The University of the State of New York

The State Education Department
State Review Officer
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No. 13-105

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, Gail Eckstein, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Diana Gersten, 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 respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School (Rebecca) for the 2012-13 school year. The parents cross-appeal from the IHO's determination which found that the annual goals developed by the district were appropriate. The appeal must be sustained in part. The cross-appeal must be dismissed.

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

I was appointed to conduct this review on October 29, 2014. The hearing record shows that the student has attended Rebecca since the 2006-07 school year (Tr. p 138). On March 1, 2012, the CSE met to create the student's IEP for the 2012-13 school year (Dist. Ex. 3 at p. 13). The CSE was composed of a district school psychologist (who also signed in as the district representative), a district special education teacher, a district social worker, an additional parent member, one of the student's parents, and via telephone, the student's then-current Rebecca teacher and social worker (id. at p. 16). The resultant March 2012 IEP shows that the CSE recommended that the student be classified as a student with autism, that he be placed in a 12-month 6:1+1 special class in a district specialized school, and that he receive the individual related services of: twice weekly speech-language therapy in 45-minute sessions; twice weekly occupational therapy (OT)

in 45-minute sessions; and twice weekly physical therapy (PT) in 45-minute sessions (id. at pp. 9, 10, 15).[1] The CSE also recommended that the student receive group speech-language therapy and OT services one time per week, also for 45 minute sessions (id. at p. 10). The CSE also recommended that the student participate the same in statewide assessments as general education students (id. at p. 11). The March 2012 IEP also included a transition plan, with four designated related services/activities (id.).

By letter dated June 15, 2012, the parents notified the district of their rejection of the March 1, 2012 IEP and of their intent to unilaterally place the student at Rebecca for the 2012-13 school year at public expense (Parent Ex. A; see Tr. pp-13. 12).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated December 24, 2012, the parents requested an impartial hearing, asserting procedural and substantive errors surrounding the student's March 2012 IEP (Parent Ex. B; see also Dist. Ex. 1). Specifically, the parents asserted that: (1) the March 2012 CSE recommended the 6:1+1 special class in a special school placement on the continuum of educational services based on the availability of the district's programming at the assigned public school site, rather than based on the student's needs; (2) the CSE did not use necessary evaluations when developing the student's present levels of performance; (3) based on the lack of necessary evaluations, the present levels of performance, management needs, goals, and transition plan contained in the IEP were inappropriate for the student; (4) the recommended placement in a 6:1+1 special class in a district special school was inappropriate; and (5) the assigned public school site was inappropriate (Parent Ex. B at pp. 2-4). The parents also asserted that Rebecca was an appropriate unilateral placement for the student, and they requested reimbursement for the cost of tuition for the 2012-13 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 12, 2013 and concluded on Arpil 26, 2013 after two days of proceedings (Tr. pp. 1-193). In a decision dated May 13, 2013, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, that Rebecca was an appropriate unilateral placement for the student, that equitable considerations weighed in favor of the parents' request for tuition reimbursement, and that the parents had proven an inability to pay the tuition up front (IHO Decision at pp. 10-11). For relief, the IHO ordered the district to reimburse the parents all monies they had already paid towards the cost of tuition and to directly pay Rebecca the outstanding balance (id. at p. 10).

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

[2] The parents admit that at some point in June 2012, they received a final notice of recommendation (FNR) from the district and shortly thereafter visited the assigned public school site (Tr. pp. 82-83); however, the FNR was not introduced at the impartial hearing, and the parents are now claiming, despite their testimony, that the district failed to prove that it sent the FNR (Ans. ¶ 4). Regardless, proof of the receipt of the FNR is not necessary for the rendering of a decision in this matter.

Initially, the IHO found that the annual goals contained in the March 2012 IEP were comprehensive and consistent with the information garnered from the private psychological report and from the student's teachers at Rebecca (IHO Decision at p. 10). Next, the IHO determined that the transition plan was a "major component" of the student's IEP but that: (1) the CSE did not discuss a transition plan; (b) the CSE did not create a transition plan for the student; (3) although the IEP contained goals related to the Rebecca transition plan, the IEP failed to include a coordinated set of activities with a result oriented process; (4) the IEP did not provide for transition training or services, such as travel training, internship opportunities, or preparation for a GED, despite the fact that the parents requested them and that these services and training opportunities were part of the Rebecca school report utilized in creating the IEP; and (5) the district representative's testimony that these services were available at the assigned public school site did not satisfy the district's burden, as the services were not listed on the IEP (id.). Finally, the IHO found that the district failed to demonstrate that the student's IEP could be properly implemented at the assigned public school site (id.).

With respect to the determination that Rebecca was an appropriate unilateral placement, the IHO found that the student received benefit from the small class size, the support provided by the special education teacher, as well as the transition facilitators (IHO Decision at p. 10). The IHO also found that Rebecca provided the student with OT, speech-language therapy, and PT, the support he needed for the continued development of his social skills, travel training, and support at his internship site (id.).

With respect to equitable considerations, the IHO found that the parents cooperated with the CSE and expressed concerns regarding GED preparation and travel training for the student (IHO Decision at p. 10). The IHO also found that the parents had demonstrated an inability based on income to pay for the remainder of the tuition at Aaron (id.). As such, the IHO ordered that the district directly pay the remaining tuition amount to Aaron (id.).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in her determinations that: (1) it failed to offer the student a FAPE based on the transition plan contained in the March 2012 IEP; (2) it failed to demonstrate that the assigned public school site could properly implement the student's IEP; (3) that Rebecca was an appropriate unilateral placement; (4) that equitable considerations weighed in favor of an award of tuition reimbursement; and (5) that the parents had demonstrated their inability to front the cost of tuition, thus warranting an order that the district directly pay for the student's tuition.

The parents cross-appeal the IHO's determination that the annual goals contained in the March 2012 IEP were appropriate, and, although they do not cross-appeal the IHO's failure to render findings on some issues, they do note that the IHO did not address their contentions that: the 6:1+1 special class placement on the continuum of educational services was made based on program availability and not the student's needs; the CSE did not have the necessary evaluative information it needed to develop the student's present levels of performance; the academic management needs contained in the IEP were inappropriate; and the recommended 6:1+1 special class in a special school placement on the continuum of educational services was inappropriate.

For the first time, the parents raise the issue that the district did not prove that it sent an FNR to them.

In its answer to the cross-appeal, the district asserts that the issue of the FNR was not raised below and, regardless, it was undisputed that the parents received the FNR, visited the assigned public school site, and rejected both the IEP and the assigned school prior to the date that the student was scheduled to start receiving services. Furthermore, the district argues that the lack of an FNR does not constitute a denial of FAPE. The district also asserts that the annual goals were developed based on a psychoeducational evaluation and input from the student's Rebecca teachers and Rebecca staff.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that

Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. March 2012 CSE

1. Parental Participation and Predetermination

The parents assert, without pointing to any evidence in the hearing record, that the CSE made its recommendation for a placement on the continuum of a 6:1+1 special class in a special school based on the services available at district schools rather than the student's needs. Placement decisions must be based on a student's unique needs as reflected in the IEP, rather than based on the existing availability of services in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014] [finding that the IDEA's LRE requirement is not limited, in the extended school year (ESY) context, by what programs the school district already offers, but rather must be based on the student's needs]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]). However, after reviewing the hearing record, there is no evidence to support such a contention and I find that the parents' argument is without merit.

2. Sufficiency of Evaluative Information

With respect to the parties' contentions regarding the sufficiency of the evaluative information that was before the March 2012 CSE, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34

CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

A CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]). In addition, as part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 CFR 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567).

In this case, the March 2012 CSE had before it a December 2011 Rebecca interdisciplinary report, an October 2010 privately obtained psychoeducational evaluation report, and the input from the student's special education teacher and social worker at Rebecca (Tr. pp. 29-30; Dist. Ex. 3 at p. 16). The private psychoeducational evaluation report, conducted approximately one-and-a-half years prior to the March 2012 CSE meeting, reveals that the student demonstrated delays in cognitive, speech-language, social/emotional, and adaptive functioning (Dist. Ex. 6 at p. 7). The evaluation shows: that the student had a borderline full scale IQ score of 74; that the student's reading level was determined to be at the 4.0 grade level (low average), while his mathematical skill level was determined to be at the 9.7 grade level (average); that his written language skills were determined to be at the 9.0 grade level (average); and that his ability to write and spell orally presented material was at the 4.8 grade level (upper end borderline) (id. at pp. 2-3, 5, 6). The report also shows that the student had deficits in organization, distractibility, adaptive functioning, memory processing, visual-spatial processing, and verbal reasoning (id. at pp. 4-6).

A review of the Rebecca progress report shows that with regard to reading skills, the student was able to read non-fiction articles and short newspaper articles (Dist. Ex. 5 at p. 2). The student was assessed in October 2011 using the Test of Word Reading Efficiency, Second Edition (TOWRE-2),[3] and received timed/untimed raw scores of 43/95 and 26/56 in sight word and phoneme recognition portions (id. at pp. 2-3). With respect to mathematics, the student struggled with word problems, especially multi-step word problems (this also was borne out in science); however, math remained a relative strength for the student as demonstrated by his use of GED preparation study, short time estimation, and participation in cooking activities and math games (id. at p. 3). A review of the student's progress and levels of achievement are in line with the results of the private psychoeducational evaluation (compare Dist. Ex. 6, with Dist. Ex. 5).

In conclusion, the hearing record reflects that the March 2012 CSE considered information derived from a comprehensive private psychoeducational evaluation report and a detailed progress report which described the student's needs in cognition, attention, academics, language, social skills, motor skills, and sensory regulation (see Dist. Exs. 5; 6). I find that the March 2012 CSE considered sufficient evaluative information and note that a district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; G.W., 2013 WL 1286154, at *23; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). While the district CSE could have performed other evaluations of the student in preparation for the March 2012 CSE meeting (e.g., a classroom observation), the hearing record demonstrates that the combination of the parents' input, Rebecca staff input, private psychoeducational evaluation, and the Rebecca progress report provided the CSE with adequate information with which to formulate an appropriate IEP (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

B. March 2012 IEP

1. Present Levels of Performance

The parents assert that the IHO did not address their original contention as found in the due process complaint notice that the March 2012 IEP failed to list appropriate present levels of performance for the student or identify appropriate academic management needs. 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]).

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[3] The TOWRE-2 is used to assess a student's ability to pronounce sight words (sight word efficiency) and phonemes (phonemic decoding efficiency).

A review of the hearing record shows that present levels of performance found in the March 2012 IEP are in line with the evaluative material that the CSE utilized. For example, the IEP lists the student's overall reading and math functioning levels at fifth and eighth grades respectively; the IEP lists the standardized TOWRE-2 scores; the IEP also notes the student's strengths and weaknesses in cognition, reading comprehension, social/emotional development, and physical development—all which were taken nearly verbatim from the Rebecca progress report and the private psychoeducational evaluation (compare Dist. Ex. 3 at pp. 1-2, 13, with Dist. Exs. 5; 6; see also Tr. pp. 170-73). Finally, I note that the student's teacher from Rebecca also participated in the development of the student's present levels of performance (see, e.g., Tr. pp. 29, 151-53, 170-73). Based on the aforementioned, the hearing record supports the conclusion that the present levels of performance found on the March 2012 IEP are appropriate.

As to academic management needs for the student, the hearing record shows that the management needs found in the March 2012 IEP are in line with the Rebecca progress report and the private psychoeducational evaluation, reflecting the student's reading comprehension, impulsivity, and distractibility, and their effect on the student's ability to solve word problems and multi-step problems (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 5 at p. 3; 6 at p. 7). The March 2012 IEP also shows that the student does not respond well when a peer becomes upset, as demonstrated by asking the peer too many questions or invading the peer's personal space (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 5 at pp. 1-2). With respect to the student's social/emotional needs, the March 2012 IEP shows that the student has difficulty seeing other's perspectives, which prevents the student from developing deeper relationships, and he will change the subject of a line of questions he has initiated if the person responding does not respond as the student had expected (Dist. Ex. 3 at pp. 6-8). To address the student's social/emotional needs, the CSE recommended counseling, and utilized the goals that were created by Rebecca staff (id. at p. 1).

2. Goals

In her decision, the IHO determined that the goals found in the March 2012 IEP were appropriate. I agree. 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 documentary evidence shows that the 22 annual goals created by the March 2012 CSE were taken directly from the goals created by Rebecca staff, as written in the progress report given to the CSE by the parents (compare Dist. Ex. 3 at pp. 3-8, with Dist. Ex. 5 at pp. 3-10). A review of the goals shows that none of them are vague, while all of them are measurable and provide evaluative criteria (e.g., 3 out of 4 trials; 8 out of 10 times; 4 out of 5 opportunities, 80% accuracy), that the goals include evaluative procedures (e.g., teacher observations, teacher made material, and verbal explanations), and that schedules are included to determine if the student was making

progress toward goal completion (Dist. Ex. 3 at pp. 3-8). Therefore, I find the parents' assertions as to the adequacy of the goals to be without merit.

3. Transition Plan

As explained herein, the IHO erred in finding that the district did not develop an appropriate transition plan for the student. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix][b]).[4]

An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]), as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school (8 NYCRR 200.4[d][2][ix][e]).

Furthermore, transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]).

In this case, the IHO determined that the district denied the student a FAPE based solely on the transition plan incorporated in the March 2012 IEP (IHO Decision at p. 10). In doing so, the IHO noted that the IEP failed to provide for travel training, an internship opportunity, or GED preparation (IHO Decision at p. 9). While the hearing record shows that the IHO correctly determined that the transition plan was inadequate, such a flaw by itself does not necessarily rise

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[4] State regulations also require that "students age 12 and those referred to special education for the first time who are age 12 and over, shall receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

to the level of a denial of a FAPE (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570 [S.D.N.Y. Mar. 19, 2013]; M.H., 685 F.3d at 245 [stating that relief is only warranted when the alleged procedural inadequacies "(I) impeded the child's right to a [FAPE]; (II) significantly impeded that parents' opportunity to participate in the decision making process regarding the provision of [a FAPE] to the parents' child; or (III) caused a deprivation of education benefits" (internal citation marks omitted)]). While I adopt the IHO's reasoning and conclusion that the transition plan was inadequate, I do not find, however, that the inadequacy of the plan rises to the level of a denial of FAPE (id.). The hearing record shows that the parents were afforded an opportunity to participate in the creation of the transition plan, including having the student's teachers provide input to the CSE (see Tr. pp. 38, 40, 72-73). While the CSE did not adopt the Rebecca transition plan and included a somewhat vague and nonspecific plan instead, I find that this does not rise to the level of a denial of a FAPE.

4. 6:1+1 Special Class in a Specialized School Placement

With respect to the parties' contentions revolving around the appropriateness of a 6:1+1 special class placement in a specialized school recommended by the March 2012 CSE, the hearing record does not support a finding that this placement was appropriate. 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]). A review of the evidence in the hearing record shows that this student's management needs, as outlined in the March 2012 IEP, are neither highly intensive, nor do they require the degree of individualized attention and intervention that are envisioned for students who do need a 6:1+1 special class placement. For example, while the student had academic delays, as demonstrated by his age equivalent levels in math, reading comprehension, writing, and spelling, the student: (a) was able to read non-fiction articles, as well as newspapers, and answer questions concerning what was read; (b) was utilizing GED study material to strengthen his math skills; and (c) could compare past experiences in order to estimate the time an activity should take (Dist. Ex. 3 at p. 1; see Dist. Exs. 5 at p. 2-4; 6 at pp. 2, 5-6). The evidence in the hearing record also shows that the student's social/emotional needs and deficits were not such that they interfered with his or other students' ability to access education, and he did not require a behavioral intervention plan (BIP) (8 NYCRR 200.22; see Dist. Exs. 3; 5; 6). The student became easily distracted and had difficulty establishing friendships and grasping social cues; however, the student had shown improvement in his self-regulation, independence, and in his ability to communicate with staff as to what was upsetting him (Dist. Exs. 5 at p. 1; 6 at p. 5). Furthermore, and most telling, the March 2012 CSE notes that the student's needs would have been met by: adult assistance when interacting with peers and adults in an appropriate manner; increasing the student's ability to communicate in a logical flow; and scaffolding in order to respond to nonverbal cues and body language that is used by others to indicate how they feel (Dist. Ex. 3 at p. 2). Accordingly, I find that the evidence in the hearing record does not support a finding that the student’s deficits and needs are so intensive as to require a 6:1+1 special class placement in a specialized school (see 8 NYCRR 200.22).

C. Assigned Public School Site

With respect to the parents' claims relating to the assigned public school site, which the IHO did not address in any detail and which the parties continue to argue on appeal, in this instance,

similar to the reasons set forth in other decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parents' assertions are without merit. The parents' claims regarding the class size at the assigned public school site and the functional grouping of the students in the proposed classroom (see Parent Ex. A at p. 4), turn on how the May 2013 IEP would or would not have been implemented and, as it is undisputed that the student did not attend the district's assigned public school site (see Parent Ex. B), the parents cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

D. Unilateral Placement and Equitable Considerations

A review of the evidence in the hearing record shows that the IHO correctly determined that for the 2012-13 school year, Rebecca was an appropriate unilateral placement for the student and that equitable considerations favored the parents' request for tuition reimbursement (IHO Decision at p. 10). Although the IHO did not provide a lengthy analysis, her ultimate conclusion is correct. The IHO noted that the student requires supports from additional adults—in this case a special education teacher and transition facilitators—who assist the student in transitions, study preparation, travel training, and individualized support at his internship site (id.). Rebecca also provides the student with the related services of PT, OT, and speech-language therapy, as well as support for social skills development (id.). With respect to equitable considerations, a review of the evidence in the hearing record demonstrates that the IHO correctly determined that the parents cooperated with the CSE, actively participated in the IEP development, expressed concerns regarding the amount of support the student would receive, and that the parents had shown their inability to "front" the costs at Rebecca (id.).

VII. Conclusion

Based on the foregoing, I agree with the IHO that ultimately the district failed to offer the student a FAPE for the 2012-13 school year; however, I disagree with her rationale as to why. Therefore, I find that the IHO's determination that the district failed to offer the student a FAPE based solely on an inappropriate transition plan is hereby annulled. Further, I find that the IHO correctly determined that Rebecca was an appropriate unilateral placement, that equitable considerations favored the parents' request for tuition reimbursement, and that the parents had demonstrated an inability to "front" the cost of tuition at Rebecca.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that that portion of the IHO's decision dated May 13, 2013 which found a denial of FAPE based solely on the lack of an appropriate transition plan is hereby annulled.

IT IS FURTHER ORDERED that the district shall pay directly to REBECCA the student's tuition costs for the 2012-13 school year, to the extent that such tuition costs have not already been paid by the parents; and

IT IS FURTHER ORDERED that, to the extent that the parents have paid any portion of the student's tuition costs at REBECCA for the 2012-13 school year, the district shall reimburse the parents for such costs upon the submission of proof of payment to the district.

Dated: **Albany, New York**
November 25, 2014

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ALAN FITZPATRICK
STATE REVIEW OFFICER