The University of the State of New York

The State Education Department
State Review Officer
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No. 13-181

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, Ilana A. Eck, of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Lauren A. Baum, 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' (parents') son and ordered it to reimburse the parents for their son's tuition costs at the Churchill School (Churchill) for the 2012-13 school year. The parents cross-appeal from the IHO's determination to the extent that the determination that the district failed to offer an appropriate educational program was not based upon procedural insufficiencies. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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 student has been diagnosed with a mixed receptive and expressive language disorder, a reading disorder, a math disorder, a disorder of written expression, and a disorder of memory (Dist. Ex. 4 at p. 11; Parent Ex. L at pp. 23-24). The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this appeal (Dist. Ex. 3; see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The student was first referred for evaluation for special education services during the 2010-11 school year when he was in pre-kindergarten (Parent Exs. XXX-ZZZ). In an Initial Educational Evaluation conducted in March 2011, it was noted that the student exhibited "significant difficulty in the area of word recall and retrieval," a "hard time retaining information that was previously taught to him," and exhibited anxiety when feeling challenged (Parent Ex. XXX, at pp. 4-5). Special instruction in an integrated classroom was recommended for the student (id. at p. 5). A Psychological Evaluation was conducted in March 2011, noting that the student's evaluation results were suggestive of a learning disability, and recommending evaluation by a neuropsychologist during the student's kindergarten year (Parent Ex. ZZZ, at p. 6).

For the 2011-12 school year, the student received integrated co-teaching (ICT) services in a kindergarten class in a community school and related services of counseling and speech language therapy (Parent Ex. II). During the course of the 2011-12 school year, the student also received "learning leader" services (a literacy-based program) and academic intervention services (AIS) (Parent Ex. LL). On December 5, 2011, a meeting was held with the school based support team (SBST) at the parents' request to review results of an October 2011 private Neuropsychological Evaluation and concerns of the parents regarding the student's progress (Parent Ex. K, Tr. pp. 248, 250, 680).

An October 2011 neuropsychological evaluation concluded that the student exhibited the signs of a language-based learning disorder (Parent Ex. L at p. 23). The evaluation report notes that "[p]articularly in view of [the student's] superior intellectual ability, highly clinically significant delays were evident in all early academic areas assessed." (id. at p. 24). It was recommended that the student be reevaluated later in his kindergarten year to determine if he needed a different learning environment. The report notes that the student had been receiving reading remediation services, but his ability to recognize letters remained below kindergarten level (id. at p. 25). His "marked retrieval challenges" placed the student at a disadvantage for retaining information presented orally or only once and it was noted that a multisensory approach should be used (id. at p. 19). The report noted that his anxiety appeared to be in reaction to his learning challenges (id. at 20). The report noted that if the student did not progress during his kindergarten year, he would "require full time placement in a specialized program for bright learning-disabled students," that incorporated a "full time, highly structured, multisensory approach" (id. at p. 25).

On February 25, 2012, the parents reserved a seat for the student at Churchill for the 2012-13 school year (Parent Ex. W).

On April 18, 2012, a neuropsychological evaluation update was completed for the student. The student's full scale IQ based on the Standford-Binet Intelligence Scales – Fifth Edition (SB–5) was noted to be in the high average range, with a verbal IQ in the average range and a nonverbal IQ in the superior range (Dist. Ex. 4 at p. 1). The results of administration of the Comprehensive Test of Phonological Processing for the student reflected that he was in the 19th percentile for phonological awareness-words and in the 3rd percentile for phonological memory (id. at p. 2). The report noted that the student's academic skill level would not permit his progress to first grade despite intensive intervention, as "highly clinically significant delays remain[ed] evident in all early academic areas assessed" (id. at p. 10). The report stated that the student "requires placement in a small, highly structured special education classroom," along with increased intensive reading intervention, continued language therapy and occupational therapy (OT) (id. at p. 12).

On May 29, 2012, the district convened a CSE meeting to develop an IEP for the student for the 2012-13 school year (Dist. Ex. 3). The CSE was aware that the student's promotion to first grade was in doubt and that he remained below kindergarten standards although he had made some progress over the year (Tr. pp. 207, 310-11).

The May 29, 2012 CSE recommended a 12:1+1 classroom placement in a community school for the student, along with related services of speech-language therapy for two individual sessions per week and one group session per week, individual OT for two sessions per week, and individual counseling services one time per week (Dist. Ex. 3 at pp. 6-7). The IEP noted that the student's special education needs required a small structured classroom for ELA, Math, Social Studies, and Science, speech-language therapy, tasks broken down, a multisensory approach to phonological processing, adaptations in writing tasks, use of manipulatives, preferential seating, refocusing and prompting, additional time on tasks, and scaffolding of new material (id. at p. 2). The IEP contained annual goals in the areas of speech and language, math, reading, writing, OT, and counseling (id. at pp. 3-6). Regarding the effect of the student's needs on his ability to progress in the general education curriculum, the IEP noted that "[the student's] academic delays and attention/concentration difficulties make it difficult for him to progress in the general education curriculum however he is expected to continue to make progress with additional support" (id. at p. 2).

On June 4, 2012, the district issued a final notice of recommendation (FNR) which summarized the services in the IEP and identified a particular public school site to which the student had been assigned (Dist. Ex. 9).

On June 15, 2012, the parents wrote a letter to the district detailing their concerns about the IEP and proposed program recommendation (Parent Exs. F, PP). On June 22, 2012, after visiting a 12:1+1 class in June 2012 and recalling a visit to a different program in 2011, the parents wrote a letter detailing further concerns (Parent Ex. E). On August 17, 2012, the parents gave notice that they would be sending the student to Churchill for the 2012-13 school year and would seek tuition reimbursement (Parent Ex. D).

On September 5, 2012, the student began attending Churchill (Parent Ex. X). On October 3, 2012, the parent was able to observe the 12:1+1 classroom in the community school that had been recommended for the student for the 2012-13 school year (Parent Ex. B, Tr. pp. 382-85). By letter dated October 11, 2012, the parent declined the specific assigned public school site offered, noting her various concerns about the school and indicating that the student would remain at Churchill and the parents would seek tuition reimbursement (Parent Ex. B).

A. Due Process Complaint Notice

The parents requested an impartial hearing pursuant to a due process complaint notice dated December 18, 2012, seeking funding or reimbursement of tuition for Churchill, appropriate related services, costs and fees, and transportation with limited time travel (Parent Ex. A).

The parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year because the IEP was invalid and there was no appropriate offer of placement (Parent Ex. A). The parents argued that the CSE was

inappropriately constituted, and also failed to consider sufficient, appropriate evaluative materials, failed to fully evaluate the student in all areas of suspected disability, and failed to provide the parents the opportunity to meaningfully participate in the decision-making process (id.). The complaint also contained numerous allegations that the IEP inadequately described the student's needs, reasons why the goals in the IEP were improper, and the reasons why the special education services were inappropriate for the student (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 4, 2013 and concluded on June 25, 2013, after five nonconsecutive hearing dates (Tr. pp. 1-799).

In a decision dated August 15, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year (IHO Decision). The IHO first considered procedural errors alleged in the development of the May 2012 IEP (id. at p. 18). The IHO noted two procedural errors, specifically that the IEP was drafted prior to the IEP meeting in substantial part, and that the special education teacher did not participate for the entirety of the IEP meeting, but found that these violations did not rise to the level of a denial of a FAPE (id.).

The IHO found that the May 2012 IEP did not substantively meet the requirements for offering the student a FAPE (IHO Decision at pp. 18-24). The IHO found that the district failed to meet its burden of establishing that it offered appropriate special education and related services to the student for the 2012-13 school year (id.). The IHO concluded that the recommended 12:1+1 program with related services in a community school did not offer sufficient reading services and teacher support in the classroom for the student to make anything more than trivial progress (id. at p. 19). The IHO noted that the student had only made trivial progress the prior school year and, although a smaller classroom was being offered, the program failed to include sufficiently intensive reading services for the student (id. at pp. 19-21). The IHO found that the IEP also failed to provide sufficient measurable annual goals for the student (id. at pp. 21-23). The IHO noted that the insufficient annual goals constituted a substantive deficiency because they were overbroad, inadequate, and failed to address the student's individual special education needs (id. at p. 23).

The IHO next found that the unilateral placement at Churchill was appropriate to meet the student's needs and that the student made progress during the 2012-13 school year (IHO Decision at pp. 24-29). Finally, the IHO determined that equitable considerations favored the parents' request for reimbursement for the costs of the student's Churchill tuition (id. at pp. 29-30).

IV. Appeal for State-Level Review

The district appeals, asserting that it offered the student a FAPE for the 2012-13 school year. The district asserts that it therefore is not properly held responsible for reimbursing the parents for the student's tuition for the 2012-13 school year at Churchill.[1]

[1] The district does not appeal the IHO's findings that Churchill was an appropriate placement for the student for the 2012-13 school year or that equitable considerations do not preclude reimbursement.

Specifically, the district asserts that the 12:1+1 placement offered was appropriate for the student; that the reading supports were sufficient to address the student's academic needs; that the goals in the IEP were sufficient to address the student specific needs; and that the IHO improperly found that the district failed to prove the appropriateness of the offered public school placement because implementation is not properly considered in this case. The district notes its concurrence with the IHO's conclusion that no procedural violations constituted a denial of FAPE.

The district argues that the placement offered was appropriate considering all the relevant factors, including that the student had made progress during the 2011-12 school year in an ICT classroom in a public school setting, and that the program offered more support, was language enriched and provided for individualized attention for the student. The district also argues that the IHO improperly held that the reading support offered was insufficient for the student. The district argues that the strategies set forth in IEP for the student relating to his academic needs, including reading, would have appropriately met the student's needs by providing him with a small, structured classroom, a multi sensory approach to phonological processing, adaptations including graphic organizers for writing tasks, the use of manipulatives and hands-on materials, preferential seating, additional time on tasks, and scaffolding of new instructional material. The district argues that the IEP references the student's needs relating to reading and also provide for annual goals relating to reading and writing and also two individual and one group session of speech therapy per week. Regarding the annual goals in the IEP, the district argues that the annual goals appropriately addressed student's deficits, that no annual goals were required for the student's anxiety, and that there was no disagreement at the IEP meeting regarding the annual goals. The district also contends that the IHO improperly considered information outside of the IEP, and argues that because the parents enrolled the student at a private placement prior to the beginning of the school year, any consideration of implementation of the IEP is speculative.

In response to the petition, the parents affirm and deny some of the allegations, arguing that IHO's determination that a FAPE was not offered to the student for the 2012-13 school year was correct. The parents also cross-appeal, arguing that the procedural violations relating to the IEP for the student for the 2012-13 school year constituted a denial of FAPE. The parents argue that the combination of procedural errors resulted in a substantively inappropriate IEP for the student for the 2012-13 school year. Specifically, the parents noted that the student's special education teacher did not participate in the entire IEP meeting, that a social history, medical assessments, standardized testing, speech or occupational therapy evaluations, and neuropsychological evaluations were not considered, nor was the student's progress towards his prior IEP goals. The parents also argue that the IEP was drafted almost entirely prior to the meeting, that the parents were denied a meaningful opportunity to participate in the decision-making process, and that the IEP failed to reflect the student's levels of performance and needs accurately or adequately and failed to set forth appropriate annual goals. The parents also cross-appeal the IHO's failure to consider claims regarding the appropriateness of the offered placement. The parents request that the appeal of the district be dismissed, that the parents cross-appeal be granted, and that the SRO uphold the IHO's findings that the district failed to offer the student a FAPE for the 2012-13 school year. The parents also argue that the IHO's findings that Churchill was appropriate for the student and that the equities supported an award of tuition reimbursement were not appealed by the district and are therefore final determinations.

In response to the parents' cross-appeal, the district denies the allegations in the cross-appeal and affirmatively asserts that the IHO properly held that the procedural errors did not deny the student a FAPE, and that the district's failure to appeal prong two, regarding the appropriateness of the parent's unilateral placement, does not equate to an admission that the program offered in the IEP was inappropriate. The district argues that the composition of the IEP team did not deprive the student of a FAPE because the student's special education teacher participated for less than the entirety of the meeting because he did contribute to the IEP at the meeting. The district asserts that any allegation of a lack of parent participation at the meeting is not supported by the record. The district also contends that the use of recent and relevant evaluations and reports establish that the team used sufficient evaluative materials in developing the student's IEP. The district also argues that the IEP was not required to list the student's medical diagnoses, that the team properly determined the student's present levels of performance, and appropriately provided for multi-sensory instruction in the IEP. The district argues that it offered the student a FAPE for the 2012-13 school year and requests that the IHO's award of tuition reimbursement for Churchill be annulled, and that the parents' cross-appeal be denied.

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 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. 12:1+1 Special Class Placement

I find that the 12:1+1 special class placement and program as recommended in the May 2012 IEP for the student for the 2012-13 school year failed to offer him a FAPE due to the its class size, teacher ratio and lack of services to address the student's needs related to reading. The district argues that the IHO erred in finding that the 12:1+1 placement recommended for the student constituted a denial of FAPE. However, the record supports a finding that a 12:1+1 special class placement, without additional supports, would not have allowed the student to make more than trivial progress during the 2012-13 school year. The record supports a finding that the student required more teacher support and additional intensive reading instruction in order to address his special education needs.

The student's ICT class during the 2011-12 school year included approximately 20 to 25 students, however there were fewer than 10 students with IEPs taught by the special education teacher (Tr. p. 484-85). Additionally, the record supports a finding that the student received extra individual attention and support from teachers and student teachers in the classroom during the 2011-12 school year, in addition to private tutoring in reading from a private Orton-Gillingham certified special education teacher for one hour per week beginning in March 2011 and continuing for approximately one year (Tr. pp. 669-71).

The district's special education teacher who was the special education teacher in the student's kindergarten classroom testified that the student received one on one attention from one of the teachers in the classroom for at least half an hour of each day (Tr. p. 491). She also noted that the student received AIS and learning leader services, each once a week for thirty minutes (Tr. pp. 492-93). She testified that the student was "very smart" but had a reading disorder and that although he made some progress, he also struggled during the 2011-12 school year despite the extra attention he received (Tr. pp. 488, 495). She noted that the student had met one of his reading and writing goals on his IEP for the 2011-12 school year but, despite making progress in the rest,

had not achieved them (Tr. p. 514). She testified that the parent wanted a recommendation for Churchill but that the CSE declined because "the next step would be to try a 12 to 1 to 1 program," which she testified offered a smaller class and more one on one time than ICT services (Tr. p. 518). In June 2012, the parents were notified that the student would not be promoted to first grade (Parent Ex. M).

Regarding the appropriateness of the 12:1+1 program, the district's school psychologist testified that the program would be appropriate for the student and would meet his reading needs because it was language enriched and only had 12 students in the classroom, along with several adults, so that the group sizes would be smaller for him so that he could get more attention and be less distracted (Tr. pp. 231, 235, 240). She also noted that the student would be provided AIS if necessary, although that would not be noted on the IEP (Tr. p. 235).

I find that the reading supports offered to the student for the 2012-13 school year were insufficient to address the student's special education needs. The district argues that the IHO erred in finding that the reading supports referenced in the 2012-13 IEP were insufficient to address the student's individual needs. However, the record supports a finding that the student required intensive multisensory instruction especially for reading and that this was not offered appropriately in the May 2012 IEP (Dist. Ex. 3). While the IEP provided for multisensory instruction for phonological processing (Dist. Ex. 3 at p. 2), it did not provide for the type of small, intensive, full time program with sufficient repetition to meet the student's documented needs in reading, writing and math instruction (Dist. Ex. 4 at pp. 11-12; Tr. pp. 778-79). The student's language-based learning disability is such that despite intensive efforts in his 2011-12 kindergarten school year, he made little progress during that school year. Furthermore, despite testimony that the student could have been provided additional services, I remind the district that if a student requires a certain service in order to receive academic benefits, the service must be stated on the student's IEP, and deficiencies in the written program may not be rehabilitated by after the fact testimony about services the district could have provided upon implementation (R.E., 694 F.3d at 186-88).

I find that the IHO properly considered the program offered and the record evidence of the student's needs and lack of meaningful progress during the prior school year to find that the program offered for the 2012-13 for the student by the district was not sufficient to offer the student a FAPE under all the circumstances (IHO Decision, at pp. 16-24). There is evidence in the record that a paraprofessional, as opposed to a certified teacher, would not be sufficient to provide the student with instruction sufficient for the student to make more than trivial progress considering the nature of his disability as noted in the documents before the CSE, including the neuropsychological evaluation report and update (Dist. Ex. 4; Parent Ex. L). Based upon the evidence in the record as to the student's lack of progress in the prior school year and the nature of his disability and needs, I concur in the IHO's conclusion that the 12:1+1 special class placement recommendation, without additional services or supports not provided in the May 2012 IEP, was not sufficient to offer the student a FAPE for the 2012-13 school year (IHO Decision, p. 20).[2]

[2] This is not to say that a 12:1+1 special class was categorically inappropriate to meet the needs of the student; rather, the district failed to establish that it offered the student a FAPE because it did not prove that the IEP provided services that were necessary to address the student's needs.

B. Annual Goals

I concur with the IHO that the annual goals on the May 29, 2012 IEP were insufficient to meet the student's needs and were not measurable. The district argues that the IHO erred in finding that the annual goals for the student in the 2012-13 IEP failed to address the student's individual needs.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The student's Churchill special education teacher testified that the IEP goals were not appropriate for the student because they required multiple skills to master them, and the goals were not appropriate for the student (Tr. pp. 578, 602-605). The IHO noted that despite the student's language-based learning disability, there were only two reading goals on the May 2012 IEP, and they were more consistent with a description of a planned curriculum than with measurable annual goals (IHO Decision at p. 22). Based upon the student's present levels of performance, the student's annual goals appear too advanced and also had multiple parts that would make it difficult to measure progress (Dist. Ex. 3 at pp. 1-6). The IHO noted that some of the goals appeared to be written for a different student entirely (IHO Decision, at p. 21). For example, the student, who knew less than 10 sight words at the commencement of the 2012-13 school year and was reading at a pre-kindergarten level, had a reading decoding goal on the May 2012 IEP that provided as follows: "one year from now [the student] will demonstrate improved decoding skills by identifying all uppercase and lowercase letters, making sound/symbol associations for all letters and digraphs, blending and segmenting the sounds in CVC words and reading grade level sight words" (Dist. Ex. 3 at p. 4). The IHO correctly noted that the goals overall were not appropriately individualized for the student's needs, that the counseling goals failed to address anxiety, and that there were no goals to address the student's needs relating to organization and planning (id. at pp. 3-6). The IHO noted that she credited the proof in the record that the student had anxiety issues that affected his educational performance (IHO Decision, p. 23).

I find that the annual goals were overbroad and failed to address or meet the student's individualized special education needs. I concur with the IHO that the annual goals were insufficient in multiple respects. However, based upon my above finding that the 12:1+1 classroom placement recommendation set forth in the IEP failed to offer the student a FAPE, it is unnecessary to determine whether the insufficiencies with the annual goals also constituted a denial of FAPE under the circumstances of this case (see, e.g., J.L. v. City Sch. Dist. of the City of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).

C. Assigned Public School Site

The district argues that any inquiry into the appropriateness of the assigned public school site is speculative because the parents unilaterally enrolled the student at Churchill prior to the beginning of the 2012-13 school year. I agree.

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., 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 24, 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 a student would be placed in 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, 677-78 [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 Dept. of Educ., (Region 4), 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]).

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. v. New York City Dep't of Educ., 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"]; see also 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 the claims that the district would have failed to implement the May 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the May 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Ex. D).

Moreover, regarding the specific public school site offered, I find that it is further unnecessary to consider alternative findings in light of my findings above that the May 2012 IEP itself failed to offer the student a FAPE for the 2012-13 school year.

D. Cross-Appeal – Procedural Violations

The parents cross-appeal and argue that procedural violations were of a sufficient nature to constitute a denial of FAPE in this case. In light of my findings that the May 2012 IEP failed to offer the student a FAPE, it is unnecessary to consider whether the procedural violations were of a sufficient nature to also constitute a denial of a FAPE.

VII. Conclusion

On review of the evidence in the hearing record, the recommended 12:1+1 special class in a community school with related services was not reasonably calculated to provide the student educational benefits under all circumstances of this case and therefore he was denied a FAPE for the 2012-13 school year. I concur with that IHO that the IEP substantively failed to offer the student a FAPE, and therefore I need not consider the issue of the appropriateness of the assigned

public school site. My determination on the district's appeal renders the parents' cross-appeal moot and I need not consider the issue of the procedural violations in the development of the students 2012-13 IEP. The district did not appeal the IHO's finding that Churchill was appropriate for the student or that equitable considerations did not preclude tuition reimbursement. Based upon the foregoing, I affirm the IHO's decision and find that the district shall reimburse the parents for tuition paid to Churchill for the student for the 2012-13 school year.

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 29, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER