The University of the State of New York

The State Education Department
State Review Officer
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No. 13-151

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

Appearances:
Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Francesca J. Perkins, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for direct payment of 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 dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross- appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision, and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The CSE convened on April 20, 2012 to conduct the student's annual review and to develop the student's IEP for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-2, 16). As a student with a speech or language impairment, the April 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school with related services of three 45-minute sessions per week of speech-language therapy in a small group, one 45-minute session per week of occupational therapy (OT) in a small group, one 45-minute session per week of individual counseling, and one 45-minute session per week of counseling in a small group (see id.

at pp. 2, 13-14).[1] The April 2012 CSE also developed annual goals and short-term objectives, as well as a transition plan (id. at pp. 4-12).

In a final notice of recommendation (FNR) dated June 11, 2012, the district summarized the special education and related services recommended by the April 2012 CSE for the 2012-13 school year for the student, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 2).

In a letter dated June 13, 2012, the parent advised the district that she had not received a "public school placement" for the 2012-13 school year (Parent Ex. C). The parent also notified the district that "absent an appropriate public school placement" the student would attend Cooke's "summer program," and she would seek funding for that program from the district (id.).[2]

In a letter dated June 20, 2012, the parent advised the district that she had visited the assigned public school site on June 19, 2012 (see Parent Ex. D at p. 1). The parent indicated that the "recommended summer school" would not meet the student's needs because the students at the assigned public school site functioned cognitively at a "much lower" level than the student, and they did not share the same eligibility classification as the student (id.). In addition, the parent noted that the "lack of peer modeling would be problematic and cause regression," and the counselor at the assigned public school site was not available on a full-time basis, with no "crisis or consistent support" (id.). The parent also indicated that the student would have difficulty navigating a "large building" (id.). As a result, the parent advised the district that as noted in her June 13, 2012 letter, the student would attend Cooke's summer program, and she would seek funding for the summer program from the district (id. at p. 2). The parent concluded her letter by requesting "placement at another school," and further noted that "[a]bsent an appropriate placement," the student would continue to be enrolled at Cooke for the 2012-13 school year and that she would seek funding for the costs of the student's tuition from the district (id.).

In a letter dated August 1, 2012, the parent reasserted her opinion that based on observations made during her June 19, 2012 visit to the assigned public school site, it was not an appropriate placement for the student for the 2012-13 school year and that the program at the "recommended school" did not meet the student's needs (Parent Ex. E). Since she had not received a "subsequent placement" for the student as requested in a previous letter, the parent notified the district of the student's continued enrollment at Cooke for the 2012-13 school year and that she would seek funding for the costs of the student's tuition from the district (id.).

On September 7, 2012, the parent executed an enrollment contract for the student's attendance at Cooke for the 2012-13 "[a]cademic [school] [y]ear" (see Parent Ex. G at pp. 1-2).[3]

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[1] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has continuously attended Cooke since September 2010 (see Tr. pp. 198-99).

[3] The hearing record also contains an unsigned enrollment contract for the student's attendance at Cooke's summer

A. Due Process Complaint Notice

In a due process complaint notice dated January 9, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. K at pp. 1-4). The parent asserted that the "program recommended" in the April 2012 IEP was not appropriate for the student, and despite the student's lack of progress, the district continued to recommend the "same 12:1:1 program" (id. at p. 2). The parent additionally asserted that the "recommended summer and school year programs" at the assigned public school site would not meet the student's needs (id. at p. 3). In particular, the parent alleged that the students at the assigned public school site functioned cognitively at a "much lower" level than the student, and they did not share the same eligibility classification as the student (id. at p. 3). In addition, the parent noted that the "lack of peer modeling would be problematic and cause regression," and the counselor at the assigned public school site was not available on a full-time basis, with no "crisis or consistent support" (id.). The parent also indicated that the student would have difficulty navigating a "large building" (id.).

With respect to the student's unilateral placement at Cooke, the parent averred that Cooke was an appropriate placement for the student for the 2012-13 school year because it provided a "small supportive environment" to address his "severe learning disabilities" (Parent Ex. K at p. 3). As relief, the parent requested that the IHO find that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate placement for the 2012-13 school year, and that equitable considerations weighed in favor of the parent's request for direct funding of the student's tuition at Cooke for the 2012-13 school year (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing in this matter began on February 28, 2013 and concluded on June 3, 2013, after three days of proceedings (see Tr. pp. 1, 10, 139). In a decision dated July 10, 2013, the IHO found that the district offered the student a FAPE for the 2012-13 school year, and denied the parent's requests sought in the due process complaint notice (see IHO Decision at pp. 12-17).[4] Based upon the hearing record, the IHO ultimately found that the district fully evaluated the student, the parent had a meaningful opportunity to participate in the process, the student's eligibility classification of speech or language impairment was appropriate, the recommended

program (see Parent Ex. F at pp. 1-2).

[4] With respect to the "Position of the Parties" in the decision, the IHO noted that the scope of the impartial hearing was "limited to the issues raised" in the due process complaint notice; therefore, while the hearing record included information about the "transition goals on the IEP, the vocational training at the proposed placement and the lack of a gym, amongst other things, these [were] not included in the complaint and ought not to be considered by the hearing officer" (IHO Decision at p. 3 [citing to the parties' closing arguments]). A review of the hearing record indicates that the IHO properly excluded these issues from consideration at the impartial hearing and properly declined to issue findings in the decision on these issues because the parent's due process complaint notice cannot be reasonably read as raising these issues as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. K at pp. 1-4). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, the parent did not attempt to amend the due process complaint notice to include these issues (see Tr. pp. 1-260; Dist. Exs. 1-5; Parent Exs. A-K), and the district did not otherwise "open the door" with respect to these issues under the holding of M.H. v. New York City Dep't of Educ., 685 F.3d 217 (2d Cir. 2012) (see Tr. pp. 24-76).

12:1+1 special class placement with related services was appropriate, and the district "timely and appropriately offered" an assigned public school site (id. at p. 16).[5] Consequently, the IHO did not address whether Cooke was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's requested relief (id. at pp. 16-17).

IV. Appeal for State-Level Review

The parent appeals, and alleges that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year. The parent asserts that as part of district's burden to prove that it offered the student a FAPE, the district must establish that the assigned public school site was appropriate for the student and could implement the student's April 2012 IEP. The parent argues that the IHO impermissibly shifted the burden of proving this element of the FAPE analysis to the parent by requiring that the parent prove that the assigned public school site was not appropriate. In addition, the parent contends that the IHO misconstrued and ignored relevant case law and that the district presented no evidence that the assigned public school site could implement the student's April 2012 IEP. The parent contends, in particular, that the assigned school could not meet any of the annual academic goals in the April 2012 IEP; the assigned school could not provide the required 35 periods per week in a 12:1+1 program; the assigned school could not provide the student's related services of speech-language therapy, OT, or individual and group counseling; the assigned school offered only one or two periods a day of academics; the assigned school did not have a social skills program; the assigned school did not have direct instruction in language skills and pragmatics; and the assigned school did not have a gymnasium. The parent also asserts that the hearing record contains no evidence to support the IHO's finding that the April 2012 IEP offered the same program the student received at Cooke.

Next, the parent argues that the IHO erred in failing to address whether Cooke was an appropriate placement and whether equitable considerations weighed in favor of her request for direct payment of the costs of the student's tuition at Cooke for the 2012-13 school year. Regarding the request for direct payment of the student's tuition costs, the parent asserts that under the fact of this case such a remedy is appropriate.

In an answer, the district contends that the IHO's decision should be upheld in its entirety. To the extent that the IHO declined to address "'transition goals on the IEP, the vocational training at the proposed placement and the lack of a gym, amongst other things,'" because the parent's due

[5] As a reminder, State regulations provide that the "decision of the [IHO] shall be based solely upon the record of the proceeding before the [IHO], and shall set forth the reasons and the factual basis for the determination" (8 NYCRR 200.5[j][5][v]). In addition, the IHO's decision "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, transcript pages and relevant exhibit numbers should be cited with specificity. However in this case, the IHO referred solely to the parties' closing arguments at the impartial hearing within his analysis of the findings of fact and conclusions of law portion of the decision (compare IHO Decision at pp. 13-16, with Tr. pp. 240-58). Due to the manner in which the IHO referenced the closing arguments in the analysis, it is unclear whether he adopted these arguments as a recitation of the parties' positions, or whether he adopted the arguments as his factual findings upon which he based the legal conclusions. Regardless, while referencing closing arguments in this manner may be appropriate to point to the position a party has taken on a particular issue, citation to written argument prepared by counsel is not sufficient under the regulations to serve as the factual basis of an IHO's determination, which is more properly done by setting forth citations to the actual documentary or testimonial evidence to support findings of fact (see 8 NYCRR 200.5[j][5][v]).

process complaint notice did not raise these issues, the district asserts that the parent has now abandoned the issues because she did not appeal the IHO's "finding" and the district declined to address these issues on appeal. Similarly, the district asserts that the parent did not appeal the IHO's findings that the district fully evaluated the student, the parent had a meaningful opportunity to participate in the process, the student's eligibility classification of speech or language impairment was appropriate, and the district declined to address these issues on appeal.[6] Alternatively, the district asserts that the IHO properly concluded that the district offered the student a FAPE for the 2012-13 school year and that the parent's legal arguments and allegations concerning the assigned public school site are speculative. In addition, the district argues that equitable considerations do not weigh in favor of the parent's requested relief, and alternatively, the parent has not met her burden to demonstrate that she is entitled to direct payment of the student's tuition costs at Cooke.

In a reply, the parent denies that she abandoned any issues on appeal as asserted in the district's answer. In particular, the parent notes that the IHO did not issue a "finding" by declining to address transition goals, the vocational training at the assigned public school site, and the lack of a gym at the assigned school, and therefore, the parent was not required to address it in her appeal, and did not abandon "any claims on appeal by not doing so."[7]

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 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

[6] As explained more fully below, the IHO exceeded his jurisdiction by issuing determinations on these particular issues; thus, the district's assertion is moot.

[7] Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the district's allegations to which the parent replied do not assert a procedural defense (see Answer ¶¶ 29-30). Accordingly, the reply is beyond the scope of the State regulations and will not be considered on appeal. Assuming for the sake of argument that the parent's reply is permissible, as noted above, the hearing record indicates that the IHO properly declined to consider these issues at the impartial hearing and properly declined to issue findings on these issues because the parent's due process complaint notice cannot be reasonably read as raising these issues as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. K at pp. 1-4), and further, because the hearing record reveals that the district did not agree to an expansion of the issues in this case, the parent did not attempt to amend the due process complaint notice to include these issues (see Tr. pp. 1-260; Dist. Exs. 1-5; Parent Exs. A-K), and the district did not otherwise "open the door" with respect to these issues under the holding of M.H. As such, the parent does not have a right to appeal these issues in the first instance, since the issues were beyond the permissible scope of the impartial hearing.

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., 2010 WL 3242234, at *2 [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, 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, 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, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, a review of the hearing record reveals that the IHO exceeded his jurisdiction by sua sponte raising and addressing the following issues in the decision: whether the district fully evaluated the student, whether the parent had a meaningful opportunity to participate in the process, whether the student's eligibility classification of speech or language impairment was appropriate, and whether the district timely and appropriately offered an assigned public school site because the parents did not raise these issues in their due process complaint

notice (see Tr. pp. 1-260; Dist. Exs. 1-5; Parent Exs. C-K; compare IHO Decision at p. 16, with Parent Ex. K at pp. 1-4).[8]

Second, a review of the hearing record also reveals that the parent raises the following issues related to implementation of the student's April 2012 IEP at the assigned public school site in the petition for the first time on appeal as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year: the assigned school could not meet any of the annual academic goals in the IEP; the assigned school could not provide the required 35 periods per week in a 12:1+1 program; the assigned school could not provide the student's related services of speech-language therapy, OT, or individual and group counseling; the assigned school offered only one or two periods a day of academics; the assigned school did not have a social skills program; the assigned school did not have direct instruction in language skills and pragmatics; and the assigned school did not have a gymnasium (see Tr. pp. 1-260; Dist. Exs. 1-5; Parent Exs. C-K; compare Petition ¶¶ 38, 40-44, with Parent Ex. K at pp. 1-4).

With respect to the issues raised sua sponte by the IHO in the decision and the allegations now raised in the parent's petition for the first time on appeal related to the implementation of the student's April 2012 IEP at the assigned school, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8); see K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *3, *6 [2d Cir. July 24, 2013). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised

[8] In the petition, the parent, herself, characterized the issues raised in the due process complaint notice as follows: "the 2012 IEP was insufficient in that it recommended the same" district program in a 12:1+1 special class that had "failed to successfully address [the student's] disabilities," and further, the assigned public school site "was for students with much lower cognitive functioning than [the student], it could not meet [the student's] counseling needs, and that the program was in too large an environment" (Pet. ¶ 12 [citing to Parent Ex. K at p. 3]).

without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include challenges to the sufficiency of the evaluations, the parent's opportunity to meaningfully participate in the process, the student's eligibility classification, or the timeliness of the district's offer of a public school or any of the issues related to the implementation of the student's April 2012 IEP at the assigned public school site raised for the first time on appeal in the parent's petition as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. K at pp. 1-4). The hearing record demonstrates that the issues for resolution before the IHO included challenges to the appropriateness of the 12:1+1 special class placement with related services, and the district's ability to implement the student's April 2012 IEP at the assigned public school site based upon the following allegations: the students at the assigned public school site functioned cognitively at a "much lower" level than the student, and did not share the same eligibility classification as the student; the assigned school's "lack of peer modeling would be problematic and cause regression;" the counselor at the assigned public school site was not available on a full-time basis, with no "crisis or consistent support;" and the student would have difficulty navigating a "large building" (id. at pp. 2-3). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-260; Dist. Exs. 1-5; Parent Exs. C-K).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at *4-*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded his jurisdiction by raising and addressing in the decision whether the district fully evaluated the student, whether the parent had a meaningful opportunity to participate in the process, whether the student's eligibility classification of speech or language impairment was appropriate, and whether the district timely and appropriately offered an assigned public school site and those particular findings must be annulled. In addition, the allegations related to the implementation of the student's April 2012 IEP at the assigned public school site in

the parent's petition raised for the first time on appeal are outside the scope of my review, and therefore, these allegations will not be considered (see M.P.G., 2010 WL 3398256, at *8; Snyder, 2009 WL 3246579, at *7; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).[9]

B. 12:1+1 Special Class Placement

Turning to the issues properly before me on appeal, the parent argues that the IHO erred in concluding that the district's recommended 12:1+1 special class placement with related services offered the student a FAPE for the 2012-13 school year. The district rejects this argument, and asserts that the IHO properly concluded that it offered the student a FAPE for the 2012-13 school year. As discussed more fully below, a review of the hearing record supports a conclusion that the 12:1+1 special class placement with related services offered the student a FAPE.[10]

In developing the student's April 2012 IEP, the district special education teacher (teacher) who participated at the April 2012 CSE meeting testified that the CSE relied upon information provided by Cooke (Tr. pp. 24-27, 29-30, 43-46, 53-54).

Based upon the information provided, the April 2012 IEP indicated that the student exhibited significant deficits in the following areas: academics, including reading, writing, and mathematics; social/emotional functioning; receptive and expressive language, as well as pragmatic language; visual motor and visual perceptual skills; activities of daily living (ADLs); and sensory and self-regulation skills (compare Dist. Ex. 1 at pp. 2-3, with Dist. Exs. 3 at pp. 3-4, 13-14; 4 at pp. 1-6). Academically, the April 2012 IEP described the student as learning best when given a specific strategy to focus on, and as an active member and learner who participated and asked questions when he was confused (Dist. Ex. 1 at p. 2). In reading, the student used strategies

[9] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, *9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), the issues raised and addressed sua sponte by the IHO in the decision and the allegations raised in the parent's petition for the first time on appeal were initially raised—if at all during the impartial hearing—by the parent or by counsel for the parent on cross-examination of a district witness or through testimony of witnesses for the parent (see, e.g., Tr. pp. 58-74, 115-17, 202-03). Here, the district did not initially elicit testimony regarding these issues, and therefore, the district did not "open the door" to these issues under the holding of M.H.

[10] The hearing record reveals that the parent disagreed with the April 2012 CSE's recommended 12:1+1 special class placement at the meeting (see Tr. pp. 35, 216); however, the parent clarified in her testimony that she did not disagree with the 12:1+1 student-to-teacher ratio of the special class placement in a specialized school, but instead, she disagreed with the assigned public school site (see Tr. pp. 216-220). In addition, the parent testified at the impartial hearing that she agreed with the related services recommendations in the April 2012 IEP, as well as the annual goals in the April 2012 IEP (see Tr. p. 234).

to monitor reading comprehension with more independence; he could usually identify "WH" questions within a text, especially when given visual prompts; and he could accurately make predictions and recall evidence from text to support ideas (id.). With regard to writing, the April 2012 IEP indicated that the student improved his ability to put ideas down on paper, and with extended time, he could respond with complete sentences on one topic when writing for extended periods of time (id.). In addition, the April 2012 IEP noted that while the student could not write a complete paragraph, he could write a few sentences on topic (id.). With regard to mathematics, the April 2012 IEP indicated that the student improved in computations and understanding mathematics related to applied concepts, and he could consistently add and subtract (id.). The April 2012 IEP also noted that the student made significant gains in counting and counting out money, as well as in his ability to pay for a purchase independently; however, the student remained "unsure" whether he had enough money to complete a purchase (id.). According to the April 2012 IEP, the student improved his ability to explain new concepts and to rephrase them for his own understanding, as well as for peers (id.).

With respect to his speech-language skills, the April 2012 IEP indicated that on a "speech teacher rubric," the student was distracted, he needed redirection, and he did not request assistance to decode difficult words (Dist. Ex. 1 at p. 2). The April 2012 IEP also indicated that on a March 2012 "conversation rubric," the student actively participated by asking "relevant and topical" questions, and by commenting on peer responses (id.).

Socially, the April 2012 IEP indicated that the student enjoyed being social with peers and preferred activities working with peers (Dist. Ex. 1 at p. 3). In addition, the student could label emotions, respond to and produce "WH" questions during conversation, and produce nonverbal cues to display interest in others (id). Furthermore, the April 2012 IEP indicated that the student continued to work on topics of interest to his peers, and he ended conversations appropriately, identified nonverbal cues to understand others' perspectives, and identified and solved a variety of problems (id.). Although the April 2012 IEP described the student as friendly and outgoing, the student could be "concerned with self-perception" and "distracted by social dynamics" (id.). Furthermore, the April 2012 IEP indicated that the student continued to work on balancing social and academic environments, and he liked to be part of a group, and participated in team sports (id.). The April 2012 IEP also noted that according to the parent, the student wanted to be "involved in every social area possible" (id.).

The April 2012 CSE developed annual goals with corresponding short-term objectives—and recommended related services of speech-language therapy, OT, and counseling—to address the student's identified needs in the following areas: reading, writing and mathematics; the student's social/emotional needs; his deficits in ADLs, and visual motor and visual processing skills; his receptive, expressive, and pragmatic language skills; and his need to develop skills and strategies related to transitioning into post-school activities, which included a coordinated set of transition activities (Dist. Ex. 1 at pp. 4-15).

To address the student's academic, social development, and physical development needs identified in the April 2012 IEP, the April 2012 CSE relied upon information provided by Cooke to recommend a variety of management needs to use within the 12:1+1 special class placement (see Tr. pp. 45-46; Dist. Ex. 1 at p. 3). In particular, the April 2012 IEP provided for the use of visual and verbal prompts; presenting directions in simple, clear language; teacher cues; the use of

graphic organizers and checklists; a multisensory approach; modeling; individual use of sensory tools; small group instruction; redirection; use of a calculator; consistent opportunities for generalization of skills; breaks to refocus; clinician made articles at appropriate reading levels; visual cues; social scripts; behavior charts and motivational strategies in counseling for review; and frequent prompts and reminders (id.). In addition, while not included as a strategy within the management needs section, the April 2012 IEP noted that the student benefited from material being presented in "small chunks" with "maximum opportunity to respond to direct questioning" as well as time for the student to work independently "at each step of the process to ensure processing of information" (id. at p. 2).[11]

In light of the information presented about the student and reflected in the April 2012 IEP, the April 2012 CSE determined that the student's "global delays warrant[ed] a small supportive environment" and recommended a 12:1+1 special class placement with related services to meet his identified needs (Dist. Ex. 1 at p. 3). State regulations provide that a 12:1+1 special class placement is designed to address 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]). State regulations define management needs for students with disabilities as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (8 NYCRR 200.1[ww][3][i][d]).

The teacher testified that the April 2012 CSE recommended a 12:1+1 special class placement because the student was academically and cognitively "very low," and the 12:1+1 special class would address the student's social and academic needs (Tr. pp. 33-34). The teacher also testified that in a 12:1+1 special class, the student would receive a small, supportive setting, and as part of the "differentiated instruction in the public schools," a 12:1+1 special class could be further divided into smaller groups for instruction in mathematics or reading depending upon the concept being taught (Tr. pp. 62-63). In addition, the teacher testified that the April 2012 CSE believed the student could benefit from the supportive environment of a 12:1+1 special class, as well as the ability to receive even smaller group instruction when the students were grouped based upon their levels of performance (see Tr. pp. 46-48, 62-63). Although the student would not have access to his nondisabled peers in a 12:1+1 special class in a specialized school, the teacher testified that the student would otherwise have appropriate peer modeling because the other students in the class had "similar profiles" (Tr. pp. 54-56).

According to the teacher, the April 2012 CSE considered other special class placements for the student, such as an 8:1+1 special class and a 12:1+4 special class, but the April 2012 CSE rejected those placements because neither met the student's profile and the student was "already doing very well" in a 12:1+1 setting at Cooke (Tr. pp. 69-73; see Dist. Ex. 1 at p. 17).

[11] The teacher testified that this information was provided to the April 2012 CSE by Cooke (Tr. pp. 43-44).

In summary, the evidence in the hearing record supports the conclusion that the student would have received adequate support within a 12:1+1 special class to address his needs. Further, the April 2012 CSE's recommendation of a 12:1+1 special class in conjunction with the recommended related services, annual goals, and management needs was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits, and offered the student a FAPE for the 2012-13 school year.

C. Challenges to the Assigned Public School Site

Turning, collectively, to the parent's arguments asserted with respect to the assigned public school site and her contentions regarding the IHO's errors in analyzing whether the district sustained its burden to establish that it offered the student a FAPE for the 2012-13 school year as they relate to the assigned public school site, the parent's arguments must be dismissed.

Initially, challenges to an assigned school 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., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 12, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; 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 in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy

the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, 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. 2013 WL 2158587, at *4 [2d Cir. May 21, 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., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). 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]).[12]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because '[t]he appropriate inquiry is into the nature of the program actually offered in the written plan']). In view of the forgoing, the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

In this case, it is undisputed that the parent rejected the assigned public school site that the student would have attended prior to the time that the district would have been obligated to implement the student's April 2012 IEP, and instead chose to enroll the student in a nonpublic school of her choosing (see Dist. Ex. 1 at pp. 1, 13; Parent Exs. C-E). Therefore, the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have

[12] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular 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 T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). 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.

executed the student's April 2012 IEP at the assigned public school site is not an appropriate inquiry (see K.L., 2013 WL 3814669 at * 6). Moreover, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute them (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669 at *6; R.C., F. Supp. 2d at 273). Accordingly, the parent's claims that the IHO impermissibly shifted the burden of proof away from the district, that the IHO should have required the district to present evidence that the assigned public school site could implement the April 2012 IEP, and that the IHO ignored uncontroverted evidence that the assigned public school site was inadequate and not able to implement the April 2012 IEP must be dismissed.

VII. Conclusion

In summary, having determined that the hearing record demonstrates that the district sustained its burden to establish that it 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 the student's unilateral placement at Cooke was an appropriate placement or whether equitable considerations support the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 24, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER