The University of the State of New York

The State Education Department
State Review Officer
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No. 13-013

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
The Law Offices of Steven L. Goldstein, attorneys for petitioners, Steven L. Goldstein, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2011-12 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that a special education teacher of the student did not participate in the development of the student's individualized education program. The appeal must be dismissed. The cross-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

The CSE convened on February 28, 2011 to conduct an annual review and develop an IEP for the student (Dist. Ex. 3). The February 2011 CSE found the student was eligible for special education and related services as a student with autism, and recommended a 12-month program consisting of a 6:1+1 special class in a specialized school and related services of individual and group speech-language therapy, individual and group occupational therapy (OT), individual and group counseling, and a full-time 1:1 "transitional" paraprofessional (Dist. Ex. 3 at pp. 14, 16).

On April 27, 2011, the parents executed an enrollment contract for the student's attendance at the Rebecca School for the 12-month, 2011-12 school year (Parent Ex. N).[1] By letter dated May 20, 2011, the parents notified the district that they disagreed with the program recommended in the February 2011 IEP (Parent Ex. G at pp. 2-4). By letter dated June 13, 2011, the parents advised the district of their belief that the district had failed to offer an appropriate program to the student and that they would unilaterally enroll the student at the Rebecca School for the 2011-12 school year and seek public funding for the costs of the student's tuition (Parent Ex. F at p. 2).

In a final notice of recommendation (FNR) dated June 15, 2011, the district summarized the special education programs and related services recommended by the February 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. 5). By letter dated June 30, 2011, the parents notified the district that after the student's mother visited the assigned school site, they determined that it was not an appropriate school for the student (Parent Ex. E at pp. 2-3).

A. Due Process Complaint Notice

In a due process complaint notice dated November 11, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A). In particular, the parents alleged that the CSE (1) was not properly composed; (2) failed to consider a nonpublic school placement; (3) relied on insufficient and/or unreliable evaluative information in the development of the student's IEP, specifically, a November 2010 district psychoeducational evaluation; (4) failed to develop sufficient and appropriate goals and promotional/assessment criteria; (5) failed to properly consider whether it should conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP); (6) predetermined the program and placement recommended for the student; and (7) failed to recommend parent counseling and training (id. at pp. 3-10). The parents further alleged that they were denied the opportunity to participate in the development of the IEP, the assigned public school site was not appropriate for the student, and the student's IEP goals could not be implemented without the use of a specific methodology (id. at pp. 4-6, 8-9).

The parents argued that the Rebecca School offered a program that appropriately addressed the student's needs (Parent Ex. A at pp. 10-11). The parents also asserted that equitable considerations were in their favor because they cooperated with the CSE (id. at p. 11). As relief, the parents requested reimbursement and direct funding of the cost of the student's 12-month tuition at the Rebecca School and round-trip transportation (id. at p. 12).

B. Impartial Hearing Officer Decision

On February 28, 2012, the parties proceeded to an impartial hearing, which concluded on September 12, 2012, after nine days of proceedings (see Tr. pp. 1-813). In a decision dated December 19, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year and denied the parent's request for tuition reimbursement (see IHO Decision at p. 27).

[1] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

The IHO found that the February 2011 CSE was not properly composed in that a special education teacher or provider of the student was not in attendance at the CSE meeting (IHO Decision at pp. 13-14). The IHO noted that the parents attended the February 2011 CSE with the Rebecca School classroom teacher and a social worker and determined that all of the CSE members participated in the meeting (id.). The IHO also found that the testimony and documentary evidence presented revealed that the parents discussed the psychoeducational evaluation and the student's anxiety at length during the meeting (id. at p. 14). In addition, the student's classroom teacher gave her opinion on the appropriateness of the goals, which were prepared by the student's service providers from the Rebecca School, and participated in program recommendations as well as reported on the student's anxiety and lack of interfering behaviors (id.). The IHO also found that the parents' concerns were addressed during the meeting (id. at pp. 14-15). Accordingly, the IHO found that the improper composition of the CSE did not rise to the level of a denial of a FAPE (id. at p. 15). The IHO also determined that parent counseling and training was discussed during the CSE meeting and was available at the assigned school site, such that the failure to include it on the student's IEP did not constitute a denial of a FAPE (id. at pp. 26-27).

As to the parents' substantive claims, the IHO found there the February 2011 CSE considered sufficient evaluative information and that the February 2011 IEP reflected the results of the evaluative information and addressed the student's needs (IHO Decision pp. 15-19, 22). The IHO further held that the parents' disagreement with the results of the psychoeducational evaluation did not render the annual goals contained in the IEP flawed. The IHO also found that the parents were informed of their rights and could have requested an independent educational evaluation at public expense (id. at p. 22). The IHO determined that there was nothing in the record to support the conclusion that the student could only learn with a specific methodology and that the February 2011 IEP included a full time paraprofessional to deliver transitional support services (id. at p. 25). The IHO also determined that requiring the student to change classrooms between summer 2011 and fall 2011 did not constitute a change to any component of the February 2011 IEP and was therefore not a change in program or placement (id. at pp. 23-24). Based on the foregoing determinations, the IHO found that the district offered the student a FAPE for the 12-month, 2011-12 school year (id. at p. 27).

Because the IHO found that the district offered a FAPE to the student for the 2011-12 school year, he did not consider the appropriateness of the parents' unilateral placement nor make any findings relative to equitable considerations (id.).

IV. Appeal for State-Level Review

The parents appeal, challenging the IHO's finding that the district offered the student a FAPE for the 2011-12 school year. The parents contend that the IHO's decision is against the weight of the evidence and that the IHO committed a number of errors during the impartial hearing.

The parents allege that they were denied a meaningful opportunity to participate in the development of the IEP and that the IHO erred by finding the absence of a special education teacher at the February 2011 CSE and the omission of parent counseling and training from the February 2011 IEP did not result in a denial of FAPE. The parents also claim that (1) the psychoeducational evaluation was unreliable; (2) the IEP did not contain descriptive present levels of educational performance; (3) the IEP goals were not individually tailored to the student; (4) the

inclusion of the goals requiring the DIR/Floortime method rendered the recommended program inappropriate; (5) the IEP contained inappropriate and insufficient transitional support services; and (6) the assigned public school site was not appropriate to meet the student's needs.

The parents further assert that their unilateral placement of the student at the Rebecca School was appropriate to address the student's needs and that equitable considerations are in their favor. The parents request that the district be ordered to pay the costs of the student's tuition for the 12-month, 2011-12 school year.

In addition, and for the first time in this proceeding, the parents contend that the district improperly refused to consider a "more restrictive" placement, the November 2010 psychoeducational evaluation was not properly conducted, the assignment of a particular public school site was untimely, and the FNR improperly referenced a crisis management paraprofessional rather than a 1:1 transitional paraprofessional.

In an answer, the district responds to the parents' allegations with admissions and denials, and cross-appeals from that portion of the IHO's decision which found a special education teacher was not in attendance at the February 2011 CSE meeting. In addition, the district asserts that the February 2011 IEP and recommended placement in a specialized school were appropriate and that the Rebecca School was not appropriate for the student. The district also contends that equitable considerations do not favor the parents' request for relief.

V. Applicable Standards

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

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

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR

300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. Scope of Impartial Hearing and Review

At the outset, a determination must be made regarding which claims are properly put forth on appeal, as the parents have raised the following issues not identified in their due process complaint notice. The parents argue that the results of the November 2010 psychoeducational evaluation were inaccurate and unreliable due to the short amount of time the evaluator spent with the student and because the evaluation omitted the student's history of anxiety. The parents allege that the IHO erred in finding the November 2010 psychoeducational evaluation of the student was sufficiently comprehensive to identify all of the student's special education and related services needs. The parents further allege that the district failed to establish that the November 2010 psychoeducational evaluation was accurate and reliable and therefore, the resulting IEP is inaccurate and unreliable. The parents also contend that the IHO committed a number of errors relative to the issue of the manner in which the evaluator conducted the assessment of the student. The parents further allege that the FNR was untimely and that the district "opened the door" to this issue through testimony and also that the FNR incorrectly included a recommendation for a 1:1 crisis management paraprofessional.

In contrast, the parents' due process complaint notice alleged that the February 2011 IEP was based upon insufficient and unreliable evaluative information because the IEP did not include adequate and updated statements of the student's present levels of performance or how his disability affected his progress in the general education curriculum (Parent Ex. A at pp. 4-5). The

only specific claims in the due process complaint notice relative to the November 2010 psychoeducational evaluation were that the student's history of anxiety was omitted and that the evaluation was not shared with the parents in advance of the CSE meeting, nor adequately explained to the parents during the CSE meeting (id. at p. 5). The IHO addressed the parents' claim regarding the sufficiency of the evaluative data that was before the CSE and found that the CSE did consider other placements during the meeting. The hearing record provides no basis to depart from that conclusion and, in any event, the parents' claim regarding the manner in which the evaluation was conducted cannot reasonably be read into the due process complaint notice.

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues nor did they request permission to amend the due process complaint notice, these issues are not properly subject to review (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint"]; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 n.2 [S.D.N.Y. May 14, 2013] [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"], aff'd, 569 Fed. App'x 57 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . ., is limited to matters either raised in the . . . impartial hearing request or agreed to" by the opposing party]). In addition, an independent review of the hearing record does not provide any indication that the district "opened the door" regarding these issues so as to expand the scope of the impartial hearing (M.H., 685 F.3d at 250-51).[2]

The IHO did permit some testimony regarding assessment protocols, the length of time the evaluator observed the student at the Rebecca School, and the Rebecca School representative was allowed to give her opinion of the evaluation. Nevertheless, the IHO limited the number of witnesses and correctly based his findings on the evidence presented relative to the sufficiency of the evaluative information considered by the CSE.

While the parents' due process complaint notice included an allegation that the CSE failed to consider a nonpublic school program (Parent Ex. A at p. 3), their assertion on appeal is that the CSE did not consider a "more restrictive" placement. To the extent that the factual basis of the parents' claim that the CSE did not consider nonpublic placements can be construed to include their claim that the CSE did not consider "more restrictive" placements, the hearing record supports the IHO's finding that the CSE members participated in discussion throughout the duration of the meeting and considered but rejected other programs, services, and staffing ratios (Dist. Ex. 3 at p. 15). In any event, this contention would be without merit since, as noted above, the IDEA requires districts to place students in the least restrictive environment, and once a CSE has determined a placement to be appropriate, it need not consider a nonpublic school placement (B.K. v. New York

[2] To the extent the parents argue the district "opened the door" to the issue of the timeliness of the FNR through the testimony of a district witness, the cited testimony occurs during cross examination by counsel for the parents and so cannot be used by the parents as a basis for asserting this claim for the first time on appeal (cf., M.H., 685 F.3d at 250 [holding that the district opened the door to an issue not in the parents' due process complaint notice by raising the issue "first in its opening statement, and then in the questioning of its first witness"]; P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 515 [S.D.N.Y. 2013] [same]).

City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, *15-*16 [E.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, *7-*8 [S.D.N.Y. Mar. 19, 2013]). The parents raise no argument on appeal (not did they in their due process complaint notice) that the 6:1+1 special class placement recommended by the CSE was not appropriate for the student; rather, their concern appears directed more at the distinction between public school and nonpublic school placements. However, courts have not been open to arguments regarding the relative superiority of a nonpublic placement (see Walczak v. Florida Union Free Sch. Dist., 142 F.3d at 132; R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10-*11 [S.D.N.Y. Feb. 20, 2013]; M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]).

The parents also contend that they did not receive timely notice of the assigned public school site through the issuance of an FNR, and that the FNR they did receive included a 1:1 crisis management paraprofessional in error. The district argues that the parents had already rejected the recommended program well in advance of receiving the FNR. Even if these claims were properly raised on appeal, they are nonetheless without merit for essentially the reasons stated by the district. The district is required to have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]). The FNR, rather than being an entitlement created by the IDEA or State law, is the mechanism by which this particular district has often notified parents of the school to which their child has been assigned and at which his or her IEP will be implemented. Likewise, the parents' concern regarding a 1:1 crisis management paraprofessional being listed on the FNR is misplaced. The district's obligation is to implement the student's February 2011 IEP, which includes the 1:1 transitional paraprofessional recommended by the CSE, and, even if the FNR procedure was required by law, the wording distinction between the two is not so significant as to result in depriving the student of a FAPE.

B. February 2011 CSE Composition

Among the required members of a CSE is a special education teacher of the student, or where appropriate, a special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person . . . certified or licensed to teach students with disabilities"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). Nevertheless, this language does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

The IHO determined that the February 2011 CSE did not include a special education teacher of the student because the district representative, who also participated as the special education teacher member, was not the student's then-current teacher, had not personally taught in a 6:1+1 classroom ratio and was not a person responsible for implementing the IEP (IHO Decision at p. 13). However, he nevertheless found that it did not result in a denial of a FAPE (id. at p. 14).

The record reflects that the student has been enrolled at the Rebecca School since 2007 (Parent Ex. A at p. 2). The record also reflects that the district representative is a certified special education teacher (Tr. p. 86). In addition, the hearing record reflects that the student's then-current classroom teacher is a certified special education teacher and the hearing record reflects that she participated in the February 2011 CSE meeting (Tr. p. 566; District Ex. 3 at p. 2). Therefore, in these circumstances, it is questionable whether the IHO correctly found there was a procedural violation due to the lack of the presence of a special education teacher of the student at the February 2011 CSE meeting (see Application of the Bd. of Educ., Appeal No. 11-040).

Although the district raised this composition matter in its cross-appeal, the parents do not ultimately prevail on their claim that it resulted in a denial of a FAPE (Parent Ex. A at p. 4). Even assuming for the sake of argument that absence of a district-employed special education teacher who would have implemented the IEP was a procedural violation of the IDEA under the facts of this case, nothing in the hearing record undermines the IHO's conclusion that any procedural infirmity did not constitute a denial of a FAPE, especially where, as here, the student's current qualified special education teacher from the private school attended the CSE (IHO Decision at pp. 13-14; see C.T. v. Croton-Harmon Union Free Sch. Dist., 812 F. Supp. 2d 420, 430 [S.D.N.Y. 2011]).

C. February 2011 IEP

The parents contend that the November 2010 psychoeducational evaluation is inaccurate and unreliable because it does not state that the student has a history of anxiety. The parents further contend that they did not receive the psychoeducational evaluation in advance of the February 28, 2011 CSE meeting and that the results of the evaluation were not sufficiently explained to them during the meeting. The parents also claim that the private school CSE participants were not provided with the documents discussed at the meeting and that parent training was omitted from the February 2011 IEP. The parents allege that for these reasons they were denied the opportunity to meaningfully participate in the development of the student's IEP.

The parents also posit that the CSE's misplaced reliance on the November 2011 psychoeducational evaluation in the development of the student's 2011-12 program yielded a substantively flawed February 2011 IEP. The parents specifically challenge the adequacy and appropriateness of the student's present levels of performance, goals and short-term objectives.

1. Sufficiency of Evaluative Information and Present Levels of Performance

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the

student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

The hearing record indicates that the February 2011 IEP reflects information drawn from a November 2010 psychoeducational evaluation, a November 2010 classroom observation, a November 2008 classroom observation and two interdisciplinary reports of progress from the Rebecca School completed in December 2010 and January 2011 (Tr. pp. 92-97; Dist. Exs. 3-4; 9-12; 15).[3] The minutes from the February 2011 CSE meeting indicate that the parents confirmed receipt of both the classroom observation and psychoeducational evaluation prior to the meeting (Dist. Ex. 4 at p. 1). The minutes reflect that the student's father requested additional time to review the materials and that the meeting did not begin until the student's father indicated he was ready to participate (id.).

According to the author of the November 2010 psychoeducational evaluation report, the student's performance on the Stanford Binet Intelligence Scales—Fifth Edition (SB-5) revealed overall cognitive functioning within the borderline range (see Dist. Ex. 10 at p. 2). Specifically, the student's performance earned a verbal IQ of 75, a nonverbal IQ of 78, and a full-scale IQ of 75 (id. at p. 2). In addition to the standardized measure of cognitive functioning, the evaluator

[3] After examining the hearing record and exhibit list, it appears that District exhibits 11 through 14 were incorrectly marked as exhibits 12 through 15 (see Dist. Exs. 11-14). For purposes of this decision, all references are to the exhibit number as introduced into evidence on the first day of the impartial hearing and as described on the exhibit list appended to the IHO's decision (IHO Decision at p. 30; Tr. pp. 8-9).

administered the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III) to assess the student's reading, writing, and math skills (Dist. Ex. 10 at p. 4). Overall, the student's performance on the WJ-III fell within the very low range when compared with other students his age, with most skills appearing at the first grade-early second grade level (Dist. Ex. 10 at p. 4).

The November 2010 evaluation also included the completion of a standardized questionnaire that is designed to quantify the parent's observations of the student's adaptive behavior skills (Dist. Ex. 10 at p. 5). According to the results of the Vineland Adaptive Behavior Scales, Second Edition (Vineland II), the student's overall adaptive behavior skills appear to be within the moderately low range for a boy his age (id. at p. 5). For example, according to the parent's description of the student's facility with communication skills, "the results indicated the student's receptive language skills were within the "low" range, while his expressive language and written language skills fell within the "moderately low" range for a boy his age (Dist. Ex. 10 at p. 5). In addition, the student's daily living skills reflected moderately low functioning, as did his overall socialization skills (Dist. Ex. 10 at p. 5).

In addition to the student's cognitive, academic and adaptive behavior challenges evidenced during the evaluation, it was also noted that the student might display various symptoms and behaviors [concomitant to his diagnosis of autism] that might "interfere with overall adjustment and academic functioning" (Dist. Ex. 10 at p. 6). Among these behaviors, the evaluator cited concerns regarding the student's "mildly decreased" attention and concentration, difficulty dealing with change in routine/transitions and maintaining self-regulation (id. at pp. 1, 6). The evaluator also identified a variety of strengths, including the student's friendly and cooperative manner, his ability to communicate his needs, and some degree of self-awareness (Dist. Ex. 10 at p. 6). It was also noted that there was no evidence of significant anxiety or depression (Dist. Ex. 10 at p. 6).

The district's school psychologist testified that at least one hour of the CSE meeting was devoted to discussion of the November 2010 psychoeducational evaluation (Tr. pp. 109-10). The record also indicates that each subtest was explained to the parents during the meeting (Dist. Ex. 4 at p. 1). The district's school psychologist also testified that the parents were given their due process rights verbally and in writing, and that she specifically explained the right to obtain an independent educational evaluation at public expense (Tr. pp. 101-02).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A review of the February 2011 IEP reveals that the February 2011 CSE incorporated information obtained directly from the November 2010 psychoeducational evaluation, including the results of the SB-5 and the WJ-III within the present levels of performance and needs sections of the IEP (compare Dist. Ex. 10 at pp. 1-2, 4-6, with Dist. Ex. 3 at pp. 3-4). The parents claim

that the psychoeducational evaluation did not state that the student had a history of anxiety and that the resulting February 2011 IEP does not adequately describe the student's anxiety or its effect on his functioning. While the evaluator indicated that the student did not exhibit anxiety or depression during the evaluation, the final report states that the student had difficulty dealing with transitions or changes in routine and he displayed issues with self-regulation. The record also indicates that the parents did not inform the evaluator that the student had a history of anxiety (Tr. p. 140).

Whether the student's needs are described as anxiety or as periods of dysregulation, they are described at length in the social/emotional performance section of the present levels of performance portion of the February 2011 IEP (Dist. Ex. 3 at p. 4). Further, the information presented in the present levels of performance echoed the description of the behaviors the student might exhibit when becoming "dysregulated," as offered in the student's December 2010 interdisciplinary Rebecca School progress report (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 11 at p. 1). For example, both the progress report and the IEP noted the student "presents with a generally calm[,] but sensory seeking regulatory state" and that the student did not "frequently become dysregulated" and upon the rare occasion that he does, the student "will turn away from other individuals to avoid contact" (Dist. Exs. 3 at p. 4, 11 at p. 1).

The February 2011 IEP also identifies the personnel responsible for providing behavioral support based on the student's needs as outlined in the present levels of social-emotional performance (Dist. Ex. 3 at p. 4). In addition, the IEP identifies counseling as a support to the student in this area (id.).

The student's social/emotional management needs as reported in the IEP indicate that the student benefitted from co-regulation strategies such as speaking to him in a soothing voice and maintaining close proximity, which mirrors the December 2010 Rebecca School progress report (Dist. Exs. 3 at p. 4, 11 at p. 1). To address the student's difficulty with transitions and changes in routine, the CSE recommended a full time 1:1 paraprofessional (Dist. Ex. 3 at pp. 12-14, 16).

I agree with the IHO that the February 2011 CSE had sufficient evaluative data and information before it to develop an appropriate IEP for the student and that the IEP appropriately reflected the evaluative data available to the CSE.

2. Annual Goals and Methodology

The parents claim that the IHO erred in finding that the district established that the IEP goals were individually tailored to meet the student's needs. In addition the parents assert that the IEP goals can only be implemented using the DIR/Floortime model and as such, the recommended program is inappropriate.

The IHO found that the goals were appropriate to address the student's needs, and that the record did not support the parents' contention that the student could not learn using other methodologies.

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]).

The February 2011 IEP includes a number of annual goals and accompanying short-term objectives that were drawn from the December 2010 Rebecca School progress report. These goals and short-term objectives targeted the student's abilities related to emotional modulation, self-regulation, and "strengthening his ability to sustain reciprocal interactions across a range of emotions" (Dist. Exs. 3 at pp. 8, 11; 11 at p. 9).

Initially, with respect to the parents' claim that the annual goals in the February 2011 IEP were not appropriate because they were intended for implementation in conjunction with the use of a particular methodology (the DIR/Floortime model), under the IDEA and State and federal regulations, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability for a particular methodology, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (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]). There is nothing in the hearing record to indicate that the May 2012 IEP annual goals could not be implemented in a setting that used a model other than DIR/Floortime (see Parent Ex. E at pp. 4-8; cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *12 [S.D.N.Y. Mar. 19, 2013]).

Next, turning to the February 2011 CSE's use of the December 2010 Rebecca School progress report to develop the annual goals, there is no authority for the proposition that a CSE cannot incorporate annual goals into a student's IEP that were developed by the student's nonpublic school teachers and/or providers (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013] [noting that the parent cited "no authority for the proposition that drawing goals from a teacher's progress report is a violation of the statute or regulations"]).

Overall, the evidence in the hearing record supports a finding that the annual goals in the February 2011 IEP targeted the student's identified areas of need and appropriately addressed the student's needs (see, e.g., D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]). Therefore, there is no reason appearing in the hearing record to disturb the IHO's findings.

3. Parent Counseling and Training

The IHO found that the February 2011 IEP did not provide for parent counseling and training, however he determined that this omission did not rise to the level of a denial of FAPE because parent counseling and training was discussed at the CSE meeting and was available at the assigned school site (IHO Decision at p. 26).

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided a "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191). The Second Circuit has explained that, "because school districts are required by [State regulation][4] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

The district concedes that parent counseling and training was not included on the student's February 2011 IEP, however the district representative testified that parent training is a component of the recommended 6:1+1 placement and the minutes from the CSE meeting also indicate that parent training was discussed (Tr. pp. 103-04, Dist. Ex. 4 at p. 1). While the district's failure to include parent counseling and training on the student's IEP violates State regulation, such failure would only constitute a denial of a FAPE if such failure (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]). In the present case, the evidence in the hearing record does not indicate that any of the consequences occurred as a result of the district's failure to comply with State regulations.

4. Transitional Support Services

The parents assert that the IEP did not include appropriate and sufficient transitional support services for the student because his ability to learn would be negatively impacted during his period of transition from his current educational setting to the assigned public school. At the outset, it is important to note that the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another.[5] Rather, transitional support services are

[4] 8 NYCRR 200.13[d].

[5] Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff] [defining "Transition Services"]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training,

"temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd] [emphasis added]), but no written plan is expressly required. State regulations further require that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). The IEP provided the student with a 1:1 transitional paraprofessional to provide the student with support as he "ma[de] the shift from his current private school environment to a public school setting" and developed goals for implementation by the student's paraprofessional (Dist. Ex. 3 at pp. 12-16). To the extent the parents assert that a 1:1 paraprofessional would have been detrimental to the student, the witness also testified that the student required "individualized support to initiate interactions with peers" (Tr. p. 702), and one of the annual goals called upon the paraprofessional to assist the student with transitions (Dist. Ex. 3 at p. 12). Furthermore, assuming without deciding that the CSE erred in failing to recommend transitional support services for the student's special education teacher, the hearing record does not support a conclusion that the IEP was not reasonably calculated to enable the student to receive educational benefits as a result (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 9, 2013]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom., R.E, 694 F.3d 167; see also M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]).

D. Challenges to the Assigned Public School Site

The parents object to the district's assignment of one public school location for summer 2011 and another location for September 2011. The parents' contentions essentially distill to speculative IEP implementation claims and a challenge to the assigned public school site.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding 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'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding 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

education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Here, the student had not attained the age of 15 at the time of the CSE meeting (see Dist. Ex. 3 at p. 1).

have been executed"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; 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"]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; 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]; C.L.K., 2013 WL 6818376, at *13).

In view of the foregoing, I find that the parents cannot prevail on their claim that the district would have failed to implement the February 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's February 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 parents rejected the assigned public school site that the student would have attended and instead enrolled the student in a nonpublic school of their choosing (see Parent Exs. D, N). 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., 2013 WL 6818376, at *13 [stating that "[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 parents cannot prevail on their claim that the assigned public school site would not have properly implemented the February 2011 IEP.

VII. Conclusion

In summary, the IHO's conclusion that a special education teacher of the student was not present at the February 28, 2011 CSE meeting is not supported by the hearing record. I find that the district offered the student a FAPE for the 12-month, 2011-12 school year. It is therefore unnecessary to reach the other issues raised in this matter, including whether the parents' unilateral placement was appropriate for the student, or whether equitable considerations support the parents' requests for relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 31, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER