



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-202

**Application of the XXXXXXXXX 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, Ilana A. Eck, Esq., of counsel

Educational Advocacy Services, attorneys for respondents, Jennifer A. Tazzi, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to pay for the costs of the student's tuition at the Aaron Academy (Aaron) for the 2012-13 school year. The appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the

opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The CSE convened on March 22, 2012 to conduct an annual review and develop the student's IEP for the 2012-13 school year (Dist. Ex. 1). Finding the student eligible for special education programs and services as a student with autism, the March 2012 CSE recommended placement in a 15:1 special class in a community school five times per week for one period per day each, for English language arts (ELA), mathematics, social studies, and science (id. at pp. 1,

11, 16).<sup>1</sup> In addition, the CSE recommended related services for group speech-language therapy two times per week for 45 minutes in the special education classroom; individual occupational therapy (OT) one time per week for 45 minutes in the special education classroom and one individual OT session per week for 45 minutes in a separate location; individual counseling services one time per week for 45 minutes in a separate location, and group counseling services one time per week for 45 minutes in a separate location (*id.* at pp. 11-12).<sup>2</sup> The CSE also recommended additional modifications within the classroom to address the student's academic, social/emotional, physical development, and classroom management needs (*id.* at pp. 2-5, 13). Furthermore, the CSE developed a transition plan to address the student's transition service needs, in preparation for his transition to post-secondary activities (*id.* at pp. 6, 14).

On or about May 8, 2012, the parents executed an enrollment contract for the student's attendance at Aaron for the 2012-13 school year (Parent Ex. E).<sup>3</sup>

In a final notice of recommendation (FNR) dated August 10, 2012, the district summarized the special education programs and related services recommended by the March 2012 CSE and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 5).

By letter dated August 15, 2012, the parents notified the district that they could not observe the public school site identified in the FNR because it was not in session (Parent Ex. C at p. 1). According to the letter, the parents would "make every effort to observe the offered program in September 2012" (*id.*). In addition, the parents indicated their intention to seek tuition reimbursement for the student's unilateral placement at Aaron for the 2012-13 school year if the recommended public school site was not appropriate for the student (*id.*).

In a handwritten notation on the FNR dated November 6, 2012, the parents indicated that they had visited the assigned public school site on September 14, 2012 (Parent Ex. D at p. 1). Based upon their visit, the parents believed that the particular public school site was not appropriate for the student because it appeared to be crowded and "safety [wa]s a major issue" (*id.*). In addition, the parents indicated that a 15:1 special class was "too large" for the student and that, based on their observation of the assigned public school site, the student would not receive a sufficient amount of individualized attention to address his academic and behavioral needs (*id.*). As a result, the parents advised the district that the student would be attending Aaron and that they would seek funding from the district for the student's tuition for the 2012-13 school year (*id.*).

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

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<sup>1</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (*see* 34 CFR 200.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>2</sup> I note that the service delivery recommendations sections of the IEP do not indicate the sizes of the groups in which the student would receive his group speech-language therapy and counseling (Dist. Ex. 1 at pp. 11-12; *see Letter to Clarke*, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

<sup>3</sup> The Commissioner of Education has not approved Aaron as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

In a due process complaint notice dated November 26, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year and requested an impartial hearing (Parent Ex. A). Specifically, the parents alleged that the CSE, by recommending a 15:1 special class placement for the student, ignored the input of the student's then special education teacher and parents (id. at p. 2). The parents further alleged that they objected at the CSE meeting to the recommended "student to staff ratio" as "too large" for the student (id.). Additionally, with respect to the assigned public school site, the parents alleged that the size of the public school site would overwhelm the student (id.). More specifically, the parents alleged that the student would not receive the proper support to allow him to be educated appropriately in the assigned public school site (id.). As relief, the parents requested tuition reimbursement or direct funding for the costs of the student's tuition at Aaron for the 2012-13 school year (id.).

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

After a prehearing conference held on February 7, 2013, the parties proceeded to an impartial hearing on April 4, 2013, which concluded on July 31, 2013 after three days of proceedings (Tr. pp. 6-269; IHO Ex. I).<sup>4</sup> In a decision dated September 18, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Aaron was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 4-9).

Initially, the IHO found that the CSE's recommendation of a 15:1 special class placement was not appropriate (IHO Decision at p. 4). More specifically, the IHO found that the information available to the CSE at the time of the March 2012 CSE meeting did not provide a basis to support the CSE's recommendation of a 15:1 special class (id. at pp. 4-5). The IHO further found that the CSE's reliance on the student's staffing ratio at Aaron to support its 15:1 special recommendation was "misplaced," as the student's academic classes at Aaron generally had a smaller student-to-teacher ratio (id.). The IHO also found it "troubling" that the district recommended placing the student in general education classes without special education supports for all non-academic classes, holding that the student would have been "overwhelmed[,] would not receive any educational benefits," and would have regressed academically (id. at pp. 5-6). Additionally, the IHO found that being in a lunchroom with hundreds of other students would result in "sensory overload" that would make the student unable to benefit from instruction after lunch (id. at p. 6).

With respect to the unilateral placement of the student at Aaron, the IHO found that it was appropriate because the Aaron program provided the student with instruction that was specially designed and individualized to meet the student's needs (IHO Decision at p. 7). The IHO also found that the student received a significant amount of 1:1 individualized support at Aaron throughout the day and that the student was able to make progress (id. at pp. 7-8).

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<sup>4</sup> The hearing record indicates that a prehearing conference was held before a different IHO on January 14, 2013 (Tr. pp. 1-5). The IHO's decision indicates that the former IHO recused herself from hearing the case (IHO Decision at p. 2).

Turning to equitable considerations, the IHO determined that equitable considerations weighed in favor of the parents' request for relief because the hearing record indicated that the parents "fully cooperated" with the CSE in the development of the student's IEP (IHO Decision at p. 8). The IHO further found the district's argument regarding the alleged deficiencies in the notice of unilateral placement the parents provided to be without merit, as the parents informed the district of their concerns with the recommended program at the time of the March 2012 CSE meeting (*id.* at pp. 8-9). Consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Aaron for the 2012-13 school year (*id.* at p. 9).

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

The district appeals, and contends that the IHO erred in finding that the district denied the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of the parents' request for relief. Initially, the district asserts that the IHO erred in finding that the CSE's 15:1 special class placement recommendation was not appropriate for the student and that the information available to the CSE at the time of the student's March 2012 CSE meeting did not support the CSE's recommendation. The district contends that the 15:1 special class placement recommendation was appropriate for the student because it addressed the student's needs and allowed him to receive meaningful educational benefits in the least restrictive environment (LRE). The district states that the offered program was based on the student's needs and abilities, and was consistent with the recommendations made by a privately obtained January 2012 psychoeducational evaluation that was provided to the March 2012 CSE by the parents.

Next, the district asserts that the IHO erred in finding that placing the student in a large lunchroom with other students would result in "sensory overload" because there is no evidence in the hearing record that the student would be unable to benefit from instruction after being in the cafeteria with other students prior to class. With respect to the assigned public school site, the district contends that any allegations regarding the implementation of the IEP at the public school site are "purely speculative". Lastly, the district asserts that the IHO exceeded her jurisdiction in finding that a general education setting for the student's non-academic subjects was inappropriate, as such a claim was not raised in the parents' due process complaint notice. In any event, the district asserts that it was appropriate to provide the student with exposure to his nondisabled peers and notes supports in the IEP that would assist the student in social interactions.

As to the parents' unilateral placement of the student at Aaron, the district does not appeal the IHO's finding that the Aaron program was an appropriate placement for the student. However, the district asserts that even if the parents were entitled to relief, the IHO erred in concluding that equitable considerations favored the parents' request for relief as the parents did not provide sufficient notice to the district of their concerns with the student's IEP or their intent to unilaterally place the student at Aaron for the 2012-13 school year at public expense. The district further argues that the parents behaved "unreasonabl[y]" in refusing to consider public school placements and made it plain to the district that the only acceptable outcome was a publicly funded placement at a nonpublic school.

In an answer, the parents respond to the district's allegations and generally seek to uphold the IHO's decision in its entirety. The parents also assert additional arguments why the district denied the student a FAPE that were not raised in their due process complaint notice, including

that the district failed to conduct an FBA and develop a BIP for the student despite the fact that his behaviors significantly interfered with his learning.

## 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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting

Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof

regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Impartial Hearing and Review**

Before reaching the merits in this case, I must determine which claims are properly reviewed on appeal. First, the district alleges that the IHO exceeded the scope of her jurisdiction by sua sponte addressing and relying upon an issue that was not raised in the parents' due process complaint notice; specifically, in determining that the district inappropriately recommended a general education setting for non-academic subjects (IHO Decision at pp. 5-6; see Parent Ex. A at pp. 1-3). Second, a review of the entire hearing record also reveals that the parents raise for the first time on appeal the district's failure to conduct an FBA and develop a BIP for the student.

With respect to the issue raised sua sponte by the IHO and the contention now raised in the parents' answer, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial hearing and may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*5-\*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*5-\*6 & n.2 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or to inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, the parents' due process complaint notice cannot reasonably be read to allege that the district inappropriately recommended the student attend a general education placement for non-academic subjects or that the district failed to conduct an FBA and develop a BIP for the

student (see Parent Ex. A at pp. 1-3).<sup>5</sup> Moreover, a review of the hearing record shows that the parents did not request the district's agreement to expand the scope of the impartial hearing to include these issues or seek to amend their due process complaint notice to include these issues (see Tr. pp. 1-269; Dist. Exs. 1-2; 4-9; Parent Exs. A-N). To hold otherwise would inhibit the development of the hearing record for the IHO's consideration and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R., 2011 WL 6307563, at \*13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." (R.B., 2011 WL 4375694, at \*6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at \*13).

To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at \*6-\*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at \*5-\*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*9-\*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, at \*9; B.M., 2013 WL 1972144, at \*5-\*6), the district's recommendation of a general education placement for non-academic subjects was first raised by the IHO at the conclusion of the parents' cross examination of the district's witness (Tr. pp. 75-77). While the district continued to evoke testimony on redirect from the district's witness regarding this issue, the examination constituted a clarification of the testimony originally solicited by the IHO (Tr. pp. 83-84). Because the district did not initially elicit the testimony regarding this issue in an attempt to establish the appropriateness of the IEP, the district did not "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at \*10-\*11; c.f., Y.S. v. New York City Dep't of Educ., 2013 WL 5722793, at \*6 [S.D.N.Y. Sept. 24, 2013]; P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at \*14 [S.D.N.Y. July 22, 2013]).

Consequently, the IHO's determination that district inappropriately recommended a general education placement for non-academic subjects must be reversed. In addition, the contention in the parents' answer raised for the first time on appeal is outside the scope of permissible review and will not be considered (see M.P.G., 2010 WL 3398256, at \*8; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 12-177; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

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<sup>5</sup> Although the parents assert on appeal that their due process complaint notice did not distinguish between academic and non-academic classes, the due process complaint notice specifically references the 15:1 special class recommendation and does not assert any claims relating to a general education classroom placement (Parent Ex. A at p. 2).

## **B. 15:1 Special Class Placement**

The district asserts that the IHO erred in determining that the March 2012 CSE's recommendation of a 15:1 special class in a community school was not appropriate for the student. Upon review, and as more fully described below, the hearing record demonstrates that the 15:1 special class placement recommended by the CSE for the student's 2012-13 school year was appropriate.

Initially, a review of the hearing record demonstrates that, at the time of the March 2012 CSE meeting, the CSE had available to it several evaluative documents including a 2011 private psychoeducational evaluation, a 2012 psychoeducational evaluation obtained by the district, a 2011 classroom observation conducted by the school psychologist who also participated in the March 2012 CSE meeting as the district representative (the district representative), and Aaron teacher reports from the first and second terms of the 2011-12 school year (Tr. p. 29; Dist. Exs. 1 at pp. 18-19; 2 at p. 1; 6;-8; Parent Ex. M). In addition, the hearing record reveals that, in formulating the student's IEP, the CSE obtained and relied upon information about the student from the parents and the student's then-current teacher from Aaron (Tr. pp. 33; Dist. Exs. 1 at pp. 3-4; 2). Also, a review of the student's IEP and the March 2012 CSE meeting minutes reflects that the CSE participants discussed the student's academic, social/emotional, and physical present levels of performance, and identified management needs to support the student in the classroom (Dist. Exs. 1 at pp. 1-5; 2).<sup>6</sup> Furthermore, the hearing record supports a finding that, with the parents' participation, the March 2012 CSE developed post-secondary goals and a coordinated set of transition activities to facilitate the student's movement from school to post-school activities (Dist. Exs. 1 at pp. 6, 14; 2 at p. 2).

In addition, the hearing record reveals that, according to the district representative, the March 2012 CSE recommended a 15:1 special class placement in a community school for the student, in part because a such a class could provide the support the student needed socially and for his difficulties with transitions and unexpected changes (Tr. pp. 33-34; see also Dist. Ex. 1 at p. 3). Furthermore, the CSE discussed the parents' expectations for the student's future as a contributing member of society, whereby the parents wanted the student to attend college and work independently and competitively (Tr. p. 34). The district representative indicated that the CSE took the parents' expectations for the student's future into consideration in order to create a plan that would address the student's current and future needs (id.). The district representative further indicated that, in order to achieve this goal, the student's first years in high school in a community school became critical for the student to earn the necessary credits that would lead to a high school diploma (Tr. pp. 34-35). Academically, the district representative noted that the student displayed many academic skills in the average range, although he struggled with fluency tasks, speeded tasks, and timed tasks, and tended to work at a slower pace (Tr. p. 30). The district representative also noted that, despite the student's eligibility for special education as a student with autism, cognitively he functioned within the average range (Tr. pp. 29-30). In addition, the district representative indicated that, according to the Aaron teacher's perspective during the March 2012 CSE meeting, the student was academically "about a year behind where

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<sup>6</sup> The minutes of the March 2012 CSE meeting reflected the parents indicated no disagreement with the management needs or the annual goals developed by the March 2012 CSE for the student (Dist. Ex. 2 at p. 2).

he should be" (Tr. p. 30; see Dist. Ex. 2 at p. 1). In contrast, the district representative testified that socially, the student sometimes had difficulty relating to peers, forming friendships, and engaging in reciprocal interactions (Tr. p. 30).

Based on the above, taking into consideration the student's overall generally average cognitive and academic skills and his need for a special class environment, the hearing record supports the March 2012 CSE's recommendation of a 15:1 special class placement in a community school. State regulations provide that a 15:1 special class is designed for students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting (8 NYCRR 200.6[h][4]). State regulations contemplate an additional adult in the classroom for those students whose management needs interfere with the instructional process (8 NYCRR 200.6[h][4][i]). State regulations define management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). In addition, State and federal law "require that a disabled child be educated in the [LRE]—i.e., with nondisabled peers—to the extent feasible" (M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013], citing B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 672 [S.D.N.Y. 2012]).

The March 2012 CSE meeting minutes indicate that the CSE discussed providing support for the student's management needs in the classroom (Dist. Ex. 2 at p. 2). Most notably, the CSE meeting minutes indicate that the parents and the Aaron teacher agreed that the student did not need a behavior intervention plan (BIP) or the assignment of a 1:1 assistant but did need a structured classroom setting (id.). Additionally, in making its placement determination, the March 2012 CSE also considered deferral to the Central Based Support Team (CBST) for placement in a State-approved nonpublic school, as requested by the parents' advocate (Dist. Ex. 1 at pp. 17-18; see Tr. pp. 40-41). However, the March 2012 IEP indicated that the CSE rejected the option of a State-approved nonpublic school because it would be overly restrictive because it would not provide the student with access to nondisabled peers and the student could "follow a general education curriculum," if provided with supports (Dist. Ex. 1 at p. 18). The district representative testified regarding her knowledge of State-approved nonpublic schools and indicated that such programs for students with autism generally served students with greater cognitive impairments than the student's and many did not offer high school diplomas (Tr. p. 42). In consideration of the parents' desire for the student to go to college, she did not think a recommendation for a State-approved nonpublic school was the "right route" for the student (Tr. pp. 42-43). The district representative further testified that she "unequivocally" thought it would be appropriate for the student to have access to nondisabled peers (id. at p. 43). The district representative also testified that the student's functioning, as evidenced in the Aaron progress report considered by the CSE, and his cognitive abilities, which were "largely within the average range," suggested that the student had the ability to follow a general education curriculum with supports (Tr. pp. 45-46; see Dist. Ex. 6).

Moreover, to further support the student in conjunction with the 15:1 special class placement, the evidence in the hearing record reflects that the March 2012 CSE recommended pull-out individual and group counseling to address the student's social/emotional needs, push-in group speech-language therapy to support the student in moving through the curriculum and in his pragmatic communication abilities, and push-in and pull-out individual OT to support the student in his writing tasks and in increasing his speed in completing writing tasks (Tr. pp. 36-

39; Dist. Exs. 1 at pp. 11-12; 2 at p. 2). The CSE also recommended the following environmental modifications and strategies consistent with input from the Aaron teacher to address the student's management needs: redirection and repetition, clear and consistent classroom instruction, scaffolding within lessons, teacher generated graphic organizers, information chunked and modeled by the teacher and presented with step by step directions, positive reinforcement in the class to increase participation, positive behavioral support, 1:1 support to provide information when the student was upset or frustrated, color coded individual schedule, previewing the plan for each day in the morning, and consistency for each class period with an opening and ending routine (Dist. Exs. 1 at pp. 4-5; 2 at p. 2).

In conclusion, while it is understandable that the parents would have preferred a smaller school environment, based upon the evidence in the hearing record, the March 2012 CSE's recommendation of a 15:1 special class in a community school—together with related services and classroom management strategies and supports—addressed the student's needs and was reasonably calculated to enable him to receive educational benefits for the 2012-13 school year in the LRE.

### **C. Challenges to the Assigned Public School Site**

Turning next to the parents' allegations in this case regarding the appropriateness of the assigned public school site, the district asserts that the IHO erred in reaching the parents' contentions since any inquiry into the appropriateness of the public school site is "purely speculative."<sup>7</sup>

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*14-\*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at \*6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements

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<sup>7</sup> The IHO indicated in a footnote that the district did not present any testimony or evidence regarding the implementation of the student's IEP at the public school site (IHO Decision at p. 3 n.1). To the extent the IHO's footnote can be read as a finding that the district's decision not to present evidence regarding the implementation of the student's IEP, contributed, in part, to the overall determination that the district failed to offer the student a FAPE, the district asserts that no legal authority exists to support the IHO's conclusion. The legal authorities are described below.

were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at \*19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at \*11-\*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R., 910 F.Supp.2d at 677-78 [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[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., (Region 4), 2013 WL 2158587, at \*4 [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., 2013 WL 3814669, at \*6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at \*13; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R., 2013 WL 4834856, at \*5 [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K., 2013 WL 4436528, at \*9 [rejecting challenges to placement in a specific classroom]).

In view of the forgoing, the parents cannot prevail on the claims that the district would have failed to implement the March 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at \*6; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are

speculative insofar as the parents did not accept the March 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Ex. E). Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, as such, there is no basis for concluding that it failed to do so. Accordingly, the IHO's findings relating to the appropriateness of the public school site must be overturned and cannot be relied upon as a basis for finding that the district failed to offer the student a FAPE.

## **VII. Conclusion**

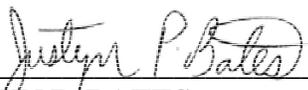
In summary, the IHO's conclusion that the district failed to offer the student a FAPE for the 2012-13 school year is not supported by the hearing record. It is therefore unnecessary to reach the issue of whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at \*12; D.D-S., 2011 WL 3919040, at \*13).

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

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated September 18, 2013, is modified, by reversing those portions which found that district failed to offer the student a FAPE for the 2012-13 school year and directed the district to reimburse the parents for the costs of the student's tuition at Aaron for the 2012-13 school year.

**Dated:** Albany, New York  
December 13, 2013

  
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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**