The University of the State of New York

The State Education Department
State Review Officer
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No. 13-135

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

Appearances:
The Law Offices of Steven L. Goldstein, attorney for petitioners, Steven L. Goldstein, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Stephen Gaynor School (Stephen Gaynor) for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

The decision of an 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. The Committee on Special Education (CSE) convened on April 26, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Dist. Ex. 2). Having determined that the student remained eligible for special education and related services as a student with a learning disability, the April 2012 CSE recommended integrated co-teaching (ICT) services in a general education setting in a community school (id. at pp. 6, 9). In addition, the April 2012 CSE recommended related services consisting of one 40-minute counseling session per week in a group of two (id. at p. 7).

On August 10, 2012 the district provided the parents with a final notice of recommendation in which the district summarized the special education and related services recommended in the April 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 3). The parents disagreed with the recommendations contained in the April 2012 IEP, as well as with the assigned public school site and, as a result, notified the district of their intent to unilaterally place the student at Steven Gaynor and seek public funding therefor (see Parent Ex. B at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice, dated December 24, 2012, the parents requested an impartial hearing and alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A at pp. 1-14). The parents asserted, among other things, that the April 2012 CSE was not properly composed and that their participation was negatively affected; the April 2012 IEP was based on insufficient and/or unreliable evaluative information; the proposed goals were insufficient, inappropriate, and incapable of implementation in the recommended placement; and the district failed to conduct a functional behavior assessment (FBA) or develop a behavioral intervention plan (BIP) (id. at pp. 6-8). The parents also alleged the April 2012 IEP did not address all of the student's learning needs, the promotional criteria in the IEP were inappropriate, and the parents were denied the right to participate in the development of the April 2012 IEP (id. at pp. 9-10). Regarding the proposed program and placement the parents asserted the recommendations were improperly predetermined without parent input and the placement was inappropriate (id. at pp. 10-11). Further, the parents indicated the student's unilateral placement at Stephen Gaynor was appropriate, equitable considerations favored the parents' claim, and they requested the district provide the student with transportation to the private school (id. at pp. 11-13).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 4, 2013, and concluded on June 19, 2013 after three days of proceedings (Tr. pp. 1-215).[1] After conducting a prehearing conference, the IHO

[1] The IHO very clearly and timely documented in the hearing record his reasons for each decision granting a

clearly and concisely identified 16 discreet points to be resolved. For reasons more fully described in his decision dated July 3, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year (IHO Decision at pp. 1-16). Accordingly, the IHO did not examine the parents' claims regarding the appropriateness of Stephen Gaynor or equitable considerations, and denied their request for tuition reimbursement (id. at p. 16).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition and the district's answer thereto is presumed and will not be recited here in detail. The parents contend that the April 2012 CSE was not properly composed and that the April 2012 IEP was based on insufficient and unreliable evaluative information, did not accurately detail the student's needs, contained insufficient and inappropriate annual goals, and lacked transitional support services. The parties also dispute whether the recommendation for ICT services in a general education class in a community school was appropriate for the student. Finally, the parents allege the assigned public school site could not accommodate the student's needs or implement the IEP.

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)

specific extension of time at the request of a party.

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]).

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

Upon careful review, the hearing record reflects that the IHO correctly concluded that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at p. 16). The IHO accurately recounted the facts of the case, addressed the core issues that were identified in the parents' due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2012-13 school year, and applied that standard to the facts at hand (id. at pp. 8-16). The decision shows that the IHO considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C § 1415 [g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

A. CSE Process

1. CSE Meeting

Turning first to the procedures under which the April 2012 CSE was conducted, the IHO determined that the April 2012 CSE composition issue did not rise to the level of a denial of FAPE and that the CSE provided the parents with the opportunity to participate in the April 2012 CSE meeting (IHO Decision at p. 10). The evidence in the hearing record shows that the IHO conducted a well-reasoned analysis of the relevant evidence.

The parents allege that the April 2012 CSE lacked a special education or regular education teacher at the annual review and that the district representative was not qualified. Any procedural deficiency did not result in a denial of a FAPE. As noted by the IHO, the student's teacher from the private school, who participated in the April 2012 CSE meeting by telephone, was a special education teacher and further, both the teacher and the parents had the opportunity to participate in the April CSE meeting (IHO Decision at p. 9; Tr. pp. 19-21, 165-66, 168, 192-94). In addition, the district representative indicated that a certified district special education teacher, who also held certification as a reading specialist, participated in the April 2012 CSE meeting (Tr. pp. 19-20).

In regard to the lack of a regular education teacher, the IHO noted this was a procedural error that would only rise to the level of a denial of a FAPE if the lack thereof impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE to the student, or caused a deprivation of educational benefit (IHO Decision at p. 9). In this case, the hearing record indicates that the parents participated in the discussion at the April CSE meeting and the lack of a regular education teacher did not impede the parents' ability to participate in the decision making process, as the district explained its recommendation at the CSE meeting (Tr. pp. 165-66, 168, 192-93).

Regarding the parents' allegation that the district representative was not qualified to act as such the IHO found, and the hearing record supports, that the district representative was qualified and that nothing in the hearing record indicated that the April 2012 CSE did not provide sufficient information to the parents about the program in question (IHO Decision at pp. 8-9; Tr. pp. 16-18). The parents' bare assertion that the district representative at the April 2012 CSE meeting was not qualified to so serve was not sufficient to overcome the district representative's testimony that, while general, nevertheless described what a district representative was required to do (Tr. p. 19). The district representative's testimony did not reveal any particular deficiency in her understanding of the programs available in the district to meet the statutory requirements. After careful review of all the evidence in this case, I find no reason to disturb the conclusions reached by the IHO that the issues raised by the parents with regard to the composition of the April 2012 CSE did not rise to a level of a denial of FAPE and that the CSE provided the parents with the opportunity to participate in the April 2012 CSE meeting.

2. Sufficiency of Evaluative Information

Turning next to the issue of whether the April 2012 CSE based its recommendations on sufficient evaluative information, the IHO determined that neither the available evaluative information nor any lack of additional assessments resulted in a denial of FAPE (IHO Decision at p. 11).

As noted by the IHO, the hearing record shows that the April 2012 CSE considered a Steven Gaynor mid-year report (IHO Decision at pp. 10-11; Tr. p. 22; compare Dist. Ex. 2 at p. 1, with Dist. Exs. 6 at pp. 1-5, 11, and Dist. Ex. 7 at pp. 1-3). The hearing record also reflects the April 2012 CSE considered a May 18, 2010 speech-language evaluation conducted by the district (Tr. pp. 43-44; Dist. Ex. 5 pp. 1-5). The April 2012 CSE also relied on the discussion that took place among the CSE members, including the student's special education teacher and the parents (Tr. p. 30; see Dist. Ex. 2 at pp. 1-2). While there are discrepant recommendations in the reports regarding the student's need for continued speech-language therapy, the hearing record supports the IHO's determination that the April 2012 CSE considered appropriate evaluative information sufficient to support its decision to not recommend speech-language therapy for the student (compare Dist. Ex. 5 at pp. 1-5, with Parent Ex. D at pp. 1-4; IHO Decision at p. 13). After careful review of all the evidence in this case regarding evaluative information, I reach the same conclusion as the IHO regarding the sufficiency of the evaluative data and I adopt his findings of fact and conclusions of law as my own. However; moving forward, if the parents continue to have concerns regarding the student's speech-language needs and their impact on his ability to learn, or

they disagree with an existing evaluation conducted by the district, the parents have the right to request an independent educational evaluation (IEE) (34 CFR 300.502; 8 NYCRR 200.5[g]).[2]

B. April 2012 IEP

1. Present Levels of Performance

With regard to the issue of whether the present levels of performance were appropriate, the IHO conducted a well-reasoned analysis of the relevant evidence. The IHO determined the April 2012 IEP contained a considerable amount of specific information regarding the student (IHO Decision at p. 11). Although the IHO found that the present levels of performance did not provide detail in terms of the student's organizational needs, he noted that the April 2012 IEP indicated that the student required "strict supervision" for his materials to be in place, and further provided interventions to address the student's management needs (id.).[3] The IHO also found that the April 2012 IEP adequately addressed the student's social development and, although the April 2012 IEP did not include a reference to the student's anxiety, the IHO further determined the hearing record did not establish that the student's anxiety prevented him from benefiting from instruction in the classroom (id.). As such, the IHO concluded that any defects in the April 2012 present levels of performance did not result in a denial of FAPE (IHO Decision at pp. 11-12). The April 2012 IEP reflects the information provided in the Steven Gaynor mid-year report prepared by the student's teacher and speech-language pathologist (compare Dist. Ex. 2, with Dist. Exs. 6; 7). Specifically, the April 2012 IEP described the student's needs and abilities in reading, mathematics, speech-language, social, and physical development with sufficient detail to determine goals and recommend a program designed to meet the student's unique needs (Dist. Ex. 2 at pp. 1-2). Additionally, the April 2012 IEP provided over 20 strategies to address the student's management needs such as: repetition; prompts; modeling; directions broken down; vocabulary presented often and in multiple contexts; check-ins; clarification; large size boxes for writing and math; checklists and logs for self-monitoring; and use of a computer, among other things (Dist. Ex. 2 at p. 2). After careful review of all of the evidence in this case, I agree with the conclusion reached by the IHO regarding the present levels of performance and adopt his findings of fact and conclusions of law as my own.

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[2] The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as an "individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district, unless the district requests a hearing and establishes the appropriateness of its evaluation (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district's criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

[3] In addition, the IEP also indicated that the student had difficulty with "organizing and categorizing" (Dist. Ex. 2 at p. 1).

2. Annual Goals

With regard to the issue of whether the goals in the April 2012 IEP were appropriate, sufficient, and measurable, the IHO conducted a well-reasoned analysis of the relevant evidence. The IHO determined the present levels of performance provided sufficient baseline data from which to implement the goals, and that the goals addressed the student's areas of need and provided measurement criteria (IHO Decision at p. 12). The April 2012 IEP contains 12 annual goals developed to address the student's needs in the areas of language, vocabulary, reading comprehension and decoding, writing, mathematics, social/emotional, organization, and focus skills (Dist. Ex. 2 at pp. 3-6). The district school psychologist stated the April 2012 CSE relied on her expertise, input from the student's current teacher, and a review of the student's strengths and weaknesses to generate the goals (Tr. pp. 29-30, 34). The April 2012 IEP goals reflect measurable skills such as improving reading comprehension skills by identifying main ideas, writing chapter summaries, and answering comprehension questions (Dist. Ex. 2 at pp. 3-6). The goals also provide sufficient measurement criteria by which to establish progress with stated criteria such as four out of five instances, 80 percent accuracy, or once per session (Dist. Ex. 2 at pp. 3-6). Therefore the hearing record supports the IHO's finding that the annual goals were appropriate to meet the student's needs during the 2012-13 school year and were measurable (see IHO Decision at p. 12).

More specifically, as related to addressing the student's needs, the parents allege the district should have provided speech-language therapy to the student as recommended in the student's Steven Gaynor mid-year report (Dist. Ex. 7 at pp. 1-3). I agree with the IHO that based on the student's expressive and receptive language needs identified in the April 2012 IEP, the student may have received even greater benefit from speech-language therapy (IHO Decision at p. 13). However; the district addressed the student's speech-language needs in the April 2012 IEP with five language-based goals (Dist. Ex. 2 at pp. 2-5). Further, the testimony from the district psychologist noted the language goals could be carried out by a classroom teacher, thereby demonstrating the district's intent to meet the student's speech-language needs (Tr. p. 60). As previously noted, should the parents continue to be concerned regarding the student's speech-language needs they have the right to request an IEE at public expense and that the CSE reconvene to discuss the results of the IEE.

3. Transitional Support Services

Further, in regard to the lack of transitional support services between the private school and a public placement, the IHO determined that such an omission did not rise to the level of a denial of FAPE (IHO Decision at p. 13). Upon careful review of the hearing record I find that while the district did not offer specific transitional support services, the April 2012 CSE did offer the student ICT services, counseling services, and over twenty management strategies to directly support the student in the general education setting (Dist. Ex. 2 at pp. 2, 6-7). Having done so, the lack of specific transitional support services on the April 2012 IEP did not rise to the level of a denial of FAPE and the IHO's determination on this issue should remain undisturbed (IHO Decision at p. 13; Dist. Ex. 2 at pp. 2, 6-7).

4. ICT Services

Turning to the issue of whether the general education placement with ICT services recommended by the April 2012 CSE was "too large" to meet the student's needs, the IHO conducted a well-reasoned analysis of the relevant evidence (IHO Decision at pp. 15-16). The crux of the parties' dispute on appeal is whether the student needed a small class in a specialized school . For the reasons that follow, the hearing record supports the IHO's determination that a general education placement with ICT and counseling services would meet the student's needs and provide the student with an appropriate education. According to State regulation, ICT services are defined as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In addition, State regulation requires that personnel assigned to each class "shall minimally include a special education teacher and a general education teacher," and each class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]). According to the district psychologist who participated in the April 2012 CSE meeting, the decision to recommend ICT services was based on the CSE's discussion with the student's teacher regarding the student's functional levels in English language arts and mathematics (Tr. pp. 39-40). Finding the student was on grade level in mathematics at the time of the review but below grade level in reading, and considering the student's strengths and needs, the April 2012 CSE felt the student would benefit from placement in an "ICT classroom" (id.). Further, the district school psychologist indicated that the April 2012 CSE felt the student would benefit from the exposure to the general education curriculum that the ICT class provided, while offering the student modifications and supports to help him in the areas where he struggled (Tr. p. 40). The district psychologist also stated that in the ICT class the student would be supported by teachers certified in both general and special education (id.). She further testified that the student would be grouped with children whose functional levels were similar (id.). The district school psychologist also noted that despite difficulty with reading comprehension, the student "had a lot of strengths" in academic skills (Tr. pp. 41-42). Consistent with the Stephen Gaynor mid-year report and the April 2012 IEP, the school psychologist stated the student had "developed a lot of strategies" such as chunking to increase fluency and self-correcting when prompted (Tr. pp. 41-42, 49; Dist. Ex. 2 at pp. 1-3; 6 at pp. 1-6). She opined that the student appeared to "adapt well" and therefore the April 2012 CSE sought to reinforce the student's strengths with exposure to a general education setting (Tr. pp. 41-42, 49; Dist. Ex. 2 at pp. 1-3; 6 at pp. 1-6). The school psychologist stated that although the April 2012 CSE considered a general education setting with special education teacher support services (SETSS), participants felt the student required more instructional time within the classroom with a full-time special education teacher rather than pull-out SETTS (Tr. pp. 42-43).

Further, the IHO determined the evidence of the student's needs did not provide sufficient basis for a different setting than the one offered and the hearing record did not establish that the student's attention deficit hyperactivity disorder and focusing issues specifically related to class size (IHO Decision at p. 15). After careful review of all the evidence in this case regarding the April 2012 CSE program recommendation and placement, I agree with the conclusion reached by the IHO and adopt his findings of fact and conclusion of law as my own.

C. Challenges to the Assigned Public School Site

The parents also claimed that the district did not provide sufficient evidence related to the assigned public school to demonstrate that the assigned school could meet the student's needs and

implement the April 2012 IEP. The IHO determined that the district's choice not to provide a witness from the assigned public school to testify regarding the appropriateness of the assigned school did not result in a denial of a FAPE (IHO Decision at pp. 14-15).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[4]

[4] The assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

Since the IHO's decision was rendered in which he discussed this issue, case law has tipped considerably more in favor of the district under the circumstances of this case. When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year based, in part, upon its failure to provide sufficient evidence regarding the assigned school site or whether the assigned school could have implemented the student's IEP cannot stand, because a retrospective analysis of how the district would have implemented the student's April 2013 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site—which the student never attended—and instead chose to enroll the student in a nonpublic school of their choosing without giving the district the opportunity to implement the student's IEP at the assigned school (see Parent Exs. B; L). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Stephen Gaynor was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 18, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER