The University of the State of New York

The State Education Department
State Review Officer
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No. 12-217

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 New York City Department of Education

Appearances:
Partnership for Children's Rights, attorneys for petitioner, Carolyn Ziegler, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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 her son's tuition costs at the Cooke Center Academy (Cooke) for the 2011-12 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

At the time of the impartial hearing in this matter, the student was unilaterally placed by his parents at Cooke for the 2011-12 school year (Dist. Ex. 1 at p. 1).[1] The results of formal testing administered in May 2010 revealed that the student demonstrated general intellectual functioning in the mentally deficient range with particular difficulty with working memory (Dist. Ex. 7 at pp. 2-3). The hearing record reflects the student had deficits in attention, language processing, academic learning, and "more than likely" had nonverbal learning disabilities (Tr. p. 740). The

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

hearing record also reflects that despite his difficulties, the student displayed a willingness to work hard (Tr. p. 744; Dist. Ex. 8 at p. 3). In addition, the student responded well to praise and encouragement and had good personal and interaction skills (id.).

The CSE found the student eligible for special education services as a student with a speech or language impairment when he was in kindergarten (Dist. Ex. 8 at p. 2). Between kindergarten and third grade, the student attended public school in 12:1 special classes, but he was placed in a general education class with no related services for his fourth grade school year (Tr. p. 701; Dist. Ex. 8 at p. 2). When the student was in fourth grade, he received a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) (Dist. Ex. 8 at p. 2). The student was initially accepted to Cooke for fifth grade, where he remained enrolled through ninth grade at district expense (Tr. pp. 715-16, 732; Dist. Exs. 1 at pp. 1-2; 8 at p. 3; see Parent Ex. C).

As relevant to the instant matter, the CSE convened on March 10, 2011 for the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 3 at pp. 1-2). Finding the student eligible for special education as a student with a speech or language impairment, the March 2011 CSE recommended the student attend a 12-month 12:1+1 special class in a specialized school (id.).[2] The March 2011 CSE recommended weekly related services of two individual sessions of speech-language therapy, two group sessions (3:1) of occupational therapy (OT), and one individual session and one group session (4:1) of counseling (id. at pp. 2, 13). The March 2011 CSE recommended multiple academic and social/emotional management strategies (id. at pp. 3, 5). The March 2011 IEP indicated that because of the student's "significant cognitive delays," the CSE recommended that the student participate in the New York State alternate assessment (id. at p. 13). The CSE also developed a coordinated set of transition activities to facilitate the student's movement from school to post-school activities (id. at p. 14).

By final notice of recommendation (FNR) dated June 15, 2011, the district summarized the special education services recommended by the March 2011 CSE, and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 6 at p. 1). By letter dated August 22, 2011, the parent alerted the district that despite her attempts to schedule an appointment to visit the assigned public school site, she was unable to make an appointment (Parent Ex. Q). The letter indicated the parent's intention to enroll the student at Cooke for the 2011-12 school year and to seek public funding for the costs of the student's tuition and ancillary fees at Cooke for that school year (id.).[3] On September 16, 2011, the parent executed an enrollment contract for the student's attendance at Cooke for the 2011-12 school year (Parent Ex. H; see IHO Dec. at p. 13). In a letter dated November 16, 2011, the parent advised the district that she visited the assigned public school site on November 4, 2011 and found it to be inappropriate for the student (Parent Ex. R). Accordingly, the letter advised the district that the parent would continue the student's enrollment at Cooke and seek funding for the costs of his tuition and fees from the district for the 2011-12 academic year (id. at p. 2).

[2] The student's eligibility for special education programs and related services as a student with speech or language impairment is not in dispute in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] For July and August 2011, the student did not attend the summer program identified in the March 2011 IEP, but instead, attended a summer camp selected by the parent (Tr. p. 704).

A. Due Process Complaint Notice

In a due process complaint notice dated January 19, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 1). Initially, the parent asserted that the IEP failed to adequately describe the student's cognitive abilities (id. at p. 2). The parent alleged that the recommended placement in a 12:1+1 special class was too large for the student and would provide insufficient support to address the student's needs related to attention and social skills (id. at p. 3). The parent further alleged that the assigned public school site was inappropriate for the student because it offered a vocational program and would not provide sufficient instruction with regard to academic and living skills (id.). Additionally, the parent alleged that the assigned public school site would not provide speech-language therapy, OT, or transition services as set forth on the student's IEP (id.). The parent also alleged that the student body and the environment at the assigned public school site posed potential safety risks for the student (id.). Lastly, the parent alleged that during her visit to the assigned public school site she was not told which class the student would be assigned to and was therefore unable to determine whether the specialized instruction mandated on the student's IEP would be provided or whether there would be an appropriate functional grouping for the student in the class (id. at p. 4).

With regard to the student's enrollment at Cooke, the parent stated that Cooke was an appropriate placement for the student (Dist. Ex. 1 at p. 4). The parent also asserted that equitable considerations favored the parent and, as relief, the parent requested direct funding for the cost of the student's unilateral placement at Cooke from September 2011 through June 2012 and provision of roundtrip transportation (id.).

B. Impartial Hearing Officer Decision

On April 27, 2012, the parties proceeded to an impartial hearing, which concluded on June 12, 2012, after five days of proceedings (see Tr. pp. 1-806).[4] In an interim decision dated October 10, 2012, the IHO determined that, upon the agreement of the parties, the student's pendency (stay put) placement was the educational placement set forth in a prior IHO decision dated August 1, 2006, which directed that the district pay the costs of the student's tuition at Cooke (IHO Interim Decision; see Parent Ex. C). In a decision dated October 11, 2012, the IHO found that the parent lacked standing to seek tuition reimbursement; however, the IHO went on to find that that the district offered the student a FAPE for the 2011-12 school year in any event and denied the parent's request for prospective payment of the student's tuition (see IHO Decision at pp. 16-19). Specifically, the IHO found that the March 2011 CSE was properly composed and that the student's IEP accurately described the student's needs and abilities (id. at pp. 17-18). The IHO also found that the IEP offered virtually the same program as that provided at Cooke, that observation of the student in his 12:1 class at Cooke showed that he was doing well in that setting, and the CSE's recommended program, by extending the school year and providing a paraprofessional in the classroom, would have provided the student with sufficient 1:1 instruction (id. at pp. 18-19). The IHO also found that the student's IEP could have been implemented at the assigned public school

[4] The certification of the hearing record submitted to the district by the IHO indicates that a proceeding was held on March 15, 2012; however, the hearing record contains no other mention of what transpired on this hearing date.

site (id. at p. 18). Accordingly, the IHO denied the parent's request for public funding of the costs of the student's tuition (id. at p. 19).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent argues that the IHO erred in finding that she lacked standing to seek tuition funding from the district for the student's attendance at Cooke during the 2011-12 school year. Regarding the IHO's alternative finding that the district offered the student a FAPE, the parent contends that the recommended 12:1+1 placement would not have provided enough support due to the student's significant language and attentional needs and his need for 1:1 support and modeling. The parent asserts that the IHO erred in finding that the recommended placement in a 12:1+1 special class setting could provide sufficient 1:1 instruction. The parent contends that the IHO erred in ignoring her argument that the March 2011 IEP called for a primarily academic program but that the assigned public school site was a vocational school with minimal available academic instruction. Next, the parent asserts that the district failed to show that it could implement the student's IEP at the assigned public school site. Lastly, the parent asserts that Cooke was an appropriate placement for the student during the 2011-12 school year, that equitable considerations favor the parent, and the parent requests direct payment for the portion of the student's tuition at Cooke that was not already paid pursuant to pendency.

In an answer, the district responds to the parent's allegations with admissions and denials, and argues to uphold the IHO's determination that it offered the student a FAPE during the 2011-12 school year. The district contends that it correctly identified the student's needs, that the recommended 12:1+1 program with related services met those needs, provided sufficient 1:1 support for the student and offered the student a FAPE. Next, the district contends that although the parent's implementation claims are speculative, the student's IEP could have been implemented at the assigned public school site.

The district next contends that the parent failed to show that Cooke was an appropriate unilateral placement for the student because the student needs a 12-month program, which the student did not receive during the 2011-12 school year, and that there is no evidence in the hearing record demonstrating that Cooke's program was individualized for student, rather, the same services were provided to all students at the school. Regarding equitable considerations, the district asserts that the parent did not act in good faith and did not truly consider placing the student in a public school. Finally, the district contends that although the parent may have standing to seek tuition relief because of an alleged denial of FAPE, prospective funding should be denied because the parent was not obligated to pay tuition at Cooke and failed to show an inability to pay.

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).

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]).

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. Preliminary Matter—Standing

I first turn to standing as a preliminary matter. For the reasons stated in prior State Review Officer decisions, and because there is no dispute that petitioner is the parent of the student within the meaning of the IDEA (Tr. p. 699; see 20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 8 NYCRR 200.1[ii]), I find that the IHO incorrectly found that the parents lacked standing to seek public funding of the costs of the student's tuition at Cooke for the 2011-12 school year (Application of a Student with a Disability, Appeal No. 12-230; Application of a Student with a Disability, Appeal No. 12-166; see Application of a Student with a Disability, Appeal No. 13-066; Application of a Student with a Disability, Appeal No. 12-202). Furthermore, the Second Circuit recently addressed the issue of standing in the IDEA context and found that both contractual obligations to pay the cost of tuition, as well as an implied promise to use best efforts to recoup the cost of tuition, were sufficient to support parental standing (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 449-61 [2d Cir. 2014]). In this case, the parent executed a contract which obligated her to

pay the costs of the student's tuition at Cooke but permitted payment "to be delayed beyond the due date in the event that [she] . . . pursue[d her] due process rights to seek direct or 'prospective' tuition funding from the [district] under applicable law" (Parent Ex. H at p. 2). The contract further specified that the parent would "take all necessary steps to secure such funding as promptly as possible and to cooperate fully in the process required to secure such funding" and provided that, in the event she did not cooperate fully, Cooke was entitled to terminate the student's enrollment (id.). In the event that the parent was unsuccessful in obtaining public funding, she agreed "to pay the tuition due under this contract within sixty (60) days" of the final administrative or judicial decision denying her request (id.). Accordingly, the parent satisfies both avenues to standing set forth by the Second Circuit in E.M. (758 F.3d at 456-61).

B. March 2011 IEP—12:1+1 Special Class Placement with Related Services

The only basis on which the parent now challenges the adequacy of the March 2011 IEP is that a 12:1+1 special class placement would not provide the student with sufficient support to address the student's need for individual attention, refocusing, and redirection. The parent asserts that the IHO erred in finding that a 12:1+1 special class was appropriate for the student.[5] The IHO concluded that the district offered the student a program for 2011-12 that was similar to, but provided more than the program at Cooke (IHO Decision at p. 18). Upon review, and as more fully described below, I find that the March 2011 IEP accurately reflected the student's needs, and that the March 2011 CSE developed an appropriate placement with related services for the student for the 2011-12 school year based on the student's needs in the areas of mathematics, English-language arts (ELA), counseling, OT, speech-language, transition, attention, and social interaction (Dist. Ex. 3).

As noted above, the CSE convened on March 10, 2011, to conduct the student's annual review and to develop his IEP for the 2011-2012 school year (Dist. Ex. 3 at pp. 1-2). To address the student's language, attention, academic, social/emotional, and fine motor needs, the CSE recommended that the student receive a 12-month placement in a 12:1+1 special class in a specialized school with related services of speech-language therapy, OT, and counseling (id. at pp. 1-2, 11-13).

In developing its placement recommendation, the March 2011 CSE considered recent documents including a May 2010 psychoeducational evaluation report, a May 2010 social history report, a November 2010 classroom observation report, and a December 2010 progress report from Cooke, as well as input from the parent and the student's Cooke providers (Tr. pp. 158-59; Dist. Exs. 7-10). On November 16, 2010, a district school psychologist conducted a classroom observation of the student during a science lesson at Cooke (Dist. Ex. 10). The observation report indicated that the student followed classroom procedures, but required frequent reminders from the teacher to sit up (id.). The observation report also reflected that the student engaged in the lesson by asking and answering questions with teacher support, and by demonstrating understanding of the concepts being taught (id.). The observation report indicated that although the student often had his head down during the observation, he was an active participant (id.).

[5] On appeal, the bulk of the parent's arguments are cast as challenges to the ability of the assigned public school site to implement the student's IEP. As discussed in greater detail below, 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).

Despite responses that were not always on target, the student seemed interested in the class material and for the most part appeared focused on the task (id.). The observation report further indicated that the student related well to peers and the teacher, and that the observation reflected a typical day for the student (id.).

Before making a placement recommendation in the IEP, the CSE also considered the May 2010 psychoeducational evaluation report (Tr. pp. 158-59). On May 9, 2010, a district school psychologist conducted a psychoeducational evaluation (Dist. Ex. 7 at p. 1). Behaviorally, the psychologist noted that the student was polite and cooperative during testing (id.). The psychoeducational evaluation report indicated the student spoke in a soft voice, mumbled, and was difficult to understand (id.). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded standard scores (range) of 73 (Borderline range) in verbal comprehension, 57 (Mentally Deficient range) in perceptual reasoning, 50 (Mentally Deficient range) in working memory, 80 (Low Average range) in processing speed, and a full scale IQ of 57 (Mentally Deficient range) (id. at p. 2). The evaluation report indicated that the student demonstrated skills in the average range for tasks measuring common sense (cause and effect relationships), social judgment, evaluation, and use of past experiences, knowledge of conventional standards of behavior, culture loaded knowledge, and the demonstration of practical behavior (id. at p. 3). The student struggled with tasks measuring trial and error learning, reproduction of models, synthesis (part/whole relationships), figural cognition, spatial visualization, and figural evaluation and speed of mental processing (id.). The student had "particular difficulty" with tasks measuring sequential processing memory of symbolic stimuli, cognition of semantic stimuli, short-term acquisition and retrieval, auditory short-term memory, encoding information for further cognitive processing, facility with numbers, and immediate rote recall (id.). The student demonstrated weakness with tasks measuring visual short-term memory, sequential processing, simultaneous processing, spatial visualization, and synthesis of speed of mental processing (id. at p. 1).

With respect to academic achievement, administration of selected subtests of the Woodcock-Johnson Tests of Academic Achievement-Third Edition (WJ-III ACH) to the student yielded standard scores of 52 in letter-word identification, 59 in passage comprehension, and 72 on a timed test of reading fluency, as well as 60 in calculation, 65 in applied problems, and 62 on a timed test that measured the student's speed in performing simple calculations and whether simple math facts had been put to memory (Dist. Ex. 7 at pp. 3-4). In the area of math, the student was able to inconsistently perform addition, subtraction, and multiplication items (id. at p. 3).

With respect to social/emotional functioning, the psychoeducational evaluation report indicated the student impressed as a happy child and did not display themes of conflict or preoccupations of thought (Dist. Ex. 7 at p. 4). The evaluation report indicated school reports noted that during the previous year the student received help with managing emotions, particularly anger and frustration (id.). At the time of the psychoeducational evaluation, the student responded well to praise and encouragement during testing (id.). The student had a positive view of himself and felt positively recognized in school (id.). The psychoeducational evaluation report indicated the student needed a "fidget toy" when he worked, and that he might not work if he was not interested in a subject (id.). The report indicated that a prior IEP reflected that at times, the student could be disruptive and defiant (id.).

The March 2011 IEP reflected that the student exhibited deficits in the areas of cognition, academics, attention, fine motor, language processing, and social/emotional functioning (Dist. Exs. 3 at pp. 3-5, 13). I note that the student's needs and abilities described in the May 2010 psychoeducational evaluation report and the November 2010 observation report were consistent with those reflected in the student's March 2011 IEP and are also consistent with the recommendation for a 12:1+1 special class (compare Dist. Exs. 3; with Dist. Exs. 7; 10).

After considering the documentary information described above and the input from the participants at the CSE meeting, the March 2011 CSE recommended a 12:1+1 special class in a specialized school for the student, in order to provide him with a small class and to address his difficulties with attention and focus to task (Tr. p. 162).[6] The IEP shows that CSE considered the placement option of a 15:1 special class in a community school, which was rejected as not adequately supportive (Tr. pp. 179-80; Dist. Ex. 3 at p. 12). The CSE also considered placing the student in a specialized school in either a 12:1+4, 6:1+1, or an 8:1+1 special class but decided those classes would not be appropriate for the student (Tr. pp. 180-81; Parent Ex. 3 at p. 12).

The March 2011 CSE recommended speech-language therapy to address the student's primary deficit area in speech-language, specifically his needs in receptive and expressive language, including following directions, responding to questions, pragmatic communication with peers, and in producing a detailed and cohesive paragraph (Tr. pp. 177-78; Dist. Ex. 3 at p. 10, 8). The March 2011 CSE also recommended OT to address the student's classroom performance needs related to improved fine motor, visual motor, and activities of daily living skills (Dist. Ex. 3 at pp. 9, 13). In addition, the March 2011 CSE recommended counseling for the student to address his needs related to language skills and interaction with peers, and self-monitoring of on-task behavior (Tr. p. 181; Dist. Ex. 3 at pp. 9, 13). The March 2011 CSE recommended the New York State alternate assessment for the student because of his significant cognitive and academic delays (Tr. p. 181; Dist. Ex. 3 at p. 13).

According to the district representative, and consistent with the March 2011 IEP, the March 2011 CSE discussed the student's academic functioning at the time of the meeting (Tr. p. 160; Dist. Ex. 3 at pp. 3-4). Specifically, the CSE discussed the student's reading decoding and comprehension abilities, his writing difficulties, and his difficulties in mathematics specific to computation and problem solving (Tr. pp. 160-61). Review of the IEP reflects the input of the student's ELA teacher from Cooke and her estimate of the student's present level of performance at the time of the CSE meeting, as well as input by the student's mathematics teacher from Cooke (Dist. Ex. 3 at pp. 2-4; see Tr. p. 670). The IEP also included results of reading and math tests administered by Cooke, in order to determine the student's strengths, weaknesses, and grade levels at the time (Tr. pp. 161-62; Dist. Ex. 3 at p. 3). The March 2011 IEP further reflects that the CSE discussed the student's social/emotional present levels of performance and indicated the student was polite, respectful, and an eager participant, but required prompting on boundaries and modeling on positive social interactions due to his tendency to become silly, fidgety, and "too

[6] According to testimony by the district special education teacher who also participated in the March 2011 CSE as the district representative, the CSE relied upon input from the CSE participants from Cooke about the student's then-current academic functioning (Tr. pp. 156, 159-60). The district representative indicated the CSE relied on the Cooke teachers' reports because his teachers at the time knew him best and the CSE relied on their expertise (Tr. pp. 159-60, 162).

social" (Dist. Ex. 3 at p. 5). The March 2011 CSE recommended counseling to address the student's social/emotional needs, and the IEP indicated the student's behavior did not seriously interfere with instruction and could be addressed by the special education classroom teacher (Tr. p. 168; Dist. Ex. 3 at pp. 5, 13).

The March 2011 CSE recommended the provision of the following supports to address the student's needs related to academics and attention: (1) small group instruction; (2) maintaining eye contact; (3) teacher prompting, cueing, and redirection; (4) verbal and auditory cues; (5) manipulatives-highlighters; (6) multisensory approach; (7) graphic organizers/checklists/graphs/charts; (8) scaffolding; (9) use of fidget objects; (10) movement and work breaks as needed; (11) auditory and visual aids; (12) encouragement and positive feedback; (13) 1:1 teacher modeling; (14) redirection to task; (15) use of sensory tools; and (16) modeling for positive social interactions (Dist. Ex. 3 at pp. 3, 5). The district representative testified that the March 2011 CSE discussed all of the student's academic management needs included in the IEP (Tr. p. 162; see Dist. Ex. 3 at p. 3). The district representative's testimony provided rationales—consistent with the discussion about the student's present levels of academic performance—for why the student needed these management strategies (Tr. pp. 162-67). With regard to the student's social/emotional management needs, consistent with the student's present levels of social/emotional performance, the CSE identified the student's needs for sensory tools, frequent breaks, and modeling for positive social interactions (Dist. Ex. 3 at p. 5). The March 2011 IEP also noted the importance of making eye contact when giving the student directions (id.). Similar to her testimony about the student's academic needs, the district representative offered cogent rationales for why the March 2011 CSE recommended the social/emotional management needs that it did for the student (Tr. pp. 168-69). Testimony by the student's ELA teacher from Cooke who participated in the March 2011 CSE by telephone indicated the student's academic and social/emotional present levels of performance and management needs included in the March 2011 were accurate at the time of the CSE meeting (Tr. pp. 655-56, 670-72; Dist. Ex. 3 at pp. 3, 5).

Although the parent did not allege the goals and objectives per the March 2011 IEP were procedurally and/or substantively inappropriate, it is relevant to my determination that the goals and objectives included in the IEP addressed the student's needs (Dist. Ex. 3 at pp. 7-10; see Tr. p. 11). Testimony by the district representative provided an appropriate rationale specific to the student's needs, for why the CSE developed the goals and objectives included the student's March 2011 IEP (Tr. pp. 171-78). The district representative noted that in developing the goals and objectives, the CSE relied on the input from the student's teachers from Cooke because they were familiar with the student's special education needs (Tr. pp. 170-71, 190-91). She indicated that no member of the March 2011 CSE raised any objection with regard to the goals and objectives during the meeting, or requested that additional goals be developed (Tr. p. 179). Consistent with the district representative's testimony, the student's ELA teacher from Cooke indicated she provided information to the CSE to help develop goals for the March 2011 IEP that the student should work on in the future (Tr. pp. 696-97). Furthermore, testimony by the Cooke representative who attended the March 2011 CSE meeting indicated that most of the substance of the goals included on the IEP were provided by Cooke staff (Tr. pp. 475, 505, 513-15).

Consistent with minutes of the March 2011 CSE meeting, the Cooke representative and the parent testified that the student's program at Cooke was appropriate for him and that a 12:1+1 special class would not offer the student sufficient support (Tr. pp. 518, 703; Dist. Ex. 4 at p. 2).

The hearing record reflects the parent participated in the March 2011 CSE and does not indicate that the parent disagreed with the recommended goals and objectives, related services, or the academic and social/emotional management strategies included in the student's IEP (see Tr. p. 513; Dist. Ex. 3).

Review of the hearing record reveals suggests that the student would be adequately supported within a 12:1+1 special class setting, with respect to the student's difficulties with academics, attention, and distractibility (see Dist. Exs. 3 at pp. 3-4; 7 at pp. 1, 7; 10). For example, the student's ELA teacher from Cooke reported to the CSE that although the student often appeared not to be paying attention, when called upon to respond to a question he demonstrated understanding (Dist. Ex. 3 at p. 3). During the March 2011 CSE, his mathematics teacher from Cooke indicated that the student needed word problems broken down into simple parts (Dist. Ex. 3 at pp. 3-4). In addition, at times the student became fidgety and needed to move, but after given time to do so he returned to task in a more focused manner, as confirmed by his ELA teacher during the impartial hearing (Dist. Ex. 3 at p. 4; see Tr. p. 667). Testimony by the student's ELA teacher from Cooke also indicated that the student benefitted from management strategies similar to those included in the March 2011 IEP (compare Tr. pp. 667-70, 678, 681-82, with Dist. Ex. 3 at pp. 3, 5). Furthermore, as previously discussed, the November 2010 classroom observation report indicated the student followed classroom procedures (Dist. Ex. 10). Despite responses that were not always on target, the student seemed interested in the class material and for the most part appeared focused on the task (id.).

The testimony of the student's ELA teacher and the assistant head of the student's program from Cooke indicated that the 12:1+1 setting addressed the student's needs (Tr. pp. 679-81, 685). Within a 12:1+1 setting, the student exhibited academic and social/emotional progress at Cooke (Tr. pp. 677, 679, 685, 763-64, 778-79; see Tr. p. 492). The Cooke representative stated that the student required supports and individual attention, and when provided with structured activities he did not have attention difficulties (Tr. p. 495). For all of the foregoing reasons, the recommendation for a 12:1+1 special class, together with the related services, management needs, and annual goals specified on the March 2011 IEP, was reasonably calculated to provide the student with educational benefits.

C. IEP Implementation—Assigned Public School Site

In her petition, the parent raises a number of concerns regarding the appropriateness of the particular public school site to which the student was assigned. For July and August 2011, the student did not attend the summer program identified in the March 2011 IEP, but instead, attended a summer camp selected by the parent (Tr. p. 704). By letters dated August 22, 2011 and November 16, 2011, the parent rejected the program offered in the March 2011 IEP and informed the district that she was placing the student at Cooke and would seek tuition funding from the district (Parent Exs. Q; R).

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 a parent's "[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 R.B. v. New

York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; 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"]).

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. 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. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). 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]). 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 her claims regarding implementation of the March 2011 IEP because a retrospective analysis of how the district would have implemented the student's March 2011 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 her choosing prior to the time the district became obligated to implement the March 2011 IEP (see Tr. pp. 234, 254, 704; Parent Exs. Q; R). Therefore, the district is correct that the issues raised and the arguments asserted by the parents 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 parents' 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 her claims that the assigned public school site would not have properly implemented the March 2011 IEP.

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 [2d Cir. 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], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. 2011]).[7]

VII. Conclusion

In summary, the evidence in the hearing record supports the conclusion that the student would have been provided adequate support within a 12:1+1 special class to address his needs related to academics, social/emotional functioning, and attention. Accordingly, I find that the CSE's recommendation of a 12:1+1 special class in conjunction with the recommended related services and the program accommodations and strategies described above was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year. Furthermore, to the extent any of the parent's claims regarding the assigned public school site were not speculative, the hearing record does not support a conclusion that the district would have deviated from substantial or significant provisions of the student's IEP in a material way.

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of Cooke or whether the equities support

[7] While not necessary to support a finding that the district offered the student a FAPE, the hearing record contains evidence supporting the district's contention that the student's IEP could have been implemented at the assigned public school site. The assistant principal at the assigned school testified that the student would have been placed in a class with other 15-year-olds and would have been scheduled for an eight-period school day consisting of math, gym, lunch, health, communication, art/marketing, graphic design, and two periods of ELA (Tr. pp. 228-29, 359). He testified that the "main site" of the assigned school offered "primarily academic classes like ELA and math, science, global" (Tr. p. 234). The assistant principal also testified that the math and ELA curriculum focused on functional skills and that the program generally aimed at providing student's with social, behavioral and other "soft" skills in order to succeed in the workplace and become successful members of society (Tr. pp. 360, 439-42). Additionally, the assistant principal also stated that the assigned school transitioned older students into a program consisting of two hours of academic instruction in the morning followed by internship and "off-site" vocational work for the remainder of the day, which corresponds to the anticipated transition activities set forth in the student's IEP (Tr. pp. 389-90; see Dist. Ex. 3 at p. 14).

the parent's claim for the tuition costs at public expense (Burlington, 471 U.S. at 370; MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS DISMISSED.

IT IS ORDERED that, to the extent it has not done so and in accordance with the IHO's interim decision, the district shall fund the costs of the student's placement at Cooke from the date of filing of the due process complaint notice through the date of this decision upon the parent's provision of proof of the student's continued attendance at Cooke.

Dated: **Albany, New York**
December 22, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER