



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-226

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Partnership for Children's Rights, attorneys for respondents, Scott R. Hechinger, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) that found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

As further described below, this State-level administrative reviewed is being conducted pursuant to an order of remand issued by the U.S. District Court for the Southern District of New York (see New York City Dep't of Educ. v. S.A., 2012 WL 6028938 [S.D.N.Y. Dec. 4, 2012]). The student's earlier educational history was discussed in a prior proceeding need not be repeated again in detail as the parties familiarity with the facts therein is presumed (Application of the Bd. of Educ., Appeal No. 10-047; see also J.A. v. New York City Dep't of Educ., 2012 WL 1075843 [S.D.N.Y. Mar. 28, 2012]).

The student is classified as a student with a speech or language impairment and his eligibility for special education services is not in dispute (Parent Ex. C at p. 1; see 34 CFR

300.8[c][11]; 8 NYCRR 200.1[zz][11]). The student had attended the Aaron School since fall 2004 (Tr. p. 304).

In November-December 2008, at the parents' request, the student was evaluated by a private psychologist (see Parent Ex. Q). The evaluating psychologist noted that, at the time of the evaluation, the student "attend[ed] a small, structured classroom at the Aaron School where he received occupational and language-based therapies, as well as social skills instruction" (id. at p. 1). Her review of teacher reports revealed that the student's academic progress had been "steady" but that his classroom challenges included "pragmatic language weakness, a tendency toward sensory overload and inconsistent attention" (id.). She further reported that the Aaron School employed a "sensory diet, which consist[ed] of movement breaks and various sensory tools" to aid the student with focus and organization and noted that the student received additional occupational therapy (OT) and speech-language therapy outside of school (id.).

The evaluating psychologist administered a battery of standardized assessments to the student, including the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Wechsler Individual Achievement Test – Second Edition (WIAT-II), the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), the Developmental Neuropsychological Assessment Test (NEPSY), and the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI) (Parent Ex. Q at pp. 1-2, 7-8). The evaluating psychologist noted that the student's tendencies "toward distractibility and withdrawal . . . in combination with his language-processing difficulties" may have prevented the standardized tests from accurately reflecting the student's "intellectual prowess," and "advise[d] that the results be interpreted with caution" (id. at p. 2). She also noted that she excluded several timed subtests, which required both speed and visual-motor precision, from her assessment altogether, as she deemed these subtests inappropriate for the student given the aforementioned concerns (id.).

The evaluation results reflected that the student fell within the average range for verbal comprehension and within the average to low average range for perceptual reasoning and working memory; the evaluating psychologist advised that "[p]rocessing [s]peed, and therefore [f]ull [s]cale measures, could not be determined and are not currently appropriate for [the student's] unique profile of intellectual strengths and developmental challenges" (Parent Ex. Q at p. 2). She opined that the student had a "fine vocabulary and a solid ability for verbal reasoning" with an adequate fund of information but noted that his "understanding and use of language [were] inconsistent and [could] be quite idiosyncratic, particularly when questions [were] abstract or involve[d] complex social-emotional thinking" (id.). She further reported that the student had a "natural talent for arithmetic," despite inconsistent attention and difficulty with verbal processing, both of which impacted his ability to solve word problems (id. at p. 3). While acknowledging that the student "possesse[d] a solid grasp of visual and spatial relations," the evaluating psychologist commented that his attentional difficulties affected his ability to perform tasks and that, while his fine motor skills were developing, the student "continue[d] to have considerable difficulty achieving visual-motor coordination and precision" (id.).

With regard to the student's academic functioning, the evaluating psychologist reported that the student's scores indicated that he was performing at or near grade level but that, when confronted with more challenging more time-consuming work, his "various learning challenges—his difficulty with complex, language-based information, his tendency toward sensory overload

and his varying levels of attention—[became] prominent obstacles" (Parent Ex. Q at p. 3). She observed that the student experienced trouble managing frustration and anxiety, especially when negotiating more complex tasks, and that these feelings prompted him to withdraw (id.). She assessed the student's listening comprehension as "variable," depending on the nature of the material; the more complex and nuanced the material, the more difficulty the student experienced (id.). During her classroom observation of the student, the evaluating psychologist characterized his attention and engagement as "inconsistent" and further noted his difficulty working independently, often requiring teacher check-ins and reminders to stay focused (id. at pp. 3-4).

With respect to the student's attention/memory/executive functions, the evaluating psychologist theorized that the student's "attentional vulnerabilities [were] closely related to his problems with sensory overload, and to his need to modulate visual, verbal and social stimulation" (Parent Ex. Q at p. 4). She also observed that "if not provided with relief or support, [the student could] eventually turn to sensory-motor outlets such as hand-flapping or jumping (id.). Addressing language functioning, the evaluating psychologist described the student as a "motivated conversationalist" who possessed "a fine command of vocabulary" (id.). However, she added that, when anxious or over-stimulated, the student's conversational ability diminished and he lost focus (id.). She identified "[c]omplex syntax, abstract ideas and spontaneous social speech" as weaknesses and, while acknowledging that the student's narrative abilities were developing, she reported that he required help "strengthening the expressive and receptive aspects of language" and "maintaining narrative structure and coherence" (id.). With regard to social/emotional development, she cited the student's "superb progress in all areas of development" but added that "[t]he following capacities continue to need strengthening: [his] comprehension of abstract language; his grasp of complex social interaction; and self-management in the areas of attention, anxiety and over-stimulation" (id. at p. 5).

The evaluating psychologist concluded her report by offering several school-based and therapeutic recommendations for the student (Parent Ex. Q at pp. 5-6). The former including: (1) "a small, structured classroom and teachers who are trained to work with special needs," following consistent routines and continuing to offer school-based [OT] and language-based therapies;" (2) teacher interventions and reminders during independent work; (3) a sensory motor routine and the development of interior "coping mechanisms;" (4) testing accommodations including double time on tests, a quiet and distraction-free room, and reading and re-reading of directions, as needed; (5) additional teacher assistance with peer interactions; and (6) a continued program of academics and therapeutic services during the summer months, consistent with the levels afforded during the school year, including speech-language therapy, OT, play therapy, and continued supervision by a child psychiatrist (id.).

On November 5, 2009, a district special education teacher conducted a classroom observation of the student at the Aaron School (see Parent Ex. K). During her 40-minute observation of the student in his reading session, the district special education teacher noted that there were five students present and that the student was "unfocused most of the time" and "did not actively participate" (id. at p. 2). The observer noted the teacher's redirection of the student throughout the class and also noted that the student answered decoding questions correctly but did not appropriately answer comprehension questions (id.). The district special education teacher was informed that the student may have been nervous during the observation but that his behavior was "semi-typical" (id.).

In February 2010, the Aaron School issued a mid-year report for the student for the 2009-10 school year (Dist. Ex. 3). The report indicated that the student was in a classroom of 10 students, that he had challenges with "auditory processing, pragmatics, receptive and expressive language and attention" and "require[d] a variety of individualized supports and strategies to ensure his continued academic and social/emotional progress" (id. at p. 1). Regarding the specific supports and strategies recommended for the student, the report noted that the student benefited from: "previewing of information, repetitive opportunities to practice skills, modified lessons taught with a strong visual component," chunking of information, use of check lists and modeling tasks, provision of "[a]dditional time and a quiet work space," "one to one support to initiate most tasks and frequent teacher check-ins and verbal redirection" (id. at p. 7). The report concluded that "a self-contained 12:1+1 center-based structured program [was] most appropriate" (id.).

On February 27, 2010, an OT progress report was issued, noting the student's low muscle tone and "sensory, fine motor, functional grasp, hand dexterity, and visual motor integration" deficits (Dist. Ex. 5 at p. 1). The report noted that the student was receiving four 30-minute sessions per week and recommended that two 60-minute sessions should be mandated instead (id. at pp. 1-2). The report noted the student's "moderate and steady progress" (id. at p. 1).

On March 22, 2010, a related services progress report was issued by the student's speech-language therapy provider (see Dist. Ex. 6). The report noted the student's diagnosis of a central auditory processing disorder and the student's "significant delays in receptive, expressive and pragmatic language skills" (id. at p. 1). The report also noted that the student "made good progress" that year "but still present[ed] with moderate global delays in all areas of language development" (id. at p. 3). The report recommended two 60-minute sessions per week instead of four 30-minute sessions (id.). The report noted the student's great improvement in pragmatic language skills, decoding and oral reading, and "significant increase in functional receptive and expressive vocabularies" (id. at pp. 1-2).

On April 20, 2010, the CSE convened to develop the student's IEP for the 2010-11 school year (Parent Ex. C at p. 1). The April 2010 CSE recommended placement for the student in a 12:1+1 special class in a community school for a ten month school year (id.). The April 2010 CSE also recommended four weekly 30-minute sessions of individual speech-language therapy, four weekly 30-minute sessions of individual OT, one weekly 30-minute session of speech-language therapy in a group of two, one weekly 30-minute session of OT in a group of two, and one weekly 30-minute push-in session of counseling in a group of three (id. at p. 20). Additionally, the April 2010 CSE recommended that the student continue to receive OT and speech-language therapy during July and August 2010 (id.). To address the student's academic management needs, the April 2010 IEP contained modifications for the student including visual and verbal cues, redirection, checklist, body breaks, sensory tools and graphic organizer (id. at p. 3). Regarding the student's social/emotional performance, the IEP noted that the student's management needs included access to sensory tools and sensory breaks, body breaks which could be within the classroom as needed, and counseling services. Regarding the student's health, the April 2010 IEP noted that the student had been diagnosed with attention deficit hyperactivity disorder (ADHD) and central auditory processing disorder, and also noted gross motor apraxia and sensory integration dysfunction (id. at p. 5). The April 2010 CSE recommended continued OT to address the student's health needs (id.). The April 2010 CSE developed annual goals for the student in the areas of reading, writing, math, counseling, speech-language therapy, and OT (id. at pp. 6-17).

By final notice of recommendation (FNR) dated August 6, 2010, the district summarized the special education programs and related services recommended by the April 2010 CSE and identified the particular public school site to which the student had been assigned to attend for the 2010-11 school year (Dist. Ex. 10).

A. Unilateral Placement and Due Process Complaint Notice

The parents initially filed a due process complaint notice dated August 9, 2010 (see Parent Ex. A at p. 1).¹ In a letter dated August 19, 2010, the parents rejected the April 2010 IEP as inappropriate and indicated their intention to unilaterally place the student at the Aaron School and seek the costs of the student's private school tuition from the district (Parent Ex. G). In an unsigned letter, dated September 15, 2010, the parents indicated that they had observed the assigned public school site on September 14, 2010 and supplemented the August 19 letter with the information that they presented questions to the principal and that the 12:1+1 special class observed on that day was "fully subscribed" (Parent Ex. H).

In an amended due process complaint notice dated November 8, 2010, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds and sought reimbursement for tuition at the Aaron School for the 2010-11 school year and reimbursement for related services for summer 2010 and September 2010 through June 2011 (Parent Ex. A at pp. 1-2).² The parents asserted that: the April 2010 CSE was improperly composed because it lacked an additional parent member; the April 2010 IEP failed to set forth evaluative criteria by which to measure the student's progress toward annual goals; the special education program recommended by the April 2010 CSE could not meet the student's academic or social/emotional needs; the proposed 12:1+1 special class in a community school was not appropriate for the student; the assigned public school site was not appropriate for the student; Aaron School provided a program designed to address the student's learning issues; and the parents were entitled to related services reimbursement for September 2010 through June 2011 (id. at pp. 5-7).

For relief, the parents sought a finding that the district failed to offer the student a FAPE for the 2010-11 school year, that the Aaron School was an appropriate unilateral placement for the student for the 2010-11 school year, that equitable considerations weighed in favor of the parents' request for relief, and that the district be directed to fund tuition at the Aaron School for the student for the 2010-11 school year, along with reimbursement for related services of OT and speech-language therapy for the 2010-11 school year for the student (Parent Ex. A at pp. 7-8).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 23, 2010 and concluded on June 30, 2011, after four days of proceedings (Tr. pp. 1-399).

¹ The original due process complaint notice referenced in the amended due process complaint was not included in the hearing record.

² The parents subsequently withdrew their request for reimbursement for related services for summer 2010 (Tr. 333; see also Parent Ex. F).

In an interim decision dated January 21, 2011, the IHO held that the pendency placement (stay put) for the student was the Aaron School and reimbursement was granted to the parents for out of pocket expenses for related services in accordance with the IEP's mandates (IHO Interim Decision).

In a decision on the merits dated August 4, 2011, the IHO found that the district did not offer the student a FAPE for the 2010-11 school year because the recommended 12:1+1 special class would not address the student's needs related to attention and sensory issues (IHO Decision at p. 11). Specifically, the IHO noted that the student required constant redirection, prompting and support and without such support he engaged in disruptive coping behaviors (*id.* at pp. 11-12).

The IHO found that the Aaron School's program met the student's individual needs and that the program was reasonably calculated to provide meaningful and appropriate academic, social and emotional benefit (IHO Decision at p. 12). Specifically, the IHO noted that the student's needs were met in the Aaron School's class of 10 students and 3 teachers, where his auditory processing disorder, sensory integration deficits, language delays, tendencies toward distraction, and weak executive functioning and organizational skills could be addressed (*id.*). The IHO also found that equitable considerations weighed in favor of an award of tuition reimbursement, noting that the parents had cooperated with the district, provided reports and evaluations, attended and participated in CSE meetings, and visited the assigned public school site (*id.*). Consequently, the IHO awarded the parents tuition reimbursement for the Aaron School for the 2010-11 school year (*id.* at pp. 12-13).

IV. Appeal for State-Level Review

The district appealed the determination of the IHO that the district failed to offer the student a FAPE for the 2010-11 school year and the award of tuition reimbursement. The district asserted that it offered the student a FAPE for the 2010-11 school year. Specifically, the district asserted that an additional parent member was not required to attend the April 2010 CSE meeting and, in any event, the absence of an additional parent member did not impede the parents' ability to participate in the development of the student's IEP. The district also argued that the evaluative criteria to measure the student's progress towards his annual goals was appropriate. Regarding the 12:1+1 special class, the district argued that it was appropriate and that the student's needs for teacher support and redirection were addressed in the IEP. Finally, the district asserts that the assigned public school site was appropriate.

The district further asserted that the Aaron School was not appropriate for the student because the Aaron School failed to provide the related services of individual OT and speech-language therapy sessions for the student and also did not provide counseling, all of which the district argued helps the student academically. The district also noted that the student took unsupervised breaks, without teacher support, which constituted a break from academics. The district also argued that the Aaron School did not constitute the least restrictive environment (LRE) for the student.

The district also asserted that equitable considerations precluded relief for the parents. Specifically, the district noted that the parents signed a contract with the Aaron School prior to the

April 2010 CSE meeting for the 2010-11 school year and that the parents never seriously intended to enroll the student in public school.

As relief, the district requested that the IHO decision be vacated.

In an answer, the parents admitted and denied allegations, asserting that the IHO decision should be affirmed. The parents argued that the district failed to offer the student a FAPE for the 2010-11 school year, that the Aaron School was an appropriate placement for the student, and that equitable considerations weighed in favor of the parents' request for relief.

On October 14, 2011, the SRO dismissed the appeal as moot in light of the fact that the district had already reimbursed the parents for tuition and related services for the Aaron School for the 2010-11 school year (Application of the Bd. of Educ., Appeal No. 11-108).

By Opinion and Order dated December 4, 2012, the United States District Court for Southern District of New York held that this appeal was not moot after finding that an exception to the mootness doctrine applied (S.A., 2012 WL 6028938, at *2). The Court remanded this appeal to the SRO (id. at *3).

V. Applicable Standards

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

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

participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. CSE Meeting and Parent Member

Although the parents alleged a denial of FAPE in their due process notice due to the lack of an additional parent member at the April 2010 CSE meeting (Parent Ex. A at p. 5), the IHO made no determination relating thereto. The district argues that the additional parent member was not a required participant because the CSE meeting was not an initial review. The district also contends that the absence of an additional parent member did not affect the parents' ability to participate at the CSE meeting.

At the time of the April 2010 CSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]).³ Under applicable State law and regulations, a CSE subcommittee has the authority to perform the same functions as a CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's

³ Effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

The evidence in the hearing record describes the April 2010 CSE meeting as a "CSE Review" and, although there was no explicit reference to a CSE subcommittee, the April 2010 IEP indicated that the CSE meeting was an annual review meeting and not an initial meeting (Parent Ex. C at pp. 1-2). The first meeting notice in fact indicated that a parent member was invited to attend the CSE meeting (Dist. Ex. 4 at p. 1). However, the first scheduled meeting was rescheduled at the parents' request and the rescheduled notice did not indicate that a parent member was invited to attend the April 2010 CSE meeting (*id.* at p. 2). The hearing record establishes that the student was not being considered for initial placement in a special class, a school primarily serving students with disabilities, or a school outside of the student's district (*see id.*). Accordingly, the April 2010 CSE could have permissively proceeded as a CSE subcommittee and, therefore, it is not clear whether the lack of an additional parent member at the April 2010 CSE meeting was a violation of State regulations (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4][i]-[iii]).

Even if there was a violation of State regulations for CSE composition, the testimony and evidence in the hearing record establishes that the parent actively participated in the April 2010 CSE meeting, that modifications were made based upon the parent's comments, that the parent was familiar with the CSE process, having previously attended CSE meetings, and that the student's special education teacher at the Aaron School also participated in the meeting (Tr. pp. 307-12; Dist. Ex. 11; Parent Ex. C at p. 2).

Based upon the foregoing, I decline to find a denial of a FAPE on this basis, as nothing in the hearing record evidences that the student's right to a FAPE was impeded, that the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student was significantly impeded, or that the lack of a parent member caused a deprivation of educational benefits (*see E.F. v. New York City Dep't of Educ.*, 2013 WL 4495676, at *13-*14 [E.D.N.Y. Aug. 19, 2013]).

B. Evaluative Criteria for Annual Goals

Although the parents alleged a denial of FAPE with regard to the evaluative criteria for the annual goals on the April 20, 2010 IEP in their due process complaint notice (Parent Ex. A at p. 5), once again, the IHO made no determination. The district argues that the evaluative criteria were appropriate and that the student was not denied a FAPE on this basis.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Review of the April 20, 2010 IEP evidences that it contains over 15 annual goals that addressed the student's identified needs relating to reading comprehension, writing, organizational skills, math computation skills, math reasoning skills, language processing, critical thinking, pragmatic language skills, graphomotor and visual motor skills, self-regulation and sensory processing, (Parent Ex. C at pp. 6-17). The district representative for the April 2010 CSE meeting testified that the annual goals for academics were drafted with input from the student's special education teacher at the Aaron School, along with reference to the Aaron School's goals for the student, as set forth in the Aaron School report, and reference to the student's prior IEP (Tr. p. 137). The April 2010 IEP provided that the student's progress toward each annual goal would be measured by teacher or provider observation and/or through checklists, assessments, or tests and it was noted that there would be three reports of progress over the course of the school year (Parent Ex. C at pp. 6-17). The parent testified that she felt the annual goals and short term objectives were reasonable (Tr. pp. 308-09). Each goal was specific and measurable, defined a procedure to evaluate each goal, included an evaluation schedule, and indicated the educational or related service professional who would be primarily responsible for implementing the goal (Parent Ex. C at pp. 6-17; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]; 8 NYCRR 200.4[d][2][iii][b]). Accordingly, the goals on the April 2010 IEP adequately addressed the student's needs so as to enable him to receive educational benefit (see S.H. v. New York City Dep't of Educ., 2011 WL 666098, at *4-5 [S.D.N.Y. Feb. 15, 2011]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; Tarlowe, 2008 WL 2736027, at *9 [S.D.N.Y. July 3, 2008]).

Based upon the foregoing, I find that the hearing record does not support the conclusion that the annual goals on the April 2010 IEP lacked appropriate evaluative criteria to measure the student's progress, or that the district denied the student a FAPE for the 2010-11 school year on this basis.

C. April 20, 2010 IEP – 12:1+1 Special Class

The IHO concluded that the district failed to offer the student a FAPE for the 2010-11 school year. Specifically, the IHO held that "[t]he 12:1+1 recommended placement would not address [the student's] substantial needs for support in the areas of attentional and sensory issues" (IHO Decision at pp. 11-12).

Contrary to the conclusion of the IHO, a careful review of the hearing record establishes that the April 2010 IEP offered the student a FAPE for the 2010-11 school year. State regulations provide that a 12:1+1 special class placement is designed for those students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In this case, the CSE team was aware of the student's academic and social emotional needs, as evidenced by the IEP contents and the notes from the meeting (Dist. Ex. 11; Parent Ex. C at pp. 3-4). The CSE reviewed the November/December 2008 psychological testing evaluation report, the student's reports from the Aaron School, the November 2009 classroom observation, and the updated reports from the student's providers for speech-language therapy and OT (see Dist. Exs. 3; 5; 6; 7; 11;

Parent Exs. C; K; Q). The hearing record reveals that the April 2010 IEP, as drafted, including the recommended 12:1+1 special class, was sufficient to offer the student a FAPE for the 2010-11 school year (see Parent Ex. C).

The April 2010 CSE described the student's attention and sensory needs appropriately on the IEP (see Parent Ex. C at pp. 3-5). The April 2010 CSE identified several strategies and methods to address the student's management needs, related to his attention and sensory needs, including visual and verbal cues, redirection, checklists, graphic organizers, body breaks, sensory tools, sensory breaks, and water breaks (id. at pp. 3-4). The April 2010 CSE also recommended annual goals and related services to address the student's attention and sensory difficulties (id. at pp. 6-18). The district special education teacher testified that push-in counseling was also recommended to address the student's cognitive inflexibility (Tr. p. 160).

The district special education teacher testified that the student was in a 12:1+1 special class at the Aaron School at the time of the impartial hearing (Tr. pp. 122-23). She testified that the 12:1+1 special class recommended in the April 2010 IEP was comparable to the student's Aaron School program and that April 2010 CSE also recommended that the student receive related services on a 12 month basis (Tr. pp. 134, 138, 157). She testified that the CSE recommended a 12:1+1 special class for the student after considering the student's academic levels (Tr. p. 157). She noted that, although the student's level in reading was behind, the student was almost on grade level for math (id.). However, the district special education teacher testified that, because of the student's distractibility, attention difficulties and cognitive inflexibility, a special class setting was appropriate and constituted the LRE for the student (id.).

The mid-year report from the Aaron School recommended a 12:1+1 placement for the student (Dist. Ex. 3 at pp. 7-8). The student's classroom at Aaron School consisted of 10 students and three teachers; however only two of the teachers worked with the students and one of the teachers was a support for another teacher (Tr. pp. 261-62).

Based upon the evidence in the hearing record, I find that the April 2010 CSE appropriately addressed the student's documented academic and social/emotional needs with its recommendation of a 12:1+1 special class, which was also similar to the program that the student attended at the Aaron School (see Dist. Ex. 3; Parent Ex. C). The CSE specifically considered the student's needs for redirection and rejected a 12:1 special class in a community school because the student's needs warranted the additional support of the paraprofessional in the classroom (Parent Ex. C at p. 19). Based on all of the foregoing, the evidence in the hearing record supports a conclusion that the district offered the student a FAPE for the 2010-11 school year and the special education program and related services recommended by the April 2010 CSE were appropriate and reasonably calculated to enable the student to receive educational benefit (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). Based upon the foregoing, I find that the district offered the student a FAPE for the 2010-11 school year.

D. Challenges to Assigned Public School Site

The district asserts that the assigned public school site would have been able to implement the student's 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., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing, the parents cannot prevail on the claims that the district would have failed to implement the April 2010 IEP at the public school site because a retrospective analysis of how the district would have executed the student's April 2010 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the April 2010 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Ex. B). Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, as such, there is no basis for concluding that it failed to do so.

As a final matter, as noted previously and the District Court, all of the relief sought by the parents in this proceeding has been achieved by virtue of pendency, the challenged April 2010 IEP has long expired by its own terms, and planning for the 2013-14 school year should have been completed, the parties' dispute regarding the 2010-11 school year has been rendered moot, although the District Court has determined that the exception to mootness applied. The discussion of the parties' arguments above is entirely academic, as I would find it an appropriate IEP offered by the district would almost certainly have to be based on a new CSE meeting, new evaluations of the student, and new assessments of the student's progress at the Aaron School. However, I have rendered a decision on the merits in accordance with the order by the Court. Even though the determination on the merits demonstrated that the district offered the student a FAPE with the April 2010 IEP, in this instance the student remains entitled to have his pendency placement—at the Aaron School—funded by the district through the conclusion of the proceedings because only a State-level administrative determination in favor of the parents (not the district) can effectuate a change in the student's pendency placement while the parents continue to challenge placements offered by the district, unless the parties agree to another pendency placement (34 CFR 300.518[d]; see Joshua A. v. Rocklin Unified Sch. Dist., 559 F3d 1036, 1038-39 [9th Cir. 2009] [finding that the "automatic" nature of the stay continues to apply in any of the statutory proceedings, including to appeals at the circuit court level and to hold otherwise would not "follow the general policy behind IDEA, which is to keep from disturbing the child throughout the statutory process"]). Thus, unless the parties have otherwise agreed, the district will be directed to pay for the costs of the Aaron School though the date of this decision, if it has not done so already.

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether the Aaron School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED

IT IS ORDERED that the portion of the impartial hearing officer's decision which determined that the district failed to offer the student a FAPE 2010-11 school year and ordered that the district provide tuition reimbursement for the student's attendance at the Aaron School is hereby annulled.

IT IS FURTHER ORDERED that the district, if it has not already done so and unless the parties otherwise agree, is directed to pay for the costs of the student's tuition at the Aaron School pursuant to pendency through the date of this decision.

Dated: **Albany, New York**
 November 29, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER