The University of the State of New York

The State Education Department
State Review Officer
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No. 13-138

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, Francesca J. Perkins, Esq., of counsel

Regina Skyer & Associates, LLP, attorneys for respondents, William Meyer, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2012-13 school year. The appeal must be sustained. The parents cross-appeal the portion of the IHO's decision which reduced the tuition reimbursement award by 10 percent. The cross-appeal must be dismissed.

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]).[1]

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 parents initially referred the student to the CSE for an evaluation in June 2012 (Parent Ex. A at p. 2). The CSE convened on August 23, 2012 to formulate the student's initial IEP for the 2012-13 school year (see generally Dist. Ex. 1 at pp. 1-11). The parents disagreed with the recommendations contained in the August 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, unilaterally placed the student at Winston Prep (see Dist. Exs. 1 at p. 5; 2; 8; Parent Ex. A). In a due process complaint notice dated November 15, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A).

Prehearing conferences were conducted on January 15, 2013, February 4, 2013, and March 1, 2013 (IHO Decision at pp. 2-3). An impartial hearing convened on May 3, 2013 and concluded on May 29, 2013 after three days of proceedings (Tr. pp. 1-365). In a decision dated June 24, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Winston Prep was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 11-14). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Winston Prep for the 2012-13 school year (IHO Decision at p. 14). However, the IHO agreed with the district that the parents' lack of notification to the district regarding the student's need for special education until June of 2012 hampered the district's ability to conduct a classroom observation of the student; and therefore, the IHO reduced the parents' award by 10 percent (IHO Decision at pp. 13-14).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition and the parents' answer/cross-appeal is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether the August 2012 CSE's recommendation for integrated co-teaching (ICT) services in a general education setting in a community school with related services, and testing accommodations, was appropriate for the student for the 2012-13 school year. Additionally, the district alleges that the IHO erred in finding that the CSE was not

[1] The administrative procedures applicable to the review of disputes between parents and school districts regarding any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student are well established and described in broader detail in previous decisions issued by the Office of State Review (see Application of the Dep't of Educ., Appeal No. 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

duly composed, the CSE did not have sufficient evaluative information, and the IEP was not appropriate (see Pet. at p. 2).

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 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. CSE Composition

The IHO determined that because the August 2012 CSE meeting participants did not include either a special education or regular education teacher of the student, the IEP omitted relevant information about the student (IHO Decision at p. 10). Therefore, the IHO determined that the failure of the CSE to include either a regular education or special education teacher of the student constituted a procedural violation of the IDEA that denied the student a FAPE.

The IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). The IDEA also requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary

aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

In this case, a review of the hearing record demonstrates that attendees at the August 2012 CSE meeting included: the parent, the student, an additional parent member, a psychologist who also participated as the district representative, a district special education teacher, a district regular education teacher, and a district social worker (Tr. pp. 15-16, 34-35, 56-57, 59-60, 104, 242; Dist. Exs. 1 at p. 11; 2). The parent testified that he did not notify anyone at Winston Prep that he had an IEP meeting with the district (Tr. p. 292). The district psychologist testified that no staff member from Winston Prep participated at the meeting and that she thought Winston Prep was closed at the time of the CSE meeting (Tr. pp. 16-17). It is unclear whether the district sought to secure the attendance of any of the student's then-current teachers at Winston Prep.

However, upon review, to the extent the failure of the CSE to include either a special education teacher or regular education teacher of the student constituted a procedural violation, the hearing record nonetheless does not provide a basis to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits in this instance (see R.E., 694 F.3d at 190). In this case, both the parent and student fully participated in, and expressed their concerns during, the August 2012 CSE meeting (Tr. pp. 39-41, 53-57, 307; see Dist. Exs. 1 at p. 11; 2). Moreover, as further discussed below, the CSE had the benefit of recent comprehensive academic and social/emotional evaluations of the student. The district special education teacher and district regular education teacher would be familiar with the general education program and special education services offered by the district and their appropriateness based upon the evaluative information available to them concerning the student. Moreover, the IHO concluded that "Winston Prep is a school for children with learning disabilities," (IHO Decision at p. 8) and it is unclear from the hearing record whether the student had a traditional regular education teacher at Winston Prep. Additionally, the presence of a district regular education teacher was useful to insure that the LRE for the student on the educational continuum was properly evaluated (see generally R.G. v New York City Dep't of Educ., 980 F. Supp 2d 345, 360-64 [E.D.N.Y. October 13, 2013][noting that the participation of a regular education teacher in the CSE meeting supports the consideration by the CSE of "mainstreaming" opportunities for special education students]). Accordingly, although it would have been the better practice – and procedurally compliant – for the CSE to include a regular education and special education teacher of the student, I cannot find, on the record before me, that this procedural impropriety impeded the parents' opportunity to participate in the decision-making process, denied the student a FAPE, or otherwise caused a deprivation of educational benefit.

B. August 2012 IEP

1. Sufficiency of Evaluations

Turning next to the issue of whether the CSE had sufficient evaluative information, the evidence in the hearing record shows that after receiving the parents' initial referral for evaluation in June 2012, the CSE conducted a psychoeducational evaluation and social history. According to the district psychologist, the August 2012 CSE had available, at the meeting, the August 2012 district psychoeducational evaluation report, the August 2012 social history, as well as a January

2011 psychoeducational evaluation report (Tr. pp. 19-21, 33, 35, 57-58, 109; Dist. Exs. 4-5; 7). The IHO determined that because the parents did not timely notify the district of the student's need for special education, the evaluation was conducted when the student was not attending school; hence, no classroom observation could take place (IHO Decision at pp. 13-14). A review of the student's August 2012 IEP demonstrates that the present levels of performance and individual needs sections of the IEP—including the student's current academic, social/emotional, and health and physical development—were consistent with evaluative information available to the August 2012 CSE (compare Dist. Ex. 1, with Dist. Exs. 4-5; 7). [2, 3]

Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). 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]). 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]; see Application of the Dep't of Educ., Appeal No. 07-018).

Although the IHO did not specifically address the parents' claims concerning the sufficiency of the evaluative materials the August 2012 CSE relied upon, on appeal, the district asserts, and I agree, that the CSE appropriately relied upon the most recent evaluations of the student, a recent social history and input from the parent and the student in its development of the August 2012 IEP (compare Dist. Ex. 1, with Dist. Exs. 4-5; 7).

2. Annual Goals

With regard to the issue of whether the goals in the August 2012 IEP were appropriate, I find that the IHO erred in his determination that the goals were not appropriate for the student. Consistent with the student's needs identified in the August 2012 psychoeducational evaluation report and the IEP present levels of performance, the August 2012 CSE developed approximately eight annual goals (compare Dist. Exs. 1 at pp. 1-2; and Dist. Ex. 4, with Dist. Ex. 1 at pp. 3-5).

[2] Although the IHO faulted the district for not including information from the student's prior IEP prepared by another district or the 2011-12 Winston Prep report in the August 2012 IEP, there is no indication in the hearing record that the district had received those documents at the time of the student's CSE meeting (IHO Decision at p. 10).

[3] The IHO characterized the student as having "severe attentional needs" citing to the management needs section of the prior IEP (IHO Decision at pp. 4, 10). However, those needs seem more organizational in nature, and are addressed by the organizational skills goal in the August 2012 IEP, and the full time special education teacher who provides the recommended ICT services (see Dist. Ex. 1 at pp. 4-5).

Specifically, the CSE developed annual goals to address the student's need to improve his self-esteem and frustration tolerance, reading comprehension skills, inference-making skills, organizational skills, and calculation skills in math (Dist. Ex. 1 at pp. 3-5). Accordingly, the IHO's conclusion on this issue must be reversed.[4]

3. ICT Services

In this case, a review of the evidence in the hearing record shows that—consistent with the district's arguments—the IHO erred in finding that the ICT services in a general education classroom at a community school, together with related services, failed to offer the student a FAPE for the 2012-13 school year.

According to State regulation, school districts may include ICT services in its continuum of services (8 NYCRR 200.6[g]). State regulation defines ICT services 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]).

In reaching the decision to recommend ICT services in a general education classroom at a community school—together with related services—the district psychologist testified that the August 2012 CSE considered the student's current levels of functioning, achievement levels, the parents' and student's concerns, and the student's LRE (see Tr. pp. 36, 46-48, 58-59, 100). A review of the August 2012 IEP further indicates that the CSE recommended a variety of strategies to address the student's management needs, some of which were included in the annual goals, such as consistent support, tailored instruction to provide academic stimulation, scaffolding, use of a planner, and the development of adaptive coping strategies (Dist. Ex. 1 at pp. 2-5). Additionally, the March 2012 CSE recommended two individual sessions per week of counseling to further meet the student's social/emotional needs (id. at pp. 5-6). Further, the August 2012 IEP included measurable post-secondary goals, a coordinated set of transition activities, and testing accommodations including providing extended time, administration in a separate location, and breaks (Dist. Ex. 1 at pp. 3, 6-7). Based on the foregoing, the special education and related services recommended in the August 2012 IEP aligned with the student's performance profile and were reasonably calculated to enable the student to receive educational benefits, and thus, offered the student a FAPE in the LRE for the 2012-13 school year (Dist. Exs. 1-2; 4-5; 7).[5]

[4] As stated above, the IHO faulted the district for not having goals consistent with a 2011-12 Winston Prep report, but there is no evidence in the record that the report was available to the August 2012 CSE (IHO Decision at p. 11).

[5] The IHO found that the CSE did not consider a "small class size" (IHO Decision at p. 11). Here, the IHO relied on Winston Prep witness testimony that the student required a small class due to his attention problems; yet, this information was not available to the CSE, as no one from Winston Prep participated in the meeting (see Tr. pp. 207-08; IHO Decision at p. 11). The evaluative information available to the CSE, however, did not emphasize small class size as a component of the student's recommended program and placement.

C. Assigned Public School

With respect to the parents' claims relating to the assigned public school site, which the IHO did not address in any detail and which the parties continue to argue on appeal, in this instance, similar to the reasons set forth in other decisions issued by the Office of State Review (see, 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 parents' assertions are without merit. The parents' claims regarding the class size at the assigned public school site and the functional grouping of the students in the proposed classroom (see Parent Ex. A), turn on how the August 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 Parent Ex. A), the parents 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]).

VII. Conclusion

Having determined that, contrary to the IHO's determination, the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a 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 Winston Prep was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' 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.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 24, 2013 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2012-13 school year.

Dated: **Albany, New York**
December 8, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER