The University of the State of New York

The State Education Department
State Review Officer
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No. 17-064

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:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Theresa Crotty, Esq.

New York Legal Assistance Group, attorneys for respondent, by Joel I. Mandelbaum, Esq.

DECISION

I. Introduction

This State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see H.L. v. New York City Dep't of Educ., 2016 WL 7429446 [S.D.N.Y. Dec. 22, 2016]). 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) previously appealed from the decision of an impartial hearing officer (IHO) which granted respondent's (the parent's) request to be reimbursed for his son's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

In a due process proceeding conducted pursuant to the IDEA, the decision of an 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[a]). The opposing party

is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5[a]). 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]).

III. Facts and Procedural History

As indicated above, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see H.L., 2016 WL 7429446 at *3). The factual and procedural background as it relates to the appeal is discussed below.

On April 13, 2011, a Committee on Special Education (CSE) convened to develop the student's individualized education program (IEP) for the 2011-12 school year (Parent Ex. C). Finding that the student remained eligible for special education and related services as a student with autism, the April 2011 CSE recommended 12-month services in a 6:1+1 special class in a specialized school with the following related services: two 40-minute sessions per week of individual counseling, four 40-minute sessions per week of individual occupational therapy (OT), one 40-minute session per week of OT in a small group, and five 40-minute sessions per week of individual speech-language therapy (id. at pp. 1, 15-17).[1] In addition, the April 2011 CSE recommended the services of a full-time, 1:1 paraprofessional (id.).

By final notice of recommendation (FNR) dated June 15, 2011, the district summarized the special education and related services recommended in the April 2011 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Parent Ex. D). The parent visited the address listed on the FNR on June 23, 2011 (Parent Ex. E at p. 1). On June 24, 2011, the student's father entered into an enrollment contract with the Rebecca School for the 2011-12 school year (Parent Ex. P at pp. 1,4).[2]

In a letter to the district dated June 28, 2011, the parent indicated that the address listed on the FNR was the address of a different school and that during his visit, the assistant principal explained that the recommended public school was "new and not yet ready" (id.). The parent further indicated that the assistant principal told him the school did not have adequate staff to satisfy the student's related services mandates and did not have staff trained in Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT) technique or in the use of the student's assistive technology device (id.). The parent also noted that he was told the school only used the Treatment and Education of Autistic and Communication related handicapped Children (TEACHH) methodology, which the parent contrasted with the student's education at the Rebecca School where all of the student's activities incorporated DIR methodology (id.). The parent

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

[2] 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).

notified the district of his intent to unilaterally place the student at the Rebecca School (id. at pp. 1-2).

By due process complaint notice dated September 20, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 1 at pp. 1-5). Pertinent to the issues presented on remand, the parent alleged that he was unable to visit the proposed school site, and that district representatives provided little information about the school site to which the student had been assigned (id. at p. 2). The parent asserted that he visited the address listed on the FNR, he was advised that the assigned school site was under construction, and he was told that the student's summer program would have been provided at the school location he visited (id.). The parent further alleged that the building size and number of students in attendance at the proposed school site would have overwhelmed the student causing him to become dysregulated (id.). According to the due process complaint notice, the district assistant principal, who spoke with the parent during his visit, did not know whether the proposed school site had a sensory gym, was unfamiliar with the class profile and functional abilities of the other students assigned to the proposed classroom, and indicated that TEACCH would have been the only methodology implemented at the proposed school site (id.). The parent further contended that the assistant principal stated that the proposed school site might not have enough service providers on staff to provide all the related services recommended in the student's April 2011 IEP (id.). The assistant principal advised the parent that related service authorizations (RSAs) would be provided in that circumstance (id.). The parent argued that the student required integration of speech-language therapy and OT and that his progress depended on continuous collaboration between related service providers and classroom staff (id. at pp. 2-3).

The parent further alleged that the assistant principal stated that the providers at the proposed school site were not trained in PROMPT therapy or in the use of the student's Dynavox Xpress augmentative communication device (Dynavox) (Dist. Ex. 1 at p. 3). The parent contended that he was given a tour by a district unit coordinator during the same visit (id.). At this time, the parent was shown a small room designated for physical therapy (PT) and OT, wherein the parent observed two separate therapy sessions occurring simultaneously in the shared space (id.). The parent noted the absence of any sensory equipment (id.). The parent observed that speech-language therapy was provided in the classroom, which would be distracting to the student and his distractibility would be further aggravated by the presence of multiple computers (id.). The parent determined that the requirements and goals set forth in the April 2011 IEP could not be met at the proposed school site (id.). The parent argued that the April 2011 IEP needs section "stipulate[d] that [the student] get 'PROMPT therapy for language/speech'" and that the IEP included goals and short-term objectives related to the student's use of the Dynavox (id.). The parent contended that the conditions at the assigned school would have dysregulated the student and the site lacked the tools to return him to a regulated state (id.). The parent also argued that additional sessions of speech-language therapy and OT recommended on the April 2011 IEP did not ameliorate the parent's concerns regarding the assigned school and would have decreased the student's participation in academic and social activities (id.). The parent further alleged that a full time 1:1 transitional paraprofessional would not be of benefit to the student without training and experience to assist the student with his communication and sensory needs (id.). Additionally, the parent argued that changing locations from the proposed summer program site to the proposed school site in September, would require the student to transition from schools and providers multiple times

during a three-month period (id. at p. 4). The parent further contended that the recommended 6:1+1 special class with the addition of a 1:1 paraprofessional was not as supportive and included less opportunity for 1:1 instruction than his current classroom at the Rebecca School (id.).

On December 13, 2012, the parties proceeded to an impartial hearing, which concluded on March 5, 2013 after six days of proceedings (see Tr. pp. 1-642).[3] In a decision dated April 11, 2013, the IHO determined that the "program set forth in the IEP was appropriate," but the district failed to offer the student a FAPE for the 2011-12 school year because the assigned public school site could not provide the student with the "related services mandated" in the April 2011 IEP (see IHO Decision at pp. 2-9).[4] The IHO also found that the Rebecca School was an appropriate unilateral placement and equitable considerations weighed in favor of the parent's requested relief (id. at pp. 9-11).

The district appealed arguing that the IHO erred by determining that the assigned public school site was unable to provide all of the student's recommended related services and by further finding that the district failed to offer the student a FAPE for the 2011-12 school year. In addition, the district alleged that the Rebecca School was not an appropriate unilateral placement, and the parent was not legally obligated to pay the tuition at the Rebecca School. In response, the parent asserted that the IHO properly found that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate unilateral placement, and that equitable considerations did not preclude relief.[5]

The undersigned reversed the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year (Application of the Dep't of Educ., Appeal No. 13-085). With respect to the parent's assigned public school challenges, I determined that each claim put forth by the parent was speculative, given that the parent had rejected the assigned public school prior to the time the district was obligated to implement the April 2011 IEP (id. at p. 7).

[3] On January 7, 2013, the IHO issued an order on pendency, which found that the Rebecca School constituted the student's pendency (stay-put) placement and ordered the district to pay the student's tuition at the Rebecca School from September 20, 2012—the date of the due process complaint notice—through the pendency of these proceedings (see Interim IHO Decision at pp. 2-3).

[4] In her decision, the IHO also stated that the parent did not challenge the type of classroom recommended by the CSE, but instead alleged that "the site offered would have been inappropriate and that the paraprofessional would have been unqualified without specific training" (IHO Decision at p. 6).

[5] In the underlying SRO decision, the parent did not appeal the IHO's determinations that the "program set forth" in the April 2011 IEP was appropriate, that whether the student's assistive communication device was unavailable for the 2011-12 school year was irrelevant to the issue of whether the parent was entitled to tuition reimbursement for that school year, and that there was no support for the proposition that the student's transition to the assigned public school site could not have been "supported appropriately" (see IHO Decision at pp. 5-7). Therefore, it was determined that the IHO's findings were final and binding on the parties and would not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Inasmuch as the District Court did not specify which of the parent's "unaddressed claims" required guidance, any unaddressed claims relevant to the assigned public school site will be addressed herein.

The parent sought judicial review of the SRO's decision in the United States District Court for the Southern District of New York (H.L., 2016 WL 7429446). The District Court remanded the case to the state administrative process for clarification of the prior SRO decision and to provide guidance on the parent's unaddressed claims in light of the Second Circuit's holding in M.O. v. New York City Department of Education, 793 F.3d 236, 244 (2d Cir. 2015) (H.L., 2016 WL 7429446 *3). Specifically, the court identified the Second Circuit's holding that "[w]hile it is speculative to conclude that a school with the capacity to implement a given student's IEP will simply fail to adhere to that plan's mandates, it is not speculative to find that an IEP cannot be implemented at a proposed school that lacks the services required by the IEP (id. at *2, quoting M.O., 793 F.3d at 244 [2d Cir. 2015]).

As part of the review process, the parties were directed, in a letter dated August 14, 2017, to notify the Office of State Review in writing of their respective positions regarding the adequacy of the hearing record to address the remanded issue and their respective positions on the remanded issue.[6] The district served and filed a supplemental submission presenting arguments related to the issue remanded by the Court.

IV. Arguments on Remand

In its submission, the district applies the Second Circuit's holding in M.O., 793 F.3d. at pp. 244-45, to the parent's claims set forth in the due process complaint notice and contends that the parent's assigned school claims should be dismissed. The district contends that many of the parent's challenges are not prospective challenges to the assigned public school site's capacity to provide the services set forth in the student's IEP; rather, they are substantive attacks on the April 2011 IEP that are "couched as challenges to the adequacy" of the assigned public school. Relative to claims that are prospective challenges to the capacity of the assigned public school to implement the student's April 2011 IEP, the district maintains that it has sustained its burden to demonstrate that the assigned school was capable of implementing the IEP as written.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New

[6] The parties represented that the hearing record is complete for the issue on remand and did not seek to submit any additional evidence.

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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[7]

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).

VI. Discussion

A. Assigned School Legal Standards

On remand, the District Court requested clarification of the prior SRO decision and guidance on the parent's unaddressed claims in light of the Second Circuit's decision in M.O., 793 F.3d 236.

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). In this matter, the IHO determined that the parent did not challenge the program recommended by the April 2011 CSE, and instead only challenged the appropriateness of the school the student would have attended (IHO Decision at p. 6). The parent has not challenged this finding at any level of this proceeding, and accordingly, in reviewing the parent's unaddressed claims, the focus of this decision is on the parent's claims related to the district's selected school location.

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

The Second Circuit has explained that "[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]).[8] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [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 does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

[8] 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, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; 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 does not confer rights on parents with regard to the selection of a school site]). 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]).

B. Assigned School Claims Unrelated to IEP Mandates

The district contends that the following claims regarding the assigned school site are challenges to the appropriateness of the substantive recommendations of the April 2011 IEP and do not relate to the assigned public school's capacity to implement the IEP: (1) the building size and number of students at the school would have overwhelmed the student, (2) the assigned school lacked a sensory gym, (3) the assigned school only used TEACCH methodology, (4) the school lacked space to deliver individual related services and the student would be distracted by related service providers sharing space or providing services in a classroom that contained computers, and (5) changing locations from the summer program to a different school in September would have required the student to transition from schools and providers multiple times during a three-month period. Although, these allegations relate to the assigned public school site, they are not linked to the April 2011 IEP, and accordingly are not challenges to the assigned school's capacity to implement the April 2011 IEP (see Parent Ex. C).[9] Therefore these claims are not permissible challenges to the assigned public school site under M.O. (see Y.F., 2016 WL 4470948, at *2).

C. Assigned School Claims Related to Capacity to Implement IEP

The parent also asserts claims concerning the district's alleged lack of capacity to implement certain provisions of the student's April 2011 IEP at the assigned school.[10] The parent alleges he was told the proposed school site might not have enough service providers on staff to provide all the related services recommended in the student's April 2011 IEP, and that RSAs would be provided in that circumstance. The parent argues that the student's progress depended on

[9] Although the parent alleges that the only methodology used at the proposed school site was TEACCH, the parent did not connect this challenge to the IEP. However, as courts appear to be split as to whether the adoption of certain language from Rebecca School progress reports is an implicit adoption of the methodology used by that school (see E.H. v. New York City Dept. of Educ., 611 Fed. Appx. 728, 732 [2d Cir. 2015]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *16 n. 8 [S.D.N.Y. Sept. 19, 2016]; T.C. v. New York City Dep't of Educ., 2016 WL 4449791, at *25 [S.D.N.Y. Aug. 24, 2016]; G.B. v. New York City Dep't of Educ., 145 F. Supp. 3d 230, 256 [S.D.N.Y. 2015]; F.B. v. New York City Dep't of Educ., 132 F. Supp. 3d 522, 550–51 [S.D.N.Y. 2015]), a brief review of the annual goals is provided. A review of the April 2011 IEP shows that while it indicated that the student benefitted from multisensory approaches for academics, it did not endorse any particular methodology (see Parent Ex. C at pp. 7-14). The phrases "circles of communication" and "circles of interaction" appear on the April 2011 IEP (id. at pp. 9-11, 13-14). As it relates to this student, the OT goal that included short-term objectives to sustain "circles of interaction" was intended to address the student's need to improve his ability to use sensory and emotional information to interact with his environment (id. at p. 9). The April 2011 IEP included short-term objectives using "circles of communication" in a speech-language therapy goal intended to address the student's need to improve his "engagement/pragmatic" language skills, and in a counseling goal intended to broaden the student's responsiveness (id. at pp. 10, 13). However, these goals do not require any specific methodology in order to be implemented as written and address needs set forth in IEP sections devoted to the student's social/emotional and health and physical present levels of performance (id. at pp. 5-6). Overall, while the term "circle of communication" is used specifically in DIR/Floortime, the use of the term in the April 2011 IEP relates to the concept behind the term—reciprocal or two-way communication—and the concept is not unique to the DIR/Floortime approach (see Application of the Dep't of Educ., Appeal No. 16-057; Application of the Dep't of Educ., Appeal No. 15-107).

[10] The parent's claims regarding the assigned school site were based on his June 23, 2011 visit to the address listed on the FNR (Parent Ex. D).

continuous collaboration between related service providers and classroom staff. The parent objects to the use of RSAs because it will limit collaboration between the student's providers and classroom teachers and aides. Additionally, the parent alleges that the full time 1:1 transitional paraprofessional required training and experience to assist the student with his communication and sensory needs. The parent also contends that he was told that staff members at the assigned school site were not trained in PROMPT therapy or trained to use the student's Dynavox. The parent argues that the student's April 2011 IEP included PROMPT therapy and included goals and short-term objectives related to the use of the Dynavox. Overall, the parent contends that the conditions at the assigned school site would cause the student to become dysregulated and that the assigned school site lacked the tools necessary to regulate him.

The hearing record indicates that the location the parent visited was not among the available sites for the start of the student's 2011-12 school year (July 2011), nor was it the proposed school site for the 2011-12 10-month academic school year (September 2011) (compare Parent Ex. D, with Tr. pp. 121-22, 128).[11]However, the parent testified that at the time of his visit he believed the school he visited would have been the school the student attended for the summer (Tr. pp. 587-88). Even attributing all of the parent's allegations to the school the student would have attended, the parent's allegations do not rise to the type of claims permitted by M.O., "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245).

The district assistant principal testified that the public school site to which the student was assigned physically became available for students to attend in September 2011 (Tr. p. 121). The assistant principal also testified that had the parent accepted the 2011-12 program and placement recommendations, he would have discussed the three middle school sites available for the summer program with the parent (Tr. pp. 121-22, 128, 172-73).[12] With regard to the class profile and functional abilities of the other students in the proposed classroom, the assistant principal testified that the student would have been placed in a 6:1+1 special class with age-appropriate peers and

[11] As discussed above, to the extent that the parent challenges the change in school location in September, there is nothing in the April 2011 IEP indicating that the student needed to be in the same school for the summer and 10-month school year (see Parent Ex. C).

[12] The United States Department of Education has explained that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]; see Letter to Veazy, 37 IDELR 10 [OSEP 2001] [stating that "the assignment of a particular school or classroom may be an administrative determination, provided that determination is consistent with the placement team's decision"]).

provided differentiated instruction at his level (Tr. pp. 127-28, 130-33, 174).[13] The assistant principal also testified that a seat was available for the student on the first day of school, July 5, 2011, and that the assigned school site "would be completely thorough in implementing all the requirements specified in the IEP" (Tr. pp. 124, 127-29).

Turning to the parent's allegations regarding the public school's ability to provide the related services recommended in the April 2011 IEP, the April 2011 IEP recommended counseling, OT, and speech-language therapy to be provided in a separate location (Parent Ex. C at p. 17). The parent testified that after reviewing the student's IEP, the assistant principal told the parent "I'm not going to be able to meet these mandates" because other students in the school also have to have their related services mandates met (Tr. pp. 587-88). In the due process complaint notice, the parent only alleged that the assistant principal told him he "might not have adequate staff [] to meet all of [the student's] related-service mandates" (compare Tr. p. 587, with Dist. Ex. 1 at p. 2). The assistant principal testified that in June 2011 when he reviewed the student's IEP, he told the parent that it may have been possible that contract therapists or RSAs might be required to fulfill the requirements of the IEP (Tr. p. 143). Based on the hearing record, the conversation between the parent and the assistant principal does not portray a situation where the school was "factually incapable" of implementing the IEP (see G.S., 2016 WL 5107039, at *15 ["a parent's 'own testimony that [school] officials made comments to her indicating an inability to effectively serve [the student] do not come close to proving that the school was 'factually incapable' of implementing the IEP, and [could] thus [be] properly excluded from consideration"], quoting J.D. v. N.Y.C. Dep't of Educ., 2015 WL 7288647, at *16 [S.D.N.Y. Nov. 17, 2015]).

The parent also acknowledged in his due process complaint notice that the student would have received RSA's if the student's related services mandates could not be met in school (Dist. Ex. 1 at p. 2). However, the parent objected to the use of RSAs and argued that RSA's were not appropriate for the student because the student required integration of speech-language therapy and OT and that his progress depended on continuous collaboration between related service

[13] State regulations require that for instructional purposes, students in special classes must be grouped with students having similar individual needs (8 NYCRR 200.1[uu], [ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 126). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students with respect to their "levels of academic or educational achievement and learning characteristics"; "levels of social development"; "levels of physical development"; and "the management needs of the students in the classroom" (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of individual students should be considered to ensure that each student has the opportunity to benefit, although neither may be the sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students grouped together may vary, the modifications, adaptations, and other resources needed by any student may not "consistently detract from the opportunities of other students in the group to benefit from instruction" (8 NYCRR 200.6[a][3][iv]; see 8 NYCRR 200.1[ww][3][ii] ["the instruction required to meet the individual needs of any one student in the group shall not consistently detract from the instruction provided other students in the group"]).

providers and classroom staff (id. at pp. 2-3).[14] The academic performance and learning characteristics section of the April 2011 IEP also included input from the student's teacher at the Rebecca School indicating that the student benefitted from "having [the] classroom teacher have direct contact with [the] speech therapist for consultation" (Parent Ex. C at pp. 3-4). When questioned about the parent's concerns regarding the use of RSAs and the need for continuous collaboration between providers and classroom staff, the assistant principal conceded that a potential drawback to the use of "outside" providers would be a lack of continuity between the therapist and teacher, but that "possible pitfall" is "easily addressed through ongoing communication" between providers and staff (Tr. pp. 144-45). The assistant principal further testified that consultation would occur through ongoing communication between related service providers and the "classroom team" (id.). Accordingly, in the event that the district did have to provide RSA's to the student in order to meet the student's related services mandates, the hearing record supports finding that the provision of RSA's to this student would not have denied the student a FAPE.

The parent also claimed that the student would be distracted by related service providers sharing space or providing services in a classroom that contained computers (Dist. Ex. 1 at p. 3). The April 2011 IEP did recommend that the student's related services be provided in a location separate from the student's classroom without further specification as to whether a specific type of environment was necessary to prevent the student from becoming distracted (Parent Ex. C at p. 16). Accordingly, the provision of related services in a shared room would not have been a material deviation from the program recommended in the IEP. In addition, the April 2011 IEP did not report that the student was distractible and indicated the student struggled with remaining engaged, but responded to redirection and individual attention (id. at p. 5). The April 2011 IEP also included academic management needs consisting of redirection, visual cues and verbal prompts, sensory tools and breaks, use of a Dynavox, and a visual schedule (id. at p. 3).

Turning to the parent's claim that the conditions at the assigned school site would cause the student to become dysregulated and that the assigned school site lacked the tools necessary to regulate him, the April 2011 IEP described the student's sensory needs and included strategies, annual goals, and short-term objectives to address them (Parent Ex. C at pp. 5-6, 9-10, 14, 17). Specifically, the April 2011 IEP described the student as presenting with an under responsive sensory system and requiring an increased amount of input to remain alert and organized (id. at p. 6). The April 2011 IEP indicated that the student sought sensory input throughout the day and became dysregulated during times when he was unable to control impulses, denied something he wanted, or unable to express himself (id. at pp. 5, 6). When dysregulated the student would cry or jump around (id. at p. 5).[15] The April 2011 IEP also indicated that the student struggled to remain

[14] The due process complaint notice contained an allegation that the student required related services in school "to further develop the student's socialization skills"; however, the IEP does not specify that related services needed to be provided in school (Dist. Ex. 1 at p. 3; see Parent Ex. C). Conversely, the due process complaint notice also contained an allegation that meeting the student's related services in school would have decreased the student's participation in social activities (Dist. Ex. 1 at p. 3). While it is permissible to plead in the alternative, it is not practical at this stage in the proceedings to address these two conflicting positions without further clarification.

[15] According to the parent, the student would also attempt to elope when dysregulated (Dist. Ex. 1 at p. 2).

engaged in novel situations, when poorly motivated, when lacking sufficient sensory support, or in an environment that was too loud or too fast (id.). The April 2011 IEP also included social/emotional management needs of adult support in the form of high affect redirection and individual attention, as well as acknowledgment of the student's feelings (id.). Additionally, the April 2011 IEP provided for movement breaks throughout the day and ample time for transitions (id.). The April 2011 IEP reflected that the student's behavior did not seriously interfere with his instruction and that his behavior could be addressed by a special education teacher (id.). The April 2011 IEP does not prescribe use of a sensory gym, however, the student is recommended to use a scooter board to improve motor planning, and sensory tools and breaks to address additional sensory needs (id. at pp. 3, 9). The parent testified that during his tour of the school he did not "see anything that related to meeting [the student's] sensory diets" or "the most basic of items that would be used for sensory" (Tr. p. 592).

The parent's due process complaint notice also included an allegation that the recommended 1:1 transitional paraprofessional would not have benefited the student without training and experience in the student's communication and sensory needs (Dist. Ex. 1 at p. 3). As noted above, the April 2011 CSE recommended a full time 1:1 transitional paraprofessional for the student to address his need for individualized support (Parent Ex. C at pp. 16-17). The district assistant principal testified that a paraprofessional would have been provided to the student and supported the student as indicated on the April 2011 IEP (Tr. pp. 135-37). The April 2011 IEP included two annual goals indicating the paraprofessional would "facilitate/support and encourage [the student] to communicate to others through his [Dynavox] and allow/provide for sensory input and movement breaks" (Parent Ex. C at p. 14). The description of the paraprofessional's role in meeting these goals is consistent with the services which paraprofessionals are permitted to provide pursuant to State regulations, including attending to the student's physical needs and performing such other services as support teaching duties (see 8 NYCRR 80-5.6 [b][2][3]).[16] The district assistant principal testified that paraprofessionals must fulfill specific educational requirements, receive training and on-the-job training; and many paraprofessionals have years of experience (Tr. pp. 137-38). Based on the above, the hearing record supports finding that the recommended paraprofessional did not require specific training that would not have been available at the assigned school.

The parent also alleged that he was told that staff members at the assigned school site were not trained in PROMPT therapy or trained to use the student's Dynavox; however, these arguments were not borne out in the hearing record. The district assistant principal testified that a speech therapist assigned to the student would have been responsible for implementing the student's speech-language therapy goals including the use of PROMPT techniques as set forth in the April 2011 IEP (Tr. p. 145). He further testified that if necessary, the speech-language provider would have learned PROMPT techniques in order to implement the annual goal (Tr. pp. 145-46). With regard to the Dynavox, the assistant principal testified that Dynavox was a common augmentative

[16] State regulations do not define the term "paraprofessional" as the term "paraprofessional" was replaced with the term "supplementary school personnel" (see "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/ policy/suppschpersonnel.pdf).

communication device used by many students and that all of the speech providers are trained to use it (Tr. p. 146).

Therefore, based upon the foregoing, the hearing record reflects that the district presented sufficient evidence to conclude that the assigned public school site could have implemented the student's IEP during the 2011-12 school year.

VII. Conclusion

Having reviewed each of the parent's challenges and determined that they are not permissible prospective challenges to the assigned public school site, I find the district offered the student a FAPE for the 2011-12 school year. Therefore, it is not necessary for me to consider the appropriateness of the parent's unilateral placement or to determine whether equitable factors favor an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 11, 2013, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2011-12 school year; and,

IT IS FURTHER ORDERED that the IHO's decision dated April 11, 2013, is modified by reversing that portion which directed the district to reimburse the parent for the costs of the student's tuition at the Rebecca School for the 2011-12 school year.

Dated: **Albany, New York**
September 6, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER