The University of the State of New York

The State Education Department
State Review Officer
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No. 14-055

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 M. Eckstein, Esq., of counsel

Susan Luger & Associates, LLC, attorneys for respondents, Lawrence D. Weinberg, 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Rebecca School (Rebecca) for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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]).[1]

III. Facts and Procedural History

This State-level administrative review is being conducted after an order of remand to the IHO issued by United States District Court for the Southern District of New York and a subsequent decision was issued by that IHO (see J.M. v. New York City Dep't of Educ., 2013 WL 5951436 [S.D.N.Y. Nov. 7, 2013]). The parties' familiarity with the detailed facts and procedural history of the case, including the IHO's decisions before and after remand, is presumed and will not be recounted here in detail (see Application of the Dep't of Educ., Appeal No. 12-079).

Briefly, in an a prior State-level appeal from an IHO decision, dated March, 6, 2012, the undersigned sustained the district's appeal, overturning the IHO's decision that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Application of the Dep't of Educ., Appeal No. 12-079). The parents sought judicial review of the SRO decision and, in a decision dated November 7, 2013, the District Court granted summary judgment in favor of the district on those issues addressed by both the IHO and SRO (see J.M., 2013 WL 5951436). Specifically, the Court agreed with the State-level determination that: (1) there was no procedural error in developing the student's individualized education plan (IEP) for the 2011-12 school year in January 2011; (2) the hearing record showed that the parents had ample opportunity to participate in the development of the January 2011 IEP; (3) the CSE considered sufficient evaluative information, which the present levels of performance in the January 2011 IEP accurately reflected, and the SRO correctly applied a prospective analysis of the IEP, declining to consider information unavailable at the time of the January 2011 CSE meeting; (4) the annual goals in the IEP were substantively appropriate and were created through a collaborative effort; and (5) based on the foregoing, that the district "offered [the student] a FAPE in the least restrictive environment for the 2011-12 school year" (id. at *15-*21). However, the Court disagreed with that portion of the State-level determination which found that the parents were required to cross-appeal from the IHO's failure to address certain claims enumerated in their due process complaint notice and, therefore, remanded the case to the IHO to make findings of fact and conclusions of law as to those issues raised in the original due process complaint notice but not addressed by either the IHO or SRO (id. at *21-*22). Specifically, the Court directed the IHO to address the parents' following claims: (1) the January 2011 CSE lacked a proper basis to recommend a public school placement; (2) the level of occupational therapy (OT) recommended in the IEP was not appropriate; (3) the assigned public school site was not appropriate; (4) the IEP and assigned public school site failed to address the student's need to leave and work outside the classroom when she became disregulated; (5) the assigned public school site lacked a quiet/crisis room; (6) the recommendation for a crisis management paraprofessional was not appropriate; (7) the IEP's transition plan was vague; and (8) the Treatment and Education of Autistic and Communication–

[1] The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in my previous decision in this matter (Application of the Dep't of Educ., 12-079).

related handicapped Children (TEACCH) model of instruction utilized at the assigned public school site was not appropriate for the student (id., at *22). The Court also left it to the IHO to ascertain whether the parents properly raised these claims in the first instance in their due process complaint notice (id. at *22 n.15).

The impartial hearing reconvened on January 21, 2014 and concluded on February 11, 2014 after two additional days of proceedings (Tr. pp. 432-504).[2] In a decision dated March 20, 2014, the IHO considered the claims identified by the District Court and concluded that the district failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at p. 16). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Rebecca for the 2011-12 school year (IHO Decision at pp. 16-17).

IV. Appeal for State-Level Review

The district appeals the IHO's determination that it failed to offer the student a FAPE for the 2011-12 school year because (1) the January 2011 IEP failed to include an appropriate transition plan, and (2) the assigned public school site was inappropriate given the student's auditory sensitivities.

The parents sought and were granted a specific extension of time in order to file an answer to the petition; however the parents did not ultimately file an answer to the district's petition. Notwithstanding the parents' failure to answer, I have examined the entire hearing record and made an independent decision thereon (Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671, 673 [2d Dep't 2002]; see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2][i],[v]).

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,

[2] Neither of the two additional days of proceedings consisted of presentation of testimonial or documentary evidence by either party other than two exhibits consisting of a closing brief (previously submitted but not included as an exhibit) and chart summarizing the parents' asserted claims along with corresponding citations to the hearing record (Tr. pp. 432-504; see Parent Exs I; J).

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. Scope of Review

Notwithstanding the IHO's ultimate determination that the district failed to offer the student a FAPE on the grounds appealed by the district, as to the parents' remaining claims, the IHO made numerous findings adverse to the parents (see IHO Decision at pp. 8-16). Specifically, the IHO determined that: (1) the CSE had a proper basis to recommend a public school placement; (2) the parents did not sufficiently raise the issue of the level of OT for the student in their due process complaint notice, and therefore, such issue would not be addressed by the IHO; (3) the IEP addressed the student's need to leave the classroom when she became disregulated; (4) while the assigned public school site did not have a dedicated "crisis room" should the student "meltdown," there was a dedicated quiet room for such an event; (5) the CSE had a proper basis to recommend a crisis management paraprofessional; and (6) the TEACCH method, as described by the teachers, was appropriate for the student (IHO Decision at pp. 6, 12, 14, 15). As the parents do not assert a cross-appeal challenging these determinations, they have become final and binding upon the

parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; J.F. v. New York City Dept. of Educ., 2012 WL 5984915, at *6 [S.D.N.Y. Nov. 27, 2012] [A particular finding that is not cross-appealed is waived, and the IHO's decision in that particular is final and binding on the parties]).[3]

B. Transition Plan

The IHO determined that, given that the student was to turn 15 during the 2011-12 school year, the CSE was required to develop a transition plan and that the transition plan included in the January 2011 IEP was "fatally vague" and inadequate in that it included only "four long term outcomes" (IHO Decision at pp. 9-10). The district asserts on appeal that the CSE discussed the student's transition needs during the January 2011 CSE meeting and created transition goals based, in part, on parental input regarding the expectations for the student's post-secondary life was to "stay at home, raise kids, and take care of the household" (Pet. ¶ 28; see Tr. pp. 44-45, 70).

As explained below, the IHO erred in finding that the district failed to offer the student a FAPE based on an inappropriate 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][A]; 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, as well as 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]; 8 NYCRR 200.4[d][2][ix]). 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]). It has been held that "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).

In this case, the student was 14 years old when the January 2011 IEP was developed, and that she turned 15 approximately four months after the IEP was to be implemented (Dist. Ex. 3 at p. 1). Due to the fact that the student turned 15 during the school year in question, the district was required to create a transition plan, including the provision of transition support services (8 NYCRR 200.4[d][2][ix][b]; see A.D., 2013 WL 1155570, at *11).

[3] I have nonetheless reviewed the hearing record for support for the IHO's determinations identified above and found that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions (IHO Decision at pp. 8-16).

The hearing record shows that the CSE created four post-secondary goals—independently integrating into the community, exploring Vocational and Educational Services for Individuals with Disabilities (VESID), living independently, and seeking employment—which, while vague, are directly related to the information the CSE had before it at the time the transition plan was developed (see Dist. Ex. 3 at p. 16; see also Dist. Ex. 7). For example, the parents input at the CSE meeting included that it was expected that the student would live independently (Dist Ex. 7 at p. 2). The Rebecca progress report also noted that one of the parents' primary long term goals for the student was increasing her ability to independently take care of activities of daily living (ADL) skills (Dist. Ex. 12 at p. 3). The post-secondary goals were aligned with this expectation.

While the January 2011 IEP included a set of post-secondary goals and noted that the student was on track for an expected 2017 high school completion year, the IEP failed to provide for the activities needed to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment, other post-school adult living objectives, or acquisition of ADL skills (Dist,. Ex. 3 at p. 16; see 8 NYCRR 200.4[d][2][ix][d]). Although the district representative testified that, once the student turned 15, the following year's IEP would include these activities, the fact remains that the district did not provide for an appropriate transition plan (Dist. Ex. 3 at p. 16).

However, the January 2011 IEP also contained annual goals and short–term objectives which would either directly or indirectly assist the student in achieving her post-school activities. For example, in relation to the student integration into the community and living independently, the IEP included an annual goal that the student would improve independent functioning and ADLs, as measured by teacher observations and check-lists, by creating and managing a budget with 80 percent accuracy and learning to travel independently and safely 100 percent of the time (Dist. Ex. 3 at p. 8). Similarly, the IEP includes a short-term objective related to a speech-langue goal targeting engagement/pragmatic language skills that indicated the student would improve problem solving skills by planning, sequencing and executing upcoming events in school and in the community with minimal verbal scaffolding in 8 out of 10 times (id. at p. 9). The counseling goal and short-term objectives of utilizing coping strategies when dysregulated not only address those deficits found in the present levels social/emotional functioning, but also assist the student's achievement of postsecondary goals of seeking employment, living independently, and integrating into the community (id. at pp. 4, 10, 16). Other annual goals included in the IEP similarly align with the student's post-secondary goals, as well as her present levels of performance (see id. at pp. 6-12).

Thus, while the evidence in the hearing record supports the IHO's finding that certain aspects of the transition plan failed to comport with statutory or regulatory requirements, when viewed in the context of the IEP as a whole, the evidence does not demonstrate that such inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, caused a deprivation of educational benefits, or otherwise caused substantive harm which rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR § 300.513[a][2]; 8 NYCRR 200.5[j][4]). Even with the deficiencies in in the transition plan, the IEP as a whole met the threshold standard of being "reasonably calculated to enable the student to receive educational benefits" (Rowley, 458 U.S. at 206-07; see Cerra , 427 F.3d at 194-95; Walczak, 142 F.3d at 130

["An appropriate public education under IDEA is one that is 'likely to produce progress, not regression'"]).

C. Challenges to the Assigned Public School

Next, the district asserts that the IHO erred in her determination that, in light of the student's auditory input sensitives, the size of the assigned public school site was inappropriate (see IHO Decision at pp. 15-16). For the reasons set forth in other State-level administrative decisions resolving similar disputes (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), I find the parents' challenges to the assigned public school site to be without merit. The parents' claim regarding the size of the assigned public school (see Dist. Ex. 1 at p. 2) turns on how the January 2011 IEP would or would not have been implemented. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. C, E, H), the parents cannot prevail on these 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] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice"]; K.L., 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. 2014]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 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]).

Although I believe that the Second Circuit has largely obviated any need for analysis as to the appropriateness of an assigned public school site under these circumstances for the reasons set forth above, because the District Court specifically remanded this issue to the administrative levels for a determination, I have reviewed the IHO's factual findings on this issue.[4] Based on that review, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation; that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502–03 [S.D.N.Y. 2011]).

First, with respect to the student's auditory sensitivity, the hearing record shows that the January 2011 CSE was aware of the student's noise sensitivity and that the student required sensory breaks; the hearing record does not provide further detail regarding the student tolerance to noise (see Tr. pp. 30, 46, 75-77, Dist Ex. 3 at pp. 3, 5). The student's behavioral intervention plan

[4] However, review of the District Court's decision does not indicate that the Court intended to foreclose a finding that such a claim was speculative (J.M., 2013 WL 5951436, at *22).

mandated that the student be provided "access to a quiet environment during the school day" (Dist. Ex. 3 at p. 17).

The hearing record shows that that the assigned public school site in this case was one of four schools co-located at a single campus site; however, the assigned school was housed in its own dedicated wing (Tr. pp. 96-97). The assistant principal at the assigned public school testified that the school followed a different schedule than that followed at the co-located schools and, therefore, the students would not hear bells in the other schools and would not pass in the hallway at the same time as the students from the other schools (Tr. p. 100). The assistant principal also testified that the students who attended the assigned public school site would not walk down the shared hallways without a paraprofessional, a teacher, or a related service provider accompanying them (id.). The assistant principal also testified that the assigned school had a private dining room dedicated to students who could not tolerate the noise or stimulation of the cafeteria (Tr. pp. 100-01). In addition, the assistant principal testified that the classrooms themselves had noise reduction boards or panels available, which she described as "cardboard things" that could be placed on a student's desk to filter out noise (Tr. p. 211). Under these facts I find it unlikely that the district would have deviated from the IEP in a material or substantial way it had been provided an opportunity to implement the student's IEP. Thus the parents' claim regarding the noise level at the assigned public school site is speculative and, in any event, is unsupported by the evidence in the hearing record (B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *5, *12 [S.D.N.Y. Dec. 3, 2014]).

VII. Conclusion

Having determined that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Rebecca was appropriate or whether equitable considerations support the parents' claim. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 20, 2014, is modified by reversing those portions which concluded that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to reimburse the parent for the costs of the student's tuition at Rebecca.

Dated: **Albany, New York**
December 12, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER