The University of the State of New York

The State Education Department
State Review Officer
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No. 12-237

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:
South Brooklyn Legal Services, attorneys for petitioner, Nancy Bedard, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request for payment of the costs of the student's tuition at the League School for the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

During the 2011-12 school year, the student attended a district public school as a regular education student in a classroom that provided integrated co-teaching services (see Dist. Exs. 4 at pp. 1-3; 9 at p. 1; see also Tr. pp. 15-20).

On May 10, 2012, the CSE convened to conduct the student's initial review and to develop an IEP with a projected implementation date of June 21, 2012 (see Dist. Ex. 9 at pp. 1, 3-4, 6). Finding the student eligible for special education and related services as a student with an emotional disturbance, the May 2012 CSE recommended a 12:1+1 special class placement at a specialized school with related services consisting of one 30-minute session per week of

counseling in a small group (see id. at pp. 1, 3-4, 6-7).[1] In addition, the May 2012 CSE created annual goals and recommended strategies to address the student's management needs (id. at pp. 1-3). The May 2012 CSE also indicated that the student required a behavioral intervention plan (BIP), and noted that the student needed to learn to "express himself in acceptable ways in school rather than acting out and becom[ing] a conduct (sic) and resistant student" (id. at p. 2). The May 2012 CSE also noted that the student needed to learn "better ways of coping with his anger, frustrations and wants" (id.).

By final notice of recommendation (FNR) dated July 16, 2012, the district summarized the special education and related services recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 3).

By letter dated July 19, 2012, the League School notified the parent of the student's acceptance for the 2012-13 school year (see Parent Ex. A).[2]

A. Due Process Complaint Notice

By due process complaint notice dated July 19, 2012, the parent alleged that the district failed to produce or provide an IEP for the student, and failed to send the parent an FNR, which prevented him from visiting any assigned public school site (see Dist. Ex. 1 at p. 3). In addition, the parent alleged that "any [d]istrict] 75 placement and program" would not be appropriate for the student, because "it would not be restrictive enough to meet his significant needs" (id. at p. 4). The parent asserted that the student required a "therapeutic program, such as that offered by the League School" due to his "severe and complicated" social/emotional difficulties (id.). As relief, the parent requested an "appropriate program and placement" for the 2012-13 school year at the League School or at an "equivalent approved or non-approved non-public school" (id.).

B. Impartial Hearing Officer Decision

On September 24, 2012 the parties conducted the impartial hearing (see Tr. pp. 1-138).[3] By decision dated November 20, 2012, the IHO concluded that the district offered the student a free appropriate public education (FAPE) for the 2012-13 school year, and thus, the IHO denied the parent's requested relief (see IHO Decision at pp. 7-8). Overall, the IHO found that the May 2012 IEP was reasonably calculated to enable the student to receive educational benefits (id. at p. 7). In addition, the IHO found that the district complied with the "procedural requirements" (id.). Having concluded that the district offered an "adequate and appropriate program and placement"

[1] The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

[2] The Commissioner of Education has approved the League School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] In the closing statement, the parent's attorney clarified that contrary to the information in the due process complaint notice the CSE only convened on May 10, 2012, and did not reconvene for a second meeting on May 21, 2012 (see Tr. pp. 134-35).

for the student, the IHO made no determinations with respect to the appropriateness of the League School or equitable considerations (id. at p. 8).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year. Specifically, the parent asserts that the 12:1+1 special class placement was not appropriate because it was too large, the recommended program did not provide the services of a registered nurse or have psychiatrists on staff, and the student's behaviors could not be addressed in the 12:1+1 student-to-staff ratio. In addition, the parent argues that the May 2012 CSE did not develop a BIP or recommend individual counseling services for the student. Next, the parent contends that the district failed to produce evidence to establish that the assigned public school site was reasonably calculated to enable the student to receive educational benefits or that the student would be appropriately functionally grouped. The parent also asserts that the IHO failed to analyze the appropriateness of the League School and equitable considerations. As relief, the parent seeks to reverse the IHO's finding that the district offered the student a FAPE for the 2012-13 school year. In addition, the parent seeks determinations that the League School was appropriate and an award of prospective funding for the costs of the student's tuition at the League School.

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's finding that the district offered the student a FAPE for the 2012-13 school year. In addition, the district contends that because the parent requested the student's placement at the League School for the 2012-13 school year—and the parent never unilaterally placed the student at the League School—the parent is not entitled to prospective funding. However, if the district did not offer the student a FAPE for the 2012-13 school year, the district asserts that an appropriate equitable remedy must be based upon the evidence in the hearing record.

V. Applicable Standards

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

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

districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

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

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

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

VI. Discussion

A. May 2012 IEP

1. 12:1+1 Special Class Placement

Turning to the parties' dispute regarding the 12:1+1 special class placement, a review of the evidence in the hearing record does not support the IHO's finding that the district offered the student a FAPE for the 2012-13 school year.

In this instance, although the student's present levels of performance and individual needs are not directly in dispute, a discussion thereof provides context for the discussion of the remaining disputed issue to be resolved—namely, whether the May 2012 CSE's recommended 12:1+1 special class placement was appropriate.

As noted in the May 2012 IEP, the student's initial referral arose due to his "acting out behavior issues" in school (Dist. Ex. 9 at p. 1). In this instance, the May 2012 CSE incorporated the testing results obtained through the administration of an April 2012 psychoeducational evaluation of the student (compare Dist. Exs. 9 at p. 1, with Dist. Ex. 4 at pp. 1-3). Specifically,

the May 2012 IEP noted that an administration of the Wechsler Intelligence Scales for Children-Fourth Edition (WISC-IV) to the student revealed cognitive abilities in the average range (see Dist. Ex. 9 at p. 1). In addition, as measured by the Wechsler Individual Achievement Test, Second Edition (WIAT-II), the student performed at a second grade level in reading and mathematics with some variation noted in reading comprehension and numerical operations (see id.). The May 2012 IEP also noted that the student "like[d] school at times," and he needed to "maintain emotional equilibrium in order to be able to learn and move his education forward" (id.).

Socially, the May 2012 IEP indicated that the student exhibited "prior poor behavior including aggressive conduct disorders as well as becoming unresponsive to any interventions from staff" (Dist. Ex. 9 at p. 1). Further, the May 2012 IEP noted the student's prior history of "physical and emotional neglect," and the student's inability to "understand or accept" all of the events that had occurred (id.). Additionally, the May 2012 IEP described the student as, at times, becoming "bellicose and unresponsive to teachers" and acting out in a "physical manner" (id.). The May 2012 IEP further indicated that the student had difficulty "expressing" what bothered him and responding appropriately to attempts to help him when he was in distress (id.). The May 2012 IEP also described the student as having a "good range of knowledge," and noted that he could be "pleasant to talk to" (id.).

With respect to the student's physical development, the May 2012 IEP reported that the student currently received medication for both an attention deficit hyperactivity disorder (ADHD) and for anxiety (see Dist. Ex. 9 at p. 1). Otherwise, the May 2012 IEP described the student as a "healthy boy" (id.).

In considering the student's needs related to special factors, the May 2012 IEP indicated that student required "strategies, including positive behavioral interventions, supports and other strategies" to address behaviors that interfered with the student's learning or that of others (Dist. Ex. 9 at p. 2). Moreover, as noted previously, the May 2012 IEP indicated that the student required a BIP, and more specifically, that the student needed to learn to "express himself in acceptable ways in school rather than acting out and becom[ing] a conduct (sic) and resistant student" (id.).

Generally, the description of the student's needs in the May 2012 IEP was consistent with information in an April 2012 psychoeducational evaluation report and a March 2012 social history (compare Dist. Ex. 4 at pp. 3-8, and Dist. Ex. 5 at pp. 1-3, with Dist. Ex. 9 at pp. 1-2). To be clear, however, the evidence in the hearing record included additional documents, including but not limited to a June 2011 comprehensive clinical assessment, behavior and intervention notes created by the student's teachers between December 2011 and April 2012, an April 2012 occurrence report, an April 2012 letter drafted by a social work assistant, an undated letter drafted by the student's treating psychiatrist, and a May 2012 structured observation, which were not reflected in the May 2012 IEP (compare Dist. Ex. 6 at pp. 1-10, and Dist. Ex. 7, and Dist. Ex. 8, and Parent Ex. C, and Parent Ex. D, and Parent Ex. E at pp. 1-4, with Dist. Ex. 9 at pp. 1-9). In addition, although it is unclear what specific information the student's second grade regular education teacher (teacher) presented to the May 2012 CSE meeting regarding the student's behavior, her testimony highlighted information she possessed about the student's behavior needs and—while consistent with information in the May 2012 IEP—provided an even more detailed description of the student's behavior issues and the effect on his ability to receive educational benefits, which were not reflected in the May 2012 IEP (see Tr. pp. 17-19; Dist. Ex. 9 at p. 9; compare Tr. pp. 16-29,

with Dist. Ex. 9 at pp. 1-2). For example, the teacher testified that during the 2011-12 school year, the student's behavior never really improved regardless of the interventions nor did he meet the one classroom behavior goal to keep his body calm (see Tr. pp. 18-19, 24). In addition, the teacher described the student as "constantly" needing prompting and reinforcement, noting further that at one point during the school year, the student required constant reinforcement "every two minutes" during academic instruction (Tr. pp. 22-23). She further testified that the student did not remain in the classroom "long enough" to learn or "be part of the class" due to his behaviors (Tr. p. 20). Additionally, the teacher testified that the student was removed from the classroom because of disruptive behavior at least twice a day every day from December 2011 to March 2012; and, after March 2012, the student was removed from the classroom because of disruptive behaviors approximately three times a week to once a day (see Tr. p 28). The student's behavior and social issues also resulted in both in-school and out-of-school suspensions in the 2011-12 school year, which further contributed to the student's limited ability to participate in, and benefit from, classroom instruction (see Tr. pp. 20, 28, 69).

To address the student's identified needs, the May 2012 CSE recommended, in part, a 12:1+1 special class at a specialized school (see Dist. Ex. 9 at pp. 3-4).[4] State regulations provide that a 12:1+1 special class placement is designed to address 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 addition, the May 2012 CSE recommended one 30-minute session per week of counseling in a small group, and developed two annual goals targeting the student's ability to express his needs, wants, and frustrations to his teacher, and his ability to monitor his feelings and to react appropriately (see Dist. Ex. 9 at pp. 3-4). To address the student's management needs, the May 2012 CSE recommended a "small class setting with controlled behavior plans and staff to avoid acting out behaviors and promote learning" (id. at p. 2). Finally, the May 2012 IEP indicated that the student would "develop appropriate and acceptable coping skills to have good school and personal interaction behaviors" (id.).

Based upon the foregoing, the evidence in the hearing record did not establish that—given the nature of the student's "aggressive conduct disorders" and the information available to the May 2012 CSE—a 12:1+1 special class at a specialized school appropriately addressed the student's behavioral and social/emotional needs. Although the May 2012 IEP indicated that the student required strategies and supports to address his interfering behaviors—as well as a BIP—the May 2012 IEP did not otherwise address the student's behaviors and the evidence in the hearing record established that the May 2012 CSE did not develop a BIP for the student for the 2012-13 school year (see id. at pp. 1-7; see also Tr. pp. 1-318; Dist. Exs. 1- ; Parent Exs. A-). In this case, absent recommendations for additional supports, strategies, or services in the May 2012 IEP—such as a 1:1 crisis paraprofessional; intensification and specifications of strategies; increased counseling services; or annual goals to address the student's management, behavior, and social/emotional needs—the May 2012 CSE's recommendation of a 12:1+1 special class at a specialized school

[4] According to the evidence in the hearing record, the May 2012 CSE also considered but rejected placing the student in a special class in a community school because the student's behavior "required more than a community program" could provide (Dist. Ex. 9 at p. 7). With respect to the recommendation for a specialized school, the May 2012 IEP indicated that the student needed such an environment to "address his behavior needs" (id. at p. 6; see Tr. pp. 17-18).

does not provide the student with the necessary support to enable him to receive educational benefits, and thus, failed to offer the student a FAPE for the 2012-13 school year.

B. Relief

Notwithstanding the determination that the district failed to offer the student a FAPE for the 2012-13 school year, the parent's request for prospective funding of the costs of the student's tuition at the League School, as discussed more fully below, must be dismissed.

Here, the parent incorrectly urges an examination of the appropriateness of the League School as a unilateral placement since the student was never placed there during the 2012-13 school year. Furthermore, the parent incorrectly asserts that he is entitled to an award of prospective funding for the costs of the student's tuition at the League School for the 2012-13 school year based upon equitable considerations. Generally, an award of prospective funding must be predicated upon proof of a lack of financial resources; moreover, the retroactive direct payment of tuition (as opposed to reimbursement) is only available as a remedy when a student has been enrolled in an appropriate private school, but the parents—due to a lack of financial resources—have not made tuition payments although legally obligated to do so (Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). This case is unlike Mr. & Mrs. A. or the principles enunciated in Burlington in which the student actually attended the nonpublic school program in question, and, in the present case, because the student did not enroll in the League School for the 2012-13 school year at all. Therefore, the relief sought by the parent can only be properly characterized as an unrealized prospective unilateral placement.

As described above, the CSE is empowered to recommend appropriate services for a student and, as such, the CSE should be the first to determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Thus, a directive to prospectively require placement of a student in a nonpublic school unnecessarily runs roughshod over the important statutory purpose of attempting, whenever possible, to have disabled students meaningfully access the public school system each year by first attempting placement in a public school (see Cooke Center for Learning and Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] [finding that "federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; Matter of Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] [noting that the "central purpose of the IDEA . . . and article 89 of the Education Law is to afford a 'public' education for children with disabilities"]). Moreover, the discussion of the student's needs as previously indicated do not suggest that removal from the public school was warranted at the time of the May 2012 CSE meeting in order to offer the student a FAPE (see, e.g., Dist. Ex. 9; see also Application of the Dep't of Educ., Appeal No.

13-082; Application of the Dep't of Educ., Appeal No. 12-157). As such, prospective placement relief would not be appropriate under the circumstances of this case.

VII. Conclusion

In sum and contrary to the IHO's determination, the evidence in the hearing record demonstrates that the district did not sustain its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year. Under the circumstances of this case, the parent is not entitled to either prospective placement of the student at the League School or prospective funding of the costs of the student's tuition at the League School for the 2012-13 school year. However, it is strongly suggested that in the development of the student's IEP for the 2014-15 school year—if not already done so—that the CSE consider additional placement options on the continuum of services for the student, whether the frequency and duration of the related services recommended for the student are appropriate, and whether the CSE should conduct a functional behavioral assessment (FBA) of the student and develop a BIP for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 20, 2012, is modified by reversing the determination that the district offered the student a FAPE for the 2012-13 school year.

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

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CAROL H. HAUGE
STATE REVIEW OFFICER