



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-163

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

Appearances:

Weil, Gotshal & Manges, LLP, attorneys for petitioner, David J. Lender, Esq., Jared R. Friedmann, Esq., Amanda B. Vrecenak, Esq., & Marjan Hajibandeh, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, 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 her request to be reimbursed for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2013-14 school year. The appeal must be dismissed.

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

During the 2012-13 school year, the student attended Cooke (see Parent Ex. A at pp. 1-8; see also Tr. pp. 552-54).¹ On February 26, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 2 at pp. 1, 12-13,

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

16-17). Finding that the student remained eligible for special education and related services as a student with an other health impairment, the February 2013 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a specialized school, with the following related services: one 45-minute session per week of individual counseling, one 45-minute session per week of counseling in a group, two 45-minute sessions per week of individual occupational therapy (OT), one 45-minute session per week of physical therapy (PT) in a group, and two 45-minute sessions per week of speech-language therapy in a group (*id.* at pp. 12-13, 16-17).²

On May 15, 2013, the parent executed an enrollment contract with Cooke for the student's attendance during summer 2013, and on May 28, 2013, the parent executed an enrollment contract with Cooke for the student's attendance for the remainder of the 2013-14 school year (*see* Dist. Exs. 15 at pp. 1-2; 16 at pp. 1-2).

In a letter dated June 19, 2013, the parent informed the district that because she had not yet received a "recommendation for an appropriate placement" for the 2013-14 school year—which began on July 1, 2013—she intended to "re-enroll" the student at Cooke and to seek funding for the costs of the student's tuition (Parent Ex. C at p. 2 [emphasis in original]).³ The parent further indicated that the district's "failure to recommend a placement [left her] with no choice but to unilaterally place" the student at Cooke (*id.*). Accordingly, the parent notified the district of her intentions to unilaterally place the student at Cooke for the 2013-14 school year and to seek payment of the costs of the student's tuition from the district for the 2013-14 school year (*id.*).

In a final notice of recommendation (FNR) dated June 25, 2013, the district summarized the special education and related services recommended in the February 2013 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (*see* Parent Ex. D at p. 1).

On July 1, 2013, the student began attending Cooke for the 2013-14 school year (Tr. p. 561).

A. Due Process Complaint Notice

By due process complaint notice dated November 5, 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. E at pp. 1-3). The parent asserted that upon receipt of the FNR on June 27, 2013, she immediately contacted the assigned public school site, which could not "accommodate a visit until July 10, 2013" after the start of the 2013-14 school year (*id.* at p.

² The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

³ The parent sent the June 19, 2013 letter to the district via facsimile; the facsimile cover page included the following handwritten notation: "Committee of Special Education 10 days letter" (Parent Ex. C at p. 1 [emphasis in original]).

2).^{4,5} Consequently, the parent alleged that she had "no choice but to proceed with re-enrolling [the student] at Cooke" for the 2013-14 school year (id.).

Based upon the visit to the assigned public school site, the parent asserted it was not appropriate for the student for the following reasons: it did not have a "whole school travel training program;" the assigned public school site did not have a specified curriculum, and the student required "differentiated, targeted instruction in order to make progress;" the assigned public school site did not employ a physical therapist and the February 2013 IEP included a recommendation for PT services; the assigned public school site was "located in a large building," which would be "detrimental" to the student's "learning and development;" the assigned public school site did not offer internship opportunities "until a student's junior and senior year;" and the assigned public school site was "too restrictive" because students remained with the "same group cohort and teacher for most academic periods" and the student could function in a departmentalized program, students only went out "into the community on occasion," and a teacher or a paraprofessional accompanied "all" students in the "hallways to switch classes or to go to the restroom" (Parent Ex. E at pp. 2-3).

Finally, the parent asserted that Cooke was an appropriate unilateral placement for the student for the 2013-14 school year and equitable considerations weighed in favor of the requested relief (see Parent Ex. E at p. 3).

B. Impartial Hearing Officer Decision

On January 22, 2014, the parties proceeded to an impartial hearing, which concluded on July 17, 2014, after six days of proceedings (see Tr. pp. 1-1193). In a decision dated September 17, 2014, the IHO found that the district offered the student a FAPE, and thus, the IHO denied the parent's request for payment of the costs of the student's tuition at Cooke for the 2013-14 school year (see IHO Decision at pp. 8-10). The IHO concluded that the February 2013 CSE was properly composed, and developed an "IEP with understandable annual goals and management needs," cautioning, however, that the annual goals "could have been better written" (id. at p. 10). In addition, the IHO indicated that the "[p]arent agree[d] with the IEP" and "voiced no complaint concerning the IEP and its proscriptions" (id.). Noting that the "inquiry" did not "end here," the IHO turned next to the "controversy concern[ing] the placement" (id.). The IHO found the "placement sufficient to meet the proscriptions of the IEP," and indicated that the parent did not understand the assigned public school site's "capacity to execute the requirements of the IEP" and that the parent also "miss-perceived the facility and services available during the observational tour" (id.). As a result, the IHO concluded that the district offered the student a FAPE and dismissed the parent's due process complaint notice (id.).

⁴ As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]).

⁵ At the impartial hearing, the individual from Cooke who accompanied the parent to visit the assigned public school site testified that the visit lasted approximately 1.5 hours (see Tr. p. 753).

IV. Appeal for State-Level Review

The parent appeals, and argues that the IHO made "errors of fact and law" in finding that the district sustained its burden to establish that it offered the student a FAPE for the 2013-14 school year. More particularly, the parent asserts that the district's failure to "provide a sufficient tour of the recommended placement"—as a procedural violation—impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student. In addition, the parent argues that if an SRO "nonetheless wish[ed] to assess the substantive adequacy of the recommended placement, the record must be examined to determine" whether the district sustained its burden to establish that the "proposed educational program was 'reasonably calculated to enable the [student] to receive educational benefits.'" Next, the parent asserts that she had a right, pursuant to State law, to "evaluate" the assigned public school site to determine whether it could implement the February 2013 IEP, and therefore, the untimely receipt of the FNR—coupled with the "woefully inadequate tour"—impeded her ability to evaluate the "recommended program." Moreover, the parent argues that the district failed to present sufficient evidence to demonstrate that the assigned public school site could implement the February 2013 IEP. Finally, the parent contends that Cooke constituted an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the requested relief in this instance.

In an answer, the district responds to the parent's allegations, and argues to uphold the IHO's determination that it offered the student a FAPE for the 2013-14 school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA

(M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals

designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. A review of the hearing record reveals that the IHO exceeded his jurisdiction by sua sponte addressing and deciding issues in the decision regarding whether the February 2013 CSE was properly composed and whether the February 2013 CSE developed an "IEP with understandable annual goals and management needs" because the parent did not raise these as issues in dispute in the due process complaint notice (compare IHO Decision at pp. 5, 10, with Parent Ex. E at pp. 1-4).⁶

With respect to the issues raised and decided sua sponte by the IHO in the decision, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151;

⁶ Although the IHO listed the issues to be resolved at the impartial hearing in the decision, it is unclear where the IHO obtained the listed issues as the IHO did not cite to the hearing record (see IHO Decision at p. 5).

Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08- 056). However, a party requesting an impartial hearing 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][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [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 *6 [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]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 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., 746 F.3d 68, 77-78 [2d Cir. 2014]; 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; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]). 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 even 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 those issues (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]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issues raised and decided sua sponte by the IHO regarding whether the February 2013 CSE was properly composed and whether the February 2013 CSE developed an "IEP with understandable annual goals and management needs" (see Parent Ex. E at pp. 1-4). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-193; Dist. Exs. 1-21; Parent Exs. A-T; IHO Exs. 1-2).⁷

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues, or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. 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 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611

⁷ Notably, the evidence in the hearing record repeatedly indicated that the parent did not challenge any aspects of the February 2013 IEP (see Tr. pp. 45-46, 244-57, 607-09, 702-04; Parent Ex. E at pp. 1-4).

[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 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded his jurisdiction by addressing in the decision whether the February 2013 CSE was properly composed and whether the February 2013 CSE developed an "IEP with understandable annual goals and management needs," and these particular findings must be annulled (see N.K., 961 F. Supp. 2d at 584-86; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at *7 [D. Maryland Sept. 29, 2009]).^{8,9}

B. Challenges to the Assigned Public School Site

Next, to the extent that the parent continues to argue that she had a right to "evaluate" the assigned public school site to determine whether it could implement the February 2013 IEP, and therefore, the untimely receipt of the FNR and the inadequate tour impeded her ability to evaluate the "recommended program," neither the IDEA nor State regulations confer a right upon parents to visit a school or classroom even if—as in this case—the district offered the parent the opportunity to visit the assigned public school site. Rather, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 12-047; Application of

⁸ The February 2013 CSE recommended a 12:1+1 special class placement for the 2013-14 school year, and in the decision, the IHO mistakenly referred to the recommended placement as a "15:1" class (compare Dist. Ex. 2 at pp. 12-13, with IHO Decision at pp. 5-6, 10). To the extent that the IHO also concluded that the "15:1 class"—or that the recommended placement—was appropriate to meet the student's needs, the parent did not raise any issues with respect to the recommended 12:1+1 special class placement in the due process complaint notice; thus, similar to the rationale expressed herein, the IHO exceeded his jurisdiction in reaching a decision on this issue and this finding must also be annulled (compare compare IHO Decision at pp. 5, 10, with Parent Ex. E at pp. 1-4).

⁹ 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., 685 F.3d 217, at 250-51; 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., 961 F. Supp. 2d at 584-86; 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., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *5-*6), a review of the evidence in the hearing record revealed that the district did not initially elicit testimonial evidence on the issues raised and addressed sua sponte by the IHO in the decision (see, e.g., Tr. pp. 110-45, 1134-80), and thus, the district did not "open the door" to these issues under the holding of M.H.

a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013). To meet its legal obligations under the IDEA and federal regulations, a school district must have an IEP "in effect, for each child with a disability in [its] jurisdiction" at the beginning of the school year and must provide the parents with a copy of the student's IEP "at no cost" (20 U.S.C. § 1414[d][2][A]; see 34 CFR 300.322[f]; 300.223[a]; Cerra, 427 F.3d at 194 [finding that the school district "fulfilled its legal obligations by providing the IEP before the first day of school"]; Tarlowe, 2008 WL 2736027, at *6 [stating that a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]; see also C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 225-27 [S.D.N.Y. 2014] [noting that "it naturally follows from the regulations" that a district must provide a copy of the student's IEP to the parents at the beginning of the school year]; N.K., 961 F. Supp. 2d at 586 [finding that the failure to provide the parents with a copy of the IEP prior to the start of the school year did not impede the parents' opportunity to participate in the decision-making process] [internal citations omitted]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).¹⁰

Moreover, to the extent that the parent continues to argue that the district failed to present sufficient evidence to demonstrate that the assigned public school site could implement the February 2013 IEP, 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., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8 2014]; see also K.L., 530 Fed. App'x 81, 87; 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 were even made"]).

¹⁰ Furthermore, the Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. Aug. 19, 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). Moreover, the R.E. Court found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and that "[t]he [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (R.E., 694 F.3d at 191-92; see S.M., 2013 WL 773098, at *5; J.L. v. City Sch. Dist. of City of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *12 [S.D.N.Y. Oct. 16, 2012]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. Nov. 18, 2011]; S.F., 2011 WL 5419847, at *12, *14; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9 [S.D.N.Y. Oct. 28, 2011]; A.L., 812 F. Supp. 2d at 504).

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., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). 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]).¹¹ When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the February 2013 IEP because a retrospective analysis of how the district would have implemented the student's February 2013 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to

¹¹ While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). 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]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

implement the February 2013 IEP (see Dist. Exs. 15-16; Parent Ex. C at pp. 1-2). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on claims that the assigned public school site would not have properly implemented the February 2013 IEP.¹²

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

¹² While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir. Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end and it is not necessary to reach the issues of whether the parent's unilateral placement of the student at Cooke was an appropriate placement or whether equitable considerations supported the parent's request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 29, 2015**

**CAROL H. HAUGE
STATE REVIEW OFFICER**