used the contact information on the FNR to attempt to arrange a visit to the proposed public school site; (2) that the information on the FNR was insufficient for that purpose because the parent never received a response to her telephone calls and messages; and (3) that when the parent's calls were not returned "she researched the school online and found what she believed to be a telephone number for the school, called that number, and was told that there were no available seats" for the student (id. at p. 16).[10]

With respect to the parent's unilateral placement, the IHO found that the student's program at the Rebecca School was "reasonably calculated to ensure that [the student] benefits educationally and makes academic, social and behavioral progress" (IHO Decision at pp. 16-17). Turning to the remedy for the district's denial of a FAPE to the student for the 2012-13 school year, the IHO found that equitable considerations did not weigh against granting the parent's request for public funding of the student's unilateral placement and that the parent had established her inability to pay the cost of the student's Rebecca School tuition, entitling her to an award of direct payment thereof (see IHO Decision at pp. 17-19). Specifically, the IHO found that the parent had "fully cooperated and communicated with the CSE and made a timely hearing request, and the amount of reimbursement requested [was] reasonable" (id. at p. 17). The IHO also found that the parent was entitled to prospective tuition funding because the parent had demonstrated by "clear and convincing evidence" that she could not afford to pay the tuition "up front" (IHO Decision at pp. 18-19).

[10] The IHO noted in passing that the district did not present any testimony or evidence regarding the appropriateness of the district's November 28, 2012 placement offer (IHO Decision at p. 16 n.2). The IHO made no additional findings with regard to the district's placement offer of November 28, 2012 (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year, that the parent's unilateral placement at the Rebecca School was appropriate, and that equitable considerations favored the parents. First, the district argues that the IHO's findings as to the July 2012 IEP should be upheld because, in addition to the reasons provided by the IHO, the CSE was properly composed, considered current and relevant evaluative material, and developed an IEP that was reasonably calculated to provide the student with a FAPE in the least restrictive environment (LRE). Moreover, relative to the goals and objectives in the IEP, the district argues that CSE developed clear, unambiguous, appropriate, and measurable goals designed to address the student's unique areas of deficit.

Second, with regard to the IHO's conclusion that the district failed to offer a timely placement recommendation by June 15, 2012, in violation of the Jose P. federal court stipulation, the district argues that Jose P. is not applicable to this appeal because neither the IHO nor the SRO has jurisdiction over matters related to the Jose P. stipulation. Moreover, the district argues that even if Jose P. were applicable, the August 13, 2012 FNR referred the student to a placement within 60 days of the September 6, 2012 implementation date of the July 2012 IEP.

Third, relative to the IHO's finding that the parent contacted the public school site and was told by an administrator that there were no available seats open at that public school, the district argues that it nevertheless made a timely offer of placement because the public school site listed on the August 13, 2012 FNR had a seat in a 6:1+1 kindergarten class available to the student in September 2012.

Fourth, the district argues that as to the district's second placement offer of November 28, 2012, the parent did not challenge the second placement offer in her due process complaint notice, and therefore any consideration of the second placement offer is beyond the scope of these proceedings.

As to the parent's unilateral placement of the student at the Rebecca School, the district does not appeal the IHO's finding that the Rebecca program was an appropriate placement for the student. With regard to the IHO's finding that equitable considerations did not bar tuition reimbursement, the district argues that the IHO erred because the parent did not provide adequate notice of her intention to place the student at the Rebecca School at public expense and failed to raise any objections to the July 2012 IEP until the filing of her due process complaint notice. Even if equitable considerations otherwise favored the parent's request, the district contends that the IHO erred in awarding direct payment of the student's Rebecca School tuition because the parent did not demonstrate that she was unable to pay the cost of the student's tuition.

The parent answers, generally denying the district's assertions and requesting that the IHO's decision be upheld for the reasons stated by the IHO. In support of upholding the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year, the parent asserts that notwithstanding whether the IHO correctly found that the August 13, 2012 FNR constituted an untimely offer of placement in violation of the Jose P. stipulation, a timely placement offer was necessary for the parent to make an informed decision about the recommended public school site. The parent also argues that the IHO correctly found that the district failed to offer to the student an appropriate placement, the IHO having credited the parent's testimony that the parent (1) attempted to arrange a visit of the recommended public school site; (2) telephoned

the placement officer several times but did not have her calls returned; and (3) called what she believed to be the telephone number for the public school site on the second day of school but was informed that there were no available seats for the student at that public school. Moreover, the parent argues that to the extent that there was an available seat for the student at the public school site in September 2012, the district had an affirmative duty to contact the parent in the beginning of September and determine why the student was not attending the recommended placement. Finally, the parent argues that the IHO correctly found that equitable considerations do not bar direct tuition funding at district expense because (1) the October 3, 2012 ten-day notice was sent to the district before the parent decided to unilaterally enroll the student at the Rebecca School; (2) she informed the district of her objections prior to the filing of the due process complaint notice; and (3) both documentary evidence and the parent's credible testimony indicated that she was unemployed and received public assistance and supplemental security income (SSI) and therefore was unable to front the costs of the student's tuition at the Rebecca School.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 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., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd,

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, 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 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, 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. Scope of Review

I first address the district's argument that I should uphold the IHO's conclusion that there were no "procedural or substantive defects of such magnitude to invalidate the July 12, 2012 IEP" and that the IEP "was reasonably calculated to provide [the student] with meaningful educational benefit" (IHO Decision at pp. 14-15). Specifically, the district argues that the IHO's findings as to the adequacy of the IEP should not be disturbed on appeal because the CSE developed clear, unambiguous, appropriate and measurable goals designed to address the student's unique areas of deficit. The parent has neither cross-appealed the adverse determination of the IHO that the July 2012 IEP was appropriate nor raised any arguments in her answer challenging the IHO's finding that the July 2012 IEP was appropriate.

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In his decision, the IHO considered the parent's challenge to the July 2012 IEP and found that the July 2012 IEP was appropriate, which constitutes an adverse finding to the parent (IHO Decision at pp. 14-15). A party who fails to obtain a favorable ruling with respect to an issue decided by an IHO is bound by that ruling unless a party asserts an appeal or a cross-appeal (see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013] [holding that "issues that were decided by the IHO and not appealed or cross-appealed by the party against which they were decided are binding against that party, and on the SRO and this Court, as to that party"]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013] [holding that "parties must appeal (or cross-appeal) any adverse findings of the IHO to preserve those arguments"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 [S.D.N.Y. Nov.

27, 2012] [finding that "parties contesting the validity of an IEP may cross-appeal an IHO's adverse particular findings even if they obtained all of their requested relief;" see also Parochial Bus. Sys. v. Bd. of Educ., 60 N.Y.2d 539, 545-47 [1983]). While the IDEA provides that "any party aggrieved by the findings and decision" of an IHO may pursue an appeal to the SRO (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]), State regulations provide that a respondent may seek review of "all or a portion" of an IHO's decision by asserting a cross-appeal in the answer (8 NYCRR 279.4[b]).

As noted above, the IHO in this case found that the July 2012 IEP was reasonably calculated to provide the student with meaningful educational benefit (IHO Decision at pp. 14-15). This determination was adverse to the parent, yet the parent did not file a cross-appeal challenging the IHO's conclusion that the July 2012 IEP was adequate to meet the student's needs. Based upon the foregoing, I find that the parent elected not to cross-appeal the adverse findings of the IHO relating to the adequacy of the offered program and thereby has waived her right to pursue these issues, and consequently, I lack the jurisdiction to review them (see Parochial Bus. Sys., Inc., 60 N.Y.2d at 545-47; J.F., 2012 WL 5984915, at *9; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).[11]

B. Challenges Regarding the Public School Site

1. Timeliness of the Notice of Recommended Placement

The district contends that the IHO and SRO do not have jurisdiction over matters related to the stipulation reached in the Jose P. class action suit. The district argues that the IHO therefore erred in concluding that the district failed to offer a timely placement recommendation by June 15, 2012, in violation of the stipulation reached in the Jose P. class action suit. I note that the remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P., 553 IDELR 298; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see also Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012]; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]). Therefore, I agree with the district that neither the IHO nor I have the jurisdiction to resolve a dispute regarding whether the

[11] The parent's due process complaint notice did not raise any claim related to the district's November 2012 offer of placement, which the district did not attempt to defend at the impartial hearing and on which the IHO made no findings (IHO Decision at p. 16 n.2; Tr. p. 18; Parent Ex. A at pp. 1-4). Accordingly, to the extent the parties raise any arguments on appeal relating to the November 2012 second offer of placement, I am without authority to review those arguments (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see also R.E., 694 F.3d at 187-88 n.4).

student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom. R.E v. New York City Dep't of Educ., 694 F.3d 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L., 2012 WL 4891748, at *11-*12; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]).[12] For the foregoing reasons, the IHO's finding that the mailing of the first FNR on August 13, 2012 resulted in the denial of a FAPE to the student must be vacated.

2. Availability of a Classroom Seat at the Assigned Public School Site

I now turn to the parties' dispute regarding whether there was an available seat for the student in a 6:1+1 special class at the public school site. The district argues that the IHO erred in finding that the student was denied a FAPE on the basis that the parent was told by an administrator at the public school site that there were no seats available at that public school. The district contends that it made a timely and appropriate placement offer because the evidence shows that the public school site listed on the August 2012 FNR in fact had an available seat in a 6:1+1 kindergarten class for the student in September 2012.

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[13] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; see also Deer Val. Unified Sch. Dist. v L.P., 2013 WL 1790320, at *7-*9 [D Ariz Mar. 21, 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

[12] The IHO also found that although the student was receiving preschool services until mid-August 2012, pursuant to an IEP developed by a Committee on Preschool Special Education (CPSE), the district failed to make a timely offer of appropriate placement by June 15, 2012 because a "timely placement offer was necessary for the parent to make an informed decision about any recommended school" (IHO Decision at p. 15). I note that the student was still a "preschool child" during July and August 2012—and receiving preschool services during those months pursuant to the CPSE IEP (Dist. Ex. 8)—and that the district was not required to implement the July 2012 IEP until the beginning of the 10-month school year in September 2012 (see N.Y. Educ. Law § 4401[1][i] ["A child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school"]; 8 NYCRR 200.4[e][1][ii] ["The school district shall ensure that each student with a disability has an IEP in effect at the beginning of each school year."]).

[13] 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" (N.Y. Educ. Law § 2[15]).

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 a parent's "[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., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; 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, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; 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 in which a student would be placed 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 adequacy of the student's services where the parent removed the student from the public school before the IEP services were implemented]).

While 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 D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 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., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, 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), 2013 WL 2158587, at *4 [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., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented], quoting R.E., 694 F.3d at 187). 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]).[14]

As explained more recently, "[t]he Second Circuit has been clear, however, 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. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 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']). In view of the foregoing and under the circumstances of this case, I find that the parent cannot prevail on the claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's July 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186 [2d Cir. 2012]; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

In this case, the IHO's conclusion that the district failed to offer the student a FAPE was based on his finding that upon receipt of the August 2012 FNR, the parent followed the instructions on the form and telephoned the placement officer listed on the FNR and attempted to arrange for a visit of the public school site, but did not receive a response to any of her telephone calls (IHO Decision at p. 16; Tr. pp. 551-52). The IHO also found that the parent then attempted to find a telephone number for the public school site (IHO Decision at p. 16; Tr. pp. 552-53). When the parent called that telephone number on or about September 7, 2012, she spoke to an individual named "Ms. [B.],"[15] who informed her that there were no available seats for the student because the school was "filled" (IHO Decision at pp. 6, 16; Tr. p. 553).

While the IHO in this case credited the parent's testimony regarding the foregoing sequence of events, the hearing record also contains considerable amount of additional evidence which further illuminated the circumstances, and which the IHO's analysis did not take into account when concluding that the district failed to offer the student a FAPE. The hearing record establishes that the district prepared an IEP for the student prior to the beginning of the school year as required by State and federal regulations (Dist. Ex. 1; see 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194). Prior to the beginning of the school year, the district also notified the parent of the public school site with a recommended 6:1+1 special class to which the district assigned the student and informed the parent that she had the option of visiting the school (Tr. p. 551; Parent Ex. C). Although the evidence shows that on or about September 7, 2012, the parent

[14] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

[15] The individual's last name appears in full in the hearing record; however, I cannot determine who this individual is, and out of an abundance of caution it is unnecessary to publish her name in full in this decision.

spoke with a person named "Ms. [B.]" who informed the parent that there were no available seats for the student, the assistant principal testified that there was a space available for the student on the first day of school (Tr. pp. 35-36, 52-53). In addition to reviewing the student's FNR and being aware that the student was recommended for the public school site, the assistant principal testified that there were "at least six to eight [kindergarten] seats available that were open the first week of September" and that "classes were not full in September and October" (Tr. pp. 35-36, 39, 52-53).[16] The assistant principal also testified that if the 6:1+1 kindergarten classes were already filled, she would have requested permission from the placement officer for a "variance" to add a seventh student to the 6:1+1 class or asked the district whether another public school site had an available seat for the student (Tr. p. 41). With regard to the individual named "Ms. [B]" who informed the parent that there were no available seats for the student at the public school site, the assistant principal testified that neither she nor anyone else that she was aware of on her staff spoke with the parent on the telephone and that there was no employee at the public school with the last name "[B.]" (Tr. pp. 40, 42-43).[17]

I note that the IHO did not address any of this evidence. While I find no reason to disbelieve that the parent may have somehow reached an individual named Ms. [B.], under the circumstances presented, a single telephone conversation like this is insufficient to find that the district simply failed to offer any education to the student at all, especially when the hearing record does not contain any evidence to rebut the assistant principal's testimony that there was space available, they were prepared to receive the student, and that Ms. [B] was not employed in the building.[18] Therefore, based on the totality of the evidence in the hearing record before me, even were implementation of the July 2012 IEP a permissible consideration, I find that there was a spot available for the student in the assigned public school site on the first day of school.[19]

VII. Conclusion

Having determined that the IHO erred in finding that the district did not offer the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support the parent's request for public funding of the student's unilateral placement at the Rebecca School (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *14 [S.D.N.Y. Feb. 20, 2013]). In light of my determinations herein, I need not address the parties' remaining arguments.

THE APPEAL IS SUSTAINED.

[16] The assistant principal testified that the public school site had available three 6:1+1 kindergarten classes in which the student could have been placed (Tr. p. 35).

[17] The parent did not indicate the telephone number that she used to contact the public school site, and there is no confirmation in the hearing record that the telephone number that the parent used to contact the public school site was actually the telephone number associated with that public school.

[18] I also note that the FNR provided the address of the assigned public school site (Parent Ex. C).

[19] Additionally, neither the IDEA nor State regulations require a district to maintain a particular classroom opening for a student while the student is enrolled elsewhere in a private school (Application of a Student with a Disability, Appeal No. 11-008 [noting that districts may modify class assignments in light of changing circumstances]).

IT IS ORDERED that the IHO's decision dated July 8, 2013 is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and directed the district to fund the cost of the student's tuition at the Rebecca School for the 2012-13 school year.

Dated: **Albany, New York**
September 13, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER