The University of the State of New York

**The State Education Department**
**State Review Officer**
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**No. 14-002**

**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, Gail M. Eckstein, Esq., of counsel

The Law Offices of Neal H. Rosenberg, attorneys for respondents, Meredith B. Garfunkel, Esq., of counsel

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the cost of their son's tuition, room and board, transportation, and related services at The Learning Clinic (TLC) for the 2012-13 school year. The parents cross-appeal asserting additional grounds, not reached by the IHO, on which the district allegedly denied the student a FAPE for the 2012-13 school year. For the reasons set forth below, the appeal must be sustained in part, and the matter is remanded to the IHO to address the parents' claims regarding the educational program recommended for the 2012-13 school year.

### 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

This matter involves a student who was 17 years-old at the time that the IEP being challenged was created (Dist. Ex. 1 at p. 1). The record reflects that the student has continuously attended TLC since July 2009, and that prior to that time the student attended three New York State-approved nonpublic schools (Tr. pp. 278, 364, 430-34). The student has received several diagnoses which impact his academic and social/emotional performance (Dist. Exs. 8 at p. 16; 17 at p. 15; Parent Ex. Z at p. 3). The student exhibits distractibility, impulsivity, and difficulty in processing information, working memory and attention, and social interactions (Tr. pp. 151-52, 176, 361, 435; Dist. Exs. 1 at pp. 1-2; 8; 13; 17; Parent Ex. Z at p. 3).

On April 3, 2012, the CSE convened to conduct the student's annual review and develop an IEP for the 2012-13 school year (Dist. Exs. 3; 4 at pp. 1-2). The April 2012 CSE developed a draft IEP recommending placement in a State-approved nonpublic residential school and deferred the matter of finding a specific school to the district's central based support team (CBST) (Tr. pp. 126-27, 165-66, 184, 200, 436-37). On April 25, 2012, the CBST case manager received notification that the student had been accepted to Westbrook Preparatory School (Westbrook), a State-approved nonpublic residential school to which the CBST had provided the student's information (Tr. pp. 46, 75-76, 442; Dist. Ex. 6 at pp. 1-2). On May 10, 2012, the parents visited Westbrook and spoke with the principal and residential director (Tr. pp. 442-445).[1] On May 11, 2012, the parents sent a letter to the CBST case manager expressing their concerns regarding Westbrook (Tr. pp. 447-448; Parent Ex. X at pp. 1-3).

On June 5, 2012, the CSE reconvened to formalize the student's program recommendation for the 2012-13 school year following the acceptance of the student into Westbrook (Tr. pp. 165-66, 190-91; Dist. Exs. 1 at pp. 12, 16; 2).[2] The CSE found the student remained eligible for special education and related services as a student with an emotional disturbance and recommended a 12-month school year program in a State-approved nonpublic residential school (Dist. Ex. 1 at pp. 1, 8-12).[3] The June 2012 CSE identified Westbrook as the school the student would attend for the 2012-13 school year, and the district provided the parents with a final notice of recommendation (FNR) indicating Westbrook as the school that would implement the June 2012 IEP (Tr. pp. 165, 184, 187; Dist. Exs. 2; 5). The parents returned the FNR to the district indicating that they were rejecting the district's recommendation for the reasons set forth in their May 2012 letter (Dist. Ex. 5). The parents also sent a letter to the CSE dated June 12, 2012 explaining their reasons for rejecting the district's recommended program and indicating their intention to keep the student at TLC for the 2012-13 school year and to seek reimbursement for the cost of his tuition (Parent Ex. Y).[4]

**A. Due Process Complaint Notice**

By due process complaint notice dated November 14, 2012, the parents requested an impartial hearing (Dist. Ex. 22). On February 26, 2013, the parents amended their due process complaint notice (Parent Ex. B). In their amended due process complaint notice the parents contended that the district did not offer the student a FAPE for the 2012-13 school year and raised a number of substantive and procedural challenges to the June 2012 IEP, including the following:

[1] The hearing record indicates that the visit in April 2012 was the parents' second visit to Westbrook within the past year, as the parents had also visited Westbrook in the fall of 2011 as a possible placement for the student for the 2011-12 school year (Tr. p. 460).

[2] Counsel for both parties agreed that there were no substantive differences between the April 2012 and June 2012 IEP's (Tr. p. 33).

[3] The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute in this proceeding (Tr. p. 152; see 34 CFR 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

[4] The Commissioner of Education has not approved TLC as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 467-68; see 8 NYCRR 200.1 [d], 200.7).

- That the June 2012 CSE was invalidly composed because it did not include personnel from either Westbrook or TLC (Parent Ex. B at p. 2);[5]

- That the CSE "did not follow proper procedures" in that none of the CSE members were familiar with Westbrook or able to address the parents' questions/concerns regarding the school, the CSE failed to consider out-of-State options, the parents were not included in the decision to place the student at Westbrook, and the "CBST has no basis in the law" (id.);[6]

- That there was no discussion about how the student would have been able to "transition" from TLC to Westbrook (id.);

- That the CSE did not review "appropriate documentation" prior to making its recommendation (id. at p. 2);

- That the June 2012 IEP did not describe the student's needs (id.);

- That the annual goals in June 2012 IEP were insufficient and did not address the student's special education needs (id.);

- That the behavioral intervention plan (BIP) was "entirely insufficient" and did not address all of the student's behaviors (id.);

- That the IEP "fails to provide guidance for how staff should address [the student's] targeted behavior[s]," and did not include sufficient supports for the student to benefit from the BIP (id.);

- That "there is absolutely no class ratio set forth on the IEP or the Final Notice of Recommendation" (id.); and

- That the CSE did not respond to the parents' communications and/or request to reconvene the CSE made after the June 2013 CSE meeting (id. at p. 3).

In addition, the parents made a number of allegations regarding Westbrook in their amended due process complaint notice. Specifically, the parents challenged the appropriateness of Westbrook for a number of reasons, including that it was "much too restrictive" for the student,[7]

[5] The parents also contended that a person "responsible for implementing the IEP" was not at this meeting, but since the IEP would have implemented at Westbrook, it is not clear whether this is simply another reference to a representative from Westbrook.

[6] Related to the procedures that were used, the parents also alleged in their due process complaint notice that the student was accepted to Westbrook without the school meeting with him or speaking with his "current school" (Parent Ex. B at pp. 2, 3), and they contended that the school would not allow the student's psychologist to visit it (id. at p. 3).

[7] It is not clear whether this statement was meant to allege that Westbrook was not the student's least restrictive environment (LRE), which typically relates to the extent to which a student will be educated with non-disabled peers (8 NYCRR 200.1[cc]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008], Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]), or whether this statement was meant simply as a general description of the parents' other claims relating to Westbrook, as described above.

that the school was "limited" to one building with "15 boys ranging from ages 14-21 living on one floor," and that the student's access to "younger students" would "only cause him to regress" and "not allow him to make progress or transition successfully into the community upon graduation" (id. at p. 1). In addition, the parents contended that the school would not afford the student with an opportunity to develop independent skills, and in this regard would be a "step back" for him (id.). The parents further asserted that "[a]cademically, the program would not meet [the student's] need," and that the "structure" at Westbrook (i.e., where there were multiple periods per day and the student would be required to change classrooms) was not appropriate for him (id.).[8] Finally, the parents contended that Westbrook would not provide the student with the "individualized support" that he required in class, and the school could not implement the June 2012 IEP, including the annual goals or transition goals contained therein (id. at pp. 1-2). As a proposed resolution, the parents requested reimbursement for the cost of the student's tuition, room and board, transportation, and related services at TLC for the 2012-13 school year (id. at p. 3).

**B. Impartial Hearing Officer Decision**

An impartial hearing convened on May 13, 2013 and concluded on September 23, 2013, after five days of proceedings (Tr. pp. 21-470).[9] In a decision dated December 2, 2013, the IHO did not address any of the parents' allegations related to the student's IEP, and instead found that the student was denied a FAPE for the sole reason that the district "failed to meet its burden" of establishing that the student would have been appropriately grouped at Westbrook (IHO Decision at p. 7). In making this finding, the IHO acknowledged that the Second Circuit "has been clear" that where a parent enrolls a child in a private placement before a district would have been obligated to implement an IEP, the validity of a 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,'" and thus, "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'" (id. at pp. 5-6, quoting A.M. v. New York City Dep't of Educ., 964 F.Supp.2d 270, 286 [S.D.N.Y. 2013] and N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 589 [S.D.N.Y. 2013]). However, the IHO held that 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" (id. at p. 6). For the parents to have been able to do so in this case, the IHO reasoned, they "required access and information" about Westbrook (id. at p. 6).

After finding that the district denied the student a FAPE, the IHO addressed the appropriateness of TLC and found that it was an appropriate placement for the student (IHO Decision at pp. 8-9). In addition, the IHO found that the parent cooperated with the CSE and determined that equitable considerations did not bar the parents' request for relief (id. at p. 9). The IHO, therefore, awarded the parents reimbursement for the costs of the student's tuition, room and board, transportation, and related services at TLC for the 2012-13 school year (id.).

[8] The parents specifically contend that the student requires a "study carrel, headphones, and a structured setting where he does not have to move every period," and expressly assert that he "could not possibly stay on task if [he was] expected to transition every 42 minutes" (Parent Ex. B at p. 1).

[9] Although the IHO's decision lists April 18, 2013 as a hearing date, the transcript from April 18, 2013 indicates that it was a second prehearing conference scheduled after an initial prehearing conference on January 31, 2013 (Tr. p. 3; IHO Decision at p. 2). In addition, the IHO appears to have inadvertently omitted the September 23, 2013 hearing date from his summary of the hearing (IHO Decision at p. 2).

## IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district did not offer the student a FAPE for the 2012-13 school year and that TLC was an appropriate placement for the student. Specifically, the district alleges that the IHO erred in determining that the parents' claims regarding Westbrook were not speculative, that the parents were not provided with information that they required regarding the assigned school, and that the district did not meet its burden of proving the student would have been grouped appropriately at Westbrook. Initially, the district asserts that because the parents rejected the district's offered program prior to the start of the school year, the district was not obligated to establish that Westbrook could implement the IEP and any analysis of the appropriateness of the school was speculative. The district also asserts that the parents had sufficient information regarding Westbrook before the parents rejected the district's offered program, noting that the parents had visited twice in the past year. In addition, the district alleges that the IHO erred in finding that Westbrook did not confer with the student's current school prior to accepting him, asserting that Westbrook personnel had observed the student at TLC during the prior school year. Furthermore, the district asserts that the issue of functional grouping at the assigned nonpublic school is speculative, and even so, the student would have been grouped appropriately for instructional purposes in classes at Westbrook with students functioning in the same academic range. Regarding the parents' unilateral placement of the student at TLC, the district asserts that the IHO erred in finding that the student made social/emotional progress at TLC and the district further asserts that the objective evidence showed the student's anxiety behavior regressed at TLC. In addition, the district notes that the IHO decision did not address certain claims raised in the parents' due process complaint notice and refers to the district's post hearing brief to support the district's position that those claims do not have merit.

The parents answer, denying the allegations contained in the petition and asserting additional grounds, not reached by the IHO, on which the district allegedly denied the student a FAPE for the 2012-13 school year. Specifically, and among other matters, the parents assert that the June 2012 CSE improperly deferred its obligations to select an appropriate non-public school to the CBST, the June 2012 CSE was not properly composed, the BIP included in the June 2012 IEP was insufficient, and the CSE improperly adapted the annual goals included in the June 2012 IEP from TLC's goals. The parents also assert that in addition to improper grouping, Westbrook is "much too restrictive" for the student,[10] and that the school would not provide appropriate peer grouping in the student's residence, the school would not provide an appropriate level of independence for the student, the school's academic program would not meet the student's needs, and that the school's curriculum would be inappropriate. In addition, the parents contend that it was not established that Westbrook would implement the June 2012 IEP.

The district replies and answers the parents' claims, asserting among other things that the district's delegation of authority to the CBST is the same as the delegation of the selection of a public school location, that the CSE is not required to name a particular school on the IEP,[11] that the CSE team was properly composed (specifically, the district argues that participation of a

[10] It is, again, not clear whether this statement is meant to allege that Westbrook was not the student's LRE.

[11] This assertion appears to have been made in response to an assertion by the parents in their answer which, seemingly for the first time, suggests that Westbrook "should have been included on the IEP" (Answer ¶17).

representative from Westbrook was not required at the CSE meeting), that the BIP and annual goals were appropriate, and that Westbrook is an appropriate placement and "not too restrictive."[12]

**V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that

[12] The district appears to have interpreted this statement as an allegation that the student was not placed in the least restrictive environment (LRE), and contends that placement in a nonpublic residential school is the student's LRE.

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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

The 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. Review of IHO's Finding and Decision

As discussed above, the parents raised a number of substantive and procedural issues related to the student's June 2012 IEP in their amended due process complaint notice. However, the IHO did not address these issues, and instead based his determination that the student was denied a FAPE for the 2012-13 school year solely on his finding that the district offered no evidence that the student would have been appropriately grouped at Westbrook (IHO Decision at pp. 5-7). For the reasons discussed below, this finding does not support an award of tuition reimbursement and must be reversed.

As an initial matter, the IHO's finding that the district offered "[n]o such evidence" of functional grouping at Westbrook is not supported by the record.[13] Rather, the record reflects that the district presented evidence regarding how the student would have been grouped at Westbrook with students functioning at similar academic levels. According to Westbrook's principal the student would have been placed according to the student's academic transcript received from the student's prior school (Tr. p. 48). Westbrook's principal further explained that classroom grouping at Westbrook was "based on academic needs and levels to the greatest extent" (Tr. p. 63). He also testified that the school tried to "match students based on where they're at academically" and that students were grouped "more or less on grade level" (Tr. pp. 63-64). At the time of the CSE meeting, the student was 17 years of age and was functioning at approximately the 10th-11th grade level academically (Tr. p. 130; Dist. Ex. 1 at p. 1).[14] This description indicates that the student could have been appropriately grouped with the students at Westbrook, who are described as being between the ages of 16 and 21 and "usually on grade level or just below" (Tr. p. 93).[15]

More importantly, the Second Circuit has made clear that in cases like this, where an IEP is rejected before a district has an opportunity to implement it,[16] the sufficiency of the district's

[13] The IHO referenced the testimony of Westbrook's principal as support for his conclusion that the principal conceded that the student's June 2012 IEP "did not have sufficient information as to what program the student required" (IHO Decision at p. 7). However, the testimony referenced by the IHO does not support the IHO's conclusion as it relates only to the transition plan and the vocational program at Westbrook, not Westbrook's overall program (Tr. pp. 95-96).

[14] The June 2012 IEP indicates the student was working on 10th-11th grade course work but was at independent functioning levels of 7th-8th grade in English and 8th grade in math (Dist. Ex. 1 at p. 1).

[15] Although Westbrook is approved for students aged 12-21, Westbrook's principal testified that the school is "leaning toward a 16 years and up age level" because of the demographics with some school districts (Tr. p. 63).

[16] The hearing record indicates the parents rejected the district's recommended program prior to the start of the school year (Dist. Ex. 5; Parent Ex. Y). Initially, the parents returned the FNR recommending placement at Westbrook to the district on the same day as the June 2012 CSE meeting (Dist. Ex. 5). The parents then rejected the recommended program by letter to the CSE dated June 12, 2012, informing the CSE of the parents' intention to return the student to TLC for the 2012-13 school year and seek reimbursement for the cost of the student's tuition from the district (Parent Ex. Y at p. 2). Although the IHO correctly indicated that the parents' enrollment contract with TLC is dated June 30, 2012, the IHO omitted any analysis of the parents' rejection of the FNR, on

offered program must be determined on the basis of the IEP itself. In, R.E., for example, the Second Circuit was confronted with a situation where the parents did not "seriously challenge the substance of the IEP," and instead argued that "the written IEP would not have been effectively implemented at [the assigned public school site]" (R.E., 694 F.3d at 195). The court rejected these claims, noting in relevant part that its "evaluation must focus on the written plan offered to the parents" (id.). Likewise in K.L. v. New York City Dep't of Educ., the Second Circuit, citing to R.E., held that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (530 Fed. App'x 81, 87 [2d Cir 2013], quoting R.E., 694 F.3d at 187). Accordingly, the Court has held that "[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 also F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014]), and claims relating to a district's "school placement" have been rejected by the Second Circuit as a basis for a finding of a denial of FAPE where an IEP has been rejected prior to when it was required to be implemented (see K.L., 530 Fed. App'x at 87 [rejecting claims that a school placement was "inadequate and unsafe" since the appropriate inquiry is into the nature of the written plan]).

By basing his determination that the student was denied a FAPE entirely on the district's purported failure to prove that the student would have been appropriately grouped, the IHO, while acknowledging that the "validity of [a] proposed placement is to be judged on the face of the IEP" (IHO Decision at p. 5), did not address any of the parents' allegations that specifically related to the student's IEP. Moreover, "grouping" is a requirement imposed by State regulations (see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). Since there is no evidence in the hearing record to suggest that the student would not have been appropriately grouped pursuant to these regulations, the IHO's decision relies on speculation that the student might not have been appropriately grouped at Westbrook.[17] Further, and because the student never enrolled at Westbrook, any analysis of this issue would require the use of retrospective evidence by the district, explaining how the district would have executed the student's June 2012 IEP, which the Second Circuit has determined is not appropriate (see K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186, 195). Accordingly, I cannot find that the parents' "grouping" claims are sufficient to support the parents' unilateral placement of the student in this matter (see, e.g., R.B. v. New York

June 5, 2012, or the parents' June 12, 2012 letter to the CSE indicating that the parents were rejecting the offered program and enrolling the student at TLC (IHO Decision at p. 5; Dist. Ex. 5; Parent Ex. Y at p. 2). In addition, although the enrollment contract was executed within days of the start of the 12-month school year, it indicates that the parents enrolled the student at TLC prior to the time the district became obligated to implement the IEP, a decision the parents had already made during the June 2012 CSE meeting (Dist. Ex. 5; Parent Exs. D at pp. 1, 3; Y at p. 2).

[17] While there are cases that suggest that parents are entitled to rely on information provided by a district outside of the written plan when making a decision regarding unilateral placements (see, e.g., D.C. v. New York City Dep't of Educ., 950 F.Supp.2d, 494 [S.D.N.Y. 2013]), and further while the Second Circuit has left open the question as to whether one such case (B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670 [S.D.N.Y. 2012]) "properly construes R.E.," (see F.L., 2014 WL 53264, at *2, *6), this matter does not present such a situation. Moreover, since the grouping of students in classrooms is something which may change over time (see, e.g., M.S. v. New York City Dep't of Educ., 2013 WL 7819319, at *16 n.10 [E.D.N.Y. Nov. 5, 2013]; Application of the Dep't of Educ., Appeal No. 13-220), even if there were evidence in the record that students were not appropriately grouped at the time of the parents' visit to Westbrook, this alone would not necessarily make the "grouping" claims relied upon by the IHO any less speculative.

City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; N.K., 961 F.Supp.2d at 588-89; A.M., 964 F.Supp.2d at 286).

Further, to the extent that the IHO held that the parents were entitled to (and required) "access and information about [Westbrook]" (IHO Decision at p. 6), I am unable to find that such is the case, particularly with respect to information regarding the students with whom the student would have been "grouped" at Westbrook. While parents have a right to participate in decisions regarding a student's "educational placement" (see, e.g., C.F. v. New York City Dep't of Educ., 2014 WL 814884, at *8 [2d Cir. Mar. 4, 2014]), such issues relate "only to the general type of educational program in which the child is placed" (T.Y., 584 F.3d at 419). Grouping, which as noted above is a regulatory requirement, is generally not such an issue, especially before an IEP has been implemented. In fact, it has been noted that the IDEA does "not expressly require school districts to provide parents with class profiles" (Cerra, 427 F.3d at 194; see also N.K., 961 F.Supp.2d at 590 [a district is not required to provide parents with details "about the specific group of students with which their child will be placed"]). Further, it has been held that the IDEA does not afford parents the right to participate in the selection of their child's classmates (see, e.g., J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013]). Thus, that the parents may not have been provided with classroom "grouping" information in this case is not dispositive of their claims (see, e.g., A.M., 964 F.Supp.2d at 286 [noting that the fact that the parents were not shown an appropriate class during a visit to a school did not affect the speculative nature of their "grouping" claims]).

Finally, to the extent that the IHO relies on the Second Circuit's decision in T.Y., I am unable to find that T.Y. supports his decision. While as the IHO correctly notes, a district must implement an IEP as written and school districts do not have "carte blanche" to assign students to a school that cannot satisfy an IEP's requirements (see T.Y., 584 F.3d at 420), T.Y. must be read in conjunction with subsequent precedent, including F.L. which had not been decided when the IHO issued his decision.[18] In F.L., the Second Circuit reiterated that "'[s]peculation that [a] district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement,'" and noted that the suggestion that some students are underserved does not overcome an assessment of a "'plan's substantive adequacy'" (F.L., 2014 WL 53264 at *6, quoting R.E., 694 F.3d at 195). Instead, the Court held that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3). Accordingly, T.Y. does not necessarily compel the conclusion that, prior to the time that an IEP is implemented, parents must be provided with "access and information" about a school (including "grouping" information) in order to "compel a non-compliant district to adhere to the terms of the written plan" as the IHO stated (IHO Decision at p. 6). Nor does T.Y. necessarily require that a district, where an IEP has been rejected prior to when it is required to be implemented, must show that, had the IEP been implemented, a FAPE would have been provided in all respects (see, e.g., M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014] [noting that it would be "inconsistent" with R.E. to require evidence of the actual classroom a student would attend where it was clear that the student would attend a private school and not be educated under the IEP], citing R.C. v Byram Hills Sch. Dist., 906

[18] The IHO's decision is dated December 2, 2013 (IHO Decision at p. 9), while F.L. was decided by the Second Circuit on January 8, 2014 (see F.L., 2014 WL 53264).

F.Supp.2d 256, 273 [S.D.N.Y. 2012]).[19] Rather, and when read in light of subsequent precedent, a more reasonable interpretation of T.Y. is that, should a district attempt to implement an IEP in a class and/or school that cannot provide the program and/or services required by that IEP, or should a district, while implementing an IEP, not comply with other legal obligations that are required for the provision of a FAPE, such claims may be the subject of a "later proceeding" in which the implementation of that IEP (or the lack thereof) may be the basis for a finding that a FAPE has been denied. This, however, is not the situation presented in this case.

**B. Unaddressed Claims**

Having reviewed the IHO's findings and decision, I will remand this matter to the IHO for further administrative proceedings. As noted above, the parents asserted multiple issues related to the development of the IEP and the IEP itself, yet none of those allegations were addressed by the IHO. While the pleadings before me refer to these issues, some are not entirely clear (such as the allegation that Westbrook is "much too restrictive" for the student), while others are addressed in what is, at best, a perfunctory manner by the parties. For example, one of the parents' claims is that the CSE was not validly composed because, among other things, a representative of Westbrook was not present during either the April 2012 or June 2012 CSE meetings (Parent Ex. B at p. 2). In response to this allegation, the district contends that "there is no regulation that requires a representative from the recommended placement to participate in the IEP meeting," and in reliance on T.Y., suggests that a discussion about Westbrook at the CSE meeting was not required (Reply ¶¶ 32-34). However, this argument fails to account for the requirement that, when recommending a nonpublic school placement, a district must ensure that a representative from that nonpublic school attend the CSE meeting (see 34 CFR 300.325[a]; 8 NYCRR 200.4[d][4][i][a]). Likewise, while the parents contend that the lack of a Westbrook representative "inhibited [their] ability to participate" at the CSE meetings (Parent Ex. FF at p 9), they neither cite to any relevant law or regulation to support their claims (in fact, they do not even cite to the above regulations), nor do they explain how such was the case given that the record reflects that they visited Westbrook and were able to discuss their concerns directly with Westbrook personnel (see, e.g., Tr. p. 462). As a result, neither party adequately addresses how the attendance (or lack thereof) of a Westbrook representative at a CSE meeting may have impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. §1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also S.M. v. Taconic Hills Cent. Sch. Dist., 2014 WL 322294, at *1 [2d Cir. Jan. 30, 2014] [although lack of a representative from the nonpublic school at a CSE meeting recommending placement in the nonpublic school was a procedural violation, it did not amount to a denial of FAPE given the attendance of a representative from the nonpublic school at a CSE meeting held several months earlier]; Gagliardo v. Arlington Cent. Sch. Dist., 418 F. Supp. 2d 559, 571 [S.D.N.Y. 2006] [stating that "the purpose of having the private school representative at the meeting is so that the parents familiarize themselves with the recommended placement"], rev'd on other grounds by 489 F.3d 105).

[19] While I recognize that there are cases that suggest otherwise, these cases were generally decided without the benefit of much (if not all) of the Second Circuit precedent discussed above (see, e.g., J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794 [S.D.N.Y. Sept. 29, 2012]; W.T. v. Bd. of Educ., 716 F.Supp.2d 270 [S.D.N.Y. 2010]), or do not address much of this precedent, especially F.L. (see, e.g., Scott v. New York City Dep't of Educ., 2014 WL 1225529 [S.D.N.Y. Mar. 25, 2014]).

In addition, the parents raised a number of claims in their amended due process complaint notice that related to the appropriateness of Westbrook (Parent Ex. B at pp. 1-3). As explained above, Second Circuit precedent requires that the appropriate inquiry in cases like this be into the IEP, and that claims that a recommended school could not implement an IEP are generally considered to be speculative (F.L., 2014 WL 53264, at *6; K.L., 530 Fed. App'x at 87; R.E. 694 F.3d at 195). However, while some of the parents' allegations regarding Westbrook clearly relate to whether Westbrook could adequately implement the student's IEP (or comply with other mandates that would be required if the IEP had been implemented), other claims are not as clear and, though related to a recommended school, may raise issues related to the student's IEP (see, e.g., N.K., 961 F. Supp. 2d at 592 [court found it was unclear whether a claim regarding music therapy was a claim regarding the adequacy of the IEP or that the recommended school could not implement the IEP]).[20] However, these issues are not clearly raised as IEP-related claims in the parents' amended due process complaint notice, and neither party clearly addresses this issue in their papers before me. In this regard, while I do not attribute all of the inadequacies with the pleading in this matter to the IHO's failure to address all of the parents' claims, I note that a well-reasoned IHO decision addressing these claims could have clarified this issue (as well as the issues discussed above) and guided the parties to a more accurate and thorough development of their arguments on appeal.

Considering the IHO's failure to address the merits of the parents' IEP-related claims and the parties' failure to adequately address and/or explain various claims and/or arguments on appeal, this matter is remanded to the IHO for a determination on the merits of the parent's IEP-related claims (including any claims relating to the appropriateness of Westbrook that the IHO determines can reasonably be read as IEP-related claims), raised in their February 26, 2013 amended due process complaint notice (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also T.L. v. New York City Dep't of Educ., 938 F. Supp. 2d 417, 437 [E.D.N.Y. 2013]; D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). It is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and conclusions of law relative to each of these issues. Furthermore, the IHO may find it appropriate to schedule a conference with the parties to, among other things, simplify and clarify the issues that need to be decided (see 8 NYCRR 200.5[j][3][xi][a]).

Based on the foregoing, I need not review the merits of the IHO's findings regarding the appropriateness of Westbrook at this juncture (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]). However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of this finding will be addressed at that time.[21]

[20] In other words, claims that a school is inadequate, or would not address the needs of a child, can be read as allegations that a student has particular needs or requires certain accommodations. Thus, and since a school must implement a student's IEP, to the extent that such needs or accommodations are not reflected on the student's IEP, these claims can be read as alleging that the IEP itself is deficient.

[21] The IHO also made a finding that "equitable considerations" do not bar an award of tuition reimbursement

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED**

**IT IS ORDERED** that the IHO's decision dated December 2, 2013 is modified, by reversing that portion which determined that the district did not offer the student a FAPE for the 2012-13 school year; and

**IT IS FURTHER ORDERED** that the matter is remanded to the IHO to determine the merits of the unaddressed IEP-related claims set forth in the parents' February 26, 2013 amended due process complaint notice; and

**IT IS FURTHER ORDERED** that, if the IHO who issued the December 2, 2013 decision is unavailable, another IHO shall be appointed in accordance with the district's rotational selection procedures.

**Dated:** **Albany, New York**
**April 9, 2014**

**HOWARD BEYER**
**STATE REVIEW OFFICER**

(IHO Decision at p. 9). However, this finding has not been appealed by the district (Pet. at ¶23) and, thus, need not be addressed.