



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 14-161

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Clarkstown Central School District

Appearances:

Gina DeCrescenzo, PC, attorneys for petitioners, Gina M. DeCrescenzo, Esq., of counsel

Jaspan Schlesinger LLP, attorneys for respondent, Carol A. Melnick, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2011-12 was appropriate and which denied their request to be reimbursed for their son's tuition costs at the Hawk Meadow Montessori School (Hawk Meadow) for the 2012-13 and 2013-14 school years. Respondent (the district) cross-appeals from the determination of the IHO that the educational program recommended by its CSE for the student for the 2013-14 school year was not appropriate. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed; however, considering the complexity of the case and the length of the impartial hearing, a brief background of the student's educational history is warranted.

In April 2010 a CSE convened for an initial review and found the student eligible to receive special education programs and services as a student with an other health-impairment (Dist. Ex.

14).¹ The April 2010 CSE developed an IEP for the remainder of the 2009-10 school year and for the upcoming 2010-11 school year (Dist. Exs. 14; 17). For the remainder of the 2009-10 school year and the 2010-11 school year the April 2010 CSE recommended placement in a 15:1 special class for math and English language arts (ELA) and direct consultant teacher services for two hours per week in science and social studies (Dist. Exs. 14 at p. 1; 17 at p. 1). In April 2011, a subcommittee on special education convened for an annual review to develop an IEP for the 2011-12 school year and recommended that the student continue to receive services as a student with an other health-impairment and that the student continue in a 15:1 special class for math and ELA, but did not recommend direct consultant teacher services (Dist. Ex. 20 at pp. 1, 7). In May 2012, a subcommittee on special education convened for an annual review to develop an IEP for the 2012-13 school year and again recommended that the student continue to receive services as a student with an other health-impairment and continue in a 15:1 special class for math and ELA (Dist. Ex. 24 at pp. 1, 8). The May 2012 CSE also added one 30-minute session of counseling per week in a small group for the 2012-13 school year (id.).

Prior to the 2012-13 school year, the student attended public schools in the district; however the parents rejected the program offered to the student for the 2012-13 school year and indicated that they would place the student at Hawk Meadow at public expense (Tr. pp. 3263-64; Dist. Exs. 25; 29; 68A; 69A; 73-74). On September 4, 2012, counsel for the parents sent a letter to the district requesting that the district provide busing for the student to Hawk Meadow pursuant to Education Law § 4402(4)(d) (Dist. Ex. 30). The parents placed the student at Hawk Meadow for the 2012-13 school year in September 2012 (Tr. p. 2582; see Parent Ex. N).² A CSE convened on September 28, 2012 during which the CSE agreed to provide transportation to Hawk Meadow (Dist. Ex. 35 at p. 2).

In June 2013, a CSE convened for an annual review to develop an IEP for the 2013-14 school year and recommended that the student continue to receive services as a student with an other health-impairment (Dist. Ex. 41 at p. 1). Although the June 2013 IEP included placement recommendations (i.e., a 15:1 special class for math and ELA, counseling, and a resource room), the comments attached to the IEP indicated that the June 2013 CSE did not have sufficient information to develop an IEP for the student and that "[a] meeting for the development of a 2013-14 IEP will be arranged" (id. at pp. 1, 2, 8).

Shortly after the June 2013 CSE meeting, the district conducted a psychoeducational evaluation of the student (Dist. Ex. 48). The parents delivered a letter to the district on August 26, 2013 informing the district that the parent intended to place the student in a nonpublic school at public expense (Dist. Ex. 50).

In a due process complaint notice dated September 27, 2013, the parents asserted that the district did not timely identify and evaluate the student and did not provide the student with a free

¹ Although the parents assert that the student was placed in a special education classroom prior to being classified as a student with a disability, the hearing record indicates that the programs and services that the student received prior to being classified were part of a response to intervention (RTI) program (see Tr. pp. 248, 645-49, 659-60, 3057-58; Dist. Exs. 75; 76; but see Tr. pp. 1873-75).

² The student also attended a summer program at Hawk Meadow prior to being enrolled for the 2012-13 school year (Tr. p. 2519; Parent Ex. U).

appropriate public education (FAPE) for the 2011-12, 2012-13, and 2013-14 school years (see IHO Ex. 3). An impartial hearing convened on January 13, 2014 and concluded on July 16, 2014 after 18 days of proceedings (Tr. pp. 1-3977).³ In a decision dated September 8, 2014, the IHO thoroughly reviewed the testimony and exhibits presented during the hearing and determined that the parent's claims relating to the 2011-12 school year were time-barred, that the district offered the student a FAPE for the 2012-13 school year, that the district failed to offer the student a FAPE for the 2013-14 school year, and that Hawk Meadow was not an appropriate placement (IHO Decision at pp. 1-191).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer and cross-appeal is presumed and will not be recited here. However, the following issues are presented on appeal and must be resolved:

1. Whether the IHO erred in finding that the parents' child find claims and claims related to the 2011-12 school year were time-barred;

2. Whether the IHO erred in finding that the CSE's classification of the student as having an other health-impairment was appropriate and in finding that any failure to classify the student as a student with a learning disability did not result in a denial of FAPE;

3. Whether the IHO erred in finding that the May 2012 CSE had sufficient evaluative data available to make an appropriate recommendation for the 2012-13 school year;

4. Whether the IHO erred in finding that the student made progress in a 15:1 special class in the district and that such progress indicated that the recommendation for a similar program in the May 2012 IEP was appropriate;

5. Whether the IHO erred in finding that the May 2012 IEP appropriately addressed the student's social/emotional needs;

6. Whether the IHO erred in finding that the placement recommendations contained in the May 2012 IEP were the least restrictive environment (LRE) for the student;

7. Whether the IHO erred in finding that the district was required to develop an IEP for the 2013-14 school year and failed to offer the student a FAPE for the 2013-14 school year because it did not do so; and

8. Whether the IHO erred in finding that the parents' unilateral placement of the student at Hawk Meadow was not an appropriate placement for the 2013-14 school year.

³ During the first day of the hearing the IHO initially appointed to hear the case recused herself at the parents' request (Tr. pp. 4-12).

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 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]).

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. 2010-11 and 2011-12 School Years

1. Child Find

The hearing record supports the IHO's determination that the parents' child find claim accrued no later than April 13, 2010, the date the CSE determined the student was eligible for special education services as a student with an other health-impairment (Dist. Ex. 14 at p. 1). Because the parents' due process complaint is dated September 27, 2013, more than two years after the student was found eligible, the alleged violations are outside of the applicable limitations period (see IHO Ex. 3). Unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir.2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013]; R.B. v. Dept. of Educ., 2011 W.L. 4375694, at * 2, *4 [S.D.N.Y. Sept. 16, 2011]). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 W.L. 4375694, at * 6).

The parents assert two reasons why the IHO's decision on this issue should be overturned, neither one of which has any merit.

First, the parents assert that their claim did not accrue on April 13, 2010 because they had no way of knowing that the other health-impairment classification and IEP were inappropriate. However, even assuming that the parents did not have sufficient information to know whether the classification and IEP were appropriate at the time they were developed, the parents' allegations are based on the district's failure to identify the student's learning disability and must therefore accrue no later than the time the parents learned the student had received a diagnosis of dyslexia. The hearing record includes two reports from the student's doctor, dated July 7, 2010 and May 16, 2012, which the parents assert offered a diagnosis of dyslexia (see Parent Exs. X; CC). While the May 2012 report includes a diagnosis of dyslexia (Parent Ex. X at p. 2), the July 2010 report does not use the term "dyslexia" but indicates that the student's "dictionary of the mind is not organized" (Parent Ex. CC at p. 4). However, the parent testified that her understanding was that the student received a diagnosis of dyslexia in 2010 and that the doctor explained dyslexia to her as disorganization in the "lexicon of the brain" (Tr. pp. 3046-47). Accordingly, the parents were aware in July 2010, at the latest, that the student had received a diagnosis of dyslexia and as the diagnosis is the basis for the parents' claim that the other health-impairment classification was inappropriate, the parents' claim could not have accrued any later than July 2010. The problem with the parents' argument is that it essentially is premised upon the theory the claim accrues when they discovered that they could pursue a claim but such an approach to accrual has been rejected

(*Keitt v. New York City*, 882 F. Supp. 2d 412, 437 [S.D.N.Y. 2011] [explaining that plaintiff's "argument that his [IDEA] claims accrued at the time of 'discovery that [he had] grounds for such a suit' . . . must be rejected because accrual of the statute of limitations does not depend on plaintiffs knowledge of the law, but rather on a plaintiff's knowledge of the injury]).

Second, the parents assert that an exception to the limitations period should apply because the district "concealed" that it did not base its decision on records provided by the parent indicating that the student received a diagnosis of dyslexia. However, as the student was initially found eligible for services in April 2010—approximately three months prior to the July 2010 doctor's report—the CSE could not have relied on that report in making its initial determination (Dist. Ex. 14; Parent Ex. CC). Additionally, the April 2010 IEP specifically lists the documentation relied on by the CSE in making the initial eligibility determination (Dist. Ex. 14 at p. 5). As the April 2010 IEP indicates the documentation relied on by the CSE, any argument that the district withheld information from the parent as to what documents the CSE relied on is untenable.

2. Classification

Although the parents' claims regarding child find are outside of the statute of limitations, the parents' contention that the student was improperly classified as a student with an other health-impairment (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]), rather than a specific learning disability (34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]), could relate to any of the student's subsequent IEP's (see Dist. Exs. 20; 24; 35; 41).

Upon review, I concur with the IHO's determination that the CSE's decision to classify the student as a student with an other health-impairment is supported by the hearing record (IHO Decision at pp. 151-54). The hearing record reflects the student demonstrated difficulties with reading, math, and writing as well as attention, self-confidence, and self-esteem (Tr. pp. 965, 2543; Dist. Exs. 6; 41; 24; 45). The student has received diagnoses of dyslexia and an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 13; 45 at p. 9; Parent Exs. X at p. 2; CC at p. 4).⁴ The parents allege that they provided the district with copies of July 2010 and May 2012 reports from the student's doctor and a May 2012 neuropsychological evaluation report, which indicate that the student's ADHD was secondary to a learning disability (see Dist Ex. 45; Parent Exs. X; CC).⁵ As discussed by the IHO, the district also had a letter from another doctor dated April 12, 2010 indicating the student had a diagnosis of ADHD, which "adversely affects his ability to succeed in a regular classroom without intervention" (Dist. Ex. 13; see Parent Ex. EE). The other health-impairment classification is consistent with the ADHD diagnosis (8 NYCRR 200.1[zz][10]). Considering the ADHD diagnosis, the student's needs related to attention, and that his difficulties

⁴ Both the district and the parents submitted copies of the private May 2012 neuropsychological evaluation report into evidence; however, the evaluator testified that the copy submitted by the parents was a draft (Tr. pp. 2175-78; Dist. Ex. 45; Parent Ex. W). Accordingly, all references to the May 2012 neuropsychological evaluation report are to the district exhibit.

⁵ Although the district asserts that it did not receive copies of the doctor reports prior to start of the hearing or the neuropsychological evaluation report prior to September 2013, a determination as to whether or when these reports were received by the district would not affect the ultimate outcome of this decision and therefore for the purposes of this decision it is assumed that they were timely provided to the district (see Dist. Ex. 45; Parent Exs. X; CC).

with attention negatively affected his ability to learn, the CSE's decision to classify the student as a student with an other health-impairment was appropriate (Dist. Exs. 13; 20; 24; 35; 41; 45 at p. 9; Parent Exs. X at p. 2; CC at p. 4; EE).⁶

Moreover, 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; 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"]; R.C. v. Keller Indep. Sch. Dist., 958 F. Supp. 2d 718, 730-32 [N.D. Tex. 2013] [holding that the IDEA "provides no specific right for a student to be classified under a particular disability, but requires that the student's educational program be designed to suit the student's demonstrated needs"]). Accordingly, I concur with the IHO's determination that even if the other health-impairment classification were not the most appropriate, it did not compromise the student's right to an appropriate education, significantly impede the parents' opportunity to participate in the development of the IEP, or cause a deprivation of educational benefits (IHO Decision at pp. 151-54).

B. 2012-13 School Year

Prior to addressing the claims raised on appeal, I note that the parents do not appeal a number of the IHO's findings related to the 2012-13 school year. Specifically, the IHO found that the parents were not denied a meaningful opportunity to participate in the development of the IEP, that the district was not required to conduct an OT evaluation or an assistive technology evaluation, that the annual goals were appropriate, that the testing accommodations were appropriate, that the student did not require a 1:1 paraprofessional, that the district's failure to offer 12-month school year services did not result in a denial of FAPE, that the student would have been properly grouped with similarly functioning students, and that the parents' claim that the district did not respond to allegations of bullying was not supported by the evidence.⁷ Accordingly, these determination have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a];

⁶ To the extent that the parents assert that a draft report of the July 2013 psychoeducational evaluation of the student indicates that the other health-impairment classification was not appropriate, I note that the June 2013 CSE meeting was the last CSE meeting at issue in this matter and the evaluation was not yet conducted at that time (see Dist. Exs. 41; 48; Parent Ex. VV). Additionally, I note that while the parents assert that the question marks in regards to "Other Health Impaired???" written in the draft of the report suggest that other health-impairment was an inappropriate classification, the evaluator testified that she was merely making a notation to herself to report the student's classification when she received a copy of his most recent IEP (Tr. pp. 969-71; Parent Ex. VV at p. 1).

⁷ The parents also do not appeal the IHO's findings that the parents' claims with respect to related services for the 2011-12 school year are time-barred (IHO Decision at p. 184).

8 NYCRR 200.5[j][5][v]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*10 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]).

1. Evaluative Data

The parents assert on appeal that the May 2012 CSE did not evaluate the student in all areas of his suspected disability and in particular contend that the district should have conducted a comprehensive reading and writing evaluation. A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In this instance, as noted by the IHO, the May 2012 CSE had sufficient evaluative information available to identify the student's needs which were reflected in the May 2012 IEP (IHO Decision at pp. 154-55, 182-84). Specifically, evaluative information available to the May 2012 CSE included a classroom observation report, a psychoeducational evaluation, and a social history, all conducted in March 2010, as well as test results from a math assessment and a reading assessment conducted in March 2012, and a January 2012 speech-language evaluation (Dist. Ex. 24 at pp. 3-4; see Dist. Exs. 6-8). Based on the information available to the May 2012 CSE, I concur with the IHO's determination that the CSE assessed the student in all areas of need and had sufficient information available to develop an IEP for the 2012-13 school year (Dist. Ex. 24 at pp. 3-4).

2. May 2012 IEP

Contrary to the parents' assertion that the IHO's decision provides "no substantive analysis of whether [the May 2012 IEP] would likely be effective in practice," the IHO thoroughly analyzed the program recommended in the May 2012 IEP based on the student's needs as set forth in the May 2012 IEP's present levels of performance and in the March 2010 psychoeducational evaluation (IHO Decision at pp. 155-64).⁸

As an initial challenge, the parents assert that the IHO erred in finding that the student made progress while attending a 15:1 special class in the district and further contend that the May 2012 CSE's continued recommendation for a 15:1 special class was inappropriate because the student had failed to make progress in similar programs during the 2010-11 and 2011-12 school years. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free

⁸ The due process complaint notice does not include any specific challenges to the description of the student contained in the May 2012 IEP (see IHO Exhibit 3), and as indicated by the IHO, the parents' private neuropsychologist agreed with the description of the student contained in the May 2012 IEP (IHO Decision at p. 156; Tr. pp. 2385-95).

Sch. Dist., 528 Fed. Appx. 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 18, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

In this instance, the hearing record supports the IHO's findings that the student made progress in reading, writing, and math while placed in a 15:1 special class for ELA and math during the 2010-11 and 2011-12 school years (IHO Decision at pp. 162-64). Foremost, the student achieved all of his annual goals during the 2010-11 school year and at the time of the May 2012 CSE meeting he was progressing satisfactorily toward nine out of eleven of his annual goals for the 2011-12 school year (Dist. Exs. 17 at pp. 5-7; 20 at pp. 6-7; 70; 71).⁹ Accordingly, the continued recommendation for a 15:1 special class in ELA and math is analyzed in light of the documented progress the student made in similar programs during the 2010-11 and 2011-12 school years.

The IHO also determined that a comparison of the standardized testing conducted in March 2010 and May 2012 indicated that the student made academic progress during that time (IHO Decision at pp. 162-64; compare Dist. Ex. 6 at pp. 9-10, with Dist. Ex. 45 at p. 13). However, the May 2012 academic testing was taken from a neuropsychological evaluation which was conducted on May 18, 2012, one week after the CSE met on May 11, 2012 to develop the student's IEP for the 2012-13 school year (Dist. Exs. 24 at p. 1; 45 at p. 1). The Second Circuit has held that "with the exception of amendments made during the resolution period, an IEP must be evaluated prospectively as of the time it was created" (R.E., 694 F.3d at 188). Consequently, courts have declined to accept evidence that was not available to the CSE at the time of the CSE meeting as a basis for determining whether that IEP was appropriate (J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at the time the IEP in question was developed]). As the information contained in the May 18, 2012 neuropsychological evaluation report was not available to the May 2012 CSE, the IHO erred to the extent that the IHO utilized the report to determine that the student had made progress while in the district (see R.E., 694 F.3d at 186-88; J.M., 2013 WL 5951436, at *18-*19; F.O., 976 F. Supp. 2d at 513). Similarly, the recommendations contained in the May 2012 neuropsychological evaluation cannot be used to criticize the recommendations made by the May 2012 CSE (see R.E., 694 F.3d at 188). "In determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision" (R.E., 694 F.3d at 187). Therefore, in reviewing the program offered to the student, the focus of the inquiry is on the information that was available to the May 2012 CSE at the time the May 2012 IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [an IEP may not be rendered inadequate through

⁹ A progress report for the 2011-12 school year indicates that, the student completed all of his goals by June 3, 2012 (Dist. Ex. 71).

testimony and exhibits that were not before the CSE]; D.A.B. v New York City Dept. of Educ., 973 F. Supp. 2d 344, 361-62 [S.D.N.Y. 2013] [same]). Accordingly, the May 2012 CSE cannot be faulted for failing to follow the recommendations contained in the May 2012 neuropsychological report, such as the recommendation for a "multisensory approach to learning and 1-1 assistance" (Dist. Ex. 45 at p. 11).

Upon review of the information available to the May 2012 CSE, the recommendation for placement in a 15:1 special class for ELA and math was reasonably calculated to enable the student to receive an educational benefit (see Dist. Exs. 6-8; 24). Although the IHO should not have relied on the May 2012 neuropsychological evaluation in determining the student's progress in the district, the IHO's reasoning regarding the appropriateness of the recommended program's ability to address the student's needs is otherwise sound, is supported by the hearing record, and is adopted (IHO Decision at pp. 155-64).

The IHO's determination that the recommendation for counseling was sufficient to address the student's social/emotional needs is also supported by the hearing record. The May 2012 CSE added one 30-minute small group counseling session per week to address the student's needs with regard to self-esteem (Dist. Ex. 24 at pp. 2, 5, 8). The IEP also included three annual goals directed at improving the student's self-confidence and addressing anxiety (id. at p. 8). Pertinently, as indicated in the IHO's decision, the parents' private neuropsychologist testified that the annual goals were appropriate long term goals to address the student's needs with regard to confidence and self-esteem (IHO Decision at p. 158; Tr. p. 2397).

Upon review, the hearing record also supports the IHO's determination that the placement recommendations contained in the May 2012 IEP were in the student's LRE (IHO Decision at pp. 161-62). The May 2012 CSE recommended a special class placement for ELA (1.5 hours per day) and math (45-minutes per day) due to the student's need for special instruction in a smaller classroom environment (Dist. Ex. 24 at pp. 6, 8, 10). The remainder of the student's day would have been in a general education setting (id.). To the extent that the parents contend that during the 2010-11 and 2011-12 school years the district kept the student in special education classes in excess of the time specified in the student's IEPs for those periods, the hearing record does not support a finding that there was a material deviation from the student's IEPs or that any such deviation would have continued into the next school year. Accordingly, the IHO's determination that the program recommended by the May 2012 CSE was in the student's LRE is adopted.

C. 2013-14 School Year

1. June 2013 IEP

The district contends that the IHO erred in finding that the district was required to develop an IEP for the student for the 2013-14 school year. Specifically, the district asserts that because the parent sought services for the student through an individualized education services program (IESP) from the district in which Hawk Meadow was located (district of location), the district, as the district of residence, was not obligated to offer the student a FAPE for the 2013-14 school year. For substantially the same reasons as set forth in the IHO's decision, I agree with the IHO's determination that in this instance the district was obligated to develop an IEP for the student for the 2013-14 school year (IHO Decision at pp. 144-46). When a student is parentally placed in a

private school outside the district of residence, the district of residence retains the obligation to offer a FAPE and to evaluate the student upon a parent's request (see Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *7-*8 [S.D.N.Y. Feb. 4, 2013]; see also Bd. Of Educ. v. Risen, 2013 WL 3224439, at *14 [N.D. Ill. June 25, 2013]; Moorestown Tp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 1067-70 [D.N.J. 2011]).

The district also asserts that IHO erred in finding a denial of FAPE and asserts that the June 2013 CSE developed an IEP for the student; however, the district's argument is not supported by the hearing record. In particular, the comments attached to the June 2013 IEP indicate that the CSE chairperson informed the parents that the CSE "cannot make a recommendation without the necessary data," that "[t]he meeting concluded with the agreement to receive and review all testing and school performance reports," and that "[a] meeting for the development of a 2013-14 IEP will be arranged" (Dist. Ex. 41 at p. 2). During the hearing, district witnesses testified that the June 2012 CSE was able to make a recommendation for a district placement and only needed the additional information to make a recommendation for placement in a nonpublic school (Tr. pp. 412-13, 1046-47). This is contrary to both the above-referenced comments to the June 2012 IEP and to the parent's recollection of the meeting (Tr. pp. 3378-87; 3491-94; Dist. Ex. 41 at p. 2). Therefore, the IHO's determination that the June 2013 CSE lacked sufficient evaluative data to make a recommendation for the 2013-14 school year is adopted (IHO Decision at pp. 168-69).

2. Unilateral Placement

The IHO based her decision that Hawk Meadow was not an appropriate placement for the student on a number of factors, including that the school was not approved by New York State to provide special education services, that the student's main teacher was not certified in elementary education by New York State, that the student was the only student in middle school at Hawk Meadow, that the student received a limited amount of direct instruction per day with most of his work being done independently, that OT was not provided regularly, that Hawk Meadow did not address the student's issues with self-esteem or anxiety, that the student was not grouped with similarly functioning peers, that the progress reports developed by Hawk Meadow indicated the student was not making progress, and that the services provided in the IESP were not sufficient to address the student's needs (IHO Decision at pp. 171-80).

Although not all of the factors considered by the IHO are relevant to the appropriateness of the parents' unilateral placement (e.g., the school's accreditation and teacher certifications), considering the totality of the circumstances, the program that Hawk Meadow provided to the student during the 2013-14 school year failed to address the student's special education needs.

Of particular importance, based on the testimony of the Hawk Meadow co-director, I agree with the IHO's finding that the student received limited special education instruction as part of his school day (see IHO Decision at p. 173). During the 2013-14 school year, the student only received 25-30 minutes of teacher instruction during the two and a half hour morning session (Tr. p. 2866-67). The co-director further testified that during the remaining two hours of the morning session, the student worked independently at his desk on assignments using the provided work materials (Tr. pp. 2538-39, 2545-46; 2866). During the afternoon session, the student worked mostly independently at his desk for 45 minutes (Tr. pp. 2867-69). The student's afternoon session consisted of 80 percent independent work and 20 percent teacher instruction time (Tr. pp. 2869-

70). The hearing record reflects that the student demonstrated delays in reading, math, writing, and attention that required specialized instruction (Dist. Exs. 6 at pp. 2, 5-6, 8; 45 at pp. 4-5, 7, 11-12). However, instead of receiving specialized instruction at Hawk Meadow, the student worked independently at his desk for the majority of his school day. Accordingly, the IHO's finding that Hawk Meadow did not address the student's special education needs related to academics and attention is adopted.

VII. Conclusion

Based on the foregoing, I concur with the IHO's determinations that the parents' allegations related to the 2010-11 and 2011-12 school years were untimely, that the district offered the student a FAPE for the 2012-13 school year, that the district failed to offer the student a FAPE for the 2013-14 school year, and that the parents' unilateral placement of the student at Hawk Meadow was not an appropriate placement.¹⁰ Having determined that the parents failed to establish the appropriateness of the student's unilateral placement at Hawk Meadow for the 2013-14 school year, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED

**Dated: Albany, New York
November 14, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹⁰ The parents also requested prospective placement at Hawk Meadow for the 2014-15 school year (IHO Ex. 3 at p. 8). However, as there is no indication in the hearing record as to the program recommended for the student for the 2014-15 school year, the parents' claim for placement for the 2014-15 school year was premature. Prospective relief, in the form of an order directing a district to pay for a student's placement at a private school, is available "where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for a placement in a public school was inappropriate" (see Burlington, 471 U.S. at 369-70).