



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-018

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:

DLA Piper LLP, attorneys for petitioners, Joshua D. Arisohn, Esq. and Joseph Alonzo, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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) that denied their request to be reimbursed by the respondent (the district) for their son's tuition costs at the Cooke Center Grammar School (Cooke) for the 2012-2013 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

A party aggrieved by the decision of an IHO may 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]).¹

III. Facts and Procedural History

With regard to the student's educational history, the hearing record shows that the student attended a 12:1+1 special class in a district public school from first through third grade (Dist. Exs. 4 at p. 1; 6 at p. 2).² The student has received diagnoses of a moderate intellectual disability, an attention-deficit hyperactivity disorder (ADHD), a severe receptive-expressive language impairment, and a separation anxiety disorder (Dist. Ex. 5 at p. 5; Parent Ex. K ¶ 6). For the beginning of the 2011-2012 school year, the student attended a third-grade "standard assessment" 12:1+1 special class placement public school in the district (Dist. Ex. 13 at p. 1; see Tr. pp. 23, 26).³ In fall 2011, the student's special education teacher expressed to the parents her concerns about the student's social skills and his "ability to perform on [S]tate tests" and suggested placing the student in a different classroom setting that would "better suit his needs" (Dist. Ex. 13 at pp. 1-2). Then, in October 2011, the parents requested that the district change the student's eligibility classification and promotion criteria (Tr. pp. 94, 113-14; see Dist. Ex. 6 at pp. 1-2).

In response to the parents' request, on December 13, 2011, the CSE convened to discuss the parents' and the student's teacher's concern about his performance thus far in the third grade standard assessment 12:1+1 special class, to review then-recent evaluations, and to develop the student's IEP to be implemented between December 2011 and December 2012 (see Tr. pp. 33, 113-14; Dist. Ex. 13 ¶¶ 23, 25; see generally Dist. Ex. 3). Finding the student eligible for special education and related services as a student with an intellectual disability, the December 2011 CSE recommended a 12:1+1 special class placement in a community school (Dist. Ex. 3 at pp. 8, 11).⁴ The December 2011 CSE also recommended related services consisting of one session of counseling and two sessions of speech-language therapy per week in a group of three for 30

¹ The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

² The evidence in the hearing record indicates that the student repeated the second grade (Dist. Ex. 4 at p. 1).

³ The special education teacher of the "self-contained" special class, which the student attended beginning in September 2011, stated that although the students in her class had IEPs, they were expected to "accomplish and reach third grade standards," take state examinations, and perform at a level "close" to that of general education students (see Tr. pp. 25, 50).

⁴ The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute in this proceeding (Tr. p. 39; Dist. Ex. 1; see also 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

minutes (id. at p. 8). In recommending that the student participate in alternate assessments and assessed via portfolio, the CSE explained that the student's "limited cognitive abilities preclude his participation in a regular assessment at this time" (id. at p. 9).

In January 2012 the student transferred into the 12:1+1 special class recommended in the December 2011 IEP within the same district public school (Dist. Exs. 13 at p. 2; 14 at p. 1).⁵

Due to their belief that the 12:1+1 special class was inappropriate for the student, at the end of the 2011-2012 school year the parents submitted a request to the district that the student be transferred to a new school (see Parent Ex. K at ¶¶ 10-18). According to the parents, in July 2012, the district denied the parents' request (Parent Ex. K ¶ 18; Dist. Ex. 1 at p. 2).

According to the parents, by May 2012 they submitted an application with Cooke for the student's enrollment for the 2012-13 school year (Tr. p. 95; see Parent Ex. K ¶ 19). The student began attending the Cooke Center in September 2012 (Parent Ex. O ¶ 17).

A. Due Process Complaint Notice

By due process complaint notice dated September 21, 2012, the parents alleged that the district failed to offer the student a free and appropriate public education (FAPE) for the 2012-13 school year and requested reimbursement for tuition and door-to-door transportation costs associated with their son's enrollment at Cooke (Dist. Ex. 1 at pp. 1, 3). In support of their claim that the student was denied a FAPE, the parents principally alleged that: (1) the recommended 12:1+1 special class was inappropriate for the student; (2) the student regressed substantially while in the special class from January to June 2012; (3) their unilateral placement of the student at Cooke for the 2012-13 school year was appropriate; and (4) equitable considerations weighed in favor of their request for tuition reimbursement because they cooperated with the district and made their decision to enroll the student at Cooke in "good faith" and "only after they performed an exhaustive search for other schools" that would be appropriate for the student (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing was held on December 19, 2012 (see Tr. pp. 1-219).⁶ By decision dated January 7, 2013, the IHO found that the district offered the student a FAPE for the 2012-13 school year (IHO Decision at p. 10). In her decision, the IHO found that the parent had an opportunity and did participate fully at the CSE meeting and in the development of the IEP (IHO Decision at pp. 8-9). Relative to the educational program recommended by the CSE in the December 2011 IEP, the IHO found that the district offered the student a FAPE in the least restrictive environment (LRE) (id. at p. 9). Specifically, with regard to the CSE's recommendation

⁵ To the extent that the special class attended by the student from January 2012 to June 2012 is referenced in the hearing record, or by the parties in their pleadings, as a 12:1+4 special class, such reference is not correct. The class was a 12:1+1 special class, with an addition 3 paraprofessionals, each of whom was assigned to three individual students (see Tr. pp. 66-67; compare 8 NYCRR 200.6[h][4][i], with 8 NYCRR 200.6[h][4][iii]).

⁶ Despite objections from both parties, pursuant to an October 10, 2012 pre-hearing order, all witnesses were required to submit direct testimony by affidavit (see Dist. Ex. 12 at ¶ 1). Cross-examination and re-direct were largely carried out telephonically (see Tr. p. 18).

for a 12:1+1 special class, the IHO found that the parents' concerns prior to and at the December 2011 CSE meeting were conflicting, confusing, and not credible as to the student's academic and social levels and that the 12:1+1 special class "met the needs of the student" in the academic and social domains (*id.* at p. 9-10).⁷ Finally, with regard to the parents' claim that the student regressed substantially while in the 12:1+1 special class from January to June 2012, the IHO found that the student was functioning at a second-grade level in reading and mathematics and, therefore, had made progress (*id.* at p. 10).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is presumed and will not be recited in depth here. As discussed more in detail below, the parents argue that the district did not offer the student a FAPE for the 2012-13 school year and that the IHO erred in denying their claim for tuition reimbursement. Specifically, the gravamen of the parents' argument is that the 12:1+1 special class was inappropriate for the student because it did not offer enough individualized 1:1 paraprofessional support for the student to make academic progress. The parents also argue that Cooke was an appropriate unilateral placement for the student for the 2012-13 school year and that equitable considerations weigh in favor of their request for tuition reimbursement.⁸

Further, the parents raise two arguments in their petition that they did not advance in their due process complaint notice—first, that the IEP contained errors, such as a reporting of the student's full scale IQ of 50, that led to an inappropriate placement and, second, that the district failed to conduct an FBA or develop a BIP for the student (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; *see R.E.*, 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint . . ."]). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, and the district cannot be said to have expanded the scope of the impartial hearing to include these issues

⁷ With regard to the parents' position that the student required a 1:1 paraprofessional in the 12:1+1 special class, the IHO noted that the student did not have a 1:1 paraprofessional at Cooke, which the parents claimed was appropriate, for the 2012-13 school year (IHO Decision at p. 8).

⁸ The parents included additional documentary evidence with their petition and reply (Pet. Exs. A; B; Reply Exs. C; D). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (*see, e.g., Application of a Student with a Disability*, Appeal No. 13-238; *Application of a Student with a Disability*, Appeal No. 12-185; *Application of the Dep't of Educ.*, Appeal No. 12-103; *see also* 8 NYCRR 279.10[b]; *L.K. v. Northeast Sch. Dist.*, 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, there is no indication in the hearing record suggesting that the parents did not have ample opportunity in this case to offer the evidence attached to their petition. Moreover, there is no evidence in the hearing record suggesting that the parents were deprived of any opportunity to present documentary or testimonial evidence or to rebut that offered by the district. Finally, although the 2012-13 Cooke progress reports and the parents' 2012 tax return attached to the parents' reply (Reply Exs. C; D), were not available at the time of the impartial hearing on December 19, 2012, in light of my decision herein, consideration of the parents' supplemental submissions is not necessary (*see* 8 NYCRR 279.10[b]).

by opening the door, they are not properly raised as new issues on appeal (see M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]).⁹

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., 685 F.3d at 245; 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

⁹ At the impartial hearing, the parents' attorney questioned the student's special education teacher, who taught the student from January 2012 to June 2012, about whether the district conducted an FBA or developed a BIP and the district specifically objected to this question, prompting the parents' attorney to withdraw the question (Tr. 66). Accordingly, the IHO appropriately did not address such a claim, and it would be inappropriate to do so now.

services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 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. December 2011 IEP

1. Present Levels of Performance

While not at issue in this appeal, to facilitate the examination of the parties' dispute concerning the placement recommendation in the December 2011 IEP, a brief discussion of the student's needs, as reflected in the December 2011 IEP, follows.¹⁰ The December 2011 IEP present levels of performance contained the results of the student's March 2011 psychological evaluation report (compare Dist. Ex. 3 at p. 1, with Dist. Exs. 4 at p. 6; 5 at p. 1), including that an administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded the following composite standard scores: verbal comprehension (57), perceptual reasoning (55), working memory (52), processing speed (75), and full scale (50) (Dist. Exs. 3 at p. 1; 5 at p. 1). The IEP reflected the March 2011 psychological evaluation report that indicated the student's full scale IQ of 50 placed his overall cognitive functioning within the moderately intellectually disabled range of ability (Dist. Exs. 3 at p. 1; 5 at p. 5). The student's adaptive behavior skills, as reported in the March 2011 psychological evaluation report and reflected on the IEP, were in the moderately low range (id.). The IEP also reflected the student's grade equivalents from a March 2011 administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), which indicated that his reading, writing, and mathematics grade equivalents were in the range of kindergarten to first grade (Dist. Exs. 3 at p. 1; 4 at p. 6).¹¹

The special education teacher of the 12:1+1 special class the student attended from September to December 2011 (2011 special education teacher) testified that she attended the December 2011 CSE meeting and presented information regarding the student's academic and social performance (Tr. pp. 19, 23, 45). According to the December 2011 IEP, the 2011 special education teacher reported that the student was reading at a first grade level and exhibited difficulty comprehending, recalling details, and recognizing grade-appropriate high frequency words (Dist. Ex. 3 at p. 1). The student's vocabulary was limited, and he demonstrated difficulty articulating words clearly (id.). In mathematics, the IEP indicated that the student functioned between a first and second grade level, struggled with mathematics concepts, forgot facts he had learned, and exhibited difficulty with word problems and

¹⁰ Notwithstanding that the parents' argument on appeal regarding the accuracy of the December 2011 IEP is outside the scope of review, the evidence in the hearing record shows that the IEP accurately reflects information from a number of evaluative reports and assessments that support the recommendations in the IEP (see Dist. Exs. 3 at p. 1; 4-7)

¹¹ The March 2011 psychoeducational evaluation report indicated that the student's WJ-III ACH picture vocabulary subtest grade equivalent was 1.0 (Dist. Ex. 4 at p. 6). The December 2011 IEP WJ-III ACH picture vocabulary subtest grade equivalent of <k.0 appears to have been transposed from a different column in the WJ-III ACH score report (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 4 at p. 6).

spatially aligning/organizing problems on the page (id.). The IEP noted that the student had difficulty copying from the board, recalling the correct spelling of grade-appropriate high frequency words, organizing his ideas prior to writing, and using proper grammar (id.). According to the IEP, the student struggled to keep up with class work and often needed assistance from the classroom paraprofessional (id.). He experienced difficulty keeping up with his workload, and often did not appear to understand new concepts (id. at p. 2). During the school day the student was easily distracted, had difficulty filtering out irrelevant/extraneous information, and recalling auditory and visual information (id. at p. 1). The IEP indicated that the student required constant repetition of instructions, one-to-one attention, and assistance to complete tasks (id.).

Regarding speech-language skills, the December 2011 IEP indicated that the student had shown progress in his conversational topic maintenance and eye contact/facial expression skills, although he needed prompting to stay on topic as he became tangential at times (Dist. Ex. 3 at p. 1). The student also exhibited difficulty retelling stories, and future goals of speech-language therapy focused on improving narrative skills, and the ability to answer various "wh" questions (id. at p. 2).

In the area of social/emotional development, the December 2011 IEP indicated that the student was a "kind and polite child who has adequate relationships with peers and authority figures" (Dist. Ex. 3 at p. 2). According to the IEP, the student experienced a significant amount of pressure to meet academic standards, and anxiety which may relate to school stress (id.). The IEP reflected that, although the student accepted help within the classroom, he had difficulty asking for help when needed, lacked self-confidence, withdrew when faced with a problem or frustration, and appeared to be a "loner" and "fearful" (id.).¹²

To address the student's needs, the December 2011 IEP recommended the student receive individualized instruction and a modified curriculum due to cognitive limitations that limited the speed by which he processed information (Dist. Ex. 3 at p. 2). The IEP also indicated that the student required positive reinforcement and as much one-to-one instruction as possible (id.). Additionally, the IEP indicated that the student needed lessons presented visually, orally, and using as many materials that he could physically manipulate (id.).

Annual goals and short-term objectives included in the December 2011 IEP addressed the student's need to improve his attention to task and reduce distractibility, make decisions in the classroom to reduce frustration, and to improve his mathematics, reading, writing and language skills (Dist. Ex. 3 at pp. 3-7). The CSE determined that the student's behavior did not interfere with his learning such that he required a BIP and that he did not require assistive technology (id. at p. 3).¹³

¹² The December 2011 IEP indicated that the student was in good health and did not have difficulty with vision or hearing (Dist. Ex. 3 at p. 2). The student's diagnosis of an ADHD and his involvement with a psychiatrist at a private clinic for medication management was also reflected on the IEP (Dist. Ex. 3 at p. 2; see Dist. Exs. 4 at p. 1; 6 at pp. 2-3).

¹³ Here, even if I were to address fully the parents' claim that the IEP was procedurally inadequate for failing to conduct an FBA and develop a BIP, that claim would not prevail. There is no evidence in the hearing record suggesting that the student presented any "interfering behaviors" that would "impede [the student's] learning or that of others" (8 NYCRR 200.4[b][1][v]), and the evidence reflects that the student is a "polite child who has adequate relationships with peers and authority figures" (Dist. Ex. 3 at pp. 2, 3).

2. 12:1+1 Special Class

Turning to the matters in dispute, the parents argue on appeal that the recommended 12:1+1 special class, with alternate assessment, was not appropriate to address the student's educational needs. In particular, the parents contend that the 12:1+1 special class recommended by the CSE lacked the requisite individualized support for the student to make academic progress. In support of their argument, the parents highlight those portions of the student's IEP that note that the student "require[d] repetition of instructions, constant one-to-one attention, and assistance to complete tasks" and that the student "require[d] individualized instruction" (*id.*). Thus, the parents argue that the student required as much one-on-one attention and individual instruction as possible in order to make reasonable academic progress and that the student failed to make such progress, and regressed, while placed in the 12:1+1 special class from January 2012 to June 2012 (Dist. Ex. 3 at p. 1).¹⁴

State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students (8 NYCRR 200.6[h][4][i]).

Here, consistent with the student's needs as identified in the evaluative data reviewed by the CSE and reflected in the student's present levels of performance articulated in the December 2011 IEP, the December 2011 CSE appropriately recommended that the student be placed in a 12:1+1 special class with alternate assessment in a community school (Dist. Ex. 3 at p. 11). Evidence in the hearing record demonstrates that the student had been retained in second grade and that, from September to December 2011, he struggled while in the third grade standard assessment 12:1+1 special class (*see* Tr. pp. 104-05, 111, 114; Dist. Exs. 6; 7; 9; 10 at p. 1; 13). In October 2011, the parent requested that the district change the student's classification and promotion criteria (Tr. pp. 113-14) and, according to the November 2011 social history update report, the parent indicated that the student was "very stressed" because he could not complete work in class and that the "assignments [were] too challenging" for him (Dist. Ex. 6 at p. 2). At that time, by parent report the student was biting his nails, became aggressive at home, and cried and yelled "when he d[id] not [know] how to complete an assignment" (*id.*). The parents also reported that the student was afraid that the teacher would yell at him if he did not complete his class work (*id.*). The social history report indicated that the parents had discussed the situation with the student's psychiatrist, who agreed with the parents that the student needed "a more nurturing environment" with less demanding work (*id.*). According to the social history report, the student was "afraid" of State tests, and the parent requested that the student participate in the alternate assessments (*id.*). The December 2011 IEP indicated that the parents were concerned that the expectations of the State assessments were "too high" for the student and that they would like him to be in a school setting where he would feel confident and "excel at his pace" (Dist. Ex. 3 at p. 11).

The evidence in the hearing record also demonstrates that, although the student could decode with fluency, his reading comprehension skills were "far lower" than the remainder of

¹⁴ The hearing record shows that Cooke has not provided the student with a dedicated 1:1 paraprofessional (Tr. p. 159).

students in the standard assessment special class (Tr. pp. 27-28; Dist. Ex. 13 at p. 2). The student also exhibited frustration with the work, and the 2011 special education teacher observed that the classroom demands were "far higher than [the student's] capability" (Dist. Ex. 13 at p. 2). Although the student exhibited some skills at a "higher" or age appropriate level, according to the 2011 special education teacher, he was "unable to comprehend basic information or recall information" (id.). Within the standard assessment special class, the student completed only the most basic tasks with one-on-one assistance from a paraprofessional, and often required one-on-one attention due to his difficulty focusing (id.). In the standard assessment special class, the student would have been required to take the State tests, but "it was clear" to the 2011 special education teacher that the student "would not [have] be[en] able to actually do the work" (id.). Her affidavit reflected that the student was socially immature when compared to the other students in the standard assessment special class (id.).

Although the student's mother testified at the impartial hearing that she did not want her son "transferred" to the alternate assessment 12:1+1 special education class (Tr. p. 105), the CSE's recommendation in the December 2011 IEP to use alternate assessments to measure the student's achievement was appropriate in this case. State regulations provide that the use of alternative testing procedures shall be limited to students identified by a CSE as eligible for special education or students whose native language is other than English (see 8 NYCRR 100.2[g][1]). Parents must be informed that their child's achievement will be measured against alternate achievement standards or assessments (see 34 CFR 200.6[a][2][iii][A][2]; 34 CFR 300.160[e]). Guidance regarding the development of IEPs states in pertinent part that a CSE must determine whether a student should participate in State and local assessments, or the New York State Alternative Assessment (NYSAA):

All students with disabilities must be included in State or district-wide assessment programs. If the Committee determines that the student will participate in an alternate assessment on a particular State or district-wide assessment of student achievement, the IEP must provide a statement of why the student cannot participate in the regular assessment, and why the particular alternate assessment selected is appropriate for the student.

("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem., at 53 [Feb. 2010; Revised Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>; see also 8 NYCRR 200.4[d][2][vii]; see generally "The State Alternate Assessment for Students with Severe Disabilities," Office of Special Educ., Policy No. 01-02, available at <http://www.p12.nysed.gov/specialed/publications/policy/alterassess.htm> [Jan. 2005]).

Here, the student's December 2011 IEP indicated that the student's "limited cognitive abilities preclude his participation in a regular assessment at this time" and that the student would be "assessed via [p]ortfolio" (Dist. Ex. 3 at p. 9). To the extent that the parents challenge this recommendation on appeal, the 2011 special education teacher stated that the 12:1+1 setting and participation in the alternate assessments was explained to the parent at the December 2011 CSE meeting (Tr. p. 39; Dist. Ex. 13 at p. 3; see Tr. pp. 84-85). According to the 2011 special education teacher, students in the standard assessment 12:1+1 special class followed the same curriculum as third grade general education students, were expected to accomplish and reach third grade

standards, and were required to take State tests with a "general progression" towards earning a Regents diploma (Tr. pp. 26, 50). In comparison, she explained that students participating in the alternate assessments were held to a different standard, did not take State tests, and that their progress was measured over the course of a few months (Tr. p. 55). She indicated that the curriculum in the alternate assessment 12:1+1 special class was "slightly change[d]" from that in the standard assessment special class, and the students in the alternate assessment special class were not under the same time constraints (Tr. pp. 24-25). The 2011 special education teacher described that, in the alternate assessment special class, the work was less demanding and the level of support and the amount of time provided to each subject area was appropriate for the student (Tr. pp. 40-41). Additionally, in the alternate assessment special class, the student would receive more time to accomplish more demanding work (Tr. p. 41).

When asked why the December 2011 CSE recommended placing the student in an alternate assessment 12:1+1 special class when, at the time, he was not making progress in the standard assessment 12:1+1 special class, the 2011 special education teacher stated that the demands of the alternate assessment special class were "completely different" than those of the standard assessment special class that the student had been attending in fall 2011 (Tr. pp. 54-55). Based upon her experience with and knowledge of the alternate assessment special class, she also stated that the student was appropriately placed because he "fit in with the students in that class and the academics were more appropriate for him" (Tr. pp. 48-49; Dist. Ex. 13 at p. 2). Consistent with the student's present levels of performance and evidence in the hearing record, the recommendation of the CSE to place the student in an alternate assessment 12:1+1 special class was appropriate.

To the extent that the parents argue that the student required a 1:1 paraprofessional because he required more individual attention than he could not receive in a 12:1+1 special class, while the evidence in the hearing record indicates that the student needed frequent one-to-one support in the standard assessment special class, the supports available in the alternate assessment 12:1+1 special class were appropriate for the student and offered the student adequate individualized assistance (see Tr. pp. 29-30, 49-53; Dist. Ex. 13 at pp. 2-3). The December 2011 IEP acknowledged that the student required individualized instruction and "as much one-to-one instruction as possible" (Dist. Ex. 3 at p. 2). This, in conjunction with the December 2011 CSE's recommendation that the student transfer to the alternate assessment special class—in which, as described above, the pace of instruction and classroom demands were reduced—supports the finding of the IHO that the CSE's determination not to recommend 1:1 paraprofessional services was reasonable, and I decline to find that the lack of 1:1 paraprofessional services denied the student of a FAPE (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ., Special Educ. Field Advisory, at pp. 1-2 [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf> [stating that an assignment of a 1:1 aide can be "unnecessarily and inappropriately restrictive" and that a "goal for all students with disabilities is to promote and maximize independence"])). Accordingly, based upon the foregoing and consistent with the IHO's findings, the evidence contained in the hearing record supports that the district's recommended 12:1+1 special class in a community school with related services was reasonably calculated to enable the student to receive educational benefits for the 2012-2013 school year.

B. Progress in the Alternate Assessment 12:1+1 Special Class

The parents also argue on appeal that their son failed to make meaningful academic progress while placed in the district's 12:1+1 special class and that he regressed. A student's progress under a prior IEP—or, as in this case, the student's progress under the December 2011 IEP—is a relevant area of inquiry for purposes of determining whether a subsequent or future IEP (i.e., a December 2012 IEP) has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [December 2010]). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S., 2011 WL 3919040, at *12; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). Here, the parents may not use the student's progress from January to June 2012 to support their claim that the December 2011 IEP was inappropriate at the time that the IEP was developed and drafted by the CSE (see R.E., 6945 F.3d at 187 ["Parents who end up placing their children in public school cannot later use evidence that their child did not make progress under the IEP in order to show that it was deficient from the outset."]).¹⁵ Parents are permitted, however, to introduce "evidence that the school district did not follow the IEP as written" in order to "show that the child was denied a FAPE because necessary services included in the IEP were not provided in practice" (id. at n.3). Here, however, the parents failed to allege in their due process complaint notice that the student did not receive any services recommended

¹⁵ To the extent that the parents argue that the IHO erroneously relied upon evidence of the student's progress in his placement in the district's 12:1+1 special class from January 2012 to June 2012 and that the IHO should have exclusively examined the 12:1+1 ratio set forth in the student's IEP, the parents are correct because the IHO should not have relied upon any retrospective testimony or evidence that modified the 12:1+1 staffing ratio or other recommendations specified in the IEP (see R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 186 [2d Cir. 2012]). Nevertheless, for the reasons discussed above, the recommendations of the CSE, set forth in the December 2011 IEP, were appropriate for the student at the time those recommendations were made (see id.; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85, 2013 WL 3814669, at *4 [2d Cir. July 14, 2013] [recognizing that the inquiry was not whether the "SRO relied on impermissible retrospective evidence, but whether sufficient permissible evidence, relied on by the SRO, support[ed] the SRO's conclusion that the IEP offered [the student] a reasonable prospect of educational benefits" (emphasis omitted)]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587, at *4 [2d Cir. May 21, 2013] [removing "retrospective testimony from the balance" of the evidentiary analysis]).

in the student's IEP (Dist. Ex. 1), and even if the parents had raised such a claim, there is no evidence in the hearing record to substantiate a claim that the student failed to receive the necessary services recommended in the December 2010 IEP. Regardless of the purpose for which the parents alleged that the student did not make progress from January to June 2012, the following evidence in the hearing record demonstrates that the student did make progress.

Here, the special education teacher of the alternate assessment 12:1+1 special class the student attended from January to June 2012 (2012 special education teacher) stated that during the time the student was in her class, she implemented the December 2011 IEP and worked toward his annual goals and short-term objectives (Dist. Ex. 14 at pp. 1, 3-4). The 2012 special education teacher indicated that she administered assessments to the student that revealed his reading comprehension and mathematics skills were "significant areas of deficit" (*id.* at p. 2). Specifically, the 2012 special education teacher stated that, while in her class, the student's general academic functioning was at "approximately" a second grade level in English language arts, phonics and mathematics (*id.*). According to the teacher, the student did not complete subtraction problems independently but did complete single-digit addition and some two-digit addition and subtraction problems that did not require regrouping (*id.*). The student also exhibited the ability to spell some words and at times remembered to apply grammatical rules (*id.* at p. 3).

According to the 2012 special education teacher, students master a skill when they are able to complete the task 80 percent of the time or better on a consistent basis (Tr. p. 68). She testified that she would never purposely limit a student's work to material that had been mastered; however, she indicated that she might use mastered material for review purposes (Tr. p. 60). In her experience with the student in this case, contrary to the parents' assertion, the student had not mastered three-digit addition and subtraction because he continued to require support to refocus and required prompts to start the problem with correct place value, and he inconsistently recalled how to perform regrouping (Tr. pp. 68-69).¹⁶ She further indicated that the student was "missing many skills" in both reading and mathematics (Dist. Ex. 14 at p. 2). Additionally, the 2012 special education teacher stated that the student could not follow multistep directions due to his deficits in memory, stopped working when he did not want to or could not complete an assignment, exhibited difficulty retaining information, and became confused if too many strategies were used at once to teach a skill (*id.* at pp. 2-3). The 2012 special education teacher acknowledged that the parents had expressed concern that the first and second grade homework provided was too simple for the student; however, that they also commented that the third grade curriculum was too difficult for the student to complete independently (*id.* at p. 2).

To support their assertion that the student regressed while in the alternate assessment special class, the parents, in part, rely on an affidavit and testimony provided by a fellow in developmental pediatrics who first met and assessed the student in May 2012 and compared those results to the results obtained during the March 2011 psychoeducational evaluation (Parent Ex. L

¹⁶ The student's mother stated that the student had mastered mathematics problems involving three-digit addition and subtraction based upon her observation of the student's homework completion (Tr. pp. 97-98, 108-09; Parent Ex. K at p. 2). However, the parent also testified that the student did not always complete all homework correctly, that she needed to monitor him and point out when he made a mistake, and that at times he was unable to determine what he had done wrong (Tr. pp. 109-110). Additionally, I note that the IHO did not find the parent's view of the student's academic "levels" to be credible (IHO Decision at p. 9).

at pp. 1-2). Although the developmental pediatric fellow admitted that the academic test administered in May 2012 was not "directly analogous" to the WJ-III ACH administered in March 2011, she concluded that the May 2012 standard scores were "lower" than in March 2011 and that the student's "scores on the May 2012 testing indicated at best, a lack of progress, and at worst, a deterioration of his academic capabilities" over the prior 14 months (*id.* at p. 2). Without determining whether this analysis of the results is accurate, other than the parents' observations, the evidence in the hearing record does not establish that any "deterioration" of the student's academic skills occurred between January 2012, when the student had entered the alternate assessment special class, and May 2012, when the updated testing occurred, such that the parents can rely on this evidence to support their claim that the student regressed. Additionally, the parent testified that the May 2012 evaluation report was not provided to the district, precluding the opportunity for the district to review it and, if appropriate, consider changes to the student's program (Tr. pp. 94-95).

Contrary to the position of the parents, the 2012 special education teacher indicated that the student was showing some improvement while in the alternate assessment special class, and she anticipated that he would have made more progress during the 2012-13 school year and that he would have been appropriately placed for the 2012-13 school year had he remained in her class (Dist. Ex. 14 at pp. 3-4).¹⁷ Given the student's cognitive and attention difficulties, gaps in academic skills, and the limited duration of the student's attendance in the alternate assessment 12:1+1 special class for six months of the 2011-12 school year, there is a lack of evidentiary support in the hearing record to substantiate the parents' claim that the student regressed academically while in that class (Tr. p. 64; Dist. Exs. 4; 5; 14 at p. 2).

Based on the foregoing, the hearing record shows that the student demonstrated overall meaningful progress from January 2012 to June 2012. Accordingly, although the student's progress may be described as gradual progress, I find that, based on his cognitive abilities, the student's progress in the district placement was meaningful (*Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir. 1997) [stating that a "child's academic progress must be viewed in light of the limitations imposed by the child's disability"]; *H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 2012 WL 2708394, at *13-*14 [S.D.N.Y. May 24, 2012]). Although I sympathize with the parent's concern that her son was making minimal progress in a district program, the IDEA guarantees access to an appropriate public education, not specific results (see *Rowley*, 458 U.S. at 192; *M.H.*, 685 F.3d at 245; *Cerra*, 427 F.3d at 195; *Walczak*, 142 F.3d at 132).

VII. Conclusion

Based on an independent review of the hearing record, I find that the recommended 12:1+1 special class in a community school with related services was reasonably calculated to provide the student with educational benefits. Accordingly, the evidence in the hearing record supports the IHO's final determination that the district offered the student a FAPE for the 2012-13 school year. Having reached this determination, it is not necessary to reach the issues of whether Cooke was

¹⁷ The special education teacher, who implemented the December 2011 IEP from January to June 2012 (2012 special education teacher), also testified that the student was provided with adult support either one-on-one or in a group and that he did not require a 1:1 paraprofessional because he was able to work in a group and a "little bit" on his own, such that his needs didn't warrant that service (Tr. pp. 73-75).

appropriate for the student or whether equitable considerations support the parents' request for tuition costs, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134). I have considered the parties' remaining contentions and find that I need not consider them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 October 29, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER