The University of the State of New York

The State Education Department
State Review Officer
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No. 13-015

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Offices of Neal Howard Rosenberg, attorneys for petitioners, Neal H. Rosenberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 a decision of an impartial hearing officer (IHO) which determined that the program and placement respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2012-13 school year was appropriate. 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 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 student has been diagnosed as having cerebral palsy and has a classification of an other health-impairment (Dist. Ex. 3 at p. 1).[1] The CSE met on May 1, 2012 to develop the student's IEP for the 2012-13 school year (id. at p. 14). At the time of the CSE meeting, the student was seven years old and in the first grade at a district public community school (Tr. pp. 16, 19-20; Dist. Ex. 3 at p. 1). The May 2012 CSE recommended integrated co-teaching (ICT) services five periods per week each in mathematics, English language arts (ELA), social studies, and science (Dist. 3 at

[1] The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute in this proceeding (34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][10]).

pp. 9-10). The May 2012 CSE also recommended four periods per week of adapted physical education and the related services of individual speech-language therapy once per week for 30 minutes, group physical therapy (PT) twice per week for 45 minutes, individual occupational therapy (OT) twice per week for 30 minutes, and individual and group counseling once per week each for 30 minutes (id. at p. 10).[2] On June 28, 2012, the student's mother consented to an amendment to the May 2012 IEP, which added a full-time 1:1 paraprofessional to assist the student with toileting and mobility needs (Dist. Ex. 6). The amended IEP is otherwise identical to the original May 2012 IEP (compare Dist. Ex. 3, with Dist. Ex. 7).

A. Due Process Complaint Notice

On September 24, 2012, the parents submitted a due process complaint notice (Dist. Ex. 1). The parents alleged that the student had been "placed in an environment that [did not] accommodate her physical challenges" and that "this problem is [a]ffecting her emotional[ly], socially and academically" (id.). As a proposed resolution, the parents requested that the student be placed in a nonpublic school (id.).

B. Impartial Hearing Officer Decision

On December 5, 2012, the parties proceeded to impartial hearing, at which the parents appeared pro se. The hearing concluded the same day (see Tr. pp. 1-182). In a decision dated December 27, 2012, the IHO found that the district offered the student a free appropriate public education (FAPE) for the 2012-13 school year (id. at p. 8). With respect to allegations raised by the parents regarding the adequacy of the student's chair in the classroom, the IHO stated that the student's classroom chair "may or may not be appropriate" and that the student was sometimes fatigued during the day but noted that the parents did not provide the district with any information from the student's physician relative to a classroom chair or the student's fatigue and therefore it was impossible for the district "to know if and how" to address these two issues (id. at pp. 7-8). The IHO determined that the recommendation for ICT services in a community school was an appropriate program and placement to meet the student's needs (id. at p. 8).

IV. Appeal for State-Level Review

The parents appeal, requesting that the IHO's determination that the district offered the student a FAPE in the least restrictive environment (LRE) for the 2012-13 school year be overturned. The parents argue that the IHO erred by finding that the district proved the appropriateness of the student's IEP. The parents also allege that the IHO did not conduct the hearing appropriately, failed to develop a complete and accurate record, failed to assist them during the course of the hearing, and violated their due process rights. In addition, the parents raise claims that were not included in the impartial hearing request. As relief, the parents request that an SRO reverse the IHO's determination and find that the district denied the student a FAPE. Lastly, the parents request that the SRO remand this matter for an impartial hearing to determine (1) the appropriateness of the parents' desired private school placement; and (2) whether any equitable

[2] Although the May 2012 IEP recommended individual speech-language therapy, the student's speech-language provider testified that this "probably was an error" and the student had previously received group speech-language therapy (Tr. p. 110).

considerations would bar the parents' requested relief. In an answer, the district responds to the parents' allegations with admissions and denials, objects to claims raised for the first time in the petition, and argues to uphold the IHO's decision in its entirety.

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]). The burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Before reaching the merits of this case, a determination must be made regarding which claims are properly before me on appeal. The district argues that the parents impermissibly have raised a number of issues on appeal that were not contemplated by their due process complaint.

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; see R.E., 694 F.3d at 187-88 & n.4; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [holding that an issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Upon review of the parties' due process complaint, I find that, as the district argues, the parents have raised the following issues on appeal for the first time and, accordingly, these issues will not be addressed herein: (1) the May 2012 IEP was not appropriate; (2) the evaluative information before the May 2012 CSE was not sufficient; (3) the May 2012 IEP did not describe the student's present levels of performance; and (4) the May 2012 IEP did not include management needs.[3] However, I do read the due process complaint to include a claim that the ICT placement recommended by the district for the student was inappropriate and denied the student a FAPE. The parents continue to pursue such claim on appeal. Accordingly, the discussion of the substantive allegations asserted by the parents in the petition shall be limited to the issue of whether or not the placement recommended by the district for the 2012-13 school year was appropriate.

[3] The parents do not contend that the due process complaint was amended, that consent was obtained by the district to introduce additional claims, or that the district "opened the door" to such claims during the due process hearing.

2. Conduct of Impartial Hearing

Before turning to the substantive issue in this case, I must first consider the allegations raised by the parents concerning the conduct of the impartial hearing. On appeal, the parents contend that the IHO failed to conduct the impartial hearing in a manner consistent with the requirements of due process. Specifically, the parents allege that the IHO did not properly assist the parents as unrepresented parties, did not explain the due process hearing procedures, and did not explain that the parents had the burden of demonstrating the appropriateness of the proposed placement.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g. Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of the Bd. of Educ., Appeal No. 09-057). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity, must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious" and, moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

After a careful review of the hearing record, I conclude that the IHO assisted the parents to the extent appropriate and find that the requirements of due process were met. Further, a complete review of the transcript reveals no abuse of discretion in the IHO's determination to limit the parents' questioning at the impartial hearing.

B. Recommended ICT Placement

The parents contend that the district denied the student a FAPE by recommending an inappropriate placement for the student 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). In other words, 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). 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). An appropriate educational program begins with an IEP that includes 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]).

In this case, upon my review of the entire hearing record, including the IEP developed for the student for the 2012-13 school year, I find that the district failed to offer the student a FAPE for that year. With respect to development of the IEP, the district did not offer any evidence relative to the conduct of the CSE meeting or the evaluative information relied upon in determining the student's placement. Only two assessments are referenced on the May 2012 IEP. The student is described as an emergent reader and as performing on a low first grade level in mathematics (Dist. Ex. 7 at pp. 1-2). The May 2012 IEP also reflected that the student was disappointed by her physical limitations (id. at p. 1). Socially, the student was described as courteous, caring and sensitive, interacting well with her peers and responding appropriately to adult directions (id.). According to the May 2012 IEP, the student's gross motor functioning level was such that the student would be expected to be able to sit on a chair but require adaptive seating for trunk control and hand function (id. at p. 2). With regard to motor functioning, the May 2012 IEP does not include a description specific to the student.

The hearing record also includes a March 2012 PT progress report that was prepared for the student's annual review and was available to the May 2012 CSE (Dist. Ex. 2). According to the PT progress report, the student's physical therapist recommended that the student receive a 45-minute individual PT session once per week and a 30-minute group PT session once per week (Dist. Ex. 2 at p. 3). The May 2012 IEP reflects that the CSE recommended two 45-minute group PT sessions per week (Dist. Ex. 3 at p. 10).

An IEP must also establish 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 provide for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v].

The May 2012 IEP included approximately 17 annual goals in the areas of reading, writing, mathematics, PT, adapted physical education, OT, and counseling (see Dist. Ex. 7 at pp. 3-9). The May 2012 IEP did not include speech-language therapy goals (see Dist. Ex. 7). The student's speech-language therapy provider testified that she was on leave during the time period in which the student's annual review was conducted and as a result did not have the opportunity to provide goals to the CSE for use in developing the May 2012 IEP (Tr. pp. 107, 110-111). The speech-language therapy provider further testified that she used the student's IEP from the 2011-12 school year while providing services during the 2012-13 school year, because the May 2012 IEP did not include any speech goals and that "in order to add new goals, the IEP would have to be amended" (Tr. at p. 111).

The May 2012 IEP indicates that the student requires adaptive seating for trunk control and hand function based upon an assessment of her motor functioning (Dist. Ex. 7 at p. 2). The

principal of the public school the student attended testified that the student used a special table in the classroom and had an adaptive chair during the prior school year but had since outgrown it (Tr. p. 37; see also Tr. p. 83). The principal further testified that the process to acquire a new chair for the student had been halted when the parents requested a hearing; and at the time of the impartial hearing the student was using an office chair with arms and a pillow for back support (Tr. pp. 37-38; see also IHO Decision at p. 6; Tr. pp. 129-30, 141-44).

The principal also testified that the student had made significant progress and had shown a great deal of growth since 2010, when the student first attended the public school (Tr. pp. 18, 22). The student's counseling provider also testified to the student's overall progress since 2010 (Tr. p. 48). With regard to the appropriateness of the student's ICT placement, the counselor testified that the student felt so different from the other students that she might be happier in a class with other students with physical disabilities (Tr. pp. 49-50, 52). The counselor also testified that the student had formed a close friendship with two other students receiving adapted physical education (Tr. pp. 50-51). The counselor explained that "the reason that they have this particular group is because they're kind of isolated from the other girls in the class" because of their physical limitations (Tr. p. 51).

The student's special education classroom teacher testified that the student made progress in reading (Tr. 74). The student's regular education classroom teacher testified that the student had shown progress since September 2012 in recalling sight words and slowly improved in mathematics (Tr. p. 54). The regular education teacher also testified that the student was far behind the majority of her classmates and was functioning at an end of kindergarten or beginning of first grade level with "very, very low" skills (Tr. p. 68). The regular education teacher indicated that the student received "a lot of services" but further testified that she believed the student was "getting something out of [the ICT placement]" (Tr. p. 58). With regard to the appropriateness of the ICT placement, the regular education teacher testified that the student would "probably benefit from another classroom" (Tr. pp. 68-69).

The student's parents testified that an ICT placement is not appropriate for their daughter and does not address her physical and social/emotional needs (Tr. pp. 136-137, 140-44).

The IHO concluded that it was impossible for the district "to know if and how" to address the appropriateness of the student's classroom chair and the student's recurring fatigue (IHO Decision at p. 7). I disagree. The student's May 2012 IEP describes the student's need for adaptive classroom seating and indicates that her participation is impacted by "her loss of energy throughout the day" (Dist Ex. 7 at pp. 1-2). The May 2012 IEP clearly identified the student's needs, however, the district failed to provide appropriate seating to meet the student's needs. I agree with the parents that the district was responsible for identifying and providing appropriate adaptive seating for the student that addressed the student's needs in this area in order to provide a placement with appropriate supports for the student.

Additionally, the district did not demonstrate that the student was receiving appropriate services to permit the student to receive educational benefits. The student's classroom teachers testified to progress in reading and mathematics during the 2012-13 school year. Nevertheless, the student's regular education classroom teacher also testified that the student was far behind the majority of the class and would probably benefit from a different classroom. The student's

counselor also testified that, with respect to her emotional needs, the student might benefit from a different classroom. The student's other current providers who offered testimony relative to the student's progress testified generally to the student's overall progress since 2010. However, the district failed to demonstrate that this general level of progress, in light of the fact that the student was performing substantially below grade-level, demonstrated that the student's current placement provided "an opportunity greater than mere 'trivial advancement,'" particularly where the testimony concerning progress was not specific to the 2012-13 school year at issue (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]).

Based upon the foregoing, I find that the IHO erred in determining that the student's ICT placement in a community school was appropriate to meet the student's needs and that the district offered the student a FAPE for the 2012-13 school year. The IEP fails, within its four corners, to present a coherent, evaluation-based description of the student's needs and the connection between those needs and the supports and services recommended by the district. Therefore, the district's placement cannot be construed as reasonably calculated to provide meaningful benefit to the student (see Rowley, 458 U.S. at 192). Moreover, although the district had an opportunity to clarify the various elements of the IEP at the impartial hearing, it failed to do so. The district also failed to establish how the recommended ICT placement would address the student's needs concerning her academic functioning which was identified as significantly below grade-level. Finally, the lack of supports within the IEP with respect to the provision of appropriate seating to the student further demonstrates the overall inappropriateness of the recommended placement. Accordingly, that portion of the IHO's decision finding that the district provided the student with a FAPE for the 2012-13 school year must be reversed.

C. Relief

As relief, the parents request that the matter be remanded for another hearing to determine the appropriateness of certain proposed State-approved nonpublic schools and for a determination that equitable considerations do not bar the parents' request for relief. For the reasons described below, I find that the parents' requested relief is not an appropriate remedy in this case.

At the outset, this case is unlike the principles enunciated in Burlington, wherein the student actually attended the nonpublic school program in question, because the student remained in public school for the 2012-13 school year. The parents have not obtained additional services for the student for which they seek reimbursement, nor do they seek compensatory education services for special education and related services they have been denied. Therefore the relief sought by the parents can only be properly characterized as an unrealized prospective unilateral placement.

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., 2013 WL 4495676, at *15 [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., 2013 WL 1155570, at *7-*8 [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] ["The 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] ["Indeed, the central purpose of the IDEA . . . and article 89 of the Education Law . . . is to afford a 'public' education for children with disabilities"]). Moreover, review of the May 2012 IEP and the testimony of the student's teachers and providers, even those teachers and providers who believed the student would benefit from a different placement, do not suggest that removal from the public school was warranted at the time the CSE meeting was conducted in order to provide the student with a FAPE (see, e.g., Application of the Dep't of Educ., Appeal No. 12-157). As such, prospective placement relief was not appropriate under the circumstances of this case. Nonetheless, I strongly encourage the district, when next it convenes a CSE to develop an IEP for the student, to determine what evaluative information is necessary to fully consider the student's needs, develop an appropriate program that addresses her academic, physical, and social/emotional needs and, if it determines that the student does not require the accommodations requested by the parents, to provide the parents with appropriate notice thereof in accordance with State and federal regulations.[4]

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE for the 2012-13 school year and that the IHO erred in determining the district's recommended program and placement was appropriate. I further find that the parents' requested relief is not an appropriate remedy to redress the denial of a FAPE to the student. I have considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 27, 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**
October 31, 2014

CAROL HAUGE
STATE REVIEW OFFICER

[4] Under the circumstances, in which the district has been required to convene a CSE and develop subsequent IEPs for the student during the pendency of this appeal, it would be unwarranted to direct any immediate action to be taken by the district. The parents, if they are displeased by the IEPs developed for the student subsequent to the May 2012 IEP, are entitled to commence impartial hearings to resolve their complaints.