



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-095

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

#### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Jean Marie Brescia, Esq., of counsel

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at The McCarton School (McCarton) for the 2012-13 school year. The parents cross-appeal from the IHO's determination which denied their request for the costs of private transportation and their daughter's tuition costs at an after-school program and a supplemental summer camp 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 parties' familiarity with the detailed facts and procedural history of this case and the IHO's decision is presumed and will not be recited here in detail.<sup>1</sup> Briefly, with regard to the

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<sup>1</sup> Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

student's educational history, the hearing record shows that the student attended preschool at McCarton for the 2010-11 and 2011-12 school years (see, e.g., Dist. Ex. 10 at pp. 1, 3). The CSE convened on April 2, 2012 to conduct the student's initial review and to formulate a draft IEP and reconvened on May 15, 2012 to address multiple parental concerns and finalize the student's IEP for the 2012-13 school year (Tr. pp. 211-12, 255-56; see Dist. Exs. 24 at pp. 9, 12, 16-17; Parent Exs. E at pp. 1, 15; G at pp. 1-2; I at pp. 1, 3, 19; see also Tr. pp. 605-10).<sup>2, 3</sup> Ultimately, the parents disagreed with the recommendations contained in the May 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year and, as a result, notified the district of their intent to unilaterally place the student at McCarton beginning in July 2012 until such time as the district could offer an appropriate placement (Parent Ex. L at pp. 1-2; see Dist. Ex. 26).

In an amended due process complaint notice, dated September 17, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A). In addition, the parents contended that the CSE failed to recommend any placement for the student for the summer of 2012 despite an obligation to do so since an October 13, 2011 IEP, developed for the student by the Committee on Preschool Special Education (CPSE), was challenged in a due process proceeding and did not provide the student with an appropriate educational program (Parent Ex. A at pp. 14-15).

An impartial hearing convened on August 17, 2012 and concluded on March 4, 2013 after seven days of proceedings (Tr. pp. 1-708).<sup>4</sup> In a decision dated April 24, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, including the summer of 2012 (IHO Decision at pp. 12-18). The IHO also found that the unilateral placement at McCarton was appropriate and that equitable considerations weighed in favor of the parents' request for reimbursement (id. at pp. 18-21). Consequently, the IHO ordered the district to reimburse the parents for tuition costs for the 2012-13 12-month school year (id. at p. 21). However, the IHO denied the parents' request for reimbursement for private transportation costs and for the costs of the supplemental after-school and summer camp programs (id. at pp. 19-20, 21-22).

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<sup>2</sup> While the hearing record includes two copies each of the April 2012 and May 2012 IEPs; the exhibits are not duplicative due to variations in pagination and to the fact that the district's exhibits also contain attendance pages relative to the respective CSE meetings (compare Dist. Exs. 7; 8, with Parent Exs. E; I). For clarity, however, this decision will cite to the parents' exhibits unless otherwise indicated.

<sup>3</sup> According to the hearing record, although the May 2012 IEP recommended a 12-month school year program for the student, the parents were informed that the CPSE was responsible for the student's summer program and that, therefore, the October 2011 IEP remained in effect through the summer of 2012 (Tr. pp. 127-28, 257-59, 486-87; see Parent Ex. I at pp. 3, 15-16).

<sup>4</sup> In addition to a prehearing conference on August 13, 2012, the first two days of proceedings also addressed preliminary matters, including identification of the student's pendency (stay-put) placement, identification of issues to be resolved, subpoenas, and scheduling; no evidence was presented (see Prehearing Summary; Tr. pp. 1-66).

#### **IV. Appeal for State-Level Review**

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer and cross-appeal is also presumed and the parties' respective positions will not be recited in full here. The gravamen of the parties' dispute on appeal is whether the IHO erred in determining that the May 2012 CSE's recommendation for a 6:1+1 special class placement with 1:1 paraprofessional support in a specialized school was not appropriate for the student. Furthermore, the district asserts that the IHO erred in reviewing the appropriateness of the summer program recommended in an October 2011 IEP, developed by the CPSE, arguing that a prior stipulation of settlement for the 2011-12 school year foreclosed any further relief relative to the October 2011 IEP. In addition, the parties also dispute the IHO's determinations with respect to the appropriateness of the supplemental after-school and summer camp programs, the parents' alleged entitlement to private transportation expenses, and whether equitable considerations favored the parents' request for tuition reimbursement.

Neither party has appealed from the IHO's determination that McCarton was an appropriate unilateral placement for the student (IHO Decision at p. 21). Therefore, that aspect of the IHO's decision has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also Application of a Student with a Disability, Appeal No. 11-027; Application of a Student with a Disability, Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-115; Application of a Student with a Disability, Appeal No. 10-102).

#### **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**

Prior to reaching the merits in this case, a determination must be made with regard to consideration of additional evidence in the form of a stipulation of settlement that the district included with its petition (see Pet. Ex. A). The document appears to have effectuated a settlement with respect to the student's 2011-12 school year and, therefore, the district argues that the IHO erred in adjudicating the appropriateness of the October 2011 IEP and granting the parents relief relative to the summer 2012 program. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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. Ne 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]). Contrary to the district's argument, the parents' due process complaint notice raised issues with respect to the student's educational placement for the summer of 2012, including assertions specific to the October 2011 IEP (Parent Ex. A at pp. 3, 14-15, 25). The district was, therefore, on sufficient notice that the student's educational placement for the summer of 2012 was subject to adjudication and should have submitted the stipulation of settlement into evidence at the time of the impartial hearing if it

wanted to advance such a defense.<sup>5</sup> As the district neglected to assert this defense or otherwise offer evidence at the impartial hearing regarding summer 2012 services for the student, there is no basis for finding that the IHO erred in reaching the merits of the parents' claims relating to the summer 2012 program recommended in the October 2011 IEP (see IHO Decision at p. 17).

Turning to the merits, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district denied the student a FAPE for the 2012-2013 school year, including the summer of 2012 (see IHO Decision at pp. 12-18). The IHO accurately recounted the facts of the case, addressed the core issues that were identified in the parents' due process complaint notice (and argued in the parties closing briefs), set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2012-13 school year, and applied that standard to the facts at hand (id. at pp. 6-18; see generally Parent Ex. A; IHO Exs. 6; 7). The decision shows that the IHO considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and supported his conclusions (IHO Decision at pp. 6-18). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]).

In particular, with respect to the essence of the parties' dispute, there is insufficient evidence in the hearing record to support a reversal of the IHO's determination that the May 2012 IEP recommended insufficient 1:1 instruction for the student to receive educational benefit (see IHO Decision at pp. 12-17). To be clear, the student may have been able to offer the student educational benefit in a 6:1+1 special class with 1:1 paraprofessional services. However, the district did not present sufficient evidence to support its position in this regard and, therefore, the IHO's ultimate conclusion on this issue will not be disturbed. Specifically, although the hearing record indicates that the student did participate in several group activities throughout the day at McCarton and was observed by the district school psychologist during a small group morning meeting, insufficient evidence was presented indicating whether the CSE possessed information that the student could acquire skills or otherwise benefit from instruction within such a small group, while a preponderance of evidence suggested the student could only be successfully instructed in a 1:1 setting (Tr. pp. 156-58, 362, 364, 371, 406-07, 413-14, 421, 467- 470, 479-480, 526-27; Dist. Exs. 10 at p. 1; 14 at pp. 2, 10; 18 at pp. 1-2 ). In other words, it was unclear the degree to which the student could receive benefit and progressing as a result of group instruction offered at McCarton, although it was clear that at least some attempts at group instruction may have occurred

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<sup>5</sup> Moreover, a reading of the stipulation reveals that it was intended to encompass the period of the student's placement at McCarton from July 1, 2011 to June 30, 2012 and, therefore, it is at least questionable whether, had it been properly entered into evidence at the impartial hearing, the stipulation could be read to foreclose review of the student's educational program for the months of July and August 2012 (see Pet. Ex. A). However, absent further context for the stipulation, such as the claims underlying the due process proceeding that resulted in the settlement, or the opportunity for the parents to offer rebuttal evidence or competing interpretations, I decline to guess at the parties' intent.

there.<sup>6</sup> As the district did not present sufficient evidence to support its position in this regard, I decline to disturb the IHO's ultimate conclusion on this issue (see P.L. v. New York Dep't of Educ., 2014 WL 4907496, at \*13-\*15 [E.D.N.Y. Sept. 29, 2014] [finding the classroom observation conducted by district insufficient to refute testimony from unilateral placement staff that "uniformly supported the . . . position that [the student] require[d] 1:1 instruction"]). Likewise, regarding the summer 2012 program recommended in the October 2011 IEP developed by the CPSE, the district has not offered an evidentiary basis for reversal of the IHO's determination that the recommended 8:1+2 special class placement also did not constitute an appropriate educational program for the student (IHO Decision at p. 17; Dist. Ex. 6 at p. 2).

Further, after a careful review of the record, I adopt the IHO's determinations: that the hearing record lacked evidence regarding the appropriateness of the supplemental after-school and summer camp programs the student attended, that equitable considerations supported an award of reimbursement of the student's tuition costs at McCarton, and that the parents were not entitled to reimbursement for the costs of private transportation (see IHO Decision at pp. 18-22).<sup>7</sup> Notwithstanding this result, I note that, although the district did not offer sufficient evidence to support its substantive IEP recommendations in this instance, the procedures utilized by the CSE in this case—conducting the April 2012 CSE meeting and reconvening in May 2012 to further consider the parents' concerns—were commendable and in keeping with the spirit of cooperation and collaboration for the benefit of the student contemplated by the IDEA (Schaffer v. Weast, 546 U.S. 49, 53 [2005]; Cerra, 427 F.3d at 192-93). "[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" (Rowley, 458 U.S. at 206), however, the inquiry does not end there and the district must also show that it offered an IEP that was substantively compliant.

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<sup>6</sup> Group instruction of students together in a classroom is the norm in American public school education, including in special education classes. However, private instruction from both institutions and individual providers who are not subject to federal and State educational oversight permits parents greater flexibility to explore the options such as 1:1 instruction only—without necessarily being subjected to strictures such as LRE or whether a student is capable of successfully engaging in the group learning typically offered in public schools. However, this case does not appear to present the more difficult question of trying to ascertain if a student is capable of group instruction when the student has never attended the public school and group instruction never even been seriously attempted by a student's private providers. In this particular case, attempts at group instruction were made and information regarding the student's experience was likely available, but it was either not obtained by the district or not presented at the hearing. Whether such evidence would have been helpful or prejudicial to the district's position is also unknown.

<sup>7</sup> Evidence in the hearing record regarding the content of the supplemental programs was limited to two invoices, as well as the parent's testimony that the student was sent to these summer programs when McCarton was not in session because the student required "a very structured day with one-on-one direct guidance" (Tr. p. 634; Parent Exs. U; V). I concur with the IHO's determination that this was insufficient to show specially designed instruction to meet the student's unique needs (Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G. v. Bd. of Educ., 459 F.3d 356, 365 [2d Cir. 2006]).



## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determinations, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find them without merit.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                      **January 28, 2015**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**