The University of the State of New York

The State Education Department
State Review Officer
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No. 13-116

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education.

Appearances:
Law Offices of Neal Howard Rosenberg, attorneys for petitioner, Jennifer D. Frank, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied a request to be reimbursed for her son's tuition costs at The Summit School (Summit) for the 2012-13 school year. Respondent (the district) cross-appeals from so much of the IHO's determination that found that Summit was an appropriate unilateral placement for the student. 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];

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

Petitioner is the parent of a child (the student) who, during the 2011-12 school year, attended fourth-grade at a public school in respondent's district (Dist. Exs. 3 at p. 1; 6; 7 at p. 1; 8; 9; 11; Tr. pp. 21, 62). The record reflects that the student - who had received multiple diagnoses, including autism, organic brain disorder/pervasive developmental disorder, oral and fine motor dyspraxia, and anxiety, and who exhibited mild to moderate symptoms of autism – was generally well-behaved, but exhibited problems with attention, concentration, planning and organization, and that he struggled both socially and academically (Dist. Exs. 2 at p. 1; 3 at p. 1; 4, 5 at. p. 1; 6 at pp. 1-2, 7 at pp. 1, 3-4; Parent Ex. B; Tr. pp. 22-24, 43-44, 50, 56, 77, 81). During the 2011-12 school year, the student was educated pursuant to an IEP which provided him with an educational placement in a general education classroom along with special education teacher support services

(SETSS) (Dist. Exs. 7 at p. 1; 11).[1] In addition, the student received related services including one session of group counseling, four sessions of speech therapy (including one group session in school, and three individual sessions outside of school), and two individual sessions of occupational therapy (both outside of school) (Dist. Exs. 6 at p. 1, 7 at p. 1, 8 at pp. 1-2). The student was also provided with the services of a full-time, 1:1 health paraprofessional (Dist. Ex. 7 at p. 1).

On June 8, 2012, a CSE convened to conduct a review of the student and develop an IEP for the 2012-13 school year (Dist. Ex. 7 at p. 1; Parent Ex. A at p. 1). The record reflects that this CSE recommended that the student continue to receive the same program and services that he received in the 2011-12 school year, but that the parent disagreed with this (Dist. Ex. 7 at p. 1; Tr. pp. 94, 130-31). On June 22, 2012, therefore, a CSE re-convened at the parent's request and, finding that the student remained eligible for special education as a student with autism, developed an IEP that recommended placement in a 12:1+1 class for ELA, math, social studies, and science (Dist. Ex. 1 at p. 1). In addition, the June 22, 2012 CSE recommended that the student receive related services of speech-language therapy in a group of three (2 x 30), individual occupational therapy (2 x 30), and counseling services in a group of three (1 x 30) (id. at p. 11). The June 22, 2012 CSE also continued the recommendation that the student be provided with the support of a full-time, 1:1 paraprofessional (id. at pp. 5, 11).

On July 5, 2012, the parent wrote to the district and expressed "concerns" with the student's recommended "program and placement," including her disagreement with the student's autism classification (Parent Ex. C at p. 3). In addition, and among other things, the parent stated that she felt that the recommended 12:1+1 class for ELA, math, social studies and science was "too large" for the student, that she was "confused" as to what "class and ratio" the student would be in during the rest of his school day, and she maintained that the student required a "small class and a special education teacher at all times" (id.). By letter dated August 19, 2012, the parent repeated these concerns, and advised the district that she was "unable to accept the program and placement offered" (Parent Ex. D at pp. 2-3). The parent also advised the district that she would visit the public school site to which the student had been assigned once the school was in session (id.).[2] Thereafter, and by letter dated September 19, 2012, the student's father wrote to the district and indicated that he had visited that public school site and that he was rejecting it because the school was too large; the class he observed was too districting; that the student would be "mainstreamed" for lunch, recess and "minor subjects;" and that it was not clear whether the student would be placed in an ICT class for reading, or whether he was be placed in a 12:1+1 class as mandated by his IEP (Parent Ex. E at pp. 2-3). In addition, and with respect to the prospect of a 12:1+1 class for reading, the student's father maintained that such class would be "below" the student's level (id. at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated November 21, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13

[1] A copy of this IEP is not contained in the hearing record.

[2] In her both her July 5 and August 19 letters, the parent indicated that she had received a final notice of recommendation (FNR) from the district assigning the student to the same public school that he attended in the 2011-12 school year (Parent Exs. C at p. 3, D at p. 2). This FNR, however, is not in the hearing record.

school year (Parent Ex. A at p. 2).[3] Specifically, the parent contended that the June 22, 2012 IEP was "procedurally and substantively invalid including invalid CSE composition and insufficient goals and objectives" (id. at p. 1).[4] In addition, the parent maintained that the student's classification of "autism" was inappropriate, that a class of 12 students would be too large for the student, and that it was "unclear as to what type of class he would be in" outside of ELA, math, social studies and science (id. at p. 1). The parent also asserted that the public school to which the student was assigned was inappropriate, contending that the "school and class are too large of a school setting" for the student, and suggesting that the student would be placed in a ICT class for ELA there, and not in a 12:1+1 class as mandated by the June 22, 2012 IEP (id.). As relief, the parent requested reimbursement for tuition paid to Summit for the 2012-13 school year, transportation, and "related services" (id. at 2).

B. Impartial Hearing Officer Decision

On March 8, 2013, an impartial hearing convened and concluded on April 23, 2013, after two days of proceedings (Tr. pp 5-197).[5] In a decision dated May 29, 2013, an IHO found that while Summit was an appropriate unilateral placement for the student and that there were no equitable reasons to deny "reimbursement/prospective funding" to the parent (IHO Decision at pp. 15-17), the district had offered the student a FAPE for the 2012-13 school year (id. at p. 15). Specifically, the IHO found that while the June 22, 2012 CSE did not include a parent member, this did not deny the student a FAPE in that the parent had a meaningful opportunity to participate at the CSE meeting and was not new to the CSE process (id. at 12-13). In addition, the IHO disagreed with the parent's assertion that the student had been improperly classified, finding instead that there was "ample evidence" in the record to support the student's autism classification (id. at p. 13). The IHO also found that the district's recommendation of a 12:1+1 class with the support of a 1:1 paraprofessional was appropriate for the student (id. at pp. 13-14), and she rejected the parent's claims regarding the public school to which the student was assigned (id. at pp. 14-15). The IHO, therefore, denied the parent's request for relief in its entirety (id. at p. 17).

IV. Appeal for State-Level Review

The parent appeals the IHO's determination and makes a number of allegations, including that the lack of a parent member at the June 22, 2012 CSE was a "significant procedural defect." The parent also challenges the IHO's determination that the record supports a classification of autism, contending instead that the student should have been classified as "other health impaired" (OHI). In addition, the parent challenges the IHO's determination that the program offered to the student in the June 22, 2012 IEP (i.e., placement in a 12:1+1 class in a community school with a 1:1 paraprofessional) was sufficient to offer a FAPE, arguing instead that such program was

[3] While the due process complaint notice indicates that it was presented by both of the student's parents, only one parent (the petitioner in this matter) is identified by name in the notice. Accordingly, I will treat the due process complaint notice as having been filed by only the parent in this matter.

[4] The parent also raised claims regarding a June 8, 2012 IEP which, she contends, she did not receive a copy of (Parent Ex. A at p. 1), and which is not in the hearing record. However, to the extent that such an IEP exists, it appears to have been superseded by the June 22, 2012 IEP and is, therefore, not at issue in this matter.

[5] The hearing record reflects that a pre-hearing conference was held on December 21, 2012, with a different IHO then the one who issued the decision being appealed (Tr. pp. 1-4). The transcript of this conference indicates that neither party attended the conference, and that this matter was simply scheduled for a hearing in January 2013 (id at p. 3). It is not clear from the record why this matter was subsequently assigned to a different IHO and/or why a hearing was not convened until March 8, 2013.

inappropriate to meet the student's academic and social/emotional needs for various reasons. Finally, the parent maintains both that the district was required (and failed) to prove that the public school to which the student was assigned was appropriate for the student, and that the school itself would not have provided the student with a FAPE. The parent, therefore, requests that the IHO's FAPE determination be overturned, and that she be awarded reimbursement for tuition at Summit for the 2012-13 school year.

The district generally denies the parent's allegations and contends that the IHO properly found that the student was offered a FAPE for the 2012-13 school year. In addition, the district cross-appeals the IHO's determination that Summit was an appropriate unilateral placement, contending both that Summit was too restrictive a setting for the student, and that the student required a 1:1 paraprofessional which Summit did not provide. The parent, in response to the district's cross-appeal, reiterates many of the claims she raised in her petition, and asserts both that the student does not require a 1:1 paraprofessional, and that Summit is actually a less restrictive setting then what the district offered because of the lack of a 1:1 paraprofessional.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v.

Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that

Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. CSE Composition

As noted above, the parent argues that the student was denied a FAPE because the June 22, 2012 CSE did not include a parent member which she contends constitutes "a significant procedural defect." In response, the district contends that (a) I lack jurisdiction to consider this issue since it was not raised by the parent in her due process complaint notice, and that (b) this claim lacks merit in that the June 22, 2012 CSE both considered evaluations provided by the parent and solicited input from the parent and the student's father at the meeting.

As an initial matter, I am unable to agree with the district's suggestion that the parent's claims regarding the lack of a parent member at the June 22, 2012 CSE are outside the proper scope of review in this matter. Generally, a party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (20 U.S.C. § 1415[b][6], [7]; 34 CFR 300.507; 300.508; 8 NYCRR 200.5[i], [j]). Such party, therefore, 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]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]). However, the record in this matter reflects that parent's due process complaint notice alleges, among other things, that the IEP developed for the student was "both procedurally and substantively invalid including invalid CSE composition . . ." (Parent Ex. A at p. 1). Thus, while the alleged lack of a parent member at the June 22, 2012 CSE was not itself explicitly identified by the parent as the reason for the "invalid CSE composition," the parent's due process complaint notice was sufficient to put the district on notice that the composition of the June 22, 2012 CSE (the requirements of which are relatively finite) was as an issue that needed to be addressed. Moreover, there is no indication in the record that the district sought and/or required clarification regarding this allegation. Accordingly, I decline to dismiss this allegation on jurisdictional grounds.

Regarding the merits of the parent's allegation, at the time of the June 22, 2012 CSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a

violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]).[6] Assistive guidance from the Office of Special Education indicates that "[t]he additional parent member can provide important support and information to the parents of the student during the meeting and, in addition to the student's parents, participates in the discussions and decision making from the perspective of a parent of a student with a disability" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 7, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/ iepguidance/IEPguideDec2010.pdf).

Initially, I note that it is undisputed that a parent member was not present at the June 22, 2012 CSE meeting, thus constituting a violation of both State law and regulations in place at the time. However, and as noted above, an administrative officer may find that a student did not receive a FAPE as a result of a procedural violation only if such inadequacy (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]). Here, the IHO indicated that she was "not convinced" that the absence of a parent member in this case resulted in any of these conditions (IHO Decision at pp. 12-13), and upon review of the hearing record I am inclined to agree. Notably, the hearing record reflects that the topic of a parent member was discussed with the parent (Tr. pp. 115-16), and there no indication that the parent thereafter sought and/or required the support or assistance of such parent member (Tr. pp. 125-154). Moreover, and as noted by the IHO, the record generally reflects that the parent was able to (and did) actively participate at the June 22, 2012 CSE (Tr. pp 96-99, 130-33). Accordingly, I am unable to find that the lack of a parent member at the June 22, 2012 CSE significantly impeded the parent's opportunity to participate in the decision-making process or otherwise rises to the level of a denial of FAPE. This is especially true where, as here, the parent does not cite to anything in the record to suggest otherwise, nor does she allege any specific harm as a result of this violation.

B. June 22, 2012 IEP

1. Classification

The parent also contends that the student was denied a FAPE because the June 22, 2012 CSE did not change the student's classification from Autism to OHI.[7] However, the IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R. v. South Orangetown Central Sch. Dist., 2011 WL 6307563, at *9

[6] Effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

[7] The parent asserts that the student's classification should have been changed because the primary difficulties that affected the student's performance were "Attention Deficit Disorder (ADHD) and anxiety" (Petition at ¶35).

[S.D.N.Y., Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA] decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). In other words, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Accordingly, even if a classification of OHI were appropriate for the child as the parent suggests, this alone, absent some evidence that the student's current classification, rather than his needs, inappropriately drove the resulting recommended program, does not contribute to a finding that the district failed to offer the student a FAPE (see M.R., 2011 WL 6307563, at *9). Here, the record reflects that the program offered to the student – while subject to disagreements among CSE team members – was driven by the student's needs, and not his classification (Dist. Ex. 7 at p. 1; Tr. pp. 25-26, 67-72, 79-82, 84-85, 94-100, 130-31). I, therefore, decline to find a denial of FAPE on the basis that the student was not properly classified. Rather, and as discussed further below, the issue is whether the June 22, 2012 IEP addresses the student's needs and is "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).

2. Recommended Program

The parent argues that the "proposed program" recommended in the June 22, 2012 IEP is inappropriate for the student and would not provide him with a FAPE. As noted above, the IHO dismissed this claim, and for the reasons discussed below I find that the IHO's decision on this issue should be upheld.

Initially, and viewing the June 22, 2012 IEP prospectively as I must (see, e.g.,. R.E., 694 F.3d at 188), the hearing record reflects that the June 22, 2012 CSE had before it a significant amount of evaluative information about the student, the sufficiency of which is not in dispute (Dist. Exs. 2-8, 11). In addition, the record reflects that a number of the student's teachers and providers attend and participated at the June 22, 2012 CSE, including the student's then-current general education teacher (Dist. Ex. 1 at p. 17; Tr. p. 25), the student's then-current SETSS (special education) teacher (Dist. Ex. 1 at p. 17; Tr. p. 45), and two of the student's then-current related services providers (Dist. Ex. 1 at p. 17; Tr. p. 65, 70). Information from these sources reflect that the student exhibited cognitive abilities in the average to low-average range, and that he had a full scale IQ in the higher end of the low average range (Dist. Ex. 4 at p. 3). Further, and academically, the record reflects that while the student tested in the average to above-average range in many areas (Dist. Ex. 7 at pp. 3-4), that he struggled in the classroom environment where the student's ability to remain focused and/or stay on task was a significant issue, though he performed better in small groups and in 1:1 situations (Dist. Exs. 2 at p. 1, 7 at p. 3, 8 at p. 2; Tr. pp. 22-25, 43-44, 50, 56, 63-64, 129-30). In addition, and with respect to the student's social/emotional functioning, the record reflects that while the student was generally well-behaved and got along with peers (Dist. Exs. 3 at p. 1, 4 at p. 2, 5 at p. 1, 7 at pp. 1, 3; Tr. pp. 25, 77), that he often would not maintain eye contact, would not engage and/or approach others, and experienced significant anxiety (Dist. Exs. 3 at p. 1, 4 at pp. 2, 5-6, 5 at p. 1, 6 at pp. 1-2, 7 at p. 1; Tr. pp. 77, 83).

Consistent with the above, the June 22, 2012 CSE developed an IEP which noted the student's deficits (Dist. Ex. 1 at pp. 1-5) and addressed them in multiple ways.[8] For example, the June 22, 2012 IEP includes multiple supports and strategies to address the student's needs, including the provision of specific strategies to assist the student academically (Dist. Ex. 1 at p 5), as well as the provision of various goals which address his academic and social/emotional deficits, including his anxiety (id. at pp. 6-8).[9] In addition, the June 22, 2012 IEP recommends that the student – who the year before was educated in a general education class with approximately 26 students (Tr. p. 36) - be placed in a smaller 12:1+1 class for ELA, math, social studies and science, and provided him with a 1:1 paraprofessional which the record shows provided the student with academic and social/emotional support (Dist. Ex. 1 at pp. 10-11; Tr. pp. 21-22, 56, 63-64, 86). The June 22, 2012 IEP also provides the student with related services of speech-language therapy (two times per week in a group of 3), occupational therapy (two times per week on an individual basis) and counseling (one time per week in a group of three) (Dist. Ex. 1 at p. 11). The record reflects that in addition to providing academic benefits to the student, these services – especially speech-language therapy and counseling - also addressed the student's social/emotional needs (id. at pp. 6-7; Tr. pp. 63, 76).

In her due process complaint notice, the parent contended that the "proposed program" recommended in the June 22, 2012 IEP is inappropriate because the size of the recommended classroom (i.e., the 12:1+1 class) was too large (Parent Ex. A at p. 1). However, this concern is not explicitly raised in the parent's petition, nor is there anything in the record to suggest that a class with 12 students would, by itself, be too large for the student to receive a meaningful benefit.[10] In fact, state regulations provide that a 12:1+1 special class placement is designed for students, like the student here, "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]). Again, the record reflects that the student – who was at or near grade-level academically - was highly distractible and required adult assistance to stay on task. Moreover, both the June 22, 2012 IEP and the record reflect that the student works well in small groups and/or 1:1 settings (Dist. Ex. 1 at p. 3; Tr. pp. 25, 56) which a 12:1+1 class would, by its nature, provide an opportunity for (see, e.g.,. Application of the Bd. of Educ., Appeal No. 13-079). This is especially true where, as here, the June 22, 2012 IEP provides the student with a full-time, 1:1 paraprofessional. Accordingly, I am unable to find on the record before me that the student would have been denied a FAPE based on class size, alone.

The parent, however, also argues that a 12:1+1 special class is inappropriate because the student would not receive enough attention from "trained teachers" which she asserts is needed for him to "focus and learn" (Petition at ¶ 17).[11] However, the parent – who did not raise this as a

[8] The description of the student's needs and deficits in the June 22, 2012 IEP is not challenged in this matter.

[9] While the parent's due process complaint notice suggests in a cursory fashion that the June 22, 2012 IEP is substantively invalid, in part, due to "insufficient goals" (Parent Ex. A at p. 1), the sufficiency of the goals contained in the June 22, 2012 IEP is not raised as an issue or challenged by the parent on appeal.

[10] Notably, the student is educated in a 12:1+1.5 environment at Summit, though the record reflects that for reading and math he is educated with fewer students (Tr. pp. 159, 166, 169, 171).

[11] The parent also suggests that the student requires a "trained teacher" to help him interact appropriately with peers (Petitioner at ¶ 24). However, while there is evidence in the record that teachers at Summit assist the student with social interactions (Tr. pp. 175-76), there is nothing in the record to suggest that direct instruction is necessary in this regard, or that only a "trained teacher" could assist the student with such interactions.

concern in her due process complaint notice (or to the IHO, for that matter) - does not cite to anything in the record to support this statement, nor is there any indication in the record that a "teacher" is required to help the student to focus. In fact, State regulations indicate that in a 12:1+1 special class the role of the "additional adult" within the classroom is "to assist in the instruction" of students (8 NYCRR 200.6[h][4][i]), and such regulations allow for one or more "supplementary school personnel" to be in the classroom with a teacher, which includes both teacher aides and teaching assistants, both of which can provide instructional support, though the former cannot provide direct instruction to students (see 8 NYCRR 80-5.6[a], [b]), 200.1[hh], 200.6[h][4][i]).[12] As helping a student focus and pay attention does not involve the provision of direct instructional services, it is a service that supplementary school personnel – under the direction and supervision of a certified special education teacher – can provide (8 NYCRR 80-5.6).[13]

The parent also contends that the "proposed program" is inappropriate because the use of a 1:1 crisis management paraprofessional is "too restrictive" and would be detrimental to the student's social skills development (Petition at ¶ 25). Specifically, the parent asserts that with a 1:1 paraprofessional, the student would rely on that paraprofessional instead of developing the skills he needs to self-advocate (id.).[14] However, while there is testimony in the hearing record from the clinic director at Summit indicating her belief that having an individual paraprofessional would "affect" the student's "social and emotional issues" (Tr. p. 187), there is no indication that any such concerns (which, again, were not raised in the parent's due process complaint notice) were brought to the attention of the June 22, 2012 CSE.[15] Moreover, I am unable to find on the record before that the use of an individual paraprofessional would, in fact, negatively impact the student's development or, as is relevant for purposes of this appeal, prohibit the student from receiving a meaningful benefit. This is especially true where, as here, the June 22, 2012 IEP

[12] Part 200 of the Regulations of the Commissioner of Education was amended to replace the term "paraprofessional" with the term "supplementary school personnel" to align the terminology used in State regulations with the federal No Child Left Behind Act ("'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID Mem. [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf).

[13] In fact, the record reflects that it was with the assistance of the student's individual paraprofessional that he was able to be re-directed and focused during the 2011-12 school year (Tr. pp 21-24, 56, 64).

[14] The parent also suggests in her petition that the district's recommended program was not in the "least restrictive environment" (LRE) (Petition at ¶ 22). Generally, whether an educational placement is in a student's LRE requires an analysis of whether a student has been appropriately removed from a general education setting and/or educated with nondisabled peers to the maximum extent appropriate (see M.W. v. New York City Dept. of Educ., 2013 WL 3868594, at *9 [2d Cir. July 29, 2013]; Newington, 546 F.3d at 114). To the extent that the parent suggests that the student should have been provided with greater access to non-disabled peers, this claim – in addition to being inconsistent with arguments raised both on appeal and at the hearing below regarding the student's ability to be "mainstreamed' (Petition at ¶ 33; Tr. pp. 166-67, 190) – was not raised in the parent's due process complaint notice and is, therefore, not properly before me (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]). Moreover, to the extent that the parent suggests that the district's program is not in the student's LRE because it recommends the use of a full time, 1:1 paraprofessional, I note that this, by itself, does not implicate LRE concerns.

[15] In this regard I note that the clinic director at Summit was not a member of the June 22, 2012 CSE, and the parent (who was a member of the June 22, 2012 CSE) testified that she did not recall indicating whether she agreed or disagreed with the recommendation of an individual paraprofessional (Tr. p. 133). Again, the sufficiency of an IEP must be evaluated prospectively as of the time of its drafting (see, e.g., R.E., 694 F.3d at 186, 188).

expressly requires the student's teacher and paraprofessional to "collaborate ideas and keep track with progress in assisting [the student] to work toward independence" (Dist. Ex. 1 at p. 5).

The parent also asserts that the "recommended program" does not meet the student's social and emotional needs in that the student requires a school that can "provide a social skills curriculum throughout the entire school year that is separate from the counseling sessions" (Petition at ¶ 24). However, while the parent cites to testimony showing that the student receives social skills assistance outside of counseling at Summit (Tr. p. 176), there is no evidence in the record to support the suggestion that the student would not receive any meaningful benefit without such assistance. Further, while the parent cites to the fact that the student did not meet his counseling goals in 2011-12 in support of her position, the record reflects that the student was making progress towards these goals and his social needs (Dist. Ex. 8 at p. 1; Tr. p 87). As noted above, the June 22, 2012 IEP addresses the student's social/emotional needs in a number of ways outside of counseling, including through other related services (i.e., speech-language therapy) and the provision of a paraprofessional which is provided, at least in part, to assist the student with communication and social interaction (Dist. Ex. 1 at pp. 7, 11; Tr. p 63). Accordingly, I am unable to find that the June 22, 2012 IEP neglects the student's social/emotional needs such that he would have been denied a FAPE.

Finally, the parent contends that the district's recommended program is flawed because it only offers the student support in ELA, math, social studies and science, and that the student would be "mainstreamed" in periods such as lunch, recess and "minor subjects" (Petition at ¶ 33).[16] Specifically, it appears to be the parent's contention that any "mainstream" setting would be too large and overwhelming for the student, and that he would fall behind in his "social and advocacy skills" (Petition at ¶ 33). However, I am unable to find that the record before me supports such a contention, or that the student would not be able to make progress or receive a meaningful benefit from the district's proposed program simply because he may have been exposed to and/or educated with non-disabled peers. This is especially true since observations of the student in a "mainstream" setting reflect that while the student did not initiate conversations with his peers and/or actively interact with them, he did get along with his peers, was able to transition from one activity to another, and was generally able to participate in activities (Dist. Ex. 3 at pp. 1-2). In addition, and while the clinic director at Summit opined that the student would not benefit from mainstreaming and that he would not be able to "prevent or deal with any type of social problem that comes up without an adult being available to monitor and support his interaction" (Tr. pp. 166-67), I note that none of the student's teachers and/or service providers from the 2011-12 school year who attended the June 22, 2012 CSE indicated a belief that less "mainstreaming" than what the June 22, 2012 IEP provides was required (or would be appropriate) for the student. In fact, at least one of these individuals (the student's prior year SETSS teacher) testified to believing that the student could make progress in a general education classroom with the support of a paraprofessional (Tr. pp. 55-56). In addition, the district's psychologist also testified to a belief that the student would benefit from being around non-disabled peers (Tr. pp. 96-97, 99-100). Accordingly, and in conjunction with the supports and services offered to the student as discussed above (including the provision of an individual paraprofessional to assist the student with social interactions), I am

[16] This issue is raised by the parent in her petition as a complaint relating to the public school to which the student was assigned. However, since the assigned public school would be required to implement the June 22, 2012 IEP as written (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320), the issue is whether the IEP – which would allow the student to be "mainstreamed" outside of ELA, math, social studies and science – was appropriate in this regard. Accordingly, I will treat this allegation as a challenge to the June 22, 2012 IEP.

unable to find that the student was denied a FAPE simply because he may have been "mainstreamed" at certain times during the school day.

In sum, I find that the June 22, 2012 IEP addresses the student's academic and social/emotional needs and, as a whole, was reasonably calculated to provide the student with a meaningful educational benefit. In this regard I note that while the parent may prefer the program at Summit (and while the student may be doing well there), school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir.2003]; Walczak, 142 F.3d at 132). Rather, the IDEA 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]).

C. Assigned School

In addition to contending that the June 22, 2012 IEP failed to offer the student a FAPE, the parent also alleges that the public school to which the student was assigned would not have provided the student with a FAPE (Petition at p. 9). In this regard, the parent alleges that the district "completely failed to carry its burden of proving the [the student] would have been appropriately placed" at this public school (id. at ¶¶ 27, 32).

As an initial matter, Second Circuit Court of Appeals has held that where an IEP is rejected by a parent before a district has had an opportunity to implement it, the sufficiency of a district's offered program must be determined on the basis of the IEP itself. In R.E., for example, the Court was confronted with a situation where the parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (id.). This claim, however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents" and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id.).

Likewise, in K.L. v. New York City Dep't of Educ., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x 81, 87 [2d Cir. 2013]). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (id., quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. v. New York City Dep't of Educ. (553 Fed. App'x 2 [2d Cir. 2014]), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (id. at *6). Citing to R.E., the Court reiterated that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" (id. at *6, citing R.E., 694 F.3d at 195), and held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice" (id., citing R.E., 694 F.3d at 187 n.3).

In light of the above, two general principals are clear: (1) the sufficiency of a special education program offered to a student must generally be based on the IEP which is offered to the

student, and (2) speculation that a school district will not adequately adhere to that IEP does not, alone, constitute an appropriate basis for unilateral placement. Accordingly, I cannot find, as the parent argues, that the district was required to prove that the public school to which the student was assigned was appropriate, for to do so would (a) suggest that looking past the June 22, 2012 IEP in assessing the sufficiency of the program offered to the student is appropriate, and (b) require me to speculate—due to a lack of evidence—that the district would not adequately adhere to that IEP (see, e.g., M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014] [noting that "it would be inconsistent with R.E. to require . . . evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP"], citing R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]). That the district "failed" to present evidence regarding the public school to which the student was assigned, therefore, does not provide a basis for unilateral placement.[17]

Notwithstanding the above, I recognize that there are district court cases suggesting that a parent may rely on evidence outside of an IEP which is known to the parent at the time the decision to unilaterally place a student is made (see, e.g., D.C. v. New York City Dep't of Educ., 950 F.Supp.2d 494, 510-11 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-79 [S.D.N.Y. 2012]). While the Second Circuit recently left open the question as to whether one such case (B.R.) "properly construes R.E." (see F.L., 2014 WL 53264, at *2), the Court has not explicitly addressed this issue. However, even considering what the parent knew about the assigned public school, I find that for the reasons discussed below her claims do not support an award of tuition reimbursement.

1. Adherence to IEP

Initially, the parent suggests that the assigned pubic school may not have adhered to the June 22, 2012 IEP. Specifically, the parent contends that the student's father observed that students were on different cognitive levels in the 12:1+1 class that he saw at the school, and that with respect to reading ability "students found to be on grade level are sent to the ICT class" (Petition at ¶ 31). Based on this the parent claims that the student, who she contends is on grade-level for reading but still requires a "small class" to assist with certain reading-related skills, "would be one

[17] While I realize that some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs (or that issues pertaining to a school site relate to the provision of a FAPE), the weight of the relevant authority, consistent with the Second Circuit precedent discussed above, supports the approach taken here (see B.K., 2014 WL 1330891, at *20-*22; M.L., 2014 WL 1301957, at *12; M.O., 2014 WL 1257924, at *2; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K., 961 F.Supp.2d at 588-90 [S.D.N.Y. 2013]; J.L., 2013 WL 625064, at *10; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] ["Absent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP."]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

of the students sent to the ICT class" (id.). However, and as noted above, districts are required to provide services in conformity with a student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320), and there is no indication in the record that the parent was specifically told that the student, despite having an IEP that explicitly recommended a 12:1+1 class for ELA, would have been placed in an ICT class at the assigned school. In fact, even the parent alleges simply that it is "not clear" whether the student's IEP would have been implemented (Petition at ¶ 31; see also Parent Ex. E at p. 3). Accordingly, the parent's claim that the district would not adhere to the June 22, 2012 IEP– even in light of what she "knew" about the assigned school – is speculative on its face and, for that reason, does not provide a basis for unilateral placement (see, e.g., R.E., 694 F.3d at 195).[18]

2. Class Environment

In addition, the parent contends that when the student's father visited the assigned school, the class he saw "seemed very crowded and distracting" given the number of students and adults in the class, and she suggests that if the student were in that class he would be too districted. However, as the student never attended this class, this claim is speculative in that one can only guess as to how the student would have reacted in it. This is especially true since, as noted above, there is evidence in the record that the student is capable of following directions and participating in classes (see, e.g., Dist. Ex. 3), and the June 22, 2012 IEP provides the student with supports (including the assistance of an individual paraprofessional) to help him focus and remain on task. Accordingly, I find that this claim does not support an award of tuition reimbursement.

3. School Size

Finally, and though not clearly raised in her petition, the parent suggested in her due process complaint notice that the size of the assigned public school was too large, and that the student would become overwhelmed and nervous during transition times (Parent Ex. A at p. 2). However, and as the IHO found, there is nothing in the record to suggest that the size of the assigned public school would have prohibited the student from receiving a FAPE. In fact, and as noted above, observations of the student at the assigned school suggest that he was capable of transitioning between activities there (Dist. Ex. 3 at p. 1). Accordingly, I am unable to find that the parent's contentions with respect to school size have merit.

VII. Conclusion

In light of the above, I find that the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2012-13 school year. Accordingly, and in light of

[18] In light of suggestions made to the district that a 12:1+1 class would be below the student's level for reading (Parent Ex. E at p. 3), it is not clear from the petition whether the parent's assertion that students in the observed 12:1+1 class "were on different cognitive levels than the student" was meant to suggest that the student would not have been appropriately grouped in that class. To the extent that this statement is meant to suggest this, I note that the "range" of functional levels identified by the parent (i.e., from 3rd to 5th grade) falls within accepted ranges identified by State regulations (see 8 NYCRR 200.6[h][7]). Further, and even if there had been evidence that students were inappropriately grouped at the time that the 12:1+1 class was observed by the student's father, any claim based on this observation would necessarily be speculative in that classroom groupings are something which may change over time (see, e.g., M.S., 2013 WL 7819319, at *16 n.10; Application of the Dep't of Educ., Appeal No. 13-220), thus providing no assurance that the grouping of students that was observed would have been the same grouping of students that would have existed had the student enrolled in the class.

this determination, I need not address the parties' remaining contentions, including whether Summit was an appropriate unilateral placement for the student.

THE APPEAL IS DISMISSED.

THE CROSS APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 21, 2014

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HOWARD BEYER
STATE REVIEW OFFICER