The University of the State of New York

The State Education Department
State Review Officer
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No. 14-027

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, Neha Dewan, Esq., of counsel

Greenberg Traurig, LLP, attorneys for respondent, Caroline J. Heller, 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 respondent's (the parent's) daughter and ordered it to pay for the student's tuition costs at the Cooke Center for Learning and Development (Cooke) for the 2013-14 school year. The parent cross-appeals from the IHO's determinations on particular claims insofar as they were adverse to the parent. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings,

conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).[1]

III. Facts and Procedural History

I was appointed to conduct this review on November 5, 2014. The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. Briefly, the Committee on Special Education (CSE) convened on February 12, 2013 to formulate the student's individualized education program (IEP) for the 2013-14 school year (see generally Dist. Ex. 12). The parent disagreed with the recommendations contained in the February 2013 IEP and, subsequently, with the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Parent Exs. K at pp. 1-2; M). As a result of these concerns, the parent notified the district of her intent to unilaterally place the student at Cooke (see Parent Exs. K at pp. 1-2; M; see also Parent Exs. N at pp. 1-2; O at pp. 1-2). In a due process complaint notice, dated August 20, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see generally Parent Ex. A).

An impartial hearing convened on October 30, 2013 and concluded on December 2, 2013 after three days of proceedings (see Tr. pp. 1-295). In a decision dated January 8, 2014, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2013-14 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision at pp. 2-12). As relief, the IHO ordered the district to pay for the cost of the student's tuition at Cooke for the 2013-14 school year (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer and cross-appeal is also presumed and will not be recited here in detail. Briefly, the following findings of the IHO are challenged on appeal: that the district properly deemed the student eligible for special education as a student with autism; that the 6:1+1 special class in a specialized school was substantively appropriate for the student but did not constitute the student's LRE; and that the district failed to timely identify a particular public school site for the student to attend for the 2013-14 school year but that such failure did not result in a denial of a FAPE. While not addressed by the IHO, the parent also argues that the student would not have been functionally grouped in the proposed classroom at the assigned public school site. In addition, the district asserts that the IHO erred in determining that Cooke constituted an

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

appropriate unilateral placement and that equitable considerations weighed in favor of the parent's request for relief.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought

desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

The 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. February 2013 IEP

1. Classification

First, the IHO correctly determined that the February 2013 CSE did not err in deeming the student eligible for special education as a student with autism (see IHO Decision at pp. 6-7; see also 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). A student's eligibility for special education services under the IDEA is determined, pursuant to federal and State regulations, as part of a district's requirement to conduct an evaluation to "gather functional developmental and academic information" about the student (34 CFR § 300.304[b][1]; see 8 NYCRR 200.4[b][1]). The results of this evaluation allow districts to determine whether the student falls into one of the disability categories under the IDEA and to determine how he or she will be "involved in and progress in the general education curriculum" (34 CFR § 300.304[b][1]; see 8 NYCRR 200.4[b][1]). The IDEA provides that a student's special education programming, services, and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111[d]; M.R. v. South Orangetown Central Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]).

The district school psychologist who attended the February 2013 CSE meeting indicated that the CSE generally determines a student's classification based on the "greatest impediment to the[] [student's] ability to function in a classroom" (Tr. pp. 69-70). She testified that the February 2012 CSE discussed the student's disability classification of autism, with which the parent agreed and Cooke attendees expressed no concerns or objections (Tr. pp. 44-45, 93). In terms of the student's needs related to such a classification, the district school psychologist identified the student's: "social concerns," such as "difficulties with reciprocal interaction"; "cognitive concerns," consisting of borderline intellectual functioning and a full-scale IQ of 72; "language concerns" reflected in expressive, receptive, and pragmatic language deficits; and "phonological concerns" (Tr. pp. 46-47; see Tr. p. 96).

The evaluative information before the February 2013 further supports the student's classification category. For example, as reported in the July 2011 private evaluation "team conferences summary" report considered by the February 2013 CSE, administration of the Childhood Autism Rating Scale, Second Edition (CARS) yielded a score suggestive of mild

symptoms of autism spectrum disorder, cognitive level (Parent Ex. C at p. 2). The report acknowledged the student's previous receipt of a diagnosis of pervasive developmental disorder and noted that, based on the evaluator and the parent's observations, the student "still" exhibited "symptoms in the [a]utism [s]pectrum [d]isorder" (id.). The evaluation report offered diagnoses of pervasive developmental disorder, phonological disorder (oral motor/articulation), and borderline intellectual functioning (with higher perceptual reasoning) (id. at p. 3). Thus, the hearing record reveals no reason to modify the IHO's determination on this issue.[2]

2. 6:1+1 Special Class Placement and LRE Considerations

As an initial matter, the district correctly asserts that the IHO erred by determining that the student-to-adult ratio in the recommended special class (or the anticipated functioning levels of other disabled students in the classroom) was relevant to the analysis of the restrictiveness or LRE aspects of the student's educational placement (see IHO Decision at p. 10). In circumstances such as those in this case, LRE is not defined by the particular special education student-to-adult staff ratio present in the placements considered by the CSE in that they do not present varying degree of access to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). Instead, as described by the Second Circuit, LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate'" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048, [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 [S.D.N.Y. 2011]). The level of access to nondisabled peers in the regular education environment, however, is of little moment in this case insofar as neither party has asserted that the student should be educated in a general education setting or otherwise mainstreamed with nondisabled peers. Moreover, considerations such as the student's similarity in functioning to other disabled students and the size of a special class that is composed of only disabled students, also do not implicate access to nondisabled peers. Thus, the IHO's stated rationale for finding the 6:1+1 special class in a specialized school too restrictive relative to an 8:1+1 or 12:1+1 special class in a specialized school was flawed.

However, the hearing record supports the IHO determination that the recommended 6:1+1 special class placement was appropriate for the student. State regulations contemplate an 8:1+1 or a 6:1+1 special class for students whose management needs are determined to be intensive or

[2] The parent's concern about the similarity of the student's functioning relative to other students in the proposed classroom appears to underlie the dispute over the appropriateness of the disability classification recommended by the February 2013 (see Parent Ex. A at p. 2). As discussed below, a claim sounding in functional grouping is speculative under the facts of this case. Moreover, contrary to expressed concerns that the autism classification drove the 6:1+1 special class placement recommendation (see id.), the district school psychologist testified that the district did not employ any policy that mandated the placement of students deemed eligible for special education as students with autism in 6:1+1 special classes (Tr. pp. 59-60, 89-90).

highly intensive, respectively (8 NYCRR 200.6[h][4][i]-[ii]).[3] State regulations define management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). Based on a review of the information available to the February 2013 CSE, as well as the unchallenged description of the student's present levels of performance and management needs in the IEP, the hearing record supports the conclusion that the student's needs could properly be characterized as "highly intensive" such that a 6:1+1 special class placement was appropriate.

The hearing record shows that the February 2013 CSE considered various evaluative information about the student, including: the student's IEP from the 2012-13 school year; a September 2011 social history update report; a July 2011 private evaluation "team conferences summary" report; as well as documents generated and provided by Cooke, consisting of an October 2012 Cooke individual diagnostic analysis that set forth the student's scores on the Group Reading Assessment and Diagnostic Evaluation (GRADE) and the Group Mathematics Assessment and Diagnostic Evaluation (GMADE); a December 2012 Adaptive Behavior Assessment System-Second Edition (ABAS-II) interpretive report, a February 2012 Cooke summary of student-based academic assessment data, a November 2012 Cooke progress report, and a February 2013 Cooke counseling progress report (Tr. pp. 39-40; see generally Dist. Exs. 2; 6; 7; 10; Parent Exs. C-F).[4] In turn, the February 2013 IEP's description of the student's needs is consistent with such evaluative documents (compare Parent Ex. B, with Dist. Exs. 2; 6; 7; 10; Parent Exs. C-F).

The February 2013 IEP's present levels of performance identified the student's functioning levels to be significantly below grade level in several areas (e.g., third grade level for reading comprehension; third to fourth grade level for decoding; first to second grade level for writing; second grade level for computation; second grade level for problem solving) (Parent Ex. B at pp. 1-2). In addition, the IEP identified the student's instructional level as third and fourth grade (id.). As supports for the student's management needs, the February 2013 IEP recommended the use of graphic organizers, a vocabulary wall, visual supports, small group instruction, and multimodal instruction, as well as the provision of supports to aid the student in the use figurative language and to initiate conversations with others (id. at pp. 2-3). In addition, within the academic goals, the February 2013 IEP also recommended the use of "direct instruction," "verbal and visual prompting and cueing," and/or "teacher modeling" and use of a "graphic organizer" to support the student's achievement of annual goals related to decoding, reading comprehension, mathematics, money skills, and writing (id. at pp. 4-6). The IEP also indicated that the student would benefit from the experience of mentoring younger students in order to increase her social interaction (id. at p. 3).

[3] By way of contrast, State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6 [h][4][i]).

[4] Review of the July 2011 private evaluation "team conferences summary" report indicates that the summary included contributions based upon a pediatric neurodevelopmental evaluation, a speech-language evaluation, and a psychoeducational evaluation (Parent Ex. C at pp. 1-3).

The February 2013 IEP present levels of performance elaborated upon the student's academic needs. For example, with respect to reading, the IEP reported information from the student's teacher that the student arrived to class prepared, with homework ready, and waited for directions and that she would choose books and enjoyed reading (Parent Ex. B at p. 1). Also with respect to reading, the IEP indicated that the student required "time to process her thoughts before she respond[ed] to questions" and would participate in class "[w]hen really comfortable with content" (id.). As for her need for prompts in this area, the IEP specified that the student required "prompts and hints to come up with her own ideas" and in the areas of story prediction and making connections in books (id.). With respect to writing, the IEP noted that the student was "able to generate multiple sentences on a topic," could "generate her own ideas and put them to paper" but that "[h]er writing require[d] support in terms of punctuation and capitalization" (id.). The IEP also discussed the student's needs in the area of writing, noting that the student required prompting to generate a topic sentence and to add details and benefited from the use of graphic organizers, visual supports, and teacher scaffolding in this area (id.). Turning to mathematics, the February 2013 IEP indicated that the student knew "many basic multiplication facts," was "able to apply operations to one step problems" but "hesita[ted] to initiate using mathematical language," required an "initial push" to carry on a task, and needed "more practice in handling money in real life situations" (id. at p. 2). In addition, the IEP indicated that the student was "able to focus her attention in class," "able to follow the routine in terms of transitions," and "d[id] not require prompting to remain on task" (id.).

In the area of social development, the February 2013 IEP detailed the student's need for prompts and supports (Parent Ex. B at p. 2). The IEP indicated that the student tended to not initiate interactions with others and would respond when others initiated but would not "extend the interaction" (id.). Thus, the IEP noted the student's need for prompts "to initiate even in small group classroom discussion" (id.). The IEP indicated that the student was more isolated in the past but had made progress socially at Cooke (id.).

The present levels of performance further noted that, in the past, the student struggled in a 12:1+1 special class (Parent Ex. B at p. 2). Review of the February 2013 IEP shows that the CSE considered and rejected a 12:1+1 special class in a community school, as well as an 8:1+1 and a 12:1+1 special class in a specialized school (id. at p. 14). As to the former, the IEP stated that the student had previously attended a 10-month school year program in a 12:1+1 special class and that such "program did not provide sufficient support to meet her specific constellation of needs" (id.). As to the other special classes in a specialized school, the IEP indicated that they were "ruled out" as consisting of student-to-adult ratios that were "too large" to address the student's needs (id.). The parent testified that the February 2013 CSE did not discuss the student's placement recommendation beyond the statement from the district school psychologist that the prior year's recommendation would be continued (see Tr. pp. 167-69, 199-200). However, the CSE meeting minutes reflect that the parent stated that the student needed a "small class"; specifically, the 12:2+1 special class ratio she was attending at Cooke at the time of the February 2013 CSE meeting

(Dist. Ex. 12 at p. 2).[5] Also, according to the IEP, the parent indicated that "having [two] teachers in the classroom [wa]s important" and that the "[p]arent ha[d] not seen a 6:1[+]1 program in the past" (Parent Ex. B at p. 13; see Tr. pp. 52-53, 92). The district school psychologist testified that she interpreted the parent's emphasis on two teachers as a desire that the student be provided with "a lot of support," which she believed the 6:1+1 special class offered (Tr. p. 57). Therefore, this contemporaneous documentary evidence is more persuasive than the after-the-fact testimony offered by the parent at the impartial hearing (see F.O. v. New York City Dep't of Educ., 976 F. Supp. 2d 499, 513-15 [S.D.N.Y. 2013]).

In addition, the parent recalled that the district school psychologist informed her that the CSE could not recommend a private school for the student (Tr. p. 199). With respect to consideration of a nonpublic school placement, the parent points out that the July 2011 private evaluation "team conferences summary" report recommended that the student continue in her then-current 12:1+1 special class in the district public school but that a nonpublic school should be considered if the student did not make progress in such a setting (Parent Ex. C at p. 3). Initially, although a CSE must consider the results of privately obtained evaluations and relevant information provided by the parent, it is not obligated to adopt every recommendation made by private evaluators (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10-*11 [S.D.N.Y. Aug. 5, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 557 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). Moreover, once the district determined that the 6:1+1 special class placement within the district was appropriate, it was under no obligation to consider a nonpublic school (cf. B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y. Aug. 19, 2013] [explaining that, once the district determined that the public school setting was the LRE in which the student could be educated, "it was not obligated to consider the nonpublic school]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]).

The district school psychologist testified that a 6:1+1 special class was "a very . . . small, intense program to address [the needs] of individuals who have significant deficits" (Tr. p. 56). She further opined that the student had "global deficits" and required "a lot of support" (Tr. pp. 56-57). As discussed above, while the student exhibited relative strengths in some areas, given the intensity of her academic, phonological, and social deficits, a 6:1+1 special class placement was

[5] In the parent's June 17, 2013 10-day notice letter to the district, she also emphasized that the student required "more teacher support" than the 6:1+1 special class could provide (Parent Ex. K at p. 1). While a larger classroom in terms of the number of students, there is little difference in the student-to-adult ratio between the student's 12:2+1 special class at Cooke at the recommended 6:1+1 special class. While the parent may have preferred the class ratio at Cooke, districts are not required to replicate the identical setting used in private schools (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]).

supported by the evaluative information before the CSE. Accordingly, the IHO's conclusion that the 6:1+1 special class was appropriate is supported by the evidence in the hearing record. The IHO's specific determination related to LRE considerations, however, is reversed.

B. Challenges to the Assigned Public School Site

1. Access to Special Education Services

Next, the district contends that the IHO erred in finding that the district failed to provide the parents with timely notice of the assigned public school site through the issuance of a final notice of recommendation (FNR). In turn, the parents argue that the IHO erred in finding that the untimely notice did not result in a denial of a FAPE.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]).[6] Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553, 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear, there is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right related to the selection of the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16,

[6] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (N.Y. Educ. Law § 2[15]).

2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2, 2014 WL 53264 [2d Cir. 2014]).

However, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an the IEP, a district must notify parents of the bricks and mortar location of the special education program and related services in a student's IEP (see Tarlowe, 2008 WL 2736027, at *6 [stating that a district's delay does not violate the IDEA so long as an public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation—for example, by an FNR which is the mechanism adopted by the district in this case—it nonetheless must be shared with the parent before the student's IEP may be implemented.

The IHO's reasoning in finding the FNR untimely in relation to the parent's obligation to provide 10-day notice is not persuasive. Relative to equitable considerations, the IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). In circumstances such as the present case, where the district did not provide notice of the assigned public school site more than 10-days prior to the commencement of the school year, the district's delay could be deemed to excuse the parent's attendant delay in providing the 10-day notice for purposes of equitable considerations (see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 247 [S.D.N.Y. 2010]).[7] It does not follow, however, that the 10-day notice provision imposes a deadline for the district's provision of notice of an assigned public school site such that the timing of the notice of the assigned school would constitute any sort of procedural violation of the IDEA.

In this case, by FNR dated June 27, 2013, prior to the beginning of the 2013-14 school year, the district notified the parent of the particular public school site to which it assigned the

[7] Indeed, notwithstanding the 10-day notice requirement, reimbursement may not be reduced or denied if, among other reasons, "the school prevented the parent from providing such notice" or the parents did not receive the procedural safeguards notice describing the 10-day notice provisions (20 U.S.C. § 1412[a][10][C][iv][I][aa]-[bb]; 34 CFR 300.148[e][1][i]-[ii]).

student to attend for the 2013-14 school year (see Parent Ex. L).[8] The parties stipulated on the record that the FNR was mailed on June 27, 2013 (Tr. p. 131; see Tr. pp. 23-27). The parent testified that she did not receive the FNR until July 8, 2013 (Tr. p. 174). Although the hearing record reflects that July 1, 2013 was the first day of the 2013-14 school year (see Tr. p. 173; see also N.Y. Educ. Law § 2[15]), the parties did not offer evidence as to the date on which classes commenced.[9] In any event, under the particular factual circumstances of this case, the parent was not prevented by the timing of the FNR from giving the district notice of her intent to unilaterally place the student; that is, by letter dated June 17, 2013, in addition to noting that she had not yet received an FNR, the parent set forth her concerns with the 6:1+1 special class placement, rejected the February 2013 IEP, and indicated that the student would attend Cooke for the 2013-14 school year (Parent Ex. K at p. 1).

Thus, consistent with the IHO's ultimate conclusion on this issue, even if the timing of the FNR constituted a procedural violation in this instance, there is no evidence in the hearing record that it (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]).

2. IEP Implementation

Finally, while not addressed by the IHO, the parent argues on appeal that, based on her observations during a visit to the school, the assigned public school site would have been unable to implement the student's IEP, in that the other students in the observed classroom were lower functioning than the student and consisted of mostly male students and the school only employed one part-time counselor. The district counters that such claims are speculative. For the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I agree with the district. The parent's claims turn on how the February 2013 IEP would or would not have been implemented. Because it is undisputed that the student did not attend the district's assigned public school site (see generally Parent Exs. K; M-P), the parent cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice"]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013];

[8] At one point in his decision, the IHO refers to notice of the assigned public school site as a prior written notice (IHO Decision at pp. 3, 13). Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child"; however, notably absent from the prior written notice provisions is any requirement that the district provide parents with written notice of a student's assigned public school site (34 CFR 300.503[a]-[d]; 8 NYCRR 200.5[a]; see 8 NYCRR 200.1[oo]).

[9] According to the hearing record, there was a seat available for the student at the assigned public school site for the 12-month 2013-14 school year (see Tr. pp. 119-20).

P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district offered the student a FAPE in the LRE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether Cooke was an appropriate unilateral placement or whether equitable considerations weigh in favor of the parent's requested relief. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated January 8, 2014, is modified by reversing that portion which concluded that the district failed to offer the student a FAPE for the 2013-14 school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated January 8, 2014, is modified by reversing that portion which ordered the district to reimburse the parent for the costs of the student's tuition at Cooke for the 2013-14 school year.

Dated: **Albany, New York**
December 12, 2014

SARAH L. HARRINGTON
STATE REVIEW OFFICER