



# The University of the State of New York

The State Education Department  
State Review Officer

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No.14-099

**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

New York Legal Assistance Group, attorneys for respondent, Ya-wen Chang, 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 costs of the student's tuition 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**

In this case, the student began attending the Rebecca School in fall 2006 (see Tr. p. 157).<sup>1</sup> On June 12, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (seventh grade) (see Parent Ex. L at pp. 1, 11-13, 16; see also Dist. Ex. 7 at p. 1). Finding that the student remained eligible for special education and related services as a student with autism, the June 2012 CSE recommended a 12-month school year program in a

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

6:1+1 special class placement at a specialized school (see Parent Ex. L at pp. 1, 11-13, 16-17).<sup>2</sup> In addition, the June 2012 CSE recommended the following related services: two 40-minute sessions per week of individual speech-language therapy, two 40-minute sessions per week of speech-language therapy in a small group, one 40-minute session per week of individual physical therapy (PT), one 40-minute session per week of PT in a small group, three 40-minute sessions per week of individual occupational therapy (OT), one 40-minute session per week of OT in a small group, one 40-minute session per week of individual counseling, and one 40-minute session per week of counseling in a small group (id. at p. 12). The June 2012 CSE also developed annual goals and corresponding short-term objectives to address the student's identified needs (id. at pp. 4-11).

In a final notice of recommendation (FNR) dated June 21, 2012, the district summarized the recommendations in the June 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. O).

On June 26, 2012, the parent visited the assigned public school site, and by letter dated June 27, 2012, the parent informed the district that the "placement" was not appropriate for the student (see Parent Ex. K at p. 1). Although the parent did not observe a 6:1+1 special class during the visit, the parent indicated that she "observed the students from the 6:1:1 classroom running up and down a hallway with students from a high school-aged 12:1:1 class" in what was described to her as "'Olympics'" (id.). In addition, the parent was advised that three students in the "recommended" 6:1+1 special class were "essentially non-verbal and used 'devices' to communicate," and the "remaining three [students] were minimally verbal" (id.). The parent also noted that the classrooms did not use a "specific teaching methodology" (id.). Additionally, the parent indicated that based upon her observations, the students in the 6:1+1 special class were "at far lower levels of functioning" than the student (id.). Moreover, the parent noted her concerns that the 6:1+1 special class attended lunch, recess, and "other activities throughout the day" with "12:1:1 classes," and that the 6:1+1 special class was "adjacent" to classrooms for hearing-impaired students (id.). Pending receipt of "another more appropriate placement," the parent notified the district of her intention to enroll the student at the Rebecca School for the 2012-13 school year and to seek an award of tuition reimbursement (id.). The parent also requested that the district provide the student with round-trip transportation services (id. at pp. 1-2).

On July 11, 2012, the parent returned to visit the assigned public school site accompanied by a social worker, and in a letter dated July 13, 2012, the parent reiterated the same concerns expressed in her previous letter, dated June 27, 2012 about the assigned public school site (see Parent Exs. I at p. 1; J; compare Parent Ex. I at p. 1, with Parent Ex. K at pp. 1-2). Because the parent could not observe the "classroom," the parent also reiterated her intention to enroll the student at the Rebecca School for the 2012-13 school year and to seek an award of tuition reimbursement from the district (Parent Ex. I at pp. 1-2).

On July 24, 2012, the parent executed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year (see Parent Ex. H at pp. 1, 4).

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

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

By due process complaint notice dated August 1, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 and the 2013-14 school years (see Parent Ex. A at p. 1).<sup>3</sup> The parent alleged that the June 2012 IEP presented a "flawed and incomplete picture" of the student and his educational needs (id. at p. 2). In particular, the parent asserted that although the June 2012 IEP included the "tests administered in a psychoeducational evaluation" the June 2012 IEP did not describe the "results" (id.). The parent further alleged that although the "Physical Development" section of the June 2012 IEP mentioned the "importance of understanding" the student's "sensory/fine motor needs," the June 2012 did not "discuss what they [were]" (id.). Additionally, the parent asserted that although the student's Rebecca School teacher who attended the June 2012 CSE meeting "emphasized the importance of having peers with which to initiate social interactions," the June 2012 IEP did not "discuss the importance of peer grouping at all" (id.). Finally, the parent asserted that the June 2012 IEP failed to include parent counseling and training (id.).

Next, the parent repeated the concerns she expressed about the assigned public school site in her letters dated June 27 and July 13, 2012 (compare Parent Ex. A at pp. 2-3, with Parent Ex. I at pp. 1-2, and Parent Ex. K at pp. 1-2). As relief, the parent indicated that the student received an "intensive, supportive educational program tailored" to his needs at the Rebecca School, and the parent requested that the district payment the Rebecca School for the tuition owed for the 2012-13 school year, and provide roundtrip transportation for the student (id. at pp. 3-4).

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

On September 27 and November 5, 2013, the IHO conducted prehearing conferences, and on December 3, 2013, the parties proceeded to an impartial hearing, which concluded on April 15, 2014, after four days of proceedings (see Tr. pp. 1-192). By decision dated June 2, 2014, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, (see IHO Decision at pp. 5-8).

With respect to the June 2012 IEP, the IHO agreed with the parent that the present levels of academic achievement and functional performance did not include "important information" about the student (see IHO Decision at p. 6). In particular, the IHO found, as noted by the parent, that the June 2012 IEP did not contain "any language requiring that the [s]tudent attend a classroom with a specific sort of grouping" (id.). The IHO found "no reason why this sort of language should not be on the IEP if appropriate," especially given the witnesses' testimony about the student's need to be "surrounded by verbal peers" (id. at pp. 6-7). The IHO further noted that while the district correctly argued that it was not required to include information about a student's "functional grouping" in the IEP, the IHO found that "where a [s]tudent need[ed] a particular sort of classroom, the [d]istrict should place this information on the IEP so that the corresponding placement c[ould] meet" the student's needs (id. at p. 7). Additionally, the IHO found that the June 2012 IEP contained "only minimal language" about the student's "highly specific" sensory needs (id. at p.

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<sup>3</sup> At the impartial hearing, the parties settled the parent's claims with respect to the 2013-14 school year; therefore, any and all issues related to the 2013-14 school year—including the June 2013 IEP—will not be addressed in this decision (see Tr. p. 189). Similarly, the parent withdrew any and all claims related to "meals" at the impartial hearing (id.).

7). Next, the IHO determined that the June 2012 IEP was deficient, because it lacked information regarding functional grouping for the student, and in this case, the hearing record reflected that the student needed to be surrounded by verbal peers (see id.). Furthermore, the IHO found that the failure to recommend parent counseling and training "compound[ed] the problems with the program and placement" (id. at p. 8). Finally, the IHO agreed with the parent that the district thwarted her efforts to "view the school placement" by failing to respond to her questions (id. at pp. 7-8).

In addition, the IHO concluded that the Rebecca School was an appropriate placement and equitable considerations weighed in favor of the parent's requested relief; thus, the IHO directed the district to pay the student's tuition and expenses related to his attendance at the Rebecca School for the 2012-13 school year (see IHO Decision at pp. 8-11).

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

The district appeals, asserting that the IHO erred in finding that it failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of the parent's requested relief. Initially, the district asserts that the IHO erred in finding that the June 2012 IEP was not appropriate because it failed to include language requiring the student to attend a classroom with specific functional grouping. The district also asserts that the IHO erred in finding that the June 2012 IEP was not appropriate because it included only minimal language regarding the student's sensory needs. Next, the district argues that the failure to recommend parent counseling and training in the June 2012 IEP did not rise to the level of a denial of a FAPE. In addition, the district contends that the IHO erred in finding that the district thwarted the parent's efforts to visit the assigned public school site. In any event, the district asserts that, consistent with its obligations, the student's IEP was in place at the beginning of the 2012-13 school year. The district further asserts that the hearing record contained no evidence that the assigned public school site could not implement the June 2012 IEP. Finally, although not addressed by the IHO, the district alleges that the June 2012 IEP adequately described the student's present levels of performance, as well as the results of the January 2011 psychological evaluation.<sup>4</sup> With regard to equitable considerations, the district contends that the parent failed to provide the district with a sufficient 10-day notice because it failed to indicate any concerns about the June 2012 IEP. In addition, the district contends that to the extent that the IHO's award of reimbursement in this case included reimbursement for expenses such as meals and transportation, the parent was not entitled to relief.

In an answer, the parent responds to the district's allegations, and generally argues to uphold the IHO's decision in its entirety.

#### **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

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<sup>4</sup> As the district did not appeal the IHO's finding that the Rebecca School was an appropriate unilateral placement for the student for the 2012-13 school year, the IHO's determination is final and binding and will not be further addressed in this decision (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

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. June 2012 IEP**

#### **1. Present Levels of Performance**

Contrary to the IHO's findings, the district asserts that the June 2012 IEP adequately describes the student's present levels of academic achievement and functional performance, the student's sensory and fine motor needs, and the results of the January 2011 psychological evaluation. A review of the evidence in the hearing record supports the district's assertions, and thus, the IHO's findings must be reversed.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, a review of the evidence in the hearing record reveals that the June 2012 CSE considered the following evaluative information in the development of the June 2012 IEP: a January 2011 psychoeducational evaluation; a December 2011 Rebecca School Interdisciplinary Report of Progress Update (December 2011 Rebecca School progress report); a June 2012 Rebecca School Interdisciplinary Report of Progress Update (June 2012 Rebecca School progress report); and input from the parent, the student's then-current teacher at the Rebecca School (Rebecca School teacher), and a social worker from the Rebecca School (Rebecca School social worker) (see Tr. pp. 42-45, 158; Dist. Exs. 4-7; Parent Exs. L; P).

The present levels of performance and individual needs section of the June 2012 IEP reflected the testing results from a January 2011 psychological evaluation, which indicated that the student obtained a nonverbal composite IQ of 74 (borderline range), a verbal composite IQ of 69 (mildly delayed), and a full-scale composite IQ placing the student in the "lower end of the borderline range" (compare Parent Ex. L at p. 1, with Dist. Ex. 4 at p. 2). The June 2012 IEP also noted the student's instructional levels in mathematics (second grade) and reading (third grade) (see Parent Ex. L at p. 16).

Consistent with the December 2011 Rebecca School progress report, the present levels of academic achievement, functional performance, and learning characteristics section of the June 2012 IEP described the student as a "good sight word reader" and further noted that he could answer "wh" questions "independently" and "without choices," he could make "inferences about familiar stories," but he did not "gravitate independently to books during the school day" (compare Parent Ex. L at p. 1, with Dist. Ex. 5 at pp. 2-3). The June 2012 IEP also indicated that the student demonstrated stronger decoding skills when compared to his comprehension skills (see id.).



In mathematics—and also consistent with the December 2011 Rebecca School progress report—the June 2012 IEP indicated that the student "mastered addition and subtraction," and demonstrated an "understanding that multiplication [was] repeated addition" (compare Parent Ex. L at p. 1, with Dist. Ex. 5 at p. 3). In accord with the June 2012 Rebecca School progress report, the June 2012 IEP noted that the student could solve "simple word problems" and "writ[e] simple word problems," and he understood the concept of elapsed time (compare Parent Ex. L at p. 1, with Dist. Ex. 6 at p. 2). In addition, consistent with the June 2012 Rebecca School progress report, the June 2012 IEP reflected that the student liked talking about current events and engaged in a "good back and forth" conversation, although he did not initiate these conversations (compare Parent Ex. L at pp. 1-2, with Dist. Ex. 6 at p. 1).

Regarding the student's sensory needs, the evaluator described the student's attention and concentration skills within the January 2011 psychoeducational evaluation report as "adequate to mildly decreased," and further noted that the student worked at an "adequate pace" and "completed all tasks with minor prompting" (Dist. Ex. 4 at p. 1). The evaluator indicated that the student's "impulse control was not significantly impaired," and described the student's frustration tolerance as "mildly decreased" (id.). The evaluator observed that, at times, the student became "somewhat impatient and easily frustrated when presented with slightly challenging tasks;" however, the evaluator also noted that the student "maintain[ed] his composure without losing control to a significant degree" (id.). In summary, the evaluator noted that the student displayed "minor issues with attention and low frustration tolerance which may impact overall academic performance and adjustment," however, with "minor external support and redirection," the student demonstrated "potential for managing and regulating his behavior" (id. at p. 5).

According to the June 2012 Rebecca School progress report, the student required "adult support" to explain why he was being "asked to do something that he d[id] not want to do" in order for the student to return to a "state of engagement" (Dist. Ex. 6 at p. 1).<sup>5</sup> According to the June 2012 Rebecca School progress report, the student's "growth in his ability for logical thinking," resulted in the student's improved ability to "remain regulated in challenging situations that he did not understand" (id.).

In the December 2011 Rebecca School progress report, the student's occupational therapist reported that, at times, the student appeared "hypo-responsive to sensory input in his environment," and that proprioceptive and vestibular input (i.e., "swinging in prone extension on the hammock swing") helped to increase the student's "arousal to the appropriate level" (Dist. Ex. 5 at p. 5). In addition, when the student was "less engaged," he sought "tactile input" such as "'mushing'" ("pushing his fingers together and wiggling them") (id. at p. 6). At that time, one of the student's OT goals focused on helping him to "identify sensorimotor strategies" to help him "maintain an alert and engaged state" (id.).

According to the June 2012 Rebecca School progress report, the same occupational therapist continued to characterize the student as "hypo-responsive to sensory input in his environment" and seeking tactile input through "'mushing' his fingers" (compare Dist. Ex. 6 at p.

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<sup>5</sup> According to the June 2012 Rebecca School progress report, the Developmental Individual Difference Relationship-based (DIR) model used at the Rebecca School relied upon the following developmental level rating system: level 1 (regulation), level 2 (engagement), level 3 (two-way interaction), level 4 (shared social problem-solving), and level 5 (creating symbols) (see Dist. Ex. 6 at p. 1).

2, with Dist. Ex. 5 at pp. 5-6). The occupational therapist also noted that the student appeared "hyperresponsive to vestibular input" and further noted that he demonstrated "gravitational and postural insecurity," which the student manifested by a "fear of falling when his balance was challenged" (Dist. Ex. 6 at p. 3). In addition, the occupational therapist described the student as an "eager member" of the "Alert program," which helped students "identify their own levels of alertness and investigate ways to provide themselves with sensory input to achieve the optimal level of calm, focused attention" (id.). During the Alert program, the student would, at times, use materials—such as "putty"—for additional "visual and tactile stimulation" similar to when the student engaged in "mushing;" however, the occupational therapist noted that the student could be "redirected to stretch it, push it and pull it to build finger strength and provide himself with proprioceptive input" (id.). The occupational therapist also noted that the student continued to "build autonomy" in order to keep himself in an "alert, regulated state throughout the day" (id.). In addition, part of the student's "sensory diet include[d] movement breaks and proprioceptive breaks (such as pushing hands together, jumping up and down, stretching and simple yoga poses)" helped to keep the student in a "calm, regulated state throughout the day" (id.).

In the June 2012 Rebecca School progress report, the occupational therapist indicated that the student continued to "seek rotary vestibular movement," noting that when the student received "such input for several minutes, for example, in his preferred hammock swing," the student was significantly more willing to be engaged, present, and responsive (Dist. Ex. 6 at p. 6). At that time, the student's OT targeted his "motor planning, visuospatial skills, and functional [activities of daily living (ADL)] skills such as buttoning, attention, and sensory processing" (id.).

Similarly, in the June 2012 Rebecca School progress report the student's physical therapist noted that the student sought "vestibular input" and enjoyed "swinging in the sensory gym" (Dist. Ex. 6 at p. 3). The physical therapist also indicated that the student's PT sessions focused on improving his "gross motor skills, ambulation, motor planning and sequencing, balance, bilateral integration and coordination, muscle strength, and endurance" (id.). At that time, the student could ascend and descend six flights of stairs using a "reciprocal pattern with one hand-rail" with a preference for using the left hand-rail (id.). When unable to use the left hand-rail, the physical therapist noted that the student appeared to have a "gravitational fear" and he became "anxious about descending the stairs" (id.).

In addition to the above mentioned information available to the June 2012 CSE, the evidence in the hearing record further reflects that both the parent and the Rebecca School teacher mentioned the student's sensory needs at the meeting. According to the June 2012 CSE meeting minutes drafted by the Rebecca School social worker, the parent stated at the meeting that the student had "many sensory needs" and "that his current school help[ed] her understand this and provide[d] her with help to work with [the student] at home" (Parent Ex. P at p. 2; see Tr. pp. 94-95, 157-59; Dist. Ex. 7 at p. 2; Parent Ex. L at p. 19). At the impartial hearing, the parent confirmed that she mentioned the student's sensory needs at the June 2012 CSE meeting because it affected his "daily living" and "affect[ed] everything" (Tr. pp. 158-59). Likewise, the Rebecca School teacher who attended the June 2012 CSE meeting testified that she discussed the student's sensory issues at the meeting (Tr. pp. 84, 89-90, 93). According to the Rebecca School teacher, a "sensory break" for the student included "jumping on the trampoline, bouncing on the therapy ball, [and]

riding scooters" (Tr. pp. 93, 95-97).<sup>6</sup> The Rebecca School teacher also testified that the June 2012 CSE discussed sensory breaks for the student as a "management need" as well as when the parent provided input about the student's "health" (Tr. pp. 96-97).

Within the present levels of physical development section of the June 2012 IEP, the June 2012 CSE documented the parent's concern that it was "important for [the student] to have teachers and therapists that underst[ood] him and his sensory/fine motor needs in order for him to work to the best of his ability" (Parent Ex. L at p. 2). The June 2012 IEP further reflected the student's "growth in his ability to think logically and remain regulated in challenging situations" (*id.*). In addition and in light of the information presented to June 2012 CSE regarding the student's sensory needs, the June 2012 IEP indicated that the student struggled with initiations and did not initiate conversations (compare Parent Ex. L at p. 2, with Dist. Ex. 7 at pp. 1-2, and Parent Ex. P at pp. 1-2). The June 2012 IEP also characterized the student as "a very emotional child" and reflected that he required "a large amount of support" (Parent Ex. L at p. 2). The June 2012 IEP further noted that in counseling sessions, the student demonstrated increased gestural and verbal communication during sensory activities (*id.*).

Moreover, as the district asserts, the June 2012 IEP as a whole addressed the student's sensory needs. For instance, the June 2012 IEP included strategies to address the student's management needs, including the use of visual and verbal prompts, redirection, sensory breaks, the use of calm affect, and time to process (see Parent Ex. L at p. 2). Furthermore, the annual goals and short-term objectives for OT and PT in the June 2012 IEP mirrored those in the June 2012 Rebecca School progress report (compare Parent Ex. L at pp. 6-9, with Dist. Ex. 6 at pp. 9-12). For example, the June 2012 IEP included an annual goal designed to improve the student's work behaviors for greater task orientation in the classroom with corresponding short-term objectives that addressed the following areas of need: expression of frustration or negative feelings without verbally or physically acting out following vestibular and proprioceptive input, and participation in a structured movement activity that provided vestibular and proprioceptive input while maintaining self-regulation and behavioral organization with minimal verbal and tactile cues (see Parent Ex. L at pp. 7-8). Another annual goal in the June 2012 IEP addressed the student's needs in the areas of sensory processing and body awareness for greater participation in school and home environments, which included corresponding short-term objectives designed to increase the student's ability to demonstrate sensory and body awareness following vestibular and proprioceptive input as indicated by his ability to verbalize his internal or external physical state (such as telling an adult he needed a break), and an enhanced capacity to identify his own emotional state by verbalizing his feelings without showing signs of dysregulation, and his ability to choose and carry out an effective self-regulatory strategy without becoming dysregulated (*id.*).

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<sup>6</sup> At the impartial hearing, the Rebecca School teacher reviewed the June 2012 CSE meeting minutes drafted by the Rebecca School social worker, and the teacher admitted upon cross-examination that the social worker's meeting minutes accurately and completely depicted "what had happened" and "what we had contributed" at the CSE meeting (Tr. pp. 94-95). However, the Rebecca School teacher then admitted that some of the "things" she testified to regarding what she "specifically" said at the June 2012 CSE meeting was not reflected in the meeting minutes (Tr. pp. 95-96). Notably, a review of the Rebecca School social worker's June 2012 CSE meeting minutes reveals that the Rebecca School teacher did not contribute any information about the student's sensory needs or sensory breaks at that meeting (see Parent Ex. P at pp. 1-2).

Finally, as detailed below, the hearing record contains little, if any, evidence demonstrating that the June 2012 CSE had information before it suggesting that the student exhibited fine motor needs or difficulties that required special education services. In the January 2011 psychoeducational evaluation, the evaluator found that although the student performed within the low range for his developmental age in the areas of perceptual-motor and organization/integrative skills, the student ambulated independently, he had functional use of his hands, and the student's ability to visualize and solve spatial and figural problems by moving plastic pieces into place fell within the average range (see Dist. Ex. 4 at pp. 1, 3). In the June 2012 IEP, the June 2012 CSE indicated that the student could write for about 30 minutes, he did not fatigue easily, and his writing was legible (see Parent Ex. L at p. 1). In addition, the June 2012 IEP reflected that according to teacher reports, the student exhibited an interest in fine motor art activities (id.; see Parent Ex. P at p. 1).

Consistent with both the December 2011 and June 2012 Rebecca School progress reports, the June 2012 IEP indicated the student required verbal prompting to carry out fine motor skills, such as manipulating small buttons (compare Parent Ex. L at p. 2, with Dist. Ex. 5 at pp. 4, 11, and Dist. Ex. 6 at pp. 3, 10). Furthermore, the June 2012 IEP included annual goals and short-term objectives targeting the student's identified areas of need noted in the Rebecca School June 2012 progress report, including motor planning through activities such as buttoning a shirt and tying his shoes, as well as improvement of visual-spatial and perceptual skills through demonstrating the proper formation of letters in cursive (compare Parent Ex. L at pp. 6-7, with Dist. Ex. 6 at pp. 9-11).

Based upon the foregoing, a review of the evidence in the hearing record demonstrates that the June 2012 IEP accurately described the student's present levels of academic achievement, social development, and physical development—and in particular, the student's sensory and fine motor needs—and that the description of the student's needs was consistent with the evaluative information available to the June 2012 CSE (see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see also P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 512 [S.D.N.Y. 2013] [holding that an IEP need not specify in detail every deficit arising from a student's disability so long as the CSE develops a program that is "designed to address precisely those issues"]). Accordingly, the IHO's finding that the June 2012 IEP lacked sufficient information with respect to the student's needs must be reversed.

## **2. Related Services—Parent Counseling and Training**

Turning next to the district's argument that the IHO erred in finding that the failure to recommend parent counseling and training in the June 2012 IEP contributed to a failure to offer the student a FAPE, State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive

parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

Here, while it is undisputed that the June 2012 CSE did not recommend parent counseling and training as a related service in the student's June 2012 IEP, the hearing record in this case does not contain sufficient evidence upon which to conclude that the failure to recommend parent counseling and training in the June 2012 IEP resulted—in whole, or in part—in a failure to offer the student a FAPE for the 2012-13 school year. In addition, although the June 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, this violation alone does not support a finding that the district failed to offer the student a FAPE (R.E., 694 F.3d at 191; see also F.L. v. New York City Dep't of Educ., 2014 WL 53264, at \*4 [2d Cir. Jan. 8, 2014]; see also M.W., 725 F.3d at 141-42).<sup>7</sup>

## **B. Challenges to the Assigned Public School Site**

Regarding the district's contention that there was no evidence to suggest that the assigned public school site could not implement the June 2012 IEP, challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

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

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<sup>7</sup> The district is cautioned, however, that it cannot continue to disregard its legal obligation to include parent counseling and training in a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

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., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). 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]).<sup>8</sup> When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

Moreover, contrary to the IHO's finding that the district "inappropriately thwarted" the parent's efforts to visit the assigned public school site, while the IDEA requires "that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child" (see 20 U.S.C. § 1414[e]; 34 CFR 300.501[c][1]), neither the IDEA nor State regulations confer upon parents the right to visit a recommended school and classroom. The United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 12-047; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't

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<sup>8</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). 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). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the 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.

of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013).

In view of the foregoing, the parent cannot prevail on the claims regarding implementation of the June 2012 IEP because a retrospective analysis of how the district would have implemented the student's June 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the June 2012 IEP (see Parent Ex. K at pp. 1-2). Therefore, the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claims that the assigned public school site would not have properly implemented the June 2012 IEP.<sup>9</sup>

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<sup>9</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; 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 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; 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, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

### **1. Functional Grouping**

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]).

Here, contrary to the IHO's finding that the June 2012 IEP should include language requiring that the student attend a classroom with a specific sort of grouping, the district correctly argues—as considered and rejected by the IHO—that there is no legal requirement to specify functional grouping in an IEP. Therefore, the IHO's finding that the omission of information regarding functional grouping from the June 2012 IEP rendered it inappropriate must be reversed.

### **VII. Conclusion**

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and I need not reach the issues of whether equitable considerations weighed in favor of the parent's requested relief (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that that the IHO's decision dated June 2, 2014 is modified by reversing that portion which determined that the district failed to offer the student a FAPE for the 2012-13 school year; and,



**IT IS FURTHER ORDERED** that the IHO's decision dated June 2, 2014 is modified by reversing that portion which ordered the district to pay the student's tuition and expenses related to his attendance at the Rebecca School for the 2012-13 school year.

**Dated:**           **Albany, New York**  
                      **September 30, 2014**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**