



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-059

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Jaclyn Okin Barney, Esq., attorney for petitioner

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner,
Brian J. Reimels, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for the costs of the student's tuition at the Vincent Smith School (Vincent Smith) for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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]).¹

III. Facts and Procedural History

I was appointed to conduct this review on November 5, 2014. The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.² Briefly, the CSE convened on March 20, 2013, to develop the student's IEP for the 2013-14 school year (see generally Parent Ex. I at pp. 1-14). The parent disagreed with the recommendations in the March 2013 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2013-14 school year; as a result, the parent notified the district of his intent to unilaterally place the student at Vincent Smith (see Parent Exs. Z at pp. 1-4; AA at pp. 1-2; see also Parent Exs. V at p. 1; W; Y; AA at pp. 1-7).³ In an amended due process complaint notice, dated October 11, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. U at pp. 1, 4-5). In particular, the parent alleged that the March 2013 CSE meeting was conducted "five months late;" the 12:1+1 special class placement was not "small enough" for the student; the March 2013 CSE ignored the recommendations in a privately obtained evaluation report for a "small class setting," "preferential seating," the use of a "multisensory curriculum throughout the school day," and the "assistance of a teacher to check on [the student's] understanding of an assignment" (*id.* at pp. 4-5).

On February 25, 2014, the parties proceeded to an impartial hearing, which concluded on February 27, 2014 after two days of proceedings (see Tr. pp. 1-289). In a decision dated March 25, 2014, the IHO determined that the district offered the student a FAPE for the 2013-14 school year and that Vincent Smith was an appropriate unilateral placement; however, the IHO—while noting "concerns" with respect to equitable considerations—declined to decide this issue in light of finding that the district offered the student a FAPE for the 2013-14 school year (see IHO Decision at pp. 8-11). The IHO denied the parent's request to be reimbursed for the costs of the student's tuition at Vincent Smith for the 2013-14 school year (*id.* at p. 11).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's petition for review and the district's answer thereto is also presumed and will not be recited here.

¹ The administrative procedures applicable to the review of disputes between parents and school districts regarding any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student are well established and described in broader detail in previous decisions issued by the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 12-228; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 12-087; Application of the Dep't of Educ., Appeal No. 09-092).

² Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolve the issues presented in this appeal.

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

The gravamen of the parties' dispute on appeal is whether the 12:1 special class placement— together with the management needs and accommodations—was appropriate to meet the student's needs and whether the assigned public school site could implement the student's March 2012 IEP.⁴ The parties additionally argue the merits of certain claims that the IHO did not address, including the parent's claims relating to the appropriateness of the assigned public school site and whether equitable considerations weighed in favor of the parent's requested relief.⁵

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services

⁴ To the extent that the parent also asserts the following issues in the petition for the first time on appeal as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2013-14 school year, such issues are beyond the scope of permissible review and will not be considered: how the student would have functioned in the 12:1 "classroom;" whether the March 2013 CSE impermissibly engaged in predetermination of the recommended 12:1 special class placement; whether the March 2013 CSE failed to provide the parent with an opportunity to meaningfully participate in the development of the IEP or otherwise document the parent's expressed concerns within the IEP, itself; whether the March 2012 IEP failed to state the student's functional performance or learning characteristics (present levels of performance); whether the assigned public school site was too large and too noisy; whether the assigned public school site offered 12:1 special class placements; and whether the departmentalized classes rendered the assigned public school site inappropriate (compare Pet. ¶¶ 38, 41-42, 45-51, 58-59, 68-72, with Parent Ex. U at pp. 4-5, and Parent Ex. Z at pp. 1-4, and Parent Ex. AA at pp. 1-7; see also B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *7-*8 [S.D.N.Y. Dec. 3, 2014]). Furthermore, 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 "open[s] the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-29 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 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 [S.D.N.Y. May 14, 2013]), the issues raised in the parent's petition for the first time on appeal were initially raised either by counsel on cross-examination of a district witness, through testimony of the parent's own witnesses, or during the closing statement by parent's counsel (see, e.g., Tr. pp. 83, 86-89, 100-01, 265-75). Thus, the district did not "open the door" to these issues under the holding of M.H.

⁵ At the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2012-13 school year, and the IHO granted the parent's request to be reimbursed for the costs of the student's tuition at Vincent Smith for the 2012-13 school year (see Tr. pp. 5-7; IHO Decision at pp. 2, 11). As neither party appeals the district's failure to offer the student a FAPE for the 2012-13 school year or the IHO's award of tuition reimbursement, these determinations are final and binding on both parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). In addition, although the parent does not continue to argue that the March 2013 CSE meeting was conducted "five months late," the IDEA requires a CSE to review, and if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). At the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194) and no indication in the hearing record that the timing of the CSE meeting in the instant case resulted in a loss of educational opportunity for the student (see Tr. pp. 1-289; Dist. Exs. 4; 6; 8; Parent Exs. A-Z; AA; IHO Ex. 1). A review of the evidence in the hearing record reveals that the district complied with these requirements for the 2013-14 school year at issue.

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than

mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning

discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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

Upon careful review, the evidence in the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2013-14 school year, and correctly denied the parent's request to be reimbursed for the costs of the student's tuition at Vincent Smith for the 2013-14 school year (see IHO Decision at pp. 8-11). The IHO accurately recounted the facts of the case, addressed the issues identified in the parent's amended due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2013-14 school year, and applied that standard to the facts at hand (id. at pp. 2-11). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must also consider independent educational

evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).

In this case, the evidence in the hearing record demonstrates that the March 2013 CSE—which consisted of a district school psychologist; a district special education teacher and audiologist (who also served as the district representative); a district social worker; the student's then-current classroom teacher, occupational therapist, and speech-language provider at Vincent Smith; the director of special education at Vincent Smith; the parent; and the parent's attorney—reviewed and considered the following evaluative information in the development of the student's March 2013 IEP: a September 2011 psychoeducational evaluation report (Parent Ex. B at pp. 1-2), a privately obtained April 2012 psychoeducational evaluation report (Parent Ex. L at pp. 1-10), a June 2012 audiological evaluation report (Parent Ex. M at pp. 1-3), a November 2012 occupational therapy student progress report (Dist. Ex. 6), a February 2013 psychoeducational evaluation report (Parent Ex. E at pp. 1-6), a February 2013 audiological evaluation report (Parent Ex. G at pp. 1-4), and a March 2013 speech-language annual review report (Parent Ex. K at pp. 1-3) (see Tr. pp. 19-22, 31, 34-35; Parent Exs. I at pp. 1-4, 14; V at pp. 1-2). Therefore, consistent with regulations, the March 2013 CSE considered the results of the student's recent evaluative information—in addition to input from the parent and the student's Vincent Smith teacher and related services' providers—and relied upon such information to accurately and adequately identify the student's needs and to develop the March 2013 IEP (compare Parent Ex. I at pp. 1-4, with Parent Ex. E at pp. 1-6).⁶ Contrary to the parent's assertions, while a CSE must consider privately obtained evaluative information, a CSE need not

⁶ The district school psychologist who attended the March 2013 CSE meeting testified that the CSE discussed a multisensory approach as a management need in the classroom for the student, however, it did not appear in the March 2013 IEP (see Tr. pp. 51-53, 62-63; Parent Ex. V at p. 2). Regardless, the evidence in the hearing record does not support a finding that the failure to include a multisensory approach as a management need in the March 2013 IEP resulted in a failure to offer the student a FAPE (see Tr. pp. 1-289; Dist. Exs. 4; 6; 8; Parent Exs. A-Z; AA; IHO Ex. 1).

adopt recommendations made within such reports or by such evaluators; relevant to the instant matter, therefore, the March 2013 CSE was not required to include any recommendations from privately obtained evaluations—including but not limited to "preferential seating," the use of a "multisensory curriculum throughout the school day," and the "assistance of a teacher to check on [the student's] understanding of an assignment"—in the March 2013 IEP (Parent Ex. U at pp. 4-5).⁷ In addition, the IHO properly found that the March 2013 IEP included several strategies to address the student's management needs, as well as accommodations, provided by the student's Vincent Smith teacher and providers, including: constant repetition and verbal models to fully comprehend the vocabulary, visual cues, redirection, breaking down tasks into small segments, positive reinforcement, extra time to complete class work, a small instructional setting with support services (related services), use of an "FM unit" to maximize her learning,⁸ and testing accommodations (extended time, directions read and reread aloud) (see IHO Decision at pp. 9-10; Tr. pp. 19-25, 34-35; Parent Exs. I at pp. 2-4, 8-10; V at pp. 1-2).⁹

Next, according to State regulation a 12:1 special class placement 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]). In reaching the decision to recommend a 12:1 special class placement, the March 2013 CSE considered and rejected integrated co-teaching services (ICT) because the student required a "smaller setting due to her significant academic delays in certain areas" (Tr. pp. 24-26). In addition, the March 2013 CSE considered and rejected a 12:1+1 special class placement at a community school (see Tr. p. 26). As noted in the March 2013 IEP, the March 2013 CSE ultimately recommended a 12:1 special class placement at a community school because the student's "academic and language needs c[ould] be best addressed in a small instructional setting . . . with supports" (Parent Ex. I at p. 13). The evidence in the hearing record indicates that the student demonstrated strengths in the areas of pragmatic and expressive language, decoding, spelling, listening comprehension, and sight-word vocabulary, and weaknesses in the areas of receptive language processing, comprehending, retaining information, grammar and sentence structure, written expression, and mathematics, and therefore, the student's special education needs consisted primarily of the need for specialized instruction—which, consistent with State regulation, could be accomplished in a 12:1 special class placement (see Parent Ex. I at pp. 1-4). Consequently, the evidence in the hearing record supports a finding that the 12:1 special class placement was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2013-14 school year.

⁷ While the evaluator who conducted the April 2012 psychoeducational evaluation of the student did not attend the March 2013 CSE meeting, the evaluation report included recommendations for a small class setting, preferential seating, and an FM unit to improve the student's ability to hear the teacher in the classroom (see Tr. pp. 169-74, 189-90; Parent Ex. L at pp. 6-7).

⁸ Although not specified in the hearing record, an FM unit is typically used in a classroom to amplify a teacher's voice (see generally Application of a Student with a Disability, Appeal No. 12-151).

⁹ State regulation defines 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]). A student's management needs shall be determined by factors related to the student's academic achievement, functional performance, and learning characteristics; social development; and physical development (8 NYCRR 200.1[ww][3][i][d]).

Finally, with respect to the parent's claims relating to the assigned public school site, which the IHO did not address in any detail and which the parties continue to argue on appeal, in this instance, similar to the reasons set forth in other decisions issued by the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of a Student with a Disability, Appeal No. 13-237; Application of the Dep't of Educ., Appeal No. 12-090), the parent's assertions are without merit. The parent's claims regarding the assigned public school site (see Parent Ex. U at pp. 4-5; see also Pet. ¶¶ 68-72), turn on how the March 2013 IEP would or would not have been implemented, and as it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. U at pp. 4-5; Y; Z at pp. 1-4; AA at pp. 1-7), the parent cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's finding that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Vincent Smith was an appropriate placement or whether equitable considerations weighed in favor of the parent's request for relief. I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
December 30, 2014

WENDY A. MERKLEN
STATE REVIEW OFFICER