The University of the State of New York

The State Education Department
State Review Officer
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No. 15-040

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

Weil, Gotshal & Manges LLP, attorneys for respondent, Jared R. Friedman, Esq., and D. Jane Cooper, Esq., of counsel

Advocates for Children of New York, attorneys for respondent, Rebecca C. Shore, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for his son's tuition costs at the Rebecca School for the 2014-15 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

With respect to the student's educational history, the evidence in the hearing record reflects that the student attended the Rebecca School since the 2011-12 school year (the student's kindergarten year) (Tr. pp. 396-98).[1] The student was the subject of a prior State-level appeal

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

related to the 2013-14 school year (Application of a Student with a Disability, Appeal No. 14-054).

On January 13, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (Dist. Exs. 1 at p. 1; 2 at p. 1). Finding the student eligible for special education as a student with autism, the January 2014 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with the following related services in 30-minute intervals on a weekly basis: two individual sessions of counseling, two individual and one small group sessions of occupational therapy (OT), two individual sessions of physical therapy (PT), and three individual and two small group sessions of speech-language therapy (Dist. Ex. 1 at pp. 1, 10-11, 13-14).[2] In addition, the January 2014 IEP included multiple supports for the students management needs, 13 annual goals with corresponding short-term objectives, and provision for two 60-minute sessions per month of parent counseling and training (id. at pp. 3-10).

In a school location letter and prior written notice dated June 10, 2014, the district summarized the 6:1+1 special class placement and related services recommended in the January 2014 IEP and identified the particular public school site to which the district assigned the student to attend for the 2014-15 school year (Parent Ex. M at pp. 2, 4).[3] By letter to the district, dated June 17, 2014, the parent indicated that, despite attempts to contact the assigned public school site, he had been unable to schedule a visit (Parent Ex. N at p. 1). He indicated that he would continue his attempts but that, absent such a visit, he was unable to evaluate the appropriateness of the assigned school or its ability to implement the student's January 2014 IEP (id.). Therefore, the parent notified the district of his intent to unilaterally place the student at the Rebecca School "for the start of the 2014-2015 school year" at district expense (id.).

The parent visited the assigned public school site on June 24, 2014 and, by letter to the district dated June 30, 2014, expressed concerns with the school and notified the district of his intent to unilaterally place the student at the Rebecca School for the 2014-15 school year (Parent Ex. R at pp. 1-4). In particular, the parent asserted that the assigned public school site could not meet the student's "significant sensory needs" or provide the student with "sufficient adult support throughout the school day" (id.). The parent also indicated that clutter he observed in the classrooms at the assigned school would be distracting to the student (id. at p. 4).

On June 30, 2014, the parent signed an enrollment contract with the Rebecca School for the student's attendance during the 2014-15 school year (Parent Ex. U at pp. 1, 4).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 28, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year

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

[3] The evidence in the hearing record indicates that the envelope in which the school location letter and prior written notice were delivered was postmarked on June 16, 2014 (Parent Ex. M at p. 1).

(Parent Ex. A at pp. 1-2, 6-7). The parent alleged that the January 2014 CSE reached a placement recommendation differing from the student-to-adult ratio or level of adult support preferred by the parent and the student's Rebecca School teacher, "in spite of the fact that none of the [CSE] meeting participants from the [district] had ever worked with or even met [the student]" (id. at p. 3). Further, the parent alleged that the recommended 6:1+1 special class placement offered insufficient adult support to address the student's needs (id. at pp. 3, 6). The parent also contended that the district's school location letter was untimely, arguing that the district was required to provide the letter by June 15, 2014 but that he did not receive one until June 17, 2014 (id. at pp. 3, 7).

Lastly, the parent asserted that the assigned public school site was unable to implement the student's January 2014 IEP (Parent Ex. A at pp. 4-6, 7). In particular, based on his visit to the assigned public school site, the parent alleged that neither the required sensory equipment nor a sensory gym was present, that the layout of the classrooms were unsuitable for the student, that administrators were unable to confirm the training of their staff, that the school did not confirm that the student would receive sensory therapy regularly, that OT would not be available regularly (specifically that it was on a "first come, first served" basis), and that the student would generally not be guaranteed access to an adult trained in providing sensory inputs, which the student required to remain regulated (id. at pp. 3-4, 5). The parent also alleged that staff members at the assigned public school site expressed to him that they "did not agree" that the student needed the sensory regulation mandated by the January 2014 IEP and that they believed his needs should instead be addressed through a behavioral intervention plan (BIP) (id. at p. 4). To support this claim, the parent indicated that he observed a student become dysregulated and, in response, "the adults in the classroom ignored him" (id. at p. 5). Finally, the parent alleged that the assigned public school site offered insufficient adult support throughout the school day (id. at p. 5).

As relief, the parent requested that the IHO order the district to reimburse him for the costs of the student's tuition at Rebecca for the 2014-15 school year (Parent Ex. A at p. 7).

B. Impartial Hearing Officer Decision

After a hearing related to pendency held on September 18, 2014, in an interim decision, dated September 19, 2014, the IHO determined that the Rebecca School constituted the student's pendency ("stay put") placement (IHO Ex. I at p. 2; see IHO Decision at p. 2). On October 21, 2014, the impartial hearing proceeded on the merits and concluded on January 21, 2015, after four nonconsecutive days of proceedings (see Tr. pp. 1-718). In a final decision, dated March 5, 2015, the IHO found that the district failed to offer the student a FAPE for the 2014-15 school year, that the Rebecca School was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief (see IHO Decision at pp. 4-13).

As a preliminary determination, the IHO held that the parent was barred from raising a claim that the district failed to conduct PT and OT evaluations of the student because it was not raised in the parent's due process complaint notice (IHO Decision at pp. 4-5). However, the IHO observed that, if the January 2014 CSE had before it insufficient evaluative data about the student, the district could "have difficulty in meeting its burden of proof" as to the appropriateness of the January 2014 IEP (id. at p. 5). Next, the IHO rejected the district's argument raised in its closing brief that she should rely on IHO and SRO decisions regarding this student's educational program

for earlier school years in evaluating the student's January 2014 IEP (id.). The IHO concluded that the district's argument impermissibly relied on facts raised for the first time in its closing brief and that, in any event, each school year should be evaluated separately as the circumstances of a student's educational needs change from year to year (id. at pp. 5-6).

Turning to the January 2014 IEP, the IHO held that the recommended 6:1+1 special class placement was not reasonably calculated to meet the student's needs (IHO Decision at pp. 6, 7). The IHO made several conclusions regarding what services and supports the student required in order to receive educational benefit; specifically, that the student required access to sensory equipment, a sensory diet, a 2:1 student-to-adult ratio when regulated, and 1:1 support when dysregulated (id. at pp. 6-7). The IHO held that that the January 2014 IEP did not address these needs and that the information available to the CSE did not support the 6:1+1 special class recommendation (id.). The IHO found that the testimony offered by the district school psychologist regarding the CSE's reasoning for the 6:1+1 special class recommendation was "not consistent with the information available to the CSE" and that, instead, the parent's testimony revealed the true rationale; to wit, that the 6:1+1 placement was recommended because it is "where students with autism [we]re educated" within the district and "it[] [was] the smallest setting that the[] [district] ha[d] available for students with autism" (id. at p. 7, citing Tr. pp. 321, 322).

Regarding the student's sensory regulation needs, the IHO held that the district school psychologist's testimony did not support the contention that the 6:1+1 special class placement, without a sensory gym, would allow him to make meaningful educational progress (IHO Decision at p. 7). The IHO also concluded that testimony about the presence of a "sensory room" at the assigned public school site as of September 2014 constituted impermissible retrospective testimony that could not be considered in evaluating the sufficiency of the January 2014 IEP (id. at pp. 7-8).

Finally, the IHO found that the district was required to provide the parent with notice of the particular public site to which the district assigned the student to attend by June 15, 2014 and failed to do so (IHO Decision at p. 4). However, the IHO ruled that the delay was de minimus and did not constitute a denial of a FAPE (id.).

With regard to the unilateral placement, the IHO concluded that the Rebecca School specifically planned for and adequately addressed the student's severe sensory regulation deficits (IHO Decision at pp. 9-10). The IHO found that the hearing record did not support the district's contentions that the Rebecca School model of education did not appropriately meet the student's needs, that the Rebecca School was too loud and unstructured, or that the student was capable of making more progress than that which he could achieve at the Rebecca School (id. at pp. 9-12). Thus, the IHO concluded that the parent met his burden to demonstrate that the Rebecca School was an appropriate unilateral placement for the student for the 2014-15 school year (id. at p. 12).

Lastly, with regard to equitable considerations, the IHO determined that there was nothing in the hearing record that warranted a reduction or denial of the parent's requested relief, noting that the district did not assert any arguments at the impartial hearing in this regard and, further, that the hearing record showed that the parent cooperated with the CSE, visited the assigned public school site, and provided the district with "prompt and appropriate written notice of his rejection of the placement" (IHO Decision at p. 12). Accordingly, the IHO ordered the district to reimburse

the parent for the cost of the student's tuition at the Rebecca School for the 2014-15 school year to the extent the parent remitted such payments (id.). In addition, noting that the district did not dispute the parent's assertion that he was unable to afford the tuition, the IHO ordered the district to directly pay the Rebecca School the balance of the student's tuition cost for the 2014-15 school year (id. at pp. 12-13).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district did not offer the student a FAPE for the 2014-15 school year.

As an initial matter, the district agrees with the IHO's determination that the parent failed to raise a claim relating to the sufficiency of evaluative data available to the January 2014 CSE in his due process complaint notice and that the district did not "open the door" to the issue at the impartial hearing through an affirmative argument. The district further argues that, even if the parent was able to raise the issue on appeal, it is without merit because the January 2014 CSE considered sufficient information to create an appropriate IEP.

The district appeals the IHO's finding that the 6:1+1 special class placement recommended in the January 2014 IEP failed to offer the student a FAPE, arguing that such a placement offered the small, special class environment that the student required. The district alleges that the IHO erred in his determination that the district was required to recommend a particular ratio or methodology to address the student's needs, which the district argues is a matter best left to the individual school. With respect to the special class ratio, the district asserts that the 6:1+1 special class offered sufficient adult support to address the student's needs, that the CSE was not required to adopt every recommendation made by the private school, and that neither the parent nor the student's Rebecca School teacher asked that the CSE recommend a 1:1 paraprofessional for the student. The district further states that the IHO erred in finding that the January 2014 IEP did not sufficiently address the student's sensory needs and argues that the IEP included strategies and annual goals that targeted such needs. The district further appeals the finding of the IHO regarding retrospective testimony, stating that the district's evidence regarding the sensory supports available at the assigned school was permissible for the purpose of explaining or justifying the services included on the IEP and was not an effort to rehabilitate an inadequate IEP.

Next, the district contends that the IHO erred in determining that the district was required to provide the parent with notice of the particular public school site to which the district assigned the student to attend by June 15, 2014, stating that State and federal regulations only require that an IEP be in effect for the student at the beginning of the school year. However, the district asserts that the IHO correctly concluded that any alleged delay was de minimus and did not rise to the level of a denial of a FAPE. Regarding the assigned public school site, the district also alleges that the public school would have been able to implement the student's January 2014 IEP.

In an answer, the parent responds to the district's petition by variously admitting or denying the allegations raised by the district and argues that the IHO correctly determined that the district

failed to offer the student a FAPE for the 2014-15 school year.[4] The parent also alleges, for the first time in these proceedings, that the meeting notes of the CSE as taken by the district did not accurately reflect the content of the meeting or the student's levels.[5]

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];

[4] Regarding the sufficiency of the evaluative information available at the time of the January 2014 CSE meeting, the parent admitted in his answer that he did not assert a claim regarding the district's failure to perform PT and OT evaluations in his due process complaint notice and does not assert a cross-appeal of the IHO's determination that he was barred from raising such a claim for that reason (see Answer ¶¶ 28-29). Therefore, the IHO's determination on this issue is final and binding on the parties and will not be further addressed (see IHO Decision at pp. 4-5; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[5] To the extent the parent asserts that inaccuracies in the CSE meeting notes could form an additional basis for a finding of a denial of a FAPE, as this is raised for the first time on appeal, it is outside the permissible scope of review and will not be considered (20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][i][b], [j][1][ii]; see, e.g., B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).

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 [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 [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 [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 [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. January 2014 IEP—6:1+1 Special Class Placement

On appeal, the district asserts that the IHO erred in finding that the recommended 6:1+1 special class placement was insufficiently supportive to address the student's needs. After ascertaining the student's present levels of performance and developing annual goals to address her areas of need, the January 2014 CSE recommended a 6:1+1 special class placement with the related services detailed above (see Dist. Ex. 1 at p. 10).

According to the evidence in the hearing record, the January 2014 CSE had available to it the following evaluative information: a November 2013 speech-language evaluation report, a November 2013 psychoeducational evaluation report, a November 2013 classroom observation report, a December 2013 Rebecca School interdisciplinary report of progress update, and a privately obtained February 2013 neuropsychological evaluation report (see Tr. pp. 123-25, 158-59; Dist. Ex. 3 at p. 3; see generally Dist. Exs. 4-7; Parent Ex. K).[6] The present levels of performance included in the student's IEP, which are not in dispute, reflect that the student demonstrated significant deficits with regard to: academic performance; speech-language development; social interaction; maintaining attention; fine motor, visual motor, and spatial skills; activities of daily living skills; motor planning; and, most significantly, in the area of sensory integration and regulation (Dist. Ex. 1 at pp. 1-3). The January 2014 IEP indicated that the

[6] The information in the December 2013 Rebecca School progress report was considerably more detailed than information reflected in the parents' private neuropsychological evaluation report or the district's psychoeducational evaluation, classroom observation, and speech-language evaluation reports (compare Dist. Ex. 7, with Dist. Exs. 4-6, and Parent Ex. K). Notably, two of the reports reflected that testing with unfamiliar evaluators was discontinued at times, due to the student's discomfort or his inability to follow directions (Dist. Ex. 5 at p. 1; Parent Ex. K at p. 3). Accordingly, the February 2013 private neuropsychological evaluation report, which was prepared approximately ten months before the December 2013 Rebecca School progress report, reflected somewhat lower functioning than that described in the Rebecca School progress report (compare Dist. Ex. 7 at pp. 1-10, with Parent Ex. K at pp. 3-7).

student's dysregulation negatively impacted his ability to attend and participate in classroom activities and that he required significant academic and sensory supports to help him progress academically, to address his developmental needs, and to help him function optimally (id. at pp. 2, 3).

The district school psychologist, who participated in the January 2014 CSE meeting, testified that the 6:1+1 special class in a specialized school would have provided meaningful educational benefits for the student because the information that was used and discussed at the time of the meeting supported the student's need for that number of peers and because the amount of support provided in the classroom would be sufficient for the student to make progress (Tr. p. 129; see Dist. Ex. 1 at p. 16). She added that, based on the student's present levels of performance, the 6:1+1 special class would provide structure and routine to promote the student's independence (id.). She also indicated that the 6:1+1 special class would provide the student with a less distracting environment and better opportunities to develop peer relationships and age appropriate social skills at the time of the CSE meeting (Tr. pp. 131, 143).

The student's then-current Rebecca School teacher testified that the January 2014 CSE had before it the most recent Rebecca School progress report of the student, dated December 2013 (Tr. p. 488). This report included current information regarding the student's functioning and needs provided by his classroom teacher, his occupational therapist, and his speech pathologist (see Dist. Ex. 7 at pp. 1, 7, 8). The report indicated that the student was doing well and had made significant progress at the Rebecca School in all areas in a 7:1+3 special class (see id. at pp. 1-10).[7] With regard to the student's ability to remain regulated, the teacher indicated in her report that the student had shown an increased ability to accept co-regulating supports during exciting and fast-paced games or interactions before becoming dysregulated (such as an adult modeling deep breathing or calm affect, verbal reminders about his pacing, and deep pressure squeezes on his head, arms and legs) and that, as a result, he was able to remain engaged for longer periods of time (id. at p. 2). Contrary to her testimony that the student was not able to self-regulate or calm himself, the teacher indicated in her report that the student had also improved his ability to self-regulate throughout the day (Tr. p. 477; Dist. Ex. 7 at p. 2). She indicated, for example, that, while the student had previously needed several verbal reminders to implement self-regulation strategies such as slowing down and taking deep breaths, as well as an adult to provide calming input such as squeezes to his head or limbs, at the time of the report, he was able to respond to an adult's verbal cue, such as "you're moving very fast," and independently slow down and take several deep breaths in order to maintain regulation (Dist. Ex. 7 at p. 2). The report indicated that the student had also demonstrated the ability to remind himself to remain calm in situations that he knew were difficult for him (id.). For example, instead of running out of the classroom when he was excited, he was able to say, "[d]o not run body" or "[b]ody, calm down" in order to self-regulate and maintain his regulation during situations that were typically "up-regulating moments" (id.). The teacher further indicated that, previously, when the student ran out of the classroom, he remained within close proximity to the classroom until an adult came out and that, at the time of the report, there had also been a decrease in the student's eloping from the classroom (id. at p. 6). The progress report also indicated that the student was more consistently asking for regulating strategies, such as brushing

[7] Testimony by the student's Rebecca School teacher indicated that she had eight students in her class at the time of the January 2014 CSE meeting, as well as during the entire 2013-14 school year (Tr. p. 514).

or head squeezes, in order to maintain his regulation and remain engaged in activities or interactions during the day (id. at pp. 1, 2). The teacher also indicated in the report, that the student had demonstrated an increased ability to remain regulated and engaged during challenging moments, for example, when he felt frustrated, upset, or mad, noting that he was able to remain calm when a peer knocked down his block structure and rebuild it instead of becoming dysregulated (id. at p. 2). The student had also demonstrated increased ability to communicate his emotions verbally using five circles of communication to express his feelings, rather than disengaging or dysregulating (id.).[8]

The occupational therapist's section of the December 2013 Rebecca School progress report included a similar description of the student's ability to verbally request a break or brushing and to talk about how he felt when he was becoming dysregulated and, further, noted the student's progress in maintaining regulation throughout his sensory motor movement group, given moderate verbal support (Dist. Ex. 7 at p. 7). She also described in her report the student's sensory diet, which began with brushing and joint compressions, followed by a specific vestibular protocol, and then by active proprioceptive input (id. at p. 8). The occupational therapist's testimony was consistent with the report with regard to the student's ability to ask for sensory input, such as a squeeze or a trip to the quiet room, before becoming dysregulated, "as opposed to an adult always having to tell him . . . what he needs to remain regulated" (Tr. p. 433). She further testified that, after receiving full body sensory input, the student exerted more control over his body and could walk instead of run in the classroom, exhibited a decrease in self stimulation behaviors and did not shake his fingers or objects in front of his eyes, and was able to be in larger groups and participate in academic group activities (Tr. p. 428).

With regard to the student's ability to maintain attention, the Rebecca School progress report indicated that, in reading, when calm and regulated, the student was able to sustain his attention and remain engaged when an adult read a familiar and preferred book in a small group setting for up to 15 minutes, with no more than two verbal or gestural reminders throughout the activity and that he was also able to hold his own copy of the book and follow along as an adult read, with only minimal adult support such as gestural cues (Dist. Ex. 7 at p. 4). The student was also reported to demonstrate ability to initiate play and remain engaged with peers for up to 15 minutes with minimal adult support (id. at p. 6).

In addition, the Rebecca School progress report reflected that the student demonstrated some relative strengths in receptive and expressive language (see Dist. Ex. 7 at p. 9). According to the student's speech pathologist, at the time of the report, the student was able to follow two-step directions with greater consistency, had demonstrated progress in his ability to communicate his wants and needs, and relied generally on mild to moderate verbal support such as prompt questions (i.e., ""what should [peer] do next?"), rephrasing ("'first pour, then mix'"), additional processing time, visual support (i.e., picture board), and gestural cues (id.). Although the student was reported to primarily use three to five word utterances and sentences and, for example, could produce only up to a four-word utterance to request items and activities using descriptors, the report also included appropriate 10-word and 14-word utterances made by the student in response

[8] The hearing record reflects that circles of communication refer to back and forth conversation (see Tr. pp. 689, 703).

to a question and an appropriate 17-word utterance, which included three complete sentences, that the student made when recalling the events of a field trip (id. at pp. 5, 6, 9).

Given that the student was doing well in his 8:1+3 special class at Rebecca, as evidenced by his increasing ability to self-regulate, his ability to verbally communicate his feelings, wants, and needs, and his ability to respond to merely minimal and moderate verbal supports and gestures (see Dist. Ex. 7 at pp. 1-10), it was not unreasonable for the CSE to determine that the student could receive educational benefits from the 6:1+1 special class placement. The student's increased ability in the areas noted above indicates that he would require less 1:1 support to function in the classroom than he had previously. The classroom observation of the student, which was completed by the district special education teacher who participated in the student's January 2014 CSE meeting, indicated that the student's level of functioning was somewhat higher than that of his classmates in the 8:1+3 special class in that he was more verbal, was able to have a conversation with a teacher during snack and joke with her, and listened and responded appropriately when his teacher corrected his behavior (Dist. Ex. 6 at p. 2). The district special education teacher further noted that the student did not need many prompts to stay on task, finished academic tasks before his peers, and wanted to do more ("i.e., let's count all the beads") (id.). While I do take into consideration the testimony of the student's occupational therapist that a ratio consisting of one adult for every three students would not work for the student and that "he[] [wa]s unable to carry out a group activity with that ratio" (Tr. p. 437), that must be contrasted with her own testimony that she did not believe such a ratio had been used with the student and that she had never observed him in such a classroom setting (Tr. p. 453). This is corroborated by testimony by the student's teacher that a ratio consisting of one adult for every three students had never been tried with the student, and that her only exposure to a 6:1+1 special class setting was during school visits (Tr. p. 706). She further acknowledged that the 6:1+1 special class settings she had visited were set up differently, in that they utilized class layouts that varied based on the methodology then in use (see Tr. pp. 708-09). In support of the CSE's recommendation for a 6:1+1 special class placement, the district school psychologist testified that "just because something is working in one environment doesn't mean it's the only thing that will work" (Tr. p. 215). Further, while the February 2013 private neuropsychological evaluation report recommended a "small, structured specialized educational setting" for the student, neither the neuropsychological evaluation report nor the district's October 2013 psychoeducational evaluation report recommended a specific class ratio for the student's placement (Tr. p. 198; see Dist. Ex. 4 at p. 4; Parent Ex. K at p. 4).

To the extent that the IHO found that the recommended 6:1+1 special class placement offered insufficient 1:1 adult support to implement the student's sensory diet and support the student when dysregulated, the hearing record demonstrates that the student was progressing at the Rebecca School in a classroom with a student to adult ratio that did not inherently provide for 1:1 support and did not guarantee that an adult would be available when the student needed one (see IHO Decision at p. 6; Tr. 454; Dist. Ex. 7 at pp. 1-10). Furthermore, according to the student's teacher, at the time of the January 2014 CSE meeting, the student's sensory diet required only between five and ten minutes to administer, three times per day (Tr. pp. 696-97).[9] Moreover, the

[9] With regard to the frequency of the student's need for additional sensory input throughout the day, the Rebecca School teacher also testified that, at the Rebecca School, they did not take data on how often a student becomes dysregulated, and the minutes of the January 2014 CSE meeting reflected that the student's teacher couldn't "comment on how often it could happen" (Tr. pp. 540-42; Dist. Ex. 2 at p. 3).

hearing record does not reflect that any member of the CSE expressed that a dedicated full time 1:1 paraprofessional would be appropriate for the student. The parent and the Rebecca School teacher both indicated that a 1:1 paraprofessional was not discussed at the January 2014 CSE meeting; however, neither testified that they believed the student needed a full time 1:1 paraprofessional or that they requested such a service for the student at the CSE meeting (Tr. pp. 320, 491-92). In addition, the January 2014 IEP provided for nine related services sessions per week in a 1:1 ratio (Dist. Ex. 1 at p. 10). Finally, the parent testified that, despite his apprehension regarding "the adult to student ratio," he was willing to consider the 6:1+1 special class placement offered by the district because "a significant amount of sensory supports can be in place even if the adult to student ratio continues to be a concern" (Tr. pp. 320-21).

As previously noted in the student's case in Application of a Child with a Disability, Appeal No. 14-054, 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]). The CSE included extensive environmental modifications and human/material resources (management needs) to enable the student to benefit from instruction, including: processing time; small classroom setting; scaffolding and cueing; sensory breaks; structured predictable class setting; repetition of skills and concepts; reminders for attention; verbal and gestural redirection; sensory input throughout the day; modeling; adult support for peer interactions; use of movement activities to engage him; on task prompts; and verbal praise (Dist. Ex. 1 at p. 3; see Tr. pp. 210, 385;). Given these highly intensive management needs and consistent with State regulation, the January 2014 CSE recommended a 6:1+1 special class (Dist. Ex. 1 at p. 10; see Tr. p. 126; see also 8 NYCRR 200.6 [h][4][ii][a]).

In addition to the CSE's recommendation for placement in the 6:1+1 special class, the January 2014 CSE developed two academic goals with ten short-term objectives designed to address the student's deficits in literacy and mathematics, and one goal with two short-term objectives to address his needs related to life skills (safety awareness and independent clean up) (Dist. Ex. 1 at pp. 6-7). The January 2014 CSE developed two annual goals with four short-term objectives to address the student's deficits related to sustaining social interaction and also recommended the provision of two 30-minute individual counseling sessions per week to further address the student's needs in this area (id. at pp. 5, 10). With regard to his speech-language deficits, the CSE created four annual goals with twelve corresponding short-term objectives designed to address the student's deficits in engagement/pragmatic language skills, receptive language skills, expressive language skills, and oral motor sensory processing (id. at pp. 8-9). The CSE further addressed the student's speech-language needs with the provision of three 30-minute individual and two 30-minute group (3:1) speech-language therapy sessions per week (id. at p. 10). Lastly, the student's deficits related to sensory regulation and sensory integration were addressed with two annual goals and five short-term objectives and his deficits related to motor planning and fine motor/visual motor/spatial skills were each addressed with one annual goal and two short-term objectives (id. at pp. 4-5, 7, 8, 10). The CSE further addressed the student's needs in these areas with the provision of two 30-minute individual and one 30-minute group (2:1) sessions of OT per week, as well as two 30-minute individual sessions of PT per week (id. at p. 10).

With regard to the IHO's finding that the student required a sensory diet throughout the day and access to sensory equipment when dysregulated (see IHO Decision at pp. 7-8), the January

2014 IEP appropriately noted the student's need for sensory input throughout the school day and included a nonexclusive list of sensory inputs, such as sensory breaks, movement activities, deep pressure squeezes, a weighted vest, vestibular input, brushing, foam steps, and a foof, which, among other things, the Rebecca report indicated had been successfully used with the student (Dist. Exs. 1 at pp. 3, 5, 7; 7 at pp. 1, 2, 7, 8; see Tr. pp. 378-79). In the context of discussing different types of sensory equipment that might be appropriate for the student, the parent testified to his belief that "[i]t's always good to try other things," but that if one approach has proven effective, it is "needed" (Tr. p. 314). Testimony by the district school psychologist indicated that the management needs section of the IEP did not list every sensory tool or piece of equipment from which the student might benefit so that a teacher or provider could "provide the appropriate input" sought by the student, which might vary depending on the environment (Tr. pp. 135-36; see Tr. pp. 205-07). In addition, testimony by both the district school psychologist and the student's occupational therapist at Rebecca reflected that the student's sensory needs and, accordingly, the student's sensory diet, would vary daily and change over time (Tr. pp. 136, 446-47). Testimony by the Rebecca occupational therapist also indicated that there were a variety of ways to address the student's sensory input needs (Tr. p. 446).

Furthermore, with regard to the IHO's determination that the 6:1+1 program, without a sensory gym, would not address the student's sensory regulation issues and allow him to make meaningful educational progress, testimony by the occupational therapist at Rebecca indicated that a sensory gym is merely "a room that includes various sensory equipment and is used as a treatment space for sensory integration" (Tr. p. 428). Her testimony indicated that she had also successfully provided sensory inputs to the student in the classroom, the hallway, the quiet room, and a small space where the student could be alone for a minute (Tr. pp. 447-49). Similarly, testimony by the district school psychologist indicated that the student did not need a specific sensory gym but rather needed access to sensory tools which one could find throughout a school building, for example, in an OT office, a PT office, a counselor's office, or in a classroom (Tr. p. 208). Thus, the evidence in the hearing record reveals that the January 2014 IEP included appropriate support for the student's sensory needs and does not support the conclusion that the student required access to a sensory gym in order to receive educational benefit.

Based on all of the foregoing, including a review of the student's needs as described in the January 2014 IEP and the evaluative data available to the CSE, supports the conclusion that a 12-month school year program in a 6:1+1 special class placement in a specialized school with the related services set forth in the January 2014 IEP was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The IHO's findings to the contrary must therefore be reversed.

B. Implementation

1. Timeliness of Public School Site Assignment

The district contends that the IHO erred in finding that the district failed to provide the parents with timely notice of the assigned public school site to which the district assigned the student to attend for the 2014-15 school year. The IHO held that "[t]he [district] was required to provide the [s]tudent with a placement by no later than June 15, 2014" and therefore the notice was not timely (IHO Decision at p. 4). However, the IHO determined that the delay was de

minimus and did not constitute a deprivation of a FAPE (id.). A review of the evidence in the hearing record and pertinent legal authority requires a reversal of the IHO's underlying determination of untimeliness.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]).[10]

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location where the student's IEP will be implemented, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents of the physical location of the special education program and related services (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; Tarlowe, 2008 WL 2736027, at *6 [stating that a district's delay does not violate the IDEA so long as an public school site is found before the beginning of the school year]; Application of the Bd. of Educ., Appeal No. 96-014). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation—for example, by a school location letter which is the mechanism adopted by the district in this case—it nonetheless must be shared with the parent before the student's IEP may be implemented.

In this case, by school location letter, dated June 10, 2014 (and postmarked June 16, 2014), the district notified the parent of the particular public school site to which it assigned the student to attend for the 2014-15 school year (see Parent Ex. M at pp. 1-2; see also Parent Ex. N at p. 1). This allowed the parent approximately two weeks during which to schedule a visit and consider the public school option before the IEP was to be implemented on July 1, 2014 (see Dist. Ex. 1 at p. 1; see also Educ. Law § 2[15]). During this period, the parent was able to visit the school on June 24, 2014 (Parent Ex. R at p. 1). Although the parent may believe this was not a significant amount of time in which to consider the appropriateness of the assigned public school prior to the beginning of the 2014-15 school year, it is not a basis for finding a denial of a FAPE (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [finding that even if the notice of the assigned public school site was "untimely, it did not interfere with the provision of a FAPE or the [p]arents' opportunity to participate because . . . [p]arents have no right to visit a proposed school or classroom before the recommendation is finalized or prior to the school year."]).

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

In finding the notice untimely, it may be possible that the IHO was taking into account the terms of the consent decree reached in the Jose P. v. Ambach class action suit and, specifically, the date set therein by which a notice of an assigned public school site must be sent to parents (see 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The legal basis of the IHO's determination remains unclear. To the extent the IHO may have relied on the Jose P. consent order applicable to the Jose P. class, this would be an improper basis here. Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d 167; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]). Consequently, neither the IHO nor SRO have the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [Mar. 28, 2011], aff'd, R.E., 694 F.3d 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]; Levine v. Greece Cent. School Dist., 2009 WL 261470, *7-*9 [W.D.N.Y. Feb. 4, 2009]; see also E.Z-L., 763 F. Supp. 2d at 594; Dean v. Sch. Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]).

Regardless of whether Jose P. informed the IHO's determination, in this case, the evidence shows that the district satisfied its statutory and regulatory obligations to have an IEP in effect by the first day of the school year and, further, identified a school location at which to implement the student's IEP prior to such date of initiation of services. Additionally, while it is the parent's stance on appeal that the IHO correctly determined that the notice of the assigned public school site was not timely, he did not appeal the IHO's conclusion that any such delay was de minimus and, therefore, not a denial of a FAPE. Thus, for the reasons detailed above, the IHO's findings are reversed with regard to the timeliness of the school location letter.

2. Challenges to the Assigned Public School Site

In their due process complaint, the parent included numerous allegations about the adequacy of the assigned public school site and its ability to implement the January 2014 IEP. The IHO appropriately based her ruling not on the parent's allegations about the assigned public school site but, rather, on the sufficiency of the IEP itself. Despite this, as the parent continues to assert in his answer claims relating to the inadequacy of the assigned school, his claims are hereby addressed.

Generally, the sufficiency of the program offered by the district 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 E.H. v. New York City

Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). The Second Circuit has also clarified that when the parents have rejected an offered program and unilaterally placed the student prior to IEP implementation, the "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, the Second Circuit has held that when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3).[11] Therefore, if the student never attends the public school under the proposed IEP, there can be no denial of a FAPE due to a parent's suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at *3).

In view of the foregoing, the parent cannot prevail on his claims regarding the assigned public school site. It is undisputed that the parent rejected the assigned public school site and instead chose to enroll the student in a nonpublic school of his choosing prior to the time the district became obligated to implement the January 2014 IEP (see Parent Exs. N at p. 1; R at pp. 1-4; U at pp. 1, 4). Accordingly, as the student never attended the assigned public school site pursuant to the January 2014 IEP, any conclusion that the assigned public school site could not meet the student's needs would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3). Nonetheless, out of an abundance of caution, the parent's claims about the assigned public school site are hereby addressed.

The speculative nature of the parent's claims is best highlighted by the district unit coordinator's testimony addressing the parent's concerns about the assigned public school site, as set forth in his due process complaint notice (see Tr. pp. 228-34; Parent Ex. A at pp. 3-7). The

[11] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA confers no rights on parents with regard to school site selection]). The Second Circuit has also made clear that the 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., 584 F.3d at 419-20). The district is required to implement the IEP 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]).

unit coordinator disputed that the parent had ever been told that sensory supports and sensory equipment were not available at the assigned school (Tr. pp. 228-29). Regarding the parent's concerns about what sensory equipment was readily available in the classroom, the unit coordinator indicated that, if there were students with different sensory support needs in the classroom, those supports and the required equipment would be in place (Tr. pp. 232-33). She further outlined the training practices of the assigned school (Tr. pp. 233-34). Further, the parent admitted that he did not know what sensory supports (if any) were required for the students in the classroom he visited at the assigned public school site (Tr. pp. 330-31) and, when he challenged the availability of sensory brushes in one classroom, one was able to be immediately produced (Tr. p. 337). The parent also admitted that he had never been told that the assigned school would be unable to handle the student's sensory needs with the equipment available at the time of enrollment (Tr. p. 390). Regarding the specific incident described by the parent in the due process complaint notice, in which a student became dysregulated and was allegedly not provided sensory supports, the unit coordinator testified that the student in question had a BIP in place, specifically developed to meet that student's needs, and that the parent's observations were in accordance with that student's IEP (Tr. p. 239).

Regarding the parent's concerns about the in-class environment and activities, the unit coordinator indicated that the student would not have been expected to do independent work for twenty-five minutes (Tr. p. 240). She went on to describe the general structure of the class and how it would meet the requirements of the student's IEP (Tr. pp. 240-41). She described the general layout of the classrooms and stated that they are not cluttered or distracting and, if that were the case, then they would "revamp the classroom to . . . not be distracting for the students in a particular room" (Tr. p. 244).

Regarding the parent's concerns about the student's access to OT, sensory support, and other related services, the unit coordinator explained that availability of OT being on a "first come/first serve" basis actually meant that, when the district therapy providers were no longer available to work with additional students attending the assigned school, the district contracted with other agency therapists to come into the school to deliver services (Tr. p. 234).[12] The unit coordinator went on to describe the various locations throughout the school in which sensory support and therapy could be administered (Tr. pp. 236-37). She also flatly denied that any staff told the parent that the sensory input strategy in the student's January 2014 IEP would not be followed (Tr. p. 238). Lastly, the unit coordinator went into detail about the extent to which adult support would be available in the 6:1+1, and described the parent's concerns as not being "an accurate picture of what we do overall here at school" (Tr. pp. 242-43).

[12] A June 2, 2010, "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control ("Questions and Answers Related to Contracts for Instruction," Question 5, P-12 Education Mem. [Jun. 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Moreover, case law also supports a finding that it is permissible for districts to offer parents vouchers to obtain related services in response to a recognized shortage of service providers (see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]). Therefore, even if the assigned public school utilized off-site private contractors to provide related services, that would not by itself result in a denial of a FAPE.

Thus, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, deviation from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2014-15 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request for relief.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED

IT IS ORDERED that the IHO's decision, dated March 5, 2012, is modified by reversing those portions which found that the district denied the student a FAPE for the 2014-15 school year and which ordered the district to pay for the costs of the student's tuition at the Rebecca School for the 2014-15 school year.

Dated: **Albany, New York**
July 3, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER