The University of the State of New York

The State Education Department
State Review Officer
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No. 15-008

Application of a STUDENT WITH A DISABILITY, by her parents, 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:
Thivierge & Rothberg, PC, attorneys for petitioners, Randi M. Rothberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 denied their request to be reimbursed for their daughter's tuition costs at the IVDU School (IVDU) for the 2013-14 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

The student has received special education services since the age of five and has received a diagnosis of an attention deficit hyperactivity disorder (ADHD) (Tr. p. 187; Dist. Ex. 5 at p. 1). In addition, the student presents with uniformly low academic abilities, and delays in the areas of receptive and expressive language, as well as fine motor and visual perceptual skills (see Dist.

Ex. 5 at pp. 1-4; Parent Ex. B at pp. 1-2). The student has been attending IVDU since the 2012-13 school year (Tr. p. 187).[1]

The CSE convened on May 9, 2013, to develop the student's IEP for the 2013-14 school year (Parent Ex. B). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the May 2013 CSE recommended placement in a 12:1+1 special class in a community school with the following related services: two 45-minute sessions per week of individual occupational therapy (OT), one 45-minute session per week of individual speech-language therapy, and one 45-minute session per week of speech-language therapy in a group (see Parent Ex. B at pp. 1, 8-9, 13-14).[2]

By final notice of recommendation dated August 8, 2013, the district summarized the special education and related services recommended in the May 2013 IEP, and identified the particular public school site to which the district assigned the student to attend during the 2013-14 school year (Dist. Ex. 2). By letter dated August 27, 2013, the parents advised the district that they received the final notice of recommendation and, although they had been unable to make contact with anyone at the assigned public school site, would "continue to try to reach [the assigned school] when school resumes in September" (Parent Ex. C at p. 1). In the interim, the parents indicated that the student would remain at IVDU for the 2013-14 school year and they would seek public funding (id.).

On September 1, 2013, the parents executed an enrollment agreement with IVDU for the student's attendance during the 2013-14 school year (Parent Ex. G).

After visiting the assigned public school site, the parents notified the district via letter dated October 3, 2013, that they were rejecting the assigned school because it was not appropriate for the student (Parent Ex. D). Specifically, the parents indicated that the parent coordinator of the assigned public school site informed them that the assigned school would have to apply for a variance in order for the student to attend the 12:1+1 classroom appropriate for the student's age (id. at p. 1). In addition, the parents expressed their concerns that the 12:1+1 class placement was "too large" and that a class "even larger" would not be appropriate (id.). The parents also indicated that the school would be "overwhelming" for the student and parent training would take place at another site (id. at pp. 1-2). Lastly, the parents advised the district that subject to an "appropriate program and placement" for the student, they would continue to maintain the student's attendance at IVDU for the 2013-14 school year and seek public funding (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated October 15, 2013, the parents alleged that the district failed to offer the student a FAPE for the 2013-14 school year, IVDU was an appropriate unilateral placement, and equitable considerations supported an award of tuition reimbursement

[1] The Commissioner of Education has not approved IVDU as a school with which school districts may contract for the instruction of students with disabilities (Parent Ex. S at p. 1; see 8 NYCRR 200.1[d], 200.7)

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 200.8[11]; 8 NYCRR 200.1[zz][11]).

(Parent Ex. A). Initially, the parents argued that the May 2013 IEP was a result of "impermissible policy and predetermination" and not based on the student's individual need (Parent Ex. A at p. 4). The parents further argued that the May 2013 CSE failed to consider all

of the placement options on the "continuum of programming and services" (id. at p. 3). The

parents also argued that the May 2013 CSE failed to involve the parents and the IVDU staff in the development of the student's IEP by failing to consider their recommendations or indicate the reasons for rejecting their recommendations (id.). Additionally, the parents asserted that the IEP did not accurately describe the student's present levels of performance (id. at p. 2). With respect to the annual goals, the parents asserted that they did not contain short-term objectives and were vague, not measurable, and not appropriate for the student (id. at p. 3). The parents further asserted that the 12:1+1 special class placement was not appropriate because it did not provide the student with sufficient individualized support and instruction (id.). Next, the parents averred that the IEP (1) contained related service recommendations which were not meaningfully discussed during the May 2013 CSE meeting; (2) contained insufficient management needs; (3) failed to monitor the student's performance or identify individuals responsible for tracking performance; (4) failed to include parent counseling and training; (5) indicated that the student would participate in all school related activities with general education students when the student required special education programming; (6) improperly indicated that the student would participate in the same assessments as general education students; (7) indicated promotional criteria which were not appropriate; (8) contained no supports, services, or goals for the student's transition to the assigned public school site; and (9) did not include appropriate testing accommodations (id. at pp. 2-4).[3] The parents also alleged that the assigned public school site was not appropriate for the student because the student would not be appropriately functionally grouped, the class size was too large, and there would be no seat available for the student (id. at p. 4). Lastly, the parents alleged that IVDU was an appropriate unilateral placement for the student, and that there were no equitable considerations that would justify reducing or denying their request for relief (id. at p. 5). As relief, the parents requested reimbursement or prospective funding for the costs of the student's tuition at IVDU for the 2013-14 school year (id.).

B. Impartial Hearing Officer Decision

On November 27, 2013, the IHO conducted a prehearing conference,[4] and on June 9, 2014, the parties proceeded to an impartial hearing, which concluded on September 15, 2014, after two

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[3] These allegations in the due process complaint notice were neither addressed by the IHO nor advanced on appeal by the parents. Under the circumstances of this case, the parents have effectively abandoned these claims by failing to identify them in any fashion or make any legal or factual argument as to how they would rise to the level of a denial of a FAPE. Therefore, these claims will not be further considered (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[4] For reasons not explained in the hearing record, the district did not appear at the prehearing conference (Tr. pp. 3-4).

days of proceedings (see Tr. pp. 1-211).[5] By decision dated December 3, 2014, the IHO found that the district offered the student a FAPE for the 2013-14 school year (see IHO

Decision at pp. 3-13). More specifically, the IHO found that the district's recommended program "provide[d] exactly what [wa]s needed and recommended for the student" (id. at p. 12). With respect to the annual goals, the IHO found they addressed the student's needs and noted that the reading goals were provided by IVDU to the May 2013 CSE (id. at p. 11). In addition, the IHO found that the student exhibited progress at the program at IVDU, and that the CSE essentially "adopted" that program (id.). With respect to the parents' contention that the district would not be able to implement the student's IEP at the assigned public school site, the IHO found that such claims were speculative because the student did not attend the district public school, and furthermore, the hearing record contained sufficient evidence that the district would have provided the student with the related services as set forth in the May 2013 IEP (id. at p. 12).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2013-14 school year. First, the parents contend that the IHO misallocated to them the burden of proof regarding the appropriateness of the district's recommended program and that the district did not meet its burden of proof during the impartial hearing. Next, the parents contend that the CSE predetermined its recommendation by failing to consider the full continuum of services for the student. The parents further contend that the CSE ignored their requests during the May 2013 CSE meeting, which denied them the opportunity to meaningfully participate in the development of the May 2013 IEP. Additionally, the parents argue that the annual goals were not appropriate and that the IEP lacked sufficient goals to address the student's related services needs. With respect to the assigned public school site, the parents argue that the IHO erred in finding that their arguments were speculative. Lastly, the parents argue that IVDU is an appropriate placement for the student and that equitable considerations weighed in favor of their request for tuition reimbursement and prospective funding.

The district answers, denying the parents' material assertions and arguing that the IHO correctly concluded that the district offered the student a FAPE for the 2013-14 school year.

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]).

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[5] The IHO is reminded to document that he has responded in writing to each extension request, that he fully considered the cumulative impact of the factors relevant to granting extensions, and his reasons for granting the extensions, and to make such responses part of the record (8 NYCRR 200.5[j][5][i], [ii], [iv]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8

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

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. IHO Decision—Burden of Proof and Legal Standard

Initially, with regard to the parents' argument that the IHO misallocated the burden of proof regarding the appropriateness of the district's recommended program, under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005]). However, under State law, the burden of proof has

been placed 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]). Here, although the IHO cited Schaffer and did not reference the State statute when setting forth the applicable standards, the hearing record does not support a conclusion that he misapplied the burden of proof (see IHO Decision at pp. 3-13). Instead, a review of the IHO's entire decision indicates that he weighed the evidence adduced at the impartial hearing and resolved the disputed issues in the district's favor (see id.). Moreover, even if the IHO had allocated the burden of proof to the parents, the harm would be only nominal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58).[12-110] Rather, an independent review of the hearing record reveals that the evidence, taken as a whole, supports the IHO's determination that the district offered the student a FAPE (see 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. Parental Participation/Predetermination

The parents allege on appeal that the district denied them the opportunity to meaningfully participate in the development of the student's May 2013 IEP because the district ignored their requests, and impermissibly predetermined the program recommendation by failing to consider the full continuum of services for the student.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

With respect to the parents' contentions that their concerns were ignored during the May 2013 CSE meeting, the evidence in the hearing record demonstrates that the parents were afforded an opportunity to participate at the CSE meeting and in the development of the student's IEP. Here, the student's mother testified that during the CSE meeting, she expressed her objection to the CSE's recommendation that the student be placed in a 12:1+1 special class for

the 2013-14 school year and stated at the CSE meeting that she thought that it would be "better for [the student] to get a lower class" (Tr. p. 193). Similarly, the hearing record reflects that the IVDU

principal expressed her concerns to the CSE regarding the placement recommendation and advised the CSE that "a class of 12 would be too much for [the student's] needs" (Tr. pp. 156-

57). While the IVDU principal noted that the CSE ultimately rejected her recommended placement for the student, the IVDU principal recognized that the CSE considered her concerns and "accepted what I said" (id.). Accordingly, there is sufficient evidence in the hearing record to demonstrate that the parents and IVDU principal were afforded an opportunity to participate at the CSE meeting and express their concerns relative to the recommended placement. In this regard, the hearing record shows that the parents and the student's providers participated, in part, by virtue of expressing their disagreement, and the fact that the CSE did not adopt those recommendations does not amount to a denial of meaningful participation (see DiRocco, 2013 WL 25959, at *20; P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754, at *7).

With respect to the parents' assertion that the CSE predetermined the student's program recommendation, courts have determined that a key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]).

In the instant case, the district representative who attended the May 2013 CSE meeting testified that during the CSE meeting, the CSE rejected placements including a 12:1 special class and general education with integrated co-teaching services (Tr. pp. 98-99). Moreover, the May 2013 IEP indicates that the CSE also considered placement in a general education setting, related services only, and special education teacher supports services (Parent Ex. B at p. 15). The May 2013 IEP indicates that these placements and services "were discussed and rejected" as they did not meet the student's "cognitive, educational and social-emotional needs" (id.). Nevertheless, once the CSE determined that the 12:1+1 special class was appropriate for the student, the district was not obligated to consider a placement with a smaller class size as the parents suggest (see, e.g., B.K. v. New York City Dep't of Educ., 12 F.Supp.3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined . . . the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options "]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]). Accordingly, the hearing record does not support the parents' contention that the program offered to the student was impermissibly predetermined.

C. May 2013 IEP

1. Annual Goals

Initially, the parents argue that they were denied input into the development of the student's annual goals, thus "bypassing the cooperative process" envisioned by the IDEA, and that the goals included in the May 2013 IEP were developed after the May 2013 CSE meeting. A review of the hearing record reveals that the student's mother, the IVDU principal and the student's teacher at IVDU participated in the May 2013 CSE meeting by telephone (Parent Ex. B at p. 17). Other attendees at the May 2013 CSE meeting included a district regular education teacher who also served as the district representative, a district school psychologist, and a district social worker (id.). In developing the May 2013 IEP, the district representative testified that the May 2013 CSE relied on an April 2012 educational evaluation report, a May 2013 school progress report, a speech-language report, as well as verbal updates from the IVDU school staff (Tr. pp. 95-96; Dist. Exs. 3; 5).[6] The district representative further testified that the goals were developed during the CSE meeting by taking notes as the teacher and principal from IVDU verbally reported on the student's areas of weakness, and that the information was then transcribed into the IEP after the CSE meeting (Tr. pp. 95-96, 100). Moreover, the district representative testified that the parents were given a general idea of what types of goals the student would be receiving and their content, but that the specific goals were written after the May 2013 CSE meeting (Tr. p. 100). Under these circumstances, courts have held that it is permissible to finalize the precise text of a student's annual goals after the CSE meeting (E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10-*11 [S.D.N.Y. Nov. 9, 2011]). Rather, "the relevant inquiry is whether there was a full discussion with the [p]arents regarding the content of the IEP before the IEP was finalized" (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *15 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, R.E., 694 F.3d 167). The hearing record contains no evidence that the May 2013 CSE impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).[13-062]

Turning to the parents' arguments regarding the appropriateness of the annual goals in the May 2013 IEP, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR

200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period

[6] The district representative testified that a speech-language report was utilized in the development of the May 2013 IEP (Tr. p. 95). Although this document is referred to by the parents' attorney as "Exhibit L" and the attorney for the district references this document as being entered into evidence, the speech-language report was not offered into evidence at the impartial hearing (Tr. pp. 133, 167). Rather, Exhibit L is the student's attendance record (Tr. pp. 37, 43).

beginning with placement and ending with the next scheduled review by the CSE (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Although the statement of the student's present levels of performance and individual needs contained in the May 2013 IEP are not directly in dispute, a brief discussion thereof provides context for the discussion of whether the annual goals in the IEP were appropriate for the student. Consistent with the April 2012 educational evaluation report relied on by the May 2013 CSE, the IEP indicated that the student displayed significant deficits in reading fluency and comprehension, mathematics computation and problem solving, as well as writing and spelling (compare Parent Ex. B at p. 1, with Dist. Ex. 5 at pp. 2-3).

In reading, the student's classroom teachers estimated her to be functioning on a third grade level overall, and described her as working on a literal level in reading comprehension and as having difficulty answering higher order and inferential questions (Parent Ex. B at p. 1). Regarding the student's writing skills, the IEP indicated that the student was only able to write one run-on sentence on a topic, required development in spelling, grammar, punctuation, and sentence formation and that while the student was a creative writer, she had difficulty putting her thoughts down on paper (id. at pp. 1-2). In math, the student's teachers estimated her computation abilities to be on a third grade level and her ability to solve word problems was estimated to be on a second grade level (id. at p. 2). The student was able to solve simple addition and subtraction problems independently, however she required assistance with multicolumn addition, and had difficulty determining the correct operation to use to solve word problems (id.).

With respect to the student's related service needs, the IEP indicated that the student required the continuation of speech-language therapy to remediate receptive and expressive language delays (Parent Ex. B at p. 2). The physical development section of the IEP stated that according to an OT report, the student had fine motor and visual perceptual delays which impacted her graphomotor skills and academic performance (id. at pp. 2-3). Specifically, the student was reported to use a thumb wrap grasp, had difficulty copying with accuracy, and exhibited delays in visual memory, sequential memory, visual discrimination skills, figure ground skills, and spatial awareness (id.).

The May 2013 IEP contained 10 annual goals which were linked to the student's aforementioned major deficit areas, including reading, writing, math, and expressive and receptive language (Parent Ex. B at pp. 4-8).[7] Specifically, two goals addressed the student's reading skills by developing her sight words/vocabulary and comprehension skills, two goals addressed her math computation skills, one goal addressed her ability to write sentences based on her understanding of a text, three goals related to her receptive and expressive language needs, one goal generally addressed group turn-taking skills, and one goal sought to improve the student's organizational skills (id.).[8] Additionally, the annual goals contained in the IEP included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress,

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[7] Although the May 2013 IEP contains 11 goals, the first two goals were identical (Parent Ex. B at pp. 4-5).

[8] While the May 2013 IEP stated that the student was "very organized with her materials," the principal from IVDU testified that an organizational goal was appropriate for the student, and the 2014 IVDU progress reports indicated that the student was working on keeping her desk free of distracting materials (Tr. p. 155; Parent Exs.

providing criteria for measurement to determine if a goal had been achieved (80% accuracy), the method of how progress would be measured (teacher/provider observation, class activities), and a schedule of when progress toward the goals would be measured (one time per quarter) (id.).

With respect to the parents' contentions that a number of the goals were inappropriate in part because they were "very simplistic" or "way below" the student's skill level, a review of the hearing record reveals that these claims were particularized to one reading goal and one math goal (see Tr. pp. 151-53). With respect to the reading goal, the IVDU principal testified that the reading goal which stated that the student would recognize "sight words and new vocabulary by identifying labels of objects around the neighborhood seen in magazines" was not appropriate for the student because "recognizing sight words was not an issue" and although the student needed to develop vocabulary, the IVDU principal stated that it would be more appropriate if those words came from a "literature selection" (Tr. pp. 151-52). While this goal could have been more challenging, the principal testified that at the beginning of the 2013-14 academic year the student's decoding skills were only "a little bit higher" than her second grade comprehension skills, and that she did not make a grade level jump in reading over the course of the school year (Tr. pp. 127-28). Additionally, the April 2012 educational evaluation indicated that although the student was able to read thirty sight words, "development" was still needed in this area (Dist. Ex. 5 at p. 2). With respect to the math goal, the IVDU principal testified that the subtraction goal in the May 2013 IEP was "way below" what the student could do, which is supported by the present levels that indicate the student could already solve simple addition and subtraction problems (Tr. p. 153; Parent Ex. B at p. 2). However, according to the April 2012 educational evaluation, the student's computation skills—while stronger than her word problem skills—were still "well below grade level," and according to the May 2013 IEP, the student made calculation errors when adding three-digit numbers with renaming and needed assistance with multi-column addition (Dist. Ex. 5 at p. 3; Parent Ex. B at pp. 1-2). Additionally, the IVDU principal testified that the second math computation goal involving memorizing the upper end of the multiplication tables "was good" based upon the IVDU May 2013 progress report (Tr. p. 153; Dist. Ex. 3; Parent Ex. B at p. 6). Therefore, while the IEP's reading and math goals could have been more ambitious, at least two of them were deemed appropriate by the IVDU principal.

With respect to the parents' argument that the May 2013 IEP lacked goals in areas that the student needed to work on, including, math word problems, time-telling, and money skills, there is a general reluctance to finding a denial of a FAPE based on failures in IEPs to identify goals (see, e.g., B.K., 12 F.Supp.3d at 360, P.K. v. New York City Dep't of Educ., 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011]), and the issue when assessing whether a FAPE has been offered to a student is not whether an IEP is perfect, but whether as a whole it is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; see also Karl v. Bd. of Educ. of the Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]). Moreover, as mentioned above, the May 2013 IEP contains goals which addressed the student's primary areas of need. In addition, the

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M at p. 3; O at p. 4).

IVDU principal testified that many of these goals—including the multiplication goal, the writing goal, and the organization goal—were appropriate for the student (Tr. pp. 152-55).

The parents also assert on appeal that the May 2013 IEP lacked sufficient related services goals. More specifically, the parents argue that the IVDU speech-language goals that were provided to the CSE prior to the May 2013 CSE meeting were not included in the May 2013 IEP. A review of the hearing record demonstrates that the parents are correct in that the district did not incorporate the IVDU speech-language goals into the May 2013 IEP, however, the three speech-language goals that are contained in the IEP were appropriate for the student, as the goals addressed the student's conversational vocabulary, verbal sequencing skills, and ability to answer oral questions (Dist. Ex. 4; Parent Ex. B at pp. 6-8). Furthermore, the IVDU principal testified that two of the speech-language goals, as well as the group turn-taking goal, would have been appropriate for the student (Tr. pp. 154-55). The parents are correct that the IEP lacks annual goals addressing fine motor and visual perceptual difficulties. However, this omission is mitigated by the abundance of detail regarding the student's fine motor and visual perceptual delays in the physical development section of the May 2013 IEP, which would have provided sufficient guidance to an occupational therapist in providing the student with services (Parent Ex. B at pp. 2, 7).[9] Thus, although the student's fine motor and visual perceptual difficulties did not have a corresponding goal, in light of the above, the goals contained in the May 2013 IEP adequately addressed the student's main areas of need and were sufficiently specific and measurable to guide the student's instruction and for a teacher to evaluate the student's progress over the course of the school year (B.K., 12 F. Supp. 3d at 359-63; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).

2. 12:1+1 Special Class Placement

On appeal, the parents argue that the recommendation for a 12:1+1 special class placement was not appropriate because the student required a smaller group setting to learn and had not been successful previously in a 12:1+1 special class.

State regulations provide that a 12:1+1 special class placement is intended for students "whose management needs interfere with the instructional process to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs are defined by State regulation as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). Despite the parents' assertion that the student required a smaller group setting in order to succeed, a review of the hearing record demonstrates that the recommended placement in a 12:1+1 special class in a community school was reasonably calculated to enable the student to receive educational benefit.

[9] Although the OT goal was written to be used in a group session while the student was mandated to receive two individual OT sessions per week, in viewing the May 2013 IEP as a whole, this deficiency would not preclude the student from receiving educational benefit from her two weekly OT sessions (id. at pp. 7-8).

With respect to management needs, the present levels of performance indicated that the student exhibited a significant number of learning and functional deficits that required various added supports, such that the student required an additional adult within the classroom in order to

benefit from instruction. As discussed previously, the student demonstrated significant delays in academic performance, expressive and receptive language, and fine motor and visual perceptual skills (Parent Ex. B at pp. 1-2). According to the May 2013 IEP, the student required "a lot of individual attention to complete her work" and needed all material in reading and mathematics to be broken down into smaller parts (Parent Ex. B at p. 2). Consistent with the May 2013 school progress report, the May 2013 IEP also indicated that the student had difficulty putting her thoughts on paper and needed further development with writing mechanics (see Dist. Ex. 3; Parent Ex. B at pp. 1-2). Additionally, consistent with the May 2013 school progress report and testimony from the IVDU principal, the IEP indicated that the student lost focus easily in class, could become frustrated with a difficult task causing her to become even more distracted, and needed one-to-one assistance to bring her back to task (Tr. pp. 126, 130; District Ex. 3; Parent Ex. B at p. 2). The May 2013 IEP also stated that the student was "very responsive" to teacher and adult assistance, and was a hard worker who was happy within the classroom (Parent Ex. B at p. 2). Additionally, the district representative testified that the May 2013 CSE recommended a 12:1+1 special class because the student was "very behind in reading and mathematics" (Tr. p. 91). Moreover, the May 2013 progress report indicated that during the student's seventh grade year, she was functioning at a third grade level for math and reading (District Ex. 3).

To address the student's academic and attentional management needs, the May 2013 IEP indicated that the student should receive classroom supports such as refocusing and redirection to help her stay on task; a multi-sensory approach to learning, information broken down, and graphic organizers to assist the student academically; visual/verbal prompts and cues to support her language comprehension; an editing checklist to help with her writing skills; praise and encouragement to support her emotionally; and testing accommodations including directions read and reread, questions read aloud except on tests of reading comprehension, extended (1.5) time, and separate location in a group of no more than 12 students (Parent Ex. B at pp. 3, 10). To further support the student, the May 2013 CSE recommended related services of speech-language therapy and occupational therapy, twice a week each, as part of the student's program (id. at pp. 8-9).

With regard to the parents' allegation, raised for the first time on appeal, that the 12:1+1 special class placement recommendation for the 2013-14 school year was not appropriate because the student had been unsuccessful in such a placement in the past, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i], [ii]; 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; see B.M. v New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]). Even if this claim were properly before me, the fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the

IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]). In this case, the hearing record reveals that the May 2013 CSE based their program recommendation on current information about the student as indicated in the present levels section of the May 2013 IEP, and considered the concerns of the parents and IVDU staff regarding the student's need for small group instruction and individualized attention (Tr. pp. 98-99; Parent Ex. B at pp. 2-3, 8-9, 12-13, 15). Furthermore, there is no information in the hearing record regarding the student's previous IEPs, and for the reasons stated above, the hearing record would not support a finding of a denial of a FAPE on this basis even if this claim were properly before me.

In conclusion, the May 2013 CSE's recommendation of a 12:1+1 special class in a community school—in conjunction with the modifications, management strategies, and related services incorporated into the student's May 2013 IEP—was tailored to address the student's unique needs and was reasonably calculated to enable her to receive educational benefit for the 2013-14 school year.

D. Challenges to the Assigned Public School Site

Finally, with respect to the parents' contentions regarding whether the assigned school would have been able to implement the student's May 2013 IEP[10], 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 R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding 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'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding 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"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]

[holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; 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

[10] The parents also argue that the assigned public school site did not have an available seat for the student; however, the IDEA does not require districts to maintain classroom openings for students enrolled in private schools (E.H. v. Bd. of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 24, 2014] [finding that the parent's argument that the student was denied a FAPE because the proposed classroom did not have a space for the student was without merit and that the district public school was not obligated to hold a seat open for the student after the parent rejected the district's offered public school placement prior to the start of the school year]).

student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; see also C.F. v. New York City Dep't of Educ., 746

F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the determination of the type of educational placement their child will attend, the IDEA confers no rights on parents with regard to school site selection]; 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]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).[11] In any event, the principal of the assigned public school site testified that a 12:1+1 class in the school would have been able to meet the student's academic and management needs as indicated in the May 2013 IEP (Tr. pp. 68-73).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether IVDU was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief. I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 20, 2015

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CAROL H. HAUGE
STATE REVIEW OFFICER

[11] 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. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [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.