



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-025

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

The Law Firm of Tamara Roff, PC, attorneys for respondents, Tamara Roff, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Cooke School (Cooke) for the 2013-14 school year. The appeal must be sustained.

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

With respect to the student's educational history, the hearing record shows that the student attended a preschool program at the McCarton Center (McCarton) and, subsequently, received home instruction and services and, for a time, attended McCarton on a part-time basis (see Tr. pp. 127, 285-86, 334-36; Dist. Exs. 1 at p. 2; 4 at p. 2; 6 at pp. 1-2). At the age of thirteen, the student began attending Cooke for the 2012-13 school year (see Tr. p. 336; Dist. Ex. 6 at p. 1; see generally Dist. Ex. 8).¹

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).

On May 7, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 1 at pp. 1, 13). Finding the student eligible for special education as a student with autism, the CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with full-time 1:1 "[c]risis [m]anagement" paraprofessional services (id. at pp. 1, 10, 13-14).² In addition, the CSE recommended related services on a weekly basis consisting of two 45-minute sessions of individual counseling, one 45-minute session of group counseling, one 45-minute session of individual occupational therapy (OT), two 45-minute sessions of group OT, one 45-minute session of individual speech-language therapy, and two 45-minute sessions of group speech-language therapy (id. at p. 10, 13). The CSE also recommended supports for the student's management needs and 17 annual goals with corresponding short-term objectives (id. at pp. 3, 4-9).

On May 27, 2013, the parents signed an enrollment contract with Cooke for the student's attendance during the 2013 summer session (Parent Ex. J at pp. 1-2). Subsequently, on June 1, 2013, the parents signed an enrollment contract with Cooke for the student's attendance for the remainder of the 2013-2014 school year (Parent Ex. K pp. 1-2).

In a letter, dated June 13, 2013, the parents rejected the May 2013 IEP and expressed concerns with the particular public school site to which the district assigned the student (Parent Ex. Q at pp. 1-2). According to the June 2013 letter, the parents received a letter from the district, dated May 28, 2013, that advised them of the particular public school site to which the district assigned the student to attend for the 2013-14 school year (id. at p. 1).³ With respect to the May 2013 IEP, the parents stated in their June 2013 letter that a speech-language evaluation report, relied upon by the CSE, did not accurately reflect the student's needs, the IEP did not fully describe or address the student's deficits, and its annual goals were vague (id. at p. 2). Moreover, according to the parents, the IEP failed to "provide for appropriate sensory supports for [the student], despite noting his severe sensory processing needs" (id.). The parents also expressed disagreement with the CSE's failure to recommend after school speech-language therapy (id.).

The parents also expressed several concerns with the assigned public school site, including that, based on their observations, the 6:1+1 classroom "could not provide [the student] with a suitable peer group, as the other students ha[d] different social/emotional, language, and behavioral needs" (Parent Ex. Q at p. 1). Moreover, the parents asserted that that the classroom at the assigned school "could not provide [the student] with an appropriate academic program" and that the student "require[d] a program that c[ould] help develop his academic skills" (id. at p. 2). They further expressed concerns that the assistant principal of the assigned school advised them that the student would attend the class for only one year before aging out (id.). The parents further objected to the size of the building, the noise levels, and that the student's related services would be carried out "in the hallway or wherever there [wa]s space" (id.). They also asserted that the assigned school "would not meet the student's speech-language mandate" (id.).

² The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][1]).

³ The hearing record does not include a copy of the May 28, 2013 letter from the district.

In a letter dated June 17, 2013, the parents again wrote to the district, reiterating their concerns with the May 2013 IEP and the assigned public school site (Parent Ex. R at pp. 1-2). The parents further informed the district of their intent to unilaterally place the student at Cooke for the 2013-14 school year (id. at p. 2).

In a final notice of recommendation (FNR), dated June 20, 2013, the district summarized the 6:1+1 special class and related services that were recommended in the May 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 3). However, the public school identified in the FNR was different from the site that the parents referenced in their June 13, 2013 letter (compare Parent Ex. Q at p. 1, with Dist. Ex. 3).

By letter, dated July 15, 2013, the parents expressed concerns with the public school identified in the June 2013 FNR, arguing that it "was inappropriate for [the student] to be in a large and overwhelming school environment" due to his sensory issues (Parent Ex. C at p. 1). The parents further objected to the manner in which OT was provided at the assigned school site (id.). The parents additionally posited that the curriculum would not provide the student with "the level of support, flexibility, and academic instruction that he require[d]" (id.). They further stated that the functional grouping in the classroom was inappropriate as the student was higher functioning than the other students in the class who were either non-verbal or had minimal verbal skills (id. at p. 2). The parents reiterated that the student would continue to attend Cooke for the 2013-14 school year (id.).

A. Due Process Complaint Notice

The parents, through their attorneys, filed a due process complaint notice, dated February 3, 2014, alleging that the district failed to offer the student a FAPE for the 2013-14 school year and that Cooke was an appropriate unilateral placement for the student (Parent Ex. A at pp. 1, 5).

Initially, the parents alleged that the district failed to conduct sufficient or appropriate evaluations and failed to include the parents in the collaborative process of developing the IEP (Parent Ex. A at pp. 1-2). The parents also contended that the district failed to review certain evaluations prior to the May 2013 CSE meeting, accurately assess the student's speech-language needs, and secure the attendance of all necessary CSE members (id.).

The parents further challenged the present levels of performance set forth in the May 2013 IEP as insufficient to provide an "adequate baseline" of the student's levels and that the IEP contained insufficient and inappropriate annual goals (Parent Ex. A at p. 2). The parents additionally stated that the IEP failed to address the student's sensory or speech-language needs and did not provide for after-school speech-language therapy (id.). The parents also asserted that the functional behavioral assessment (FBA) and behavior intervention plan (BIP) developed by the CSE were insufficient to address the student's behaviors (id.). The parents additionally alleged that the IEP was inappropriate because the recommended 6:1+1 special class placement offered insufficient teacher support and instruction for the student (id. at p. 2). Further, the parents asserted that the May 2013 IEP inappropriately failed to include transition services relative to the student's adjustment to a larger school environment and parent counseling and training services (id.).

The parents further contended that each of the assigned public school sites identified by the district were inappropriate for the student due to their size, inability to provide mandated related services, and inability to provide appropriate functional grouping within the classrooms (Parent Ex. A at pp. 3-4).

For remedies, the parents sought the costs of the student's tuition at Cooke for the 2013-14 school year, reimbursement for speech-language therapy services obtained by the parents, reimbursement for the costs of transportation, and declaratory relief pertaining to the provision of FAPE for the 2013-14 school year (Parent Ex. A at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 5, 2014 and concluded on October 1, 2014, after three days of proceedings (Tr. pp. 1-469). In a decision dated January 20, 2015, the IHO found that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at p. 17). The IHO further found that Cooke was an appropriate placement for the student and the equitable considerations supported the parents' requested relief (*id.* at pp. 20-21). The IHO also found that private after school speech-language therapy was not necessary to provide the student with a FAPE and denied this relief (*id.* at p. 18). Accordingly, the IHO granted the parents' request for tuition reimbursement and transportation reimbursement but denied the parents' request for reimbursement for private speech-language therapy services (*id.* at pp. 21-22).⁴

With respect to the process by which the May 2013 IEP was developed, the IHO noted that the May 2013 CSE considered "all required evaluations and reports," including updated progress reports from Cooke, the district's classroom observation report, a private neuropsychological evaluation, and a January 2013 speech-language evaluation report (IHO Decision at pp. 3-4). As for the May 2013 IEP, the IHO found that the recommended 6:1+1 special class placement with 1:1 paraprofessional support was not appropriate because it represented a reduction in instructional and staff support from the student's classroom ratio at Cooke and the district "provide[] no justification" for this determination (*id.* at p. 15). In this regard, the IHO noted that, during the 2012-13 school year at Cooke, the student received instruction in a classroom with a ratio of 7:2+3, which included one paraprofessional who was assigned to work with the student (*id.*). The IHO found that Cooke progress reports considered by the May 2013 CSE reflected that the student required a comparable level of support as that which Cooke offered in order to make educational progress (*id.* at p. 16-17). The IHO further found that the district's educational placement recommendation was not based on any objective evidence and failed to take into account the "intensity of support" required to address the student's unique needs (*id.* at p. 16). Therefore, the IHO found that the May 2013 IEP's placement recommendation was inappropriate (*id.* at p. 17).

Turning to the parents' claims relating to the assigned public school site, the IHO found that it was inappropriate for the student based on the parents' contention that a 6:1+1 classroom

⁴ The district has not appealed the IHO's findings with respect to the appropriateness of Cooke, equitable considerations, or reimbursement of transportation costs (see IHO Decision at pp. 20-22). Also, the parents have not cross-appealed the IHO's denial of reimbursement for private speech-language therapy (*id.* at pp. 18, 22). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

that they observed contained other students who were lower functioning than their son (*id.* at pp. 14-15). Therefore, the IHO concluded that the assigned school's inability to group students by similarity of need resulted in a denial of a FAPE to the student (*id.* at p. 15). The IHO further found that the parents' argument in this regard was not overly speculative because the summer session of the 2013-14 school year was "in full swing" at the time of their visit to the assigned public school site and it was reasonable to infer that the district was aware of the composition of the 6:1+1 classroom within the assigned public school site at that time (*id.* at p. 14).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding that it failed to offer the student a FAPE for the 2013-14 school year. First, the district argues that it possessed sufficient evaluative material about the student and, further, that this information was considered by the May 2013 CSE in developing the student's present levels of performance. The district also contends that it offered the student a FAPE and, specifically, that the May 2013 CSE's placement recommendation of a 6:1+1 special class was appropriate for the student, who required a high degree of individualized attention and intervention. Further, the district argues that this placement, together with 1:1 paraprofessional services, would provide the student with small group instruction and individual support to focus his attention. The district also argues that the IHO erred by comparing the supports Cooke offered to the student during the 2012-13 school year to those the district recommended instead of assessing whether the district offered the student a FAPE in the first instance. Finally, the district contends that the IHO's findings with respect to the assigned public school site must be reversed because they were speculative, as the parents rejected the May 2013 IEP and the student did not attend this school.

In an answer, the parents respond to the district's petition by variously admitting or denying the allegations raised by the district and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year. The parents contend that the IHO properly held that the district failed to obtain sufficient clinical or objective data to support its recommendations. Rather, the district elected to rely on Cooke reports which, according to the parents, indicated that the student required a classroom with more adult support than a 6:1+1 special class. The parents also argue that 1:1 paraprofessional services were unnecessary and inconsistent with the student's needs. The parents also argue that the IHO correctly determined that the assigned public school site would not have been able to implement the IEP because it could not offer an appropriate functional grouping or learning environment for the student. Further, the parents assert that the student could not make progress given the functional grouping within the classroom at the assigned public school. The IHO, argue the parents, properly held that the objections to the assigned public school site were not speculative.

V. Applicable Standards

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

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

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

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

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

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

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

VI. Discussion

A. 6:1+1 Special Class Placement with a 1:1 Paraprofessional

A careful review of the hearing record supports the conclusion that, contrary to the IHO's determination, the IEP recommending a 6:1+1 special class in a specialized school with the additional support of a 1:1 crisis management paraprofessional was appropriately designed to address the student's special education needs.

Although the statement of the student's present levels of performance contained in the May 2013 IEP is not in dispute, a brief discussion thereof provides context for the discussion of whether the 6:1+1 special class placement was appropriate for the student.⁵ The description of the student's evaluation results and needs found in the May 2013 IEP is consistent with information considered by the May 2013 CSE; namely, a February/March 2012 neuropsychological evaluation, a December 2012 classroom observation, a December 2012 Adaptive Behavior Assessment System-Second Edition (ABAS-II) evaluation report, January 2013 speech-language and OT reports, and a March 2013 Cooke progress report (compare Dist. Ex. 1 at pp. 1-3, with Dist. Exs. 4-8; see Tr. 101, 119-12). In addition, according to the IEP and the district representative who attended the May 2013 CSE meeting, much of the information included in the student's present levels of performance was provided by the student's then-current teacher at Cooke during the CSE meeting (Tr. pp. 116-18, 279; Dist. Ex. 1 at p. 2).

More specifically, according to the May 2013 IEP, administration of the Wechsler Intelligence Scales for Children-Fourth Edition (WISC-IV) and the Comprehensive Test of Nonverbal Intelligence-Second Edition (CTONI-2), during the February/March 2012 neuropsychological evaluation, yielded scores in the extremely low range in nonverbal reasoning skills (Dist. Ex. 1 at p. 1; see Dist. Ex. 4 at pp. 1, 5). The May 2013 IEP further noted that administration of the Woodcock-Johnson III Normative Update (WJ III NU) revealed that the student's abilities were at or below the kindergarten level for reading and at the kindergarten grade level for mathematics (Dist. Ex. 1 at pp. 1-2; see Dist. Ex. 4 at pp. 5-6). The May 2013 IEP reported general adaptive, conceptual, social, and physical composite scores from the December 2012 ABAS-II evaluation report, each of which was in the "extremely low range" (Dist. Ex. 1 at p. 1; see Dist. Ex. 10). Further, the IEP reported information from the January 2013 speech-language evaluation report (Dist. Ex. 1 at p. 1; see Dist. Ex. 6).⁶ The IEP reported that the student presented with "significantly decreased receptive and expressive language skills" (Dist. Ex. 1 at p. 1). The IEP further reported that the student had difficulties in all areas and performed in the below average range on the majority of the subtests of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) (id.).

With regard to academics, the IEP reported that the student exhibited relative strength in his receptive language skills, could not yet read independently but knew the letters of the alphabet as well as five sight words, and demonstrated the ability to recall facts from stories but had more difficulty when "asked to connect to the text" (Dist. Ex. 1 at p. 2). The student's ability to answer yes/no questions was described as "inconsistent" (id.). With regard to writing, the IEP indicated that the student could copy letters independently and was working on proper use of upper and lower case letters (id.). As for mathematics, the IEP stated that the student could count to 11 or

⁵ While the IHO found that that the district did not "obtain sufficient clinical data" in support of its recommendations, a review of this finding, in context, reveals that it was directed toward the May 2013 CSE's placement recommendation and not the sufficiency of the evaluative information before the CSE (see IHO Decision at p. 17 ["[p]rior to recommending the 6:1:1 special class program, the [district] failed to obtain sufficient clinical data to support its recommendation"]). Moreover, this finding was relevant to the IHO's determination, as discussed below, that the CSE was required to offer an explanation as to any deviations from the educational services then received by the student at Cooke (id.).

⁶ The May 2013 IEP noted that the parents expressed concern regarding inaccuracies in the January 2013 speech-language evaluation report (see Tr. p. 106-07; Dist. Exs. 1 at pp. 1-2; 6 at p. 4).

12 and was working on the concept of more or less (*id.*). The IEP also reported that the student was also working on skip counting by 10s to 100 and identifying even and odd numbers up to 10 (*id.*). Generally, the IEP noted that the student was "able to focus" on tasks with paraprofessional support and "ha[d] been doing well" with such individual support (*id.*).

According to the social development section of the May 2013 IEP, the student initiated contact with others through non-aggressive actions, wanted to be among other people, responded to adult initiated interactions (but not consistently to peer initiated interactions), and maintained eye contact with reminders (Dist. Ex. 1 at p. 2). Further, the IEP reported that the student did not present with specific behavioral concerns, although he occasionally put his fingers to the palm of his hand, fidgeted, and hummed (*id.* at pp. 2-3). The IEP further indicated that the student benefitted from teacher modelling of socially appropriate behaviors, was kind and considerate, was learning to ask for breaks, enjoyed music, and had begun to help with household tasks (*id.*). Additionally, according to the May 2013 IEP, the CSE determined that the student required strategies and supports to address behaviors that impeded the student's learning or that of others such as safety awareness, touching others, and touching inappropriate objects (i.e., garbage) (*id.* at p. 4). The IEP recorded an observation by the student's then-current teacher that the student "d[id] not require a 1:1 [behavior] plan in his current classroom" (*id.* at p. 2).⁷

According to the physical development section of the May 2013 IEP, the student presented with ongoing low muscle tone, visual processing concerns, food sensitivities, and seasonal allergies (Dist. Ex. 1 at p. 3). The IEP also reported that the student presented with significant sensory needs (*id.*). To address these needs, the IEP prescribed sensory breaks and sensory supports (e.g., wall pushes and water breaks) throughout the day and the use of headphones to block out sound during large school events and class trips (*id.*).

According to the May 2013 IEP, the CSE considered and ruled out a 10-month program and further considered and rejected 8:1+1 and 12:1+1 special classes in a specialized school as insufficiently supportive (Dist. Ex. 1 at p. 14).⁸ The May 2013 CSE determined that the student required 12-month services and 1:1 paraprofessional support within a 6:1+1 special class in a specialized school, noting his "specific constellation of needs" (*id.* at pp. 10, 14).

Consistent with the student's needs described above, State regulation provides that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). The May 2013 CSE identified the following supports for the student's management needs: graphic organizers, sentence starters and models, technology as a positive

⁷ On appeal, the parents contend that an FBA and BIP generated by the May 2013 CSE were unnecessary but do not assert that the development of these assessments resulted in a denial of FAPE to the student (Answer at pp. 19-20). Therefore, even assuming that the FBA and BIP were gratuitous or unnecessary as the parents urge, their development during the May 2013 CSE meeting would not have resulted in a denial of FAPE to the student. On the other hand, the FBA or BIP may not be relied upon as affirmative support for the district's recommendations because the district failed to introduce copies of these documents and enter them into the hearing record.

⁸ The May 2013 IEP also reflects that the CSE rejected a 6:1+1 special class in a specialized school (Dist. Ex. 1 at p. 14). While it is not clear, presumably this referred to placement in a 6:1+1 classroom without paraprofessional services (*see id.*).

reinforcement, visual supports, tasks and directions broken into small increments, verbal prompts, individual support to focus attention, small group instruction, redirection, repetition, manipulatives, and scaffolding (*id.* at pp. 3, 10). Further, the May 2013 IEP included 17 annual goals and corresponding short-term objectives to address the student's needs in the areas of: basic decoding skills; phonemic awareness; reading comprehension; writing skills; basic math concepts relating to time, measurement, quantity and number sense; speech intelligibility; receptive, expressive, and pragmatic language skills; sensory processing and ADL skills; fine and gross motor skills; and social/emotional development (*id.* at pp. 4-9). Additionally, the May 2013 CSE recommended 11 45-minute sessions of related services, detailed above, 6 of which were to be provided on a 1:1 basis (*id.* at pp. 10).

With the forgoing background evidence, I find unpersuasive the IHO's reasoning that, because the student attended a classroom with a 7:2+3 configuration at Cooke during the 2012-13 school year, the district's recommendation of a 6:1+1 class with 1:1 paraprofessional services "amounted to an academic learning environment with half the staff support" (IHO Decision at p. 16). The hearing record indicates that, with some variations, the composition of the student's class at Cooke consisted of seven students, two teachers (one head teacher and one assistant teacher), and two classroom paraprofessionals, as well as a 1:1 paraprofessional assigned to the student (*see* Tr. pp. 243-44; Dist. Exs. 5 at p. 1; 8 at pp. 1, 8, 11, 15). While the student received 1:1 instruction for years prior to his enrollment at Cooke during the 2012-13 school year due to his need to master foundational skills and his sensory sensitivities, by the time of the May 2013 CSE meeting, the evaluative information before the CSE reflected that the student would continue to benefit from small group instruction in a classroom setting (Dist. Exs. 4 at p. 6; 8 at p. 3; *see* Tr. pp. 335-37, 340-41). While the psychologist examined the student and recommended that the student be placed in a "structured, nurturing and highly specialized school for students with special needs," she also noted that the student had been approved by the district for a 6:1+1 special class setting and did not opine that such a setting would be inadequate or otherwise opine in her neuropsychological evaluation report that was before the CSE as to the specific student-to-staff ratio that the student required in order to receive educational benefit (Dist. Ex. 4 at pp. 3, 6). The May 2013 offered the student a special class designed to provide a "high degree of individualized attention and intervention," which, when combined with the recommended 1:1 paraprofessional services, offered sufficient support aligned with the student's needs identified in the present levels of performance (Dist. Ex. 1 at p. 10; 8 NYCRR 200.6[h][4][ii][a]). While it is clear that the parents preferred the staffing ratio and services available at Cooke, the district was not required to disprove the need to replicate the unilateral choice of the 7:2+3 setting that was created by the experts at Cooke (*see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist.*, 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; *see also G. v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 307 [4th Cir. 2003]). More modestly, the CSE was required to consider the services that the student was receiving at the time of the development of the IEP and then the district was required prove at hearing that the services that the CSE offered in the IEP were aligned with the student's needs in a way that was reasonably calculated to enable the student to receive educational benefits.

On appeal, the parents contend that the May 2013 CSE's placement recommendation was inappropriate because the student did not require the support of a 1:1 a crisis management paraprofessional. The Office of Special Education issued a guidance document in January 2012, which indicates that, with respect to special classes, an additional 1:1 aide should only be

considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a [BIP], etc., cannot meet these needs" (id. at p. 2). The parents argue that the student required more instructional support, as opposed to behavioral support. Specifically, the parents' objection to the 1:1 paraprofessional appears to be largely based on the crisis management designation because the student did not exhibit behavioral needs requiring of such support.⁹ Designations have changed from time to time and neither the IDEA nor State regulations establish subspecialties for paraprofessionals (known collectively as supplementary school personnel) (see 8 NYCRR 80-5.6, 200.1[hh]; see also "Supplementary School Personnel" Replaces the Term "Paraprofessional" in Part 200 of the Regulations of the Commissioner of Education" available at <http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf>). Regardless of the "crisis management" designation, a review of the May 2013 IEP, as a whole, reflects the student's needs such that a 1:1 paraprofessional charged with aiding in the implementation of the student's IEP would understand his or her role.

The IEP specified that the student's 1:1 paraprofessional at Cooke at the time of the May 2013 CSE meeting provided refocusing and explanation/restatement of material (see Dist. Ex. 1 at p. 2). At the impartial hearing, the district psychologist, who conducted a classroom observation of the student at Cooke, which was discussed at the May 2013 CSE meeting, testified that the student "needed a lot of individual prompting and support" in the classroom and was "internally distracted as well as externally distracted" (Tr. pp. 103-04, 121; see Dist. Ex. 5). The psychologist further testified that, in her opinion, the student required 1:1 support to provide "constant prompting and redirection," which would ensure that the student "attend[ed] to what [wa]s in front of him" (Tr. p. 121). Further, as stated above, the IEP reflects that the student possessed needs with respect to "[s]afety awareness" as well as touching others and objects such as garbage (Dist. Ex. 1 at p. 4). Given this information, it was reasonable for the CSE to prescribe 1:1 support for the student in a 6:1+1 special class setting.

Finally, the parents raise the valid concern on appeal that 1:1 paraprofessional services would not promote the student's independence (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ., Special Educ. Field Advisory, at pp. 1-2 [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf> [stating that an assignment of a 1:1 aide can be "unnecessarily and inappropriately restrictive" and that a "goal for all students with disabilities is to promote and maximize independence"]). However, in this instance, the May 2013 IEP's unchallenged present levels of performance, which are grounded in the evaluative information in the hearing record, supported the CSE's recommendation of this service.

⁹ The parents also objected to the FBA and BIP on this basis, which the parents testified were developed because, once a crisis management paraprofessional was selected on the "drop down" menu, the computer program used by the district to develop IEPs automatically required the completion of a BIP (see Tr. pp. 347-48).

Therefore, a review of the student's needs in the May 2013 IEP and evaluative data supports the conclusion that a 6:1+1 special class placement with 1:1 paraprofessional services set forth in the May 2013 IEP was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The IHO's findings to the contrary must be reversed.

B. Challenges to the Assigned Public School Site

A review of the evidence in the hearing record supports the district's argument that the parents' claims relative to the implementation of the May 2013 IEP at the assigned public school site are speculative in nature and, further, that the IHO erred in determining that the district was required to establish that it could implement the May 2013 IEP at this school or offer an appropriate functional grouping.

"The Second Circuit has clearly held that, where a child never enrolls in the public placement, the adequacy of [a district's] offered placement must be determined on the face of the IEP" (K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at *12 [S.D.N.Y. Apr. 9, 2015]). 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., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the bricks-and-mortar institution to which their son was assigned would have been unable to implement his IEP"] [internal quotations and citation omitted]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. 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"]; H.C. v. New York City Dep't of Educ., 2015 WL 1782742, at *3-*4 [S.D.N.Y. Apr. 10, 2015] [finding that, when a parent seeks tuition reimbursement for a unilateral placement, "the complaint generally must be based on defects in the IEP itself rather than from doubts about the specific school's ability to implement the IEP"]; J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *24-*26 [S.D.N.Y. Mar. 31, 2015]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11 [E.D.N.Y. Mar. 27, 2015]; M.M. v. New York City Dep't of Educ., 2015 WL 1267910, at *8 [S.D.N.Y. Mar. 18, 2015]; J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015]; D.N. v. New York City Dep't of Educ., 2015 WL 925968 [S.D.N.Y. Mar. 3, 2015]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2013]; 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., 2013 WL 6818376, at *13).

Here, it is undisputed that the parents rejected the May 2013 IEP and instead enrolled the student in a nonpublic school of their choosing well before the time the district was required to implement the IEP (see Parent Exs. C at p. 2; Q; R). Therefore, the district is correct that the issues raised and the arguments asserted by the parents 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 parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP (such as information gleaned from a parental visit to the public school) 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., 2013 WL 6818376, at *13 [stating that "[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 regarding the execution of the student's program or to refute the parents' 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 parents cannot prevail on their claim that the assigned public school site would not have properly implemented the May 2013 IEP and the IHO erred by issuing findings as to this issue.¹⁰

VII. Conclusion

A review of the evidence in the hearing record indicates that the district offered the student a FAPE for the 2013-14 school year and, specifically, that a 6:1+1 special class with 1:1 paraprofessional services was appropriate to meet the student's needs.

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

THE APPEAL IS SUSTAINED.

**Dated: Albany, New York
April 29, 2015**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹⁰ This is not to say that had the parents enrolled the student in the district they had no recourse and could not have required the district to group the student with suitable peers upon implementation of the IEP, but it is not, in this context, a denial of a FAPE (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013] aff'd, 589 F. App'x 572 [2d Cir. 2014]). The IHO noted testimonial evidence supporting that the district was capable of implementing the student's IEP as the district had students with great variation in the range of functioning in its 6:1+1 special classes (IHO Decision at p. 5; see Tr. pp. 136, 141).