



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-177

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

Appearances:

Law Offices of Scott M. Cohen, PLLC, attorneys for petitioner, Scott M. Cohen, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

During the 2011-12 school year the student attended Cooke (see generally Dist. Ex. 4).¹ On February 6, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 2 at pp. 16-17, 20). Finding that the student remained eligible for special education and related services as a student with an intellectual disability, the February 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a specialized school with the following related services: two 40-minute

¹ The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

sessions per week of speech-language therapy in a small group, two 40-minute sessions per week of individual speech-language therapy, one 40-minute session per week of physical therapy (PT) in a small group, two 40-minute sessions per week of occupational therapy (OT) in a small group, one 40-minute session per week of individual counseling, and one 40-minute session per week of counseling in a small group (id. at pp. 1, 16-17, 19).² In addition, the February 2012 CSE recommended the services of a full-time, 1:1 crisis management paraprofessional (id. at p. 17). The February 2012 CSE also developed annual goals with corresponding short-term objectives, strategies to support the student's management needs, and a behavioral intervention plan (BIP), and further recommended that the student participate in alternate assessments (id. at pp. 3-16, 18-19).

On May 1, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year (see Parent Ex. N at pp. 1-2).

In a final notice of recommendation (FNR) dated June 13, 2012, the district summarized the special education and related services recommended in the February 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. C at p. 2).

By letter dated July 12, 2012, the parent indicated that since she could not reach an individual at the assigned public school site to schedule a visit, she could not, at that time, determine "whether to accept or reject the placement" (Parent Ex. B at p. 1). The parent requested "any information" about the other students in the "proposed class, such as the "age range, reading and math functioning ranges, classifications and any behavior plans" id.). Additionally, the parent advised that she did not agree to a 12-month school year program for the student, and based upon her own understanding, the district's "summer program [was] in fact, optional;" therefore, the parent elected not to send the student to a "full time school program this summer" but rather, she made "alternative plans" to send the student to a "camp" for students with "special needs" (id.).

In a subsequent letter dated August 24, 2012, the parent advised the district that since she had not yet received a response from the assigned public school site regarding her telephone calls and messages, she would "visit the recommended program in September" and advise the district of her "response to [the] offer at that time" (Parent Ex. C at p. 1). However, in the interim, the parent indicated that the student would attend Cooke and she would seek reimbursement for the costs of the student's placement (id.).

On September 10, 2012, the student began attending Cooke for the 2012-13 school year (see Parent Exs. M: O).

On October 12, 2012, the parent visited the assigned public school site (see Parent Ex. D at p. 1). In a letter dated November 6, 2012, the parent notified the district that based upon the information she obtained and what she observed during her visit to the assigned public school site, the "program" was not appropriate for the student (id. at pp. 1-2). Arriving without an appointment and having seen the "school facilities before," the parent indicated that at the visit she requested, in particular, to view a "couple" of 12:1+1 special classes (id. at p. 1). In the first classroom, the

² The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (see 8 NYCRR 200.1[zz][7]; see also 34 CFR 300.8[c][6]).

parent indicated that overall the instruction was not "tailored to the individual student's academic level" (*id.* at pp. 1-2). The parent expressed concern that the student would not receive all of the related services recommended in the February 2012 IEP (*id.* at p. 2). Furthermore, the parent expressed concerns about the student's safety traveling outside the school building to attend "vocational training" (*id.*). The parent was also concerned about behavior issues she learned about through a website report (*id.*). As a result of the visit, the parent indicated that given the "wide range of classifications" of the students in the "offered class," the parent did not find the assigned public school site could provide the student with a "sufficient level of individual attention and support" that she required to make progress (*id.*). In addition, the parent did not think the student would continue to make progress in a school that was not "focused on academic" and that the "emotional and behavioral issues" of the other students would be too distracting for the student and would not provide appropriate peer models (*id.*). Accordingly, although she remained "willing" to consider any appropriate placement for the student, the parent notified the district that in the interim the student would continue to attend Cooke and that she would seek reimbursement for the costs of the student's tuition (*id.*).

A. Due Process Complaint Notice

By due process complaint notice dated October 20, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A at pp. 1, 6). Initially, the parent contended that the February 2012 IEP was "[i]nvalid," the recommendation in the IEP was "too restrictive," the IEP did not include a "substantively appropriate recommendation of placement," the district failed to make a "recommendation of placement" capable of implementing the February 2012 IEP, and the district failed to recommend a "placement in conformity with the IEP" (*id.* at p. 1). In addition, the parent asserted that the February 2012 CSE was not properly composed, the CSE reduced the student's related services without "sufficient or appropriate justification," and the CSE failed to provide the parent with a "meaningful opportunity to participate in the decision-making process" (*id.*). More specifically, the parent asserted upon information and belief that the February 2012 CSE failed to "fully evaluate" the student and failed to consider "sufficient, current, evaluative and documentary material to justify its recommendations and goals" (*id.* at pp. 1-2). The parent further asserted upon information and belief that the February 2012 CSE did not rely upon or discuss an "observation" of the student, or a social history or a medical report, which deprived the CSE of an "understanding" of the student's then-current functioning and needs (*id.* at p. 2). Next, the parent alleged upon information and belief that the February 2012 CSE failed to provide the parent and the Cooke staff attending the February 2012 CSE meeting with copies of "all the documentation" it relied upon to develop the IEP, which deprived the parent and the Cooke staff of the opportunity to meaningfully participate at the meeting and in the development of the student's IEP (*id.*). Further, the parent alleged upon information and belief that the February 2012 CSE failed to "adequately review" the student's progress on annual goals in her previous IEP to "assess the extent of [the student's] progress" or to "consult them regarding" development of the annual goals in the February 2012 IEP.

In addition to the foregoing, the parent alleged that the present levels of performance in the February 2012 IEP did not fully and accurately describe the student or address her needs (*see* Parent Ex. A at pp. 2-3). More specifically, the parent asserted that the February 2012 IEP failed to "mention" the following information: the student's difficulty retaining new information; her

instructional levels in all academic areas; and the effects on the student's "learning and progress" related to her auditory processing, organizational, memory, sensory, social, visual motor and visual perceptual issues, and her difficulties due to physical fatigue (id. at p. 3). The parent also alleged that the "class program" and "services" recommended in the February 2012 IEP did not provide the student with the appropriate level of "individual attention and support" she required from "trained educators" (id. at p. 3). Moreover, the parent alleged that the recommended 12:1+1 special class, together with the services of a full-time, 1:1 paraprofessional at a specialized school was "too restrictive," noting further that the student did not require a 1:1 paraprofessional at her "then-current placement" and therefore, no longer required a 1:1 paraprofessional (id.). The parent also asserted that the "1:1 paraprofessional" recommended in the February 2012 IEP was not an appropriate substitute for the absence of a "second teacher in the classroom" (id.).

Next, the parent asserted that the February 2012 IEP did not include appropriate measurable annual goals or short-term objectives given the student's academic and social/emotional needs (see Parent Ex. A at p. 3). In particular, the parent pointed to an "insufficient number" of annual goals for reading, writing, and mathematics (id.). Moreover, the parent indicated that the academic annual goals did not include "what grade level materials" would be used to measure the student's progress (id.). In addition, the parent characterized the annual goals as "vague and generic," and alleged that "numerous goals and short term objectives fail[ed] to include baselines" to measure the student's progress (id.). The parent asserted that the February 2012 IEP failed to include "transition supports" to assist the student's transition from her "then-current educational setting" to the "new environment recommended by the CSE" (id. at p. 3). Finally, the parent alleged that the "transition plan" in the February 2012 IEP was "generic, vague, and insufficient" to meet the student's needs for "transition support services" (id. at pp. 3-4). In addition, the parent generally asserted that the February 2012 CSE failed to conduct a vocational assessment, the promotion criteria in the February 2012 IEP was not appropriate, the BIP was "vague and generic" and did not address the student's needs, and the functional behavioral assessment (FBA) included with the IEP was "inadequate" (id. at p. 4).

As to the assigned public school site, the parent asserted that the "peer group in the proposed program" was not appropriate for the student with regard to the other students' ages, physical size, social skills, or ability to model language (Parent Ex. A. at pp. 4-5). The parent also expressed concern about the functional grouping of the student, noting, in particular, the various classifications of the other students in the "special education classes" (id.). In addition, the parent asserted that given the "disparate needs" of the other students, the student would not receive sufficient "individual attention and support" from a trained teacher (id. at p. 5).

Furthermore, the parent noted that the "classroom environment" at the assigned public school site was also not appropriate for the student (Parent Ex. A at p. 5). The parent alleged upon information and belief that the assigned public school site would not provide the student with "appropriate instruction" at her level or use a curriculum or methodology "tailored" to the student's needs (id.). In addition, the parent expressed concern about the functional grouping of the students with respect to academic functioning levels, as well as not observing any "differentiation in instruction or in the materials used by the students" (id.). Next, the parent asserted that the assigned school would not provide the student with appropriate "transition training and services," which included daily living, social skills, and opportunities for "community inclusion" (id. at pp. 5-6). The parent also asserted that given the amount of time dedicated to "work-study," the assigned

public school site was not appropriate because the student still required a "strong academic program" (*id.* at p. 5). With respect to related services, the parent indicated that the student would not receive speech-language therapy in accordance with the recommendation in the February 2012 IEP (*id.* at p. 6). Finally, the parent expressed concerns about the "school setting itself," noting that it was "too large, noisy and tumultuous" for the student and the student would not receive the "sufficient or appropriate support" during the "less structured portions of the school day, such as lunch and recess" (*id.*).

Turning to the unilateral placement, the parent asserted that Cooke's "program" appropriately addressed the student's needs and enabled the student to "make measureable academic and social/emotional progress and avoid regression" (Parent Ex. A at p. 6). In addition, the parent asserted that equitable considerations weighed in favor of the requested relief (*id.* at pp. 6-7). Accordingly, as relief, the parent requested funding for or to be reimbursed for the costs of the student's tuition at Cooke for the 2012-13 school year, as well as for the costs of related services and transportation (*id.* at p. 7).

B. Impartial Hearing Officer Decision

On April 21, 2014, the parties proceeded to an impartial hearing, which concluded on August 13, 2014, after four days of proceedings (*see* Tr. pp. 1-444).³ In a decision dated November 12, 2014, the IHO found that the district offered the student a FAPE for the 2012-13 school year (*see* IHO Decision at pp. 3-18). Initially, the IHO found that the February 2012 CSE included all of the required members (*id.* at pp. 8-9). Next, the IHO determined that the February 2012 CSE relied upon a March 2011 psychoeducational evaluation of the student—which was "well within the statutory three year period required by law"—in the development of the February 2012 IEP (*id.* at p. 9). The IHO then summarized the information in the March 2011 psychoeducational evaluation report, as well as the information in a March 2011 social history update and a November 2012 Cooke progress report (*id.* at pp. 10-11). Having reviewed the evaluative information in the hearing record, the IHO found that the February 2012 IEP accurately reflected the findings in the March 2011 psychoeducational evaluation report and the November 2012 Cooke progress report (*id.* at p. 11). The IHO further indicated that based upon the February 2012 IEP, the CSE recommended a 12:1+1 special class placement at a specialized school; related services of speech-

³ In the IHO's decision, the IHO indicated that "at least one other IHO" recused himself or herself prior to his appointment on December 10, 2013 (IHO Decision at p. 2). While this accounts for perhaps an initial delay in proceeding to an impartial hearing in this case, it does not explain why—after the IHO's appointment in December 2013, nearly two months after the date of the due process complaint notice—that the first day of the impartial hearing did not occur until nearly four months later on April 21, 2014; moreover, the IHO's description in the decision, itself, for granting "adjournments on consent or for cause" does not comply with State regulations that require IHOs to only grant extensions consistent with regulatory constraints and to ensure that the hearing record documents the reason for each extension (8 NYCRR 200.5[j][5][i]). Moreover, State regulations mandate that each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). In addition, regulatory requirements set forth specific factors that an IHO must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). State regulation also provides that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, settlement discussions between the parties or other similar reasons" (8 NYCRR 200.5[j][5][iii]; *see Application of the Dep't of Educ., Appeal No. 08-061; Application of a Child with a Disability, Appeal No. 06-005*).

language therapy, OT, PT, and counseling; the services of a full-time, 1:1 crisis management paraprofessional; annual goals using a multisensory approach; academic annual goals to address the student's "phonemics;" strategies to address the student's management needs, including but not limited to, preferential seating, repetition of directions and concepts, graphic organizers, and manipulatives for mathematics; a BIP to address the student's "frustration tolerance;" annual goals to address the student's "physical challenges;" mathematics and writing annual goals; a 12-month school year program; the student's participation in alternate assessments; and specialized transportation services (id. at pp. 11-12). Based upon the foregoing, the IHO concluded that the February 2012 IEP was reasonably calculated to enable the student to receive educational benefits (id. at p. 12).

Next, the IHO rejected the parent's contention that the February 2012 CSE failed to fully evaluate the student prior to developing the February 2012 IEP (see IHO Decision at pp. 12-13). Here, the IHO found that, as noted above, the March 2011 psychoeducational evaluation relied upon, in part, to develop the IEP was conducted "less than one year" prior to the development of the February 2012 IEP, and moreover, that pursuant to regulations, a CSE must determine as a group "what additional evaluation data" was needed, if any (id. at p. 12). In addition to the March 2011 psychoeducational evaluation and the November 2012 Cooke progress report, the IHO determined that the February 2012 CSE also considered the student's "'entire confidential folder,'" which included a "classroom observation and social history update" (id. at pp. 12-13).

Turning to the issue of parent participation, the IHO found that the February 2012 CSE's failure to provide copies of the documents relied upon at the meeting to the parent and the Cooke staff who attended the meeting via telephone impeded the Cooke staff's ability to "meaningfully participate in the CSE meeting" (IHO Decision at pp. 13-14). As a result, the IHO then concluded that the February 2012 CSE was "not validly composed when it prepared the [student's] IEP" and found the "IEP that was prepared at that meeting was a nullity" (id. at p. 14). However, the IHO then determined that although the February 2012 CSE team was "not properly constituted and an error occurred in the procedure for developing the IEP," the evidence in the hearing record did not demonstrate "how this procedural deficiency resulted in the denial of a FAPE to the student" (id. at pp. 14-16). Therefore, the CSE's failure to provide documents to the parent or the Cooke staff prior to the February 2012 CSE meeting did not "amount to a denial of [a] FAPE" (id. at p. 16). Finally, the IHO rejected the parent's assertions that the recommended placement was not the student's least restrictive environment (LRE) and that a 12-month school year program was "too restrictive" (id.).

Turning to the parent's contentions regarding the assigned public school site's ability to implement the February 2012 IEP, the IHO determined that since the parent rejected the district's "offer of a 12-month school year" and "signed a contract with [Cooke] on May 1, 2012, two months before the student's 12-month 2012-2013 school year would have started in July," the parent could not prevail on claims that the assigned public school site could not implement the February 2012 IEP (id. at pp. 16-19). Having concluded that the district offered the student a FAPE for the 2012-13 school year, the IHO found it was not necessary to determine whether the student's unilateral placement at Cooke was appropriate or whether equitable considerations weighed in favor of the parent's requested relief (id. at p. 19).

IV. Appeal for State-Level Review

The parent appeals, arguing generally throughout the petition that the IHO erred in finding that the parent's allegations related to the implementation of the February 2012 IEP at the assigned public school site were speculative. The parent also argues that the IHO did not address the appropriateness of the student's unilateral placement at Cooke or equitable considerations.⁴

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's decision in its entirety. The district also asserts, however, that the parent's allegations regarding whether the assigned public school site could implement the February 2012 IEP are, as the IHO properly concluded, speculative as the student never attended the assigned public school site. The district also asserts that equitable considerations did not weigh in favor of the parent's requested 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

⁴ In the petition, the parent initially indicates that although she "disagrees with the IHO's findings that the CSE based the IEP on a complete assessment of [the student's] needs, his finding that the CSE adequately reviewed sufficient evaluative material in developing the IEP, and his finding that the nullified IEP did not rise to the level of a denial of a FAPE," the parent focused the petition on the IHO's finding that the district's assigned public school site could properly implement the IEP (Pet. ¶4). Therefore, since the parent failed to appeal the IHO's findings on these particular issues, the IHO's findings have become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). In addition, to the extent that the parent does not continue to argue the merits of any issues in the due process complaint notice that the IHO did not address as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year, those issues are deemed waived or abandoned and will also not be reviewed on appeal (compare Parent Ex. A at pp. 1-7, with IHO Decision at pp. 1-19, and Pet. ¶¶ 1-81).

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 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).

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—Challenges to the Assigned Public School Site

The parent alleges that the IHO erred in finding that the district's "recommended placement would have been procedurally and substantively appropriate for [the student] and capable of implementing" the February 2012 IEP appropriately. However, as properly determined by the IHO, challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be

appropriate, but the parents chose not to avail themselves of the public school program]).⁵ When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the February 2012 IEP because a retrospective analysis of how the district would have implemented the student's February 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the district's recommended 12-month school year program and elected to place the student at a camp for summer 2012 in July 2012; in addition, it is also undisputed that the parent chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the February 2012 IEP (see Parent Exs. B at pp. 1-2; C at pp. 1-2; M; N at pp. 1-2; O). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing

⁵ While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Se. Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided 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). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

regarding the execution of the student's program or to refute the parent's claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on claims that the assigned public school site would not have properly implemented the February 2012 IEP.⁶

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

In this case, a review of the evidence in the hearing record reveals that the IHO accurately recounted the facts of the case, addressed specific issues identified in the parent's due process complaint notice, set forth the proper legal standards, and applied that standard to the facts at hand (see IHO Decision at pp. 3-19). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (*id.*). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO are hereby adopted.

⁶ While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 370-72 [E.D.N.Y. 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86, 588-50 [S.D.N.Y. 2013]; 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 [2d Cir. Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], *adopted*, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 25 F. Supp. 3d 295, 300-01 [E.D.N.Y. 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2012-13 school year and that the parent's assertions related to the assigned public school site's ability to implement the February 2012 IEP were speculative, the necessary inquiry is at an end and it is not necessary to reach the issues of whether the parent's unilateral placement of the student at Cooke was appropriate or whether equitable considerations supported the parent's request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 27, 2015**

**CAROL H. HAUGE
STATE REVIEW OFFICER**