



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-118

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, Neha Dewan, Esq., of counsel

Manatt, Phelps & Phillips, LLP, attorneys for respondent, Jeremiah P. Sheehan, Esq., and Alpa V. Patel, 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 respondent's (the parent's) son and ordered it to reimburse the parent for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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 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]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. Briefly, the Committee on Special Education (CSE) convened on March 2, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Dist. Ex. 3 at pp. 1-18).¹ By letters to the district dated June 29, July 18, and August 20, 2012, the parent disagreed with the recommendations contained in the March 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 her intent to unilaterally place the student at Cooke (see Parent Exs. A-C).² In a due process complaint notice, dated December 4, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-5).

On January 25, 2013, the parties proceeded to an impartial hearing, which concluded on April 26, 2013 after five days of proceedings (see Tr. pp. 1-477).³ In an amended decision dated June 10, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 8-17). As relief, the IHO ordered the district to reimburse the parent and to directly pay Cooke for the costs of the student's tuition for the 2012-13 school year (id. at p. 17).

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 parent's answer thereto is also presumed and will not be recited here. The crux of the parties' dispute on appeal is whether the district was obligated to fund a 12-month school year program as the student's pendency placement at Cooke; whether a 12-month school year program in a 12:1+1 special class placement was appropriate to meet the student's needs; whether Cooke was an appropriate unilateral placement; whether equitable considerations weighed

¹ On April 23, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during the 2012-13 "academic" school year beginning September 10, 2012 and ending June 21, 2013 (see Parent Exs. E; G at pp. 1-2).

² On September 12, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during the summer program, which began on July 16, 2012 and concluded on August 8, 2012 (see Parent Exs. D; F at pp. 1-2). According to the evidence, the student attended Cooke's 2012 summer program for a total of 18 days (see Parent Ex. D).

³ On "February 22, 2012," the IHO issued an interim order directing the district to continue to fund the student's attendance at Cooke on a 12-month school year basis as the student's pendency (stay-put) placement (Interim IHO Decision at pp. 2-4). It appears that the IHO mistakenly dated the interim decision as "2012," rather than "2013" (compare Interim IHO Decision at p. 4, with Tr. pp. 1, 8).

in favor of the parent's request for relief; and whether the assigned public school site was appropriate for the student.⁴

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]).

⁴ With respect to the assigned public school site, the IHO took judicial notice of—and relied, in part, upon—information that the IHO, himself, obtained from the district's internet website and which, over the district's objection, the IHO entered into the hearing record as evidence (see IHO Decision at pp. 14-16; IHO Ex. III). On appeal, the district objects to the IHO entering IHO Exhibit III into the hearing record as evidence and to the IHO's reliance upon such evidence in concluding that the assigned public school site was not appropriate.

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 final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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. Pendency Placement

Turning first to the district's contention that the student was not entitled to public funding for a 12-month school year program at Cooke pursuant to the pendency (stay-put) provision of the IDEA, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; 8 NYCRR 200.16[h][3][i]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 08-009). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859,

864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require that a student remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753-54, 756 [2d Cir. 1980]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; Application of the Bd. of Educ., Appeal No. 99-90; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"], or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16). However, even though a change in location does not necessarily constitute a change of placement, "parents are not free to unilaterally transfer their child from one school to another" (Application of the Bd. of Educ., Appeal No. 00-073; see Ambach, 612 F. Supp. at 235).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004]; Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The United States Department of Education (DOE) has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP and can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

At the time the parent commenced the due process proceeding with the December 2012 due process complaint notice, the student was attending Cooke and had attended Cooke's summer 2012 program (see Parent Exs. D-E). At the impartial hearing held on January 25, 2013, the parties stipulated that a prior, unappealed IHO decision, dated March 14, 2007 (March 2007 IHO Decision), reflected that the student attended a 10-month school year program at Cooke for the 2006-07 school year; however, the parties also stipulated that for the two years subsequent to the March 2007 IHO decision, the student attended a 12-month school year program at Cooke (see Tr. pp. 5-7, 9-10, 12, 15-16). The district argued that based upon the prior, unappealed, March 2007 IHO decision—which represented the student's last agreed upon educational placement—the student's pendency placement at Cooke consisted of a 10-month school year program (see Tr. pp. 15-16). In addition, the district argued that any stipulations of settlement between the parties for school years subsequent to the March 2007 IHO decision specifically prohibited pendency arising therefrom (see Tr. pp. 15-17). The parent argued that the purpose of a student's pendency placement would not be served in this case if the district only had to fund a 10-month school year

program at Cooke, when as here, the prior, unappealed March 2007 IHO decision did not specify tuition reimbursement for either a 10-month or a 12-month school year program and the student had been attending a 12-month school year program at Cooke at the time the current due process proceeding was commenced (see Tr. pp. 9-14, 17-18).

In the interim decision, the IHO reasoned that while a prior, unappealed IHO's decision could establish a student's pendency placement, an unappealed IHO decision did not constitute the "only" way to determine such a placement (Interim IHO Decision at pp. 2-3). Relying upon Mackey v. Board of Education, 386 F. 3d 158, 163 (2d Cir. 2004), the IHO found that when the parent commenced the due process proceedings, the "operative" educational program consisted of a 12-month school year program at Cooke (id. at pp. 3-4). Consequently, the IHO explained that to "go back to an IEP that only contained ten months of schooling in the same school, it would seem, would violate the meaning of pendency, as it would deny the consistency and stability required" (id.). Thus, the IHO ordered the district to fund the student's pendency placement as a 12-month school year program at Cooke (id. at p. 4).

However, the IHO failed to recognize that when the parent placed the student at Cooke in a 12-month school year program, the parent unilaterally changed the student's placement from a 10-month school year program at Cooke—which an IHO found appropriate in the prior, unappealed March 2007 IHO decision—to the parent's preferred placement in a 12-month school year program at Cooke (see, e.g., M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 513 [S.D.N.Y. 2008]). It would not serve the purposes of the pendency provision to require the district to provide the student with a stay put placement subsequent to a unilateral parental change to the student's placement, nor does the IDEA compel such a result when there has been no administrative or judicial finding that the district denied the student a FAPE (Burlington, 471 U.S. at 373-74; T.M., 2012 WL 4069299, at *4; Murphy, 86 F. Supp. 2d at 357-58; Application of the Bd. of Educ., Appeal No. 12-008; see Susquenita Sch. Dist., 96 F.3d at 86 [subsequent to a unilateral placement, "the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parents' position"]). Here—and regardless of any stipulations of settlement between the parties for intervening school years when the student attended a 12-month school year program at Cooke—there has been no administrative or judicial decision vindicating the parent's position that a 12-month school year program at Cooke was appropriate to meet the student's needs, nor have the parties agreed to modify the student's then current educational placement to include a 12-month school year program at Cooke, such that the district would be required to fund a 12-month school year program at Cooke as the student's pendency placement.⁵ As a result, the IHO's interim decision on pendency must be reversed.

B. March 2012 IEP—12:1+1 Special Class Placement

As described herein, a review of the evidence in the hearing record reveals that the parent's only objection to the March 2012 IEP was that although the IEP reflected the student's need for a "small group setting and individual attention and reinforcement," the March 2012 CSE failed to

⁵ Nonetheless, the district's decision to recommend a 12-month school year program in a 12:1+1 special class placement at a specialized school for the 2012-13 school year indicates, at the very least, that there is no practical dispute over what type of placement the student required, only whether the district remained obligated to fund his tuition in a 12-month school year program at Cooke pursuant to pendency.

recommend a "classroom setting that was smaller than" a 12:1+1 special class placement (Dist. Ex. 1 at pp. 1-2; see Tr. pp. 147-48). However, contrary to the parent's assertion, the March 2012 CSE's recommendation for a 12:1+1 special class placement was consistent with the student's needs as identified in the present levels of performance in the March 2012 IEP.

With regard to the student's present levels of performance and individual needs, the March 2012 IEP reflected that the student was in 10th grade, and according to recent testing, functioned at a third grade level in independent reading, a fourth grade instructional level in reading, and a third to fourth grade level in mathematics (see Dist. Ex. 3 at pp. 1, 16).⁶ The student also exhibited difficulties in his use of social language as well as in social interactions, although he did not display any behavioral problems and was described as a "conscientious student" (see id. at pp. 1- 2). The March 2012 IEP further reflected that the student had difficulty retaining new information and benefited from a variety of strategies to address his management needs, including but not limited to, small group instruction, clear class routines, directions read and reread, repetition and review, scaffolding, multisensory instruction, visual and auditory cues, and graphic organizers (id. at pp. 1-3).

Based on the student's needs as described at the time of the March 2012 CSE meeting, the CSE recommended a 12-month school year program in a 12:1+1 special class placement at a specialized school with related services (see Dist. Ex. 3 at pp. 11-17). State regulation provides that a 12:1+1 special class placement is designed for those 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]). At the March 2012 CSE meeting, the parent disagreed with the recommendation for a 12:1+1 special class placement because she believed the student needed a "smaller classroom" (Dist. Ex. 13 at p. 8). At the impartial hearing, the parent testified that she agreed with a Cooke representative's opinion expressed at the March 2012 CSE meeting that the student required "two teachers, because the prompting was necessary to keep him on task" (Tr. pp. 353-54).⁷ The parent further explained that she believed the student required two teachers in the classroom—as opposed to one teacher and one paraprofessional—because the student required "prompting," "someone to keep him on task and also [to] give him the right cues" and to ask the student "specific questions" to "make sure he's getting it [from] beginning to end" (Tr. pp. 354-55). The parent also testified that the second teacher would prompt the student, "pull him back on track," and "figure out where he's going wrong and bring him back to the lesson" (Tr. p. 355). In addition, the parent testified that based upon her understanding, a paraprofessional "help[ed] with other things, not the educational part" (id.). The parent also testified that based upon her observations of two teachers in a classroom, one teacher instructed the students and the second teacher moved through the classroom to make sure that the students were "really focused" and had "what they need[ed] in front of them" (Tr. p.

⁶ A January 2010 psychoeducational evaluation of the student yielded a full scale IQ of 75 (borderline range of functioning) (see Dist. Ex. 4 at pp. 1-2).

⁷ The March 2012 CSE meeting minutes do not reflect any comments regarding the student's need for "two teachers" in the classroom; rather, the meeting minutes reflect that the Cooke representative who attended the CSE meeting disagreed with the size of the classroom setting (compare Dist. Ex. 13 at pp. 1-8, with Tr. pp. 353-54). The Cooke representative referred to in the parent's testimony did not appear at the impartial hearing as a witness (compare Dist. Ex. 3 at p. 18, with Tr. pp. 1-477).

357). The parent further indicated that the student could lose attention, which a paraprofessional would not necessarily recognize, and in that instance, a teacher would ask the student a question about the lesson or give the student feedback in order to get him back on task (see Tr. pp. 357-58). According to the parent, the teacher would also break up the student's lessons (see Tr. p. 358).

Notwithstanding the parent's observations and understanding of the role of a paraprofessional, the State regulation pertaining to a 12:1+1 special class placement describes the role of an "additional adult" within the classroom as assisting in the "instruction" of such students (8 NYCRR 200.6[h][4][i]). In addition, the plain language of the same State regulation does not preclude the additional adult in the 12:1+1 special class placement from performing the tasks described in the parent's testimony—which were consistent with the strategies recommended in the March 2012 IEP to address the student's management needs—nor does the evidence in the hearing record suggest that an additional adult—or a paraprofessional—could not perform the tasks described in the parent's testimony (see id.; see also Tr. pp. 1-477; Dist. Exs. 1-6; 8-15; Parent Exs. A-O; IHO Exs. I-IV; compare Tr. pp. 354-58, with Dist. Ex. 3 at pp. 2-3). Therefore, based upon the evidence in the hearing record, the recommended 12:1+1 special class in a specialized school was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2012-13 school year.

Next, with respect to the IHO's findings related to the assigned public school site, in this instance, similar to the reasons set forth in other decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the IHO erred in determining that the district failed to offer the student a FAPE for the 2012-13 school year because the assigned public school site was not appropriate (see IHO Decision at pp. 8-16). The parent's claims regarding the class size at the assigned public school site, the functional grouping of the students at the assigned public school site, and the vocational program verses the academic program offered at the assigned school (see Dist. Ex. 1 at pp. 2-4), turn on how the March 2012 IEP would or would not have been implemented, and as it is undisputed that the student did not attend the district's assigned public school site (see Tr. p. 188; Parent Exs. A-G), the parent cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).⁸

VII. Conclusion

Having found that, contrary to the IHO's determination, the evidence in the hearing record supports a finding that the district sustained its burden to establish that it offered the student a

⁸ Regardless of whether the IHO appropriately used judicial notice as the legal mechanism upon which to obtain additional information about the assigned public school site, the IHO's decision to obtain—and to rely, in part, upon—such additional evidence under the guise of ensuring the completeness of the hearing record is not authorized by State regulations (see generally 8 NYCRR 200.5[j]).

FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Cooke was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request for relief. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated June 10, 2013 is modified by reversing that portion which found that the district failed to offer the student a FAPE in the LRE for the 2012-13 school year; and,

IT IS FURTHER ORDERED that the IHO's decision dated June 10, 2013 is modified by reversing that portion which directed the district to reimburse the parent or directly pay Cooke for the costs of the student's tuition for the 2012-13 school year.

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

CAROL H. HAUGE
STATE REVIEW OFFICER