



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-111

### **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, Alexander M. Fong, Esq., of counsel

Law Offices of George Zelma, attorneys for respondent, George Zelma, 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) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Rebecca School for the 2013-14 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**

The student has been the subject of a prior administrative appeal related to the 2011-12 school year; the parties' familiarity with the student's educational history and the prior due process proceeding is presumed and they will not be repeated here in detail (see Application of the Dep't of Educ., Appeal No. 12-134).

The student has attended the Rebecca School since May 2011 (Dist. Ex. 6 at p. 1). On April 11, 2013, the CSE convened for the student's annual review and to develop her IEP for the 2013-14 school year (Dist. Ex. 3). The April 2013 CSE found the student eligible to receive special education and related services as a student with autism and recommended placement in a 6:1+1 special class in a specialized school on a 12-month basis (id. at pp. 1, 9-10, 13-14). The April

2013 CSE also recommended that the student receive adapted physical education and related services consisting of one 30-minute session per week of speech-language therapy in a group, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of OT in a group (id. at p. 9). By final notice of recommendation (FNR) dated June 14, 2013, the district summarized the special education and related services recommended in the April 2013 IEP, and identified the particular public school site to which the district assigned the student for the 2013-14 school year (Dist. Ex. 7).

On June 21, 2013, the parent visited the assigned school and by letter dated June 27, 2013, she notified the district that she was rejecting the recommended program and assigned school and would enroll the student in the Rebecca School for the 2013-14 12-month school year and seek funding from the district for the costs of the student's attendance (Parent Ex. E at pp. 2-3; see Parent Ex. D at p. 1). Among the parent's concerns regarding the assigned school were numerous alleged safety hazards that she observed; the location of classrooms on the third floor; the lack of air conditioning in the building; the lack of sensory equipment available for the student's use; and the location of the sensory gym in the nurse's office (Parent Ex. E at pp. 2-3). The parent also informed the district that she was advised during her June 2013 visit that the school may not have 6:1+1 classrooms for all subjects and that the student would receive instruction in an 8:1+1 special class "more often than not" (id. at p. 2). In addition, the parent related that she was informed that the school would "play it by ear" with respect to the program provided to the student (id.). The parent also objected to the lack of rooms dedicated to provision of related services, as she believed provision within the classroom would be distracting for the student (id. at p. 3). On July 23, 2013, the parent signed an enrollment contract for the student's attendance at the Rebecca School for the 2013-14 school year (Parent Ex. L).

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

By due process complaint notice dated September 3, 2013, the parent requested an impartial hearing (Parent Ex. A). The parent challenged the adequacy and appropriateness of the April 2013 IEP and assigned public school placement. Specifically, the parent contended that the April 2013 CSE failed to consider the student's progress at the Rebecca School during the 2012-13 school year or her educational and social/emotional needs, impeding the parent's ability to participate in the development of the student's IEP (id. at pp. 6-7). The parent also alleged that the April 2013 IEP included annual goals developed by the student's Rebecca School providers and the CSE did not discuss how they could be implemented in the recommended program and assigned school (id. at p. 6). Furthermore, the parent asserted that the CSE inappropriately recommended placement in a 6:1+1 special class in a specialized school rather than a State-approved nonpublic school, and did not adequately address the student's educational and social/emotional needs (id. at pp. 6-7). Further, the parent claimed that the district's recommendation was untimely (id. at p. 11). With regard to the assigned school placement, the parent claimed that the size of the school presented safety concerns and would be over-stimulating to the student because of her difficulties with sensory processing, the school would not provide the student with related services in an appropriate manner, and the school could not address the student's sensory needs (id. at pp. 7-8). The parent also alleged that the Rebecca School was an appropriate program for the student and that equitable considerations favored her request for public funding of the costs of the student's tuition at the Rebecca School (id. at pp. 11-12). Additionally,

the parent invoked the student's right to public funding for the costs of the student's tuition at the Rebecca School pursuant to the pendency (stay put) provision of the IDEA in accordance with an unappealed 2011 IHO decision (id. at pp. 4-5, 10).

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

After a hearing related to pendency held October 16, 2013, by interim decision dated November 4, 2013, the IHO determined that the Rebecca School was the student's pendency placement (Interim IHO Decision at p. 2). On March 21, 2014, the impartial hearing proceeded on the merits and concluded on May 27, 2014, after three hearing dates (Tr. pp. 14-395). In a decision dated June 20, 2014, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year, that the parent's unilateral placement of the student at the Rebecca School was appropriate, and that equitable considerations favored an award of direct funding for the costs of the student's attendance at the Rebecca School (IHO Decision at pp. 14-18). In reaching her conclusions, the IHO primarily focused on "whether the recommended program could provide the sensory input the student needs to be available for learning" (id. at p. 14). The IHO found that the district did not establish that a sensory diet would be available to the student in the recommended program and that the CSE "did not describe in any manner how a sensory diet would be implemented" in the student's classroom (id. at p. 15). The IHO also determined that the recommended 6:1+1 program was not individualized for the student and was not reasonably calculated to enable the student to receive educational benefits (id. at p. 16). The IHO further found that "the district failed to meet its burden that it could implement the IEP," did not establish that a 6:1+1 classroom was available in the assigned school site, and did not prove that a sensory diet could be implemented in the recommended program and placement (id. at pp. 16-17).

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

The district appeals and requests that the IHO's decision be overturned with respect to the appropriateness of the recommended program, assigned public school site, and equitable considerations.<sup>1</sup> The district argues that the recommended 6:1+1 program was appropriate for the student and addressed her sensory needs. The district also contends that the IHO erred in finding that the district did not prove it could implement the student's April 2013 IEP at the assigned school site because the parent rejected the recommended program and placement at the April 2013 CSE meeting. The district maintains that the parent's claims were speculative because the student never attended the recommended assigned school site. The district also argues that equitable considerations do not favor the parent.

In an answer, the parent responds to the district's allegations with admissions and denials. The parent first contends that the district's appeal is moot, because the parent has received all of the requested relief by operation of law pursuant to the pendency provision of the IDEA. The parent argues to uphold the IHO's findings that the recommended 6:1+1 special class in a specialized school was inappropriate and could not address the student's sensory needs, and further

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<sup>1</sup> The district does not appeal the IHO's finding that the Rebecca School was an appropriate unilateral placement for the student.

contends that the annual goals contained in the April 2013 IEP could not be implemented in the recommended program and assigned public school.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove 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**

Initially, with regard to the parent's claim that the case was rendered moot due to receiving all of the relief she requested under pendency, the parent was entitled to reimbursement for the costs of the unilateral placement effective with the filing of the due process complaint on September 3, 2013 (Interim IHO Decision at p. 2). Additionally, it appears that the district began funding the student's placement prior to the filing of the due process complaint notice (Parent Ex. M at p. 1). Although the parent has received most, if not all, of the relief she sought pursuant to pendency, out of an abundance of caution and in light of recent conflicting authority on this issue, the merits of the appeal are addressed in the interests of administrative and judicial economy (compare New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at \*2 [S.D.N.Y. Dec. 4, 2012], New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at \*9-\*10 [E.D.N.Y. July 29, 2011], and Matter of Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 3 A.D.3d 821, 823-24 [3d Dep't 2004], with V.M. v No. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013], F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254-55 [S.D.N.Y. 2012], M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*7-\*9 [S.D.N.Y. Dec. 16, 2011], and M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]).

### **A. Annual Goals**

Although the issues for resolution on appeal largely relate to the appropriateness of the annual goals and the 6:1+1 special class recommendation to address the student's needs, a brief review of the April 2013 IEP provides context for the discussion. According to the school psychologist present at the April 2013 CSE meeting, the CSE reviewed a December 2010 psychological evaluation report, a December 2010 educational evaluation report, an August 2011 social history update<sup>2</sup>, and a December 2012 Rebecca School interdisciplinary report of progress (Tr. pp. 30-32; Dist. Exs. 6; 8; 10; 11). As discussed below, a careful review of the December 2012 Rebecca School progress report and the April 2013 IEP reveals that the IEP accurately identified the student's present levels of performance, identified the resources necessary to address the student's management needs, and included annual goals consistent with the information provided by the student's then-current providers (compare Dist. Ex. 3, with Dist. Ex. 6).

The April 2013 IEP reflects the results of the December 2010 psychological evaluation, which described the student as capable of overall adaptive functioning within the low range (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 8 at p. 2). The April 2013 IEP also indicates that the December 2012 progress report showed that the student could recognize 20 words by sight, answer simple wh- questions about a familiar story, count 15 objects, and identify colors, shapes, more/less and was beginning to speak in full sentences (compare Dist. Ex. 3 at p. 1 with Dist. Ex.

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<sup>2</sup> The school psychologist testified that the CSE also considered an October 2013 social history update (Dist. Ex. 9) in developing the student's IEP; however, that report is dated after the April 2013 IEP was developed and could not have been considered by the CSE.

6 at pp. 3, 4). Further, as described by the student's then-current teacher at the April 2013 CSE meeting, the student recognized all letters, exhibited some sound-symbol recognition, and benefitted from multimodal support during learning activities such as visual cues, repetition, and sensory supports (Dist. Ex. 3 at p. 2). The April 2013 IEP reported that the student's attention was variable depending on her interest level, and improved given sensory breaks (*id.*). With respect to social/emotional functioning, the IEP indicated that the student did not consistently initiate interactions with peers, but did consistently initiate interactions with familiar adults (*id.*). The student's then-current teacher reported that the student did not engage in aggressive behaviors in school; however, the parent reported that the student would hit others in the home when she was upset (*id.*). The student reportedly sought sensory input throughout the day, had a high energy level, a limited concept of danger, and often put non-edible items in her mouth (*id.* at p. 3). The April 2013 IEP included management needs to address these issues such as redirection, repetition, visual cues, sensory diet, sensory breaks at least every two hours, multimodal learning, close monitoring to prevent ingestion of inedible items, and to allow gum chewing during the school day (*id.* at p. 3).

The parent argues that the April 2013 IEP goals were developed by the Rebecca School and could not be implemented in the recommended program. The IHO made no finding specific to the appropriateness of the April 2013 IEP goals. The parent also claims that the recommended program would have used a structured methodology not appropriate for the student, but does not explicitly cross-appeal the IHO's determination that the record did not support the parent's contention that the student could not learn using other methodologies.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The April 2013 IEP includes annual goals and accompanying short-term objectives that were drawn from the December 2012 Rebecca School progress report. The April 2013 CSE recommended approximately nine annual goals and 30 short-term objectives for the student in the areas of prereading, math, prewriting, language, motor planning, fine motor skills, self-care, and safety awareness (Dist. Ex. 3 at pp. 5-8). Specifically, in the area of reading, the student was projected to work on letter-sound correspondence, recognizing new words, and answering wh-questions related to a story (*id.* at p. 5). In the area of math, the student was working on counting 20 objects, recognizing numbers to 20, understanding "more/less" and "before/after" and sorting objects (*id.* at p. 6). Further, the student was working on writing skills including tracing upper case letters; and speech-language skills such as maintaining a conversation during turn-taking activities, following one step directions, and verbally expressing her needs (*id.* at pp. 6-7). Finally, the student was working on motor skills such as completing an obstacle course, navigating her environment, cutting on a line, dressing, and improving hygiene, and awareness of danger (*id.* at



pp. 7-8). Overall, the annual goals contained in the April 2013 IEP addressed the needs of the student as identified in the present levels of performance sections of the IEP.

To the extent the parent claims that the annual goals in the April 2013 IEP were not appropriate because they were intended for implementation in the Rebecca School,<sup>3</sup> under the IDEA and State and federal regulations, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability for a particular school or methodology, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). There is nothing in the hearing record to indicate that the April 2013 IEP annual goals could not be implemented in a public school setting (see Dist. Ex. 3 at pp. 5-8; cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*12 [S.D.N.Y. Mar. 19, 2013]).

In addition, with respect to the April 2013 CSE's use of the December 2012 Rebecca School progress report to develop the annual goals, there is no authority cited by the parent for the proposition that a CSE cannot incorporate annual goals into a student's IEP that were developed by the student's nonpublic school teachers and/or providers and are otherwise appropriate for the student (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013]).

Overall, the evidence in the hearing record provides no basis for a finding that the annual goals in the April 2013 IEP were inappropriate, improperly developed or could not have been implemented in the recommended 6:1+1 public school placement.

### **B. 6:1+1 Special Class**

The district argues that the IHO erred in finding that its recommendation of a 6:1+1 special class in a specialized school was not tailored to address the student's unique needs. While not addressed by the IHO, the parent also alleges that the district failed to establish that the student could be successfully educated in a less restrictive setting than the student's program at the Rebecca School. The hearing record supports a conclusion that the recommended 6:1+1 special class in a specialized school was appropriately designed to address the student's special education needs.

State regulations provide that a 6:1+1 special class placement is designed to address 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]). Consistent with the student's needs as described in detail above and State regulations, the April 2013 CSE recommended 12-month school year services in a 6:1+1 special class in a specialized school with related services to address the student's needs in the areas of prereading, math, prewriting, language, motor planning, fine motor skills, self-care, and safety awareness (Dist. Ex. 3 at pp. 5-8).

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<sup>3</sup> The parent's assertion that the annual goals "cannot be implemented in the recommended 6:1+1 program," appears to be predicated upon evidence that the goals were developed by Rebecca School staff "with the intention of their implementation in a different program and placement."

According to the December 2012 progress report, the student was enrolled in an 8:1+3 special class at the Rebecca School (Dist. Ex. 6 at p. 1). At the time of the report, the student was able to communicate verbally, and to participate in structured group activities such as morning meeting and reading with adult prompts and sensory support (id.). In addition, the student was able to transition from one activity to the next with relative ease, but could become dysregulated when limits were set or she did not receive a desired item (id.). Further, the student displayed an improved ability to attend to structured activities and remain engaged in longer interactions (id. at pp. 1-2). Although the student continued to have difficulty with turn-taking, limit-setting, and following directions; she benefitted from verbal, visual, and sensory supports (id. at pp. 2, 8). The school psychologist testified that the student did not consistently initiate or maintain interaction with peers and, while she was not aggressive toward peers, her interactions were "fairly minimal" and her eye contact was poor (Tr. p. 35). As indicated on the student's April 2013 IEP, the parent expressed concerns about aggression in the home, but this was not a problem within the school setting (id.; Dist. Ex. 3 at p. 2). Furthermore, 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] [emphasis added]). The district school psychologist indicated that the CSE recommended a 6:1+1 special class placement because one of the issues raised at the CSE meeting was the student's need for adult support and she opined that the student would receive the adult support she needed in a 6:1+1 special class because it was a very small classroom for students with intensive management needs (Tr. pp. 35-36). According to the April 2013 IEP, the student would also receive supports to address her management needs including redirection, repetition, visual cues, multimodal learning, and close monitoring to prevent ingestion of inedible items (Dist. Ex. 3 at p. 3).

The school psychologist testified that the April 2013 CSE considered and discussed an approved nonpublic school, but the CSE rejected that option because it was determined that the 6:1+1 special class in a public school could meet the student's needs (Tr. p. 45; Dist. Ex. 3 at p. 15). The school psychologist also testified that at the meeting, the parent voiced her concern that that level of sensory support that the student needs would not be available in a 6:1+1 program (Tr. p. 64). The school psychologist explained however, that the 6:1+1 is a very small environment where students can be monitored and closely supervised due to the ratio of staff to students (Tr. p. 76). She testified that in a 6:1+1 special class placement, the teacher as well as the paraprofessional would be able to provide the sensory supports that the student required (Tr. pp. 77-78). Further, she explained that it was her understanding that sensory supports would be available in the 6:1+1 special class, but also that the district was obliged to implement the IEP, which included sensory support (id.; Dist. Ex. 3 at pp. 2-3, 7-8). Additionally, the April 2013 IEP provided the student with two sessions per week of individual OT, and one session per week of group OT (Dist. Ex. 3 at p. 9).

The student was described in the December 2010 psychological evaluation as a "self-directed child who was unable to engage in structured tasks," and the parent contends that because a 6:1+1 program is structured, it was therefore inappropriate for the student (Tr. p. 45; Dist. Ex. 8 at p. 1). However, the December 2010 psychological report also recommended that the student be provided "activities in quick succession, avoiding unstructured time in which [the student] does not have an assigned task to perform" (Dist. Ex. 8 at p. 3). In addition, the school psychologist opined that "school is structured by its nature" and is "a structured environment where there are

expectations" (Tr. p. 46). The December 2012 progress report indicated that the student's current private school incorporated some degree of structure, such as morning meeting, reading, and cooking group (Tr. pp. 45, 79-80; Dist. Ex. 6 at pp. 1, 2, 5, 7-8).

The Rebecca School program director and occupational therapy supervisor testified that the student's sensory diet was developed by her occupational therapist, and consisted of a specific timeline for the student to receive brushing, joint compression, rhythmic vestibular input; and participate in movement activities, jumping on a trampoline and heavy work (Tr. pp. 94-95, 195-98, 202-03). The occupational therapy supervisor stated that without sensory input, the student would become dysregulated, unsafe, out of control, unavailable for any learning, and unable to attend to a classroom activity (Tr. pp. 202-03). However, the student's need for a sensory diet, breaks, and supports were included in the April 2013 IEP; and the district school psychologist testified that the particulars of the student's sensory diet would be developed by her occupational therapist (Tr. p. 86; Dist. Ex. 3 at pp. 2-3, 7-8).

Based on the foregoing, the evidence in the hearing record demonstrates that, in light of the student's needs as identified in the April 2013 IEP, the April 2013 CSE's decision to recommend a 12-month school program in a 6:1+1 special class placement in a specialized school with strategies to address the student's management needs, goals to address her identified areas of need, and related services, was reasonably calculated to enable the student to receive educational benefits for the 2013-14 school year.

### **C. IEP Implementation and Assigned School Claims**

The parent objected to the assigned public school site and argued that the site posed safety hazards to the student. Additionally, the parent claimed that the district would not provide sensory equipment in the student's proposed classroom. The parent also was concerned that the assigned school site did not have air conditioning, the sensory gym shared space with the nurse's office, and that the proposed classroom was located on an upper floor of the building. The IHO determined that "the district failed to meet its burden that it could implement the IEP," the district did not prove that a 6:1+1 classroom was available in the assigned school site, and did not prove that a sensory diet could be implemented in the recommended program and placement (IHO Decision at p. 15). The parent's claims relative to the implementation of the April 2013 IEP and assigned public school site are speculative in nature, and the IHO erred in determining that the district was required to establish that it could implement the student's April 2013 IEP and that a 6:1+1 classroom was available at the assigned school.

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 R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at \*4 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'"], quoting

R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; 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"]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]; C.L.K., 2013 WL 6818376, at \*13).

Here, it is undisputed that the parent rejected the April 2013 IEP and assigned public school site and instead enrolled the student in a nonpublic school of her choosing prior to the time the district was required to implement the IEP (see Parent Ex. E). Therefore, the district is correct that 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., 2013 WL 6818376, at \*13 [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's 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 claim that the assigned public school site would not have properly implemented the April 2013 IEP.<sup>4</sup>

## VII. Conclusion

In summary, the IHO erred in determining that the district's recommended 6:1+1 special class in a specialized school and assigned public school site were not appropriate and that the district failed to offer the student a FAPE for the 2013-14 school year. I therefore find that the

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<sup>4</sup> To the extent the parent asserted that she was informed, at the time she visited the assigned public school site in June 2013, that the district would not implement the student's IEP, she admitted that school staff had not been provided with the student's IEP (Tr. pp. 286-87). The Second Circuit has also made clear that a district is not permitted to deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]). As noted by the district school psychologist, the district is required to implement the written IEP (Tr. p. 78) and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D], 1414[d][2]; 34 CFR 300.17[d], 300.323; 8 NYCRR 200.4[e]).

IHO's conclusion that the parent was entitled to an award of direct funding for the cost of the student's attendance at the Rebecca School is not supported by the hearing record.

As I have found that the district offered the student a FAPE for the 2013-14 school year, it is unnecessary to reach the other issues raised in this matter, including whether equitable considerations support the parent's 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]).

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated June 20, 2014, is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2013-14 school year and directed the district to fund the costs of the student's attendance at the Rebecca School; and

**IT IS FURTHER ORDERED** that the district shall pay, pursuant to the student's stay put entitlement, the student's tuition costs for the 2013-14 academic school year which accrued during the pendency of this proceeding, to the extent that it has not already done so.

**Dated:**            **Albany, New York**  
                         **February 19, 2015**

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