



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-083

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, Lisa R. Khandhar, Esq., of counsel

Law Firm of Tamara Roff, PC, attorneys for respondent, Tuneria R. Taylor, 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 her son's tuition costs at the Rebecca School for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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 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]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The Committee on Special Education (CSE) convened on May 17, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Dist. Ex. 1). The parent disagreed with the recommendations discussed at the May 2012 CSE meeting and notified the district of her intent to unilaterally place the student at the Rebecca School (see Parent Ex. B). In a due process complaint notice, dated August 9, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A).

An impartial hearing convened on November 19, 2013 and concluded on March 20, 2014 after three days of proceedings (Tr. pp. 1-230). In a decision dated May 5, 2014, 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 unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 19-32). As relief, the IHO ordered the district to pay for the costs of the student's tuition at the Rebecca School for the 2012-13 school year (id. at p. 32).

IV. Appeal for State-Level Review

The district asserts that the IHO erred in his determination that the district failed to offer the student a FAPE for the 2012-13 school year. Specifically, the district claims that the IHO erred in finding a denial of a FAPE because the May 2012 CSE did not (1) include a member with experience teaching in a 6:1+1 classroom; (2) consider or conduct a "timely evaluation" of the student to determine whether he could make meaningful progress in a less restrictive program than the Rebecca School program; (3) properly assess the student's needs to determine whether the recommendation for him to take State and local assessments was appropriate; (4) recommend Developmental Individual-difference Relationship-based (DIR) "or related methodology" on the IEP; (5) make an appropriate program recommendation that would provide sufficient 1:1 special education support; and (6) recommend transitional support services and/or assistance of a consultant teacher. In addition, the district argues that the parent is not entitled to direct funding of the costs of the student's tuition. While not addressed by the IHO, in an answer, the parent asserts as an additional reason to affirm the IHO that the district failed to provide the parent with a copy of the IEP or with an assignment of a particular public school site for the student to attend for the 2012-13 school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8

NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. CSE Composition

In the due process complaint notice the parent asserted that the lack of duly qualified district representative rendered the May 2012 CSE improperly constituted and contributed to a denial of a FAPE (Parent Ex. A at pp. 1-2). State and federal law require the attendance of a district representative at the CSE meeting (see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; 8 NYCRR 200.3[a][1][v]). Such a member of the CSE is described as a

representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist, provided that such individual also meets the above statutory qualifications (8 NYCRR 200.3[a][1][v]).

In the instant matter, the hearing record reflects that the following individuals attended the May 2012 CSE meeting: a district school psychologist, who also served as the district representative, a district special education teacher, a district social worker, the parent, an additional parent member, a Rebecca School social worker, and the student's then-current Rebecca School teacher who participated via telephone (Dist. Ex. 1 at p. 18). The school psychologist testified that he had been employed by the district for over nineteen years and his duties included conducting psychoeducational evaluations, participating in CSE meetings, helping to develop IEPs, and case management (Tr. pp. 7, 9-10). He indicated that he was qualified to serve as the district representative because of his familiarity with the continuum of public special education services in the district and his ability to provide special education counseling services (Tr. p. 11). The IHO found that no one at the May 2012 could adequately explain how special education services would be provided in a 6:1+1 special class placement, thus denying the parent meaningful participation in the May 2012 CSE meeting (IHO Decision at pp. 21-22). However the statute only requires the district representative to be knowledgeable about the availability of resources in the district and does not actually require the individual to have taught in all of the available settings. There is nothing in the hearing record to suggest that the school psychologist who served as the district representative lacked sufficient qualifications, which in turn (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]). Consequently, the IHO's decision that the composition of the May 2012 CSE impeded the parent's participation must be reversed.

B. May 2012 IEP

1. Sufficiency of Evaluative Information

The district contends that the May 2012 CSE had a substantial amount of information before it regarding the student's functioning and that the IHO erred in finding that the CSE failed to review sufficient evaluative material upon which to base its ultimate recommendation. As explained below, a review of the hearing record supports the district's assertion.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and the district must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately

assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the hearing record shows that the May 2012 CSE considered: a December 2011 Rebecca School progress report that described the student's academic abilities, communication skills, social/emotional functioning, motor development, and daily living skills; a February 2009 psychological evaluation report that indicated that the student's overall cognitive functioning was in the low average range; and the student's IEP for the 2011-12 school year (Tr. p. 12; Dist. Exs. 1, 2).¹ In addition, the student's parent and then-current teacher from the Rebecca School participated in the May 2012 CSE meeting and provided information regarding the student's needs (Tr. pp. 13-21; Dist. Ex. 1 at pp. 17-18).

The IHO stated that, while the Rebecca School progress report was "comprehensive and appropriate," the "school-based information [wa]s not an adequate substitute for testing . . . mandated under the [IDEA]" (IHO Decision at p. 20). Thus, the IHO determined that "failure to perform appropriate evaluations of the student's educational needs contributed to denial of a FAPE in this case[,] given that the [district] was considering and ultimately recommended a less restrictive 6:1[+]1 special class . . . when the student was attending an 8:1[+]3 program . . . at the Rebecca School" (id.). The district school psychologist testified that the February 2009 psychological evaluation report was "the most recent formal individualized evaluation of the student" (Tr. p. 42). Based upon the available information, the district was required to complete a triennial evaluation prior to the May 2012 CSE meeting and the failure to do so constituted a procedural violation (see 8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]).

Furthermore, the December 2011 Rebecca School progress report considered by the May 2012 CSE was fairly comprehensive with respect to the student's needs and progress (see generally Dist. Ex. 2). The progress report described the student as a friendly and curious boy with a great sense of humor (id. at p. 1). When regulated, the student was able to join in and participate during group activities for about 90 percent of the activity (id.). Progress was noted with respect to self-

¹ The district school psychologist indicated that he reviewed the February 2009 psychological evaluation report, but the parent recalled only that the May 2012 CSE reviewed a Rebecca School progress report (Tr. pp. 12, 42, 192-93). Consistent with the recollection of the district school psychologist, the May 2012 IEP includes test scores from the "most recent psychological evaluation" from February 2009 (Dist. Ex. 1 at p. 1). However, the February 2009 psychoeducational evaluation report was not included in the hearing record.

regulation from May to December 2011, such that, when dysregulated, the student was described as being more open to having an adult co-regulate and could more easily be brought back to an interaction (id.). According to the report, the student showed interest in peers and communicated verbally but still needed adult support to expand on back and forth interactions (id. at p. 2). It was noted that he had made gains in pretend play and reflective thinking (id.). The student showed interest in reading and was able to read over 100 words as well as short sentences. (id. at p. 3). The report indicated that the Test of Word Reading Efficiency-2 (TOWRE-2) had been administered in October 2011 and the student received a standard score of 78 on the timed portion of the real words section and a standard score of 76 on the timed portion of the nonsense or phonetic section (id.). He was able to follow multi-step directions and answer fact-based "what" and "where" questions (id.). In mathematics, the student was able to add numbers 1-20 with manipulatives, identify and attribute value to coins, and understand the passage of time in relation to his daily schedule (id. at p. 4). In occupational therapy (OT), the student was working on fine motor skills, handwriting, problem-solving with peers, strengthening, coordination, and endurance (id. at p. 5).

In conclusion, the hearing record reflects that the May 2012 CSE considered information describing the student's needs with respect to cognition, academics, language, social skills, motor skills, and sensory regulation (Tr. pp. 12-21). The hearing record further shows that the May 2012 CSE incorporated this information into the recommended IEP (Tr. pp. 12-21 ; compare Dist. Ex. 1, with Dist. Ex. 2 at pp. 1-3). I find that the May 2012 CSE considered sufficient evaluative information and note that a district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. Mar. 29, 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). Although the district's failure to conduct a triennial reevaluation constitutes a procedural violation, in this instance, I do not find that this violation lead to a denial of a FAPE to the student.

2. State and Local Assessments

The district asserts that the IHO erred in determining that the district did not properly assess the student's needs to determine whether it was appropriate for him to participate in State and local assessments (see IHO Decision at pp. 25-26). All students with disabilities must be included in all general State and local assessment programs with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs (20 U.S.C. §1412[a][16][A]; 34 CFR 300.160[a]; "Guide to Quality Individualized Education Program (IEP) Development and Implementation," p. 53, Office of Special Educ. [Feb. 2010 Revised Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>; see 8 NYCRR 200.4[d][2][vii]; see generally "The State Alternate Assessment for Students with Severe Disabilities," Office of Special Educ., Policy No. 01-02 [Jan. 2005], available at <http://www.p12.nysed.gov/specialed/publications/policy/alterassess.htm>). The CSE cannot exempt students with disabilities from participating in State or local assessments (Letter to State Directors of Special Education, 34 IDELR 119 [OSEP 2000]). If the CSE determines that the student cannot participate in State or local assessments even with accommodations, then the CSE must recommend that the student participate in alternate assessments (id.). Only students with severe cognitive disabilities are eligible for the New York State Alternate Assessment (see "Eligibility and Participation Criteria - NYSAA," Office of State Assessment [Aug. 2011],

available at <http://www.p12.nysed.gov/assessment/nysaa/nysaa-eligibility.pdf>). Students with severe disabilities are defined as "students who have limited cognitive abilities combined with behavioral and/or physical limitations and who require highly specialized education, social, psychological and medical services in order to maximize their full potential for useful and meaningful participation in society and for self-fulfillment" (8 NYCRR 100.1[t][2][iv]).

With respect to participation in State and district-wide tests, the district school psychologist testified that "all students should . . . have the opportunity to participate in the same types of tests . . . unless it can be specifically . . . documented that the student is incapable of participating" and that there was no documentation or reason to believe the student could not participate (Tr. pp. 63-64). The student's previous participation in formal testing procedures and his scores on previous psychological testing showed that he had the ability to participate (Tr. p. 75). In addition, to address the student's specific needs, the following testing accommodations were included on the May 2012 IEP: extended time, separate location, revised test directions, questions read aloud, and answers recorded in any manner (Dist. Ex. 1 at p. 13). Based on the foregoing I find that the May 2012 CSE appropriately determined that the student was able to participate in State and district-wide assessments.

3. Methodology

The district asserts that the IHO erred in finding that the May 2012 CSE's failure to specify a methodology on the IEP denied the parent meaningful participation in the meeting and constituted a form of predetermination not permitted by IDEA (see IHO Decision at p. 22). Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86, 2013 WL 3814669 [2d Cir. 2013]; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; 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, 2014 WL 53264 [2d Cir. 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11-*12 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012], aff'd, 528 Fed. App'x 64 [2d Cir. June 24, 2013]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 2014 WL 5463084, at *4; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also R.B., 2014 WL 5463084, at *4; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

Here, the school psychologist testified that he did not recall a discussion or presentation regarding a specific methodology required by the student at the May 2012 CSE meeting (Tr. pp. 37-39). While there is evidence that the student benefited from the DIR methodology (see Dist. Ex. 2 at p. 1), there is nothing in the hearing record to indicate that the student would not also receive benefit using other educational methodologies. In addition, I note that in a prior State-level administrative proceeding involving the same student, the hearing record actually showed that the student experienced some success using other educational methodologies (see Application of the Dep't of Educ., Appeal No. 13-091). Finally, contrary to the IHO's finding, there is nothing in the hearing record that persuasively indicates that the May 2012 IEP annual goals could not be implemented in another setting aside from the Rebecca School or that they could not be employed with a methodology other than DIR (see IHO Decision at p. 22 n.3; cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570 [S.D.N.Y. Mar. 19, 2013] [affirming the SRO's rejection of the parents' contention that the assigned TEACH classroom could not implement the annual goals in the IEP, which contention noted that they were also related to the DIR methodology]). Based on the foregoing, I find that no evidence was presented to the CSE to suggest the student's instruction should be limited to one specific methodology in order to enable him to receive educational benefit and, therefore, the IHO's determination that the May 2012 CSE's failure to specify a methodology on the IEP denied the parent meaningful participation in the meeting and constituted a form of predetermination is unsupported by the hearing record.

4. 6:1+1 Special Class

With regard to the appropriateness of the 6:1+1 special class placement, the parent argued that the student required a more structured and individualized setting such as the 8:1+3 staffing ratio recommended by the student's then-current Rebecca School teacher (Parent Ex. A at p. 2). She stated that the student would not get the "one to one that she felt he needed" and the student "needed to be surrounded by the same people and a larger group of teachers" to "get the best out of him" (Tr. p. 194). State regulations provide that a 6:1+1 special class placement 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]).

As an initial matter, the IHO erred by examining the student-to-adult ratio in the recommended special class as relevant to the analysis of the restrictiveness or LRE aspects of the student's educational placement. In circumstances such as those in this case, LRE is not defined by the particular special education student-to-adult staff ratio present in the placements considered by the CSE because it presents no difference in the degree of the student's access to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). Instead, as described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child," and, if not, then "whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 639 [S.D.N.Y. 2011]). The level of access to nondisabled peers in the regular education environment, however, is of little moment in this case insofar as neither party has asserted that the student should be educated in a general education setting or otherwise mainstreamed with nondisabled peers. Thus, the IHO's stated rationale for

finding the 6:1+1 special class in a specialized school less restrictive relative to the 8:1+3 program at the Rebecca School was flawed.

The hearing record reflects that the student demonstrated needs in the areas of academics, motor skills, sensory regulation, and social/emotional functioning (Tr. pp. 96-100, 130-31 156-58; Dist. Ex. 1 at pp. 1-3). The school psychologist testified that the CSE developed the present levels of performance section of the IEP through discussion with the student's then-current teacher and parent (Tr. pp. 13-21). In addition to the 6:1+1 special class placement, the following related services were recommended: two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group (3:1), two 30-minute sessions per week of individual OT, two 30-minute sessions per week of OT in a group (2:1), one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a group (2:1) (Dist. Ex. 1 at pp. 11-12). The May 2012 IEP also included the following supports for the student's management needs: high interest stories, mathematics manipulatives, number lines, sensory support, visual and verbal cues, redirection, calming affect, and visual and verbal prompts (*id.* at pp. 1-2). According to the school psychologist, the CSE considered and rejected special classes in community and specialized schools with varying ratios because they would not be sufficiently supportive (Tr. pp. 51-53).² The student's parent and then-current teacher expressed reservations during the May 2012 CSE meeting regarding whether a 6:1+1 special class placement would be supportive enough to address the student's needs (Tr. p. 194).

Here, consistent with the student's needs and State regulations, the May 2012 CSE appropriately recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school together with related services to address the student's needs in the area of academics, language, sensory regulation, social/emotional functioning, and motor skills (Dist. Ex. 1 at pp. 1-3, 11-13).

Further, contrary to the IHO's determination, there is no indication in the hearing record that the student required 1:1 instruction in order to receive educational benefit (*see* IHO Decision at pp. 23-24). The hearing record does not indicate that, at the time of the May 2012 CSE meeting, the student received 1:1 instruction at the Rebecca School (*see* Dist. Ex. 2 at p. 1). Moreover, the Rebecca School progress report, on which the CSE relied, described the student's progress in group settings (*see id.* at pp. 3-4). Thus, the IHO's reliance on *C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 81 (2d Cir. 2014) was misplaced in this instance, where there was no information before the CSE indicating that the student needed 1:1 instruction. The IHO went on to identify certain services that the CSE could have offered that would have offered more 1:1 support for the student, including transitional support services or consultant teacher services (IHO Decision at pp.

² However, the May 2012 IEP does not include information about the other placement options considered (*see* Dist. Ex. 1 at p. 17) and the hearing record does not include a prior written notice, which should also include such information.

23).^{3, 4} The hearing record does not support a finding that the student required additional support in the classroom and, further, both services identified by the IHO were inconsistent with the requirements or definitions of State regulations.

First, as to transitional support services, the IHO's finding was premised upon the supposition that, were the parent to enroll the student in the district's recommended 6:1+1 special class, he would have entered a "less restrictive setting" thus triggering the district's obligation under State regulations to provide transitional support services (see IHO Decision at p. 23; see 8 NYCRR 200.1[ddd], 200.6[b][2]). However, the student's theoretical move from a classroom with a ratio of 8:1+3 at the Rebecca School to a 6:1+1 classroom ratio would not be more or less restrictive as it would entail a move from one self-contained special class to another self-contained special class (see Dist. Exs. 1 at p. 11; 2 at p. 1). As stated above, restrictiveness, as used in the IDEA, pertains to the extent to which students with disabilities are educated with students who are not disabled, and not to the number of adults within a classroom (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]). In addition, transitional support services are designed to assist teachers. State regulations define transitional support services as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd] [emphasis added]).⁵

Similarly, the IHO's alternative finding that the CSE could have recommended consultant teacher services is also in error, as such services are intended for student with disabilities who attend general education class settings (8 NYCRR 200.1[m], 200.6[d]; see IHO Decision at p. 23). It is undisputed that the student was not recommended to attend a general education class setting.

Further, the May 2012 IEP is not devoid of 1:1 support as, in addition to the recommendations for a 6:1+1 special class, the IEP also includes recommendations for individual OT, speech-language therapy, and counseling (Dist. Ex. 1 at p. 19). Accordingly, based on the student's ability to function in a group setting, as described above, the May 2011 CSE's

³ The district correctly asserts that the parent did not allege in her due process complaint that the May 2012 CSE failed to recommend transitional support services (see generally, Parent Ex. A). As such, the IHO should not have addressed this issue (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]). However, as the IHO addressed the service in the context of his reasoning regarding the 6:1+1 special class placement and out of an abundance of caution, it is addressed in this context.

⁴ Although the parent's due process complaint notice described the recommendations of the May 2012 IEP as including a 1:1 transitional support paraprofessional (see Parent Ex. A at pp. 1, 2), review of the IEP shows that a 1:1 paraprofessional was not recommended for the student's 2012-13 school year (see generally Dist. Ex. 1). I note that the student's IEP for the 2011-12 school year, reviewed in a prior administrative proceeding, included a recommendation for a transitional paraprofessional (see Application of the Dep't of Educ., Appeal No. 13-091).

⁵ In addition, it is not clear that these transitional support services were intended for certified special education teachers of highly intensive special class settings such as the 6:1+1 special class placement recommended in this case. It is much more likely that an individual with such experience would be the provider of transitional support services to another teacher having either less familiarity or formal training in working with a student with autism (e.g., a regular education teacher).

recommendation that the student could obtain an educational benefit from the small, highly structured environment provided in a 6:1+1 special class, along with related services, was reasonably calculated to enable the student to receive an educational benefit. While I can sympathize with the parent's desire for the student to have a more intensive level of support or instruction, the district is not required to "furnish . . . every special service necessary to maximize each handicapped child's potential" (Rowley, 458 U.S. at 199).

C. Parental Receipt of Documents

While not addressed by the IHO, the parent contends that the district failed to provide her with a copy of the May 2012 IEP or with a final notice of recommendation (FNR) identifying the particular public school site to which the district assigned the student to attend for the 2012-13 school year. The district argues that the parent failed to raise this issue regarding the FNR in her due process complaint notice. In addition, the district asserts that the parent's claims of nonreceipt of such documents are without merit.⁶

Initially, with respect to the notice of the assigned school, in general, 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; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]).⁷ Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student 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). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see also Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553, 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear, there is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right

⁶ Review of the due process complaint notice shows that the parent sufficiently raised the issue of the district's failure to provide notice of the assigned public school site (Parent Ex. A at p. 2).

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

related to the selection of the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L., 2012 WL 4891748, at *11 [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

However, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an the IEP, a district must notify parents of the bricks and mortar location of the special education program and related services in a student's IEP (see Tarlowe, 2008 WL 2736027, at *6 [stating that a district's delay does not violate the IDEA so long as an public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation—for example, by an FNR which is the mechanism adopted by the district in this case—it nonetheless must be shared with the parent before the student's IEP may be implemented.

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

Here, the hearing record included a copy of the May 2012 IEP and the district representative testified as to the routine office practice following with respect to the mailing of IEPs (Tr. pp. 25-27, 33-34, 68; Dist. Ex. 1). In addition, the hearing record included copy of an FNR dated June 6, 2012 (Dist. Ex. 3). A district employee testified to the routine office practice followed in the office relative to the mailing of such documents to parents (Tr. pp. 212-17). Further, the parent confirmed that she lived at the address which appeared of file with the district (see Tr. pp. 209-10; Dist. Ex. 3). I find that this evidence gives rise to a presumption of mailing and receipt of both the IEP and the FNR.

The parent testified that she never received the IEP or the FNR (Tr. p. 196). In a letter dated June 18, 2012, the parent notified the district, among other things, that she had not yet received "the IEP" or "a placement recommendation" (Parent Ex. B). In addition, the parent testified that, in October 2013, she visited the district on another matter and, upon inquiring, was informed by a district staff member that "there wasn't anything in regard to a placement on file" for the student for the 2012-13 school year (Tr. p. 197). Even if this testimony was sufficient to rebut the presumption of mailing, the parent was not prevented by the alleged nonreceipt from giving the district notice of her intent to unilaterally place the student; that is, by her June 18, 2012 letter, in addition to indicating that she had not yet received a copy of the IEP or an assigned school recommendation, the parent set forth her concerns with the 6:1+1 special class placement and the recommendation that the student participate in standardized testing and indicated that the student would attend the Rebecca School for the 2012-13 school year (Parent Ex. B). Thus, even if the district did not mail the parent the IEP or the FNR and such constituted a procedural violation, there is no evidence in the hearing record that it (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]).

VII. Conclusion

In summary, having determined that the IHO erred in concluding that the district failed to 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 issues of whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 5, 2014, is modified by reversing that portion which concluded that the district failed to offer the student a FAPE for the 2012-13 school year,

IT IS FURTHER ORDERED that the IHO's decision, dated May 5, 2014, is modified by reversing that portion which ordered the district to pay for the costs of the student's tuition at the Rebecca School for the 2012-13 school year; and

IT IS FURTHER ORDERED that, if it has not already done so, the district is ordered to conduct the mandated triennial reevaluation of the student within 45 days from the date of this decision.

Dated: Albany, New York
January 8, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER