The University of the State of New York

The State Education Department
State Review Officer
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No. 15-073

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, Brian J. Reimels, Esq., of counsel

Greenberg Traurig, LLP, attorneys for respondent, Caroline J. Heller, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter (the student) and ordered it to reimburse the parent for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2014-15 school year. The parent cross-appeals from the IHO's determination on a particular claim insofar as it was adverse to her. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may 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 been the subject of a prior administrative appeal related to the 2013-14 school year, and, as a result, the parties' familiarity with her earlier educational history and the prior due process proceedings is assumed, and they will not be repeated here in detail (Application of the Dep't. of Educ., Appeal No. 14-027). Briefly, at the time of the impartial hearing, the student

was enrolled in Cooke (Tr. p. 287).[1] In April 2014, the parent executed enrollment contracts with Cooke for the 2014-15 school year (Parent Exs. I; J).

On June 10, 2014, the CSE convened for an annual review of the student's program and to develop her IEP for the 2014-15 school year (Dist. Ex. 1 at pp. 1, 12). Finding the student eligible for special education as a student with an intellectual disability, the June 2014 CSE recommended a 12-month school year program for the student in a 12:1+1 special class placement in a specialized school with adapted physical education and travel training, in addition to individual counseling and individual and group speech-language therapy (Dist. Ex. 1 at pp. 9-10, 12).[2]

In a letter dated June 17, 2014, the parent informed the district that she planned to enroll the student at Cooke for the 12-month 2014-15 school year and seek public funding of the costs of the student's tuition (Parent Ex. B at pp. 1, 2). The parent also outlined the reasons for her belief that the June 2014 IEP was inappropriate, including that the June 2014 CSE classified the student as a student with an intellectual disability and recommended that the student attend a specialized school (id. at pp. 1-2). Additionally, the parent asserted that the June 2014 CSE inappropriately recommended a 12:1+1 special class placement for the student, despite having "empirical evidence . . . that [the student] d[id] not make progress in a classroom with a 12:1[+]1 staffing ratio" (id. at p. 2). Lastly, the parent indicated that she had yet to receive notice of which public school site the district assigned the student to attend, in direct contravention of a prior IHO order (id.).

In a "school location letter" dated June 17, 2014, the district notified the parent of the specific public school site to which it had assigned the student to attend (Dist. Ex 7). After receiving the letter, the parent visited the assigned public school site, was given a tour, and spoke to an assistant principal (Tr. pp. 161-66). In a letter to the parent coordinator of the assigned public school site, dated July 17, 2014, the parent requested additional information about the school, including information regarding the ages, abilities, and educational levels of the students with whom the student would be grouped and whether the school could provide the related services required by the IEP (Tr. pp. 168-69; Parent Ex. O).

A. Due Process Complaint Notice

By due process complaint notice dated September 9, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (see generally Parent Ex. A). Specifically, the parent alleged that the June 2014 CSE did not have sufficient evidence to support the recommendation to classify the student as a student with an intellectual disability (id. at pp. 2-3). Next, the parent asserted that the June 2014 CSE's recommendation to place the student in a 12:1+1 special class was inappropriate, and that the student required more support than such an educational setting could provide (id. at p. 3). The parent also alleged that the June 2014 CSE inappropriately recommended placement of the student

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

[2] The student's eligibility for special education is not in dispute, although the parent alleges that intellectual disability is not the most appropriate disability category for the student (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

in a specialized school, which "traditionally [had] students with behavioral issues and complicated emotional profiles," in that the student would not make progress in such an environment because she became "unfocused when other children [we]re disruptive" (id.). The parent also alleged that the district failed to comply with the order of an IHO in a prior proceeding directing it to notify her of the assigned public school site prior to June 15, 2014 (id. at pp. 3-4). Finally, the parent asserted that the student would not be appropriately grouped at the assigned public school site, that the school failed to provide the parent with the additional information she requested, and that the school had a history of failing to fulfill students' related services mandates (id. at pp. 4-5). As relief, the parent requested that the district pay the costs of the student's tuition at Cooke for the 12-month 2014-15 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

On December 9, 2014, the parties proceeded to an impartial hearing, which concluded on December 17, 2014, after two days of proceedings (Tr. pp. 1-309). In an interim decision dated December 24, 2014, the IHO made no explicit findings with regard to the student's pendency placement (Interim IHO Decision at p. 2). The IHO held that the student's pendency placement could not be determined until the dispute over the student's placement for the 2013-14 school year was resolved (id.). Therefore, the IHO ordered that the district be responsible for funding the costs of whatever placement for the student prevailed as a consequence of the final outcome of the dispute over the student's 2013-14 school year from the filing of the due process complaint notice until resolution of this matter or the student's placement was otherwise changed (id.).[3]

In a decision dated June 2, 2015, the IHO concluded that the district did not offer the student a FAPE for the 2014-15 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations supported the parent's request for relief (see generally IHO Decision at pp. 52-65).[4] Initially, regarding the parent's claim that the June 2014 CSE improperly classified the student as a student with an intellectual disability, the IHO found that the evaluative material available to the CSE did not provide a sufficient description of the student's needs to determine the impact of the student's disability on her education (id. at pp. 53-54). Moreover, the IHO concluded that the district failed to demonstrate the appropriateness of the intellectual disability classification, and directed the district to fund the costs of independent neuropsychological and speech-language assessments of the student and convene a CSE to review the assessments (id. at pp. 54-55, 59, 64).

[3] The decision in Appeal No. 14-027, relating to the student's placement during the 2013-14 school year, was issued during the pendency of the impartial hearing in this matter, and the parent informed the IHO of her intention to appeal the decision to a federal district court (Tr. p. 128). The parent's appeal from the SRO decision in that matter is currently pending (see IHO Ex. VII).

[4] Although the IHO subsequently issued an amended decision dated June 4, 2015, containing additional or differently worded analyses relating to the parents' claims in this matter (compare June 2, 2015 IHO Decision at pp. 55, 58-62, 64, with June 4, 2015 IHO Decision at pp. 54-55, 58-61, 64, 65), I remind the IHO that his decisions, once issued, are final unless timely appealed to an SRO and that he may not amend them thereafter (20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, references in this decision are to the IHO's June 2, 2015, decision.

Next, the IHO concluded that the June 2014 IEP "f[e]ll short in all regards" (IHO Decision at p. 55). Specifically, the IHO noted that neither party disputed that a 12:1+1 special class placement in a community school had not worked for the student in the past (id. at pp. 53, 55). The IHO further found that the hearing record did not support a finding that a 12:1+1 special class placement in a specialized school would be appropriate to meet the student's needs, absent a more detailed description of the student's specific needs in the IEP or a description of how a specialized school placement could meet her needs in ways that a community school had not (id. at pp. 55-58). In conclusion, the IHO determined that the June 2014 IEP "neither delineate[d] the essential components of a program individually-tailored to this student's needs," nor gave guidance to the individuals responsible for its implementation with respect to the necessary characteristics of what would constitute an appropriate public school site (id. at pp. 58-59).

In addition, the IHO found that the district failed to timely notify the parent of the particular public school site to which it assigned the student to attend for the 2014-15 school year, in contravention of his order resulting from the previous impartial hearing concerning the student's 2013-14 school year; however, he found that its failure to do so did not result in a denial of a FAPE to the student (IHO Decision at pp. 60-61). The IHO also found that the district did not establish that it offered the student an assigned public school site capable of implementing the June 2014 IEP, but did not specify whether this failure contributed to his finding that the district denied the student a FAPE (id. at pp. 40, 59-60).

With regard to the parent's unilateral placement of the student at Cooke, the IHO found that the hearing record supported a conclusion that Cooke addressed the student's needs and that she made progress there (IHO Decision at pp. 61-62). The IHO noted that the district did not contend that equitable considerations weighed against the parent's request for relief (id. at p. 62).

Turning to the student's pendency placement, the IHO indicated that it still could not be determined because the parent's appeal of the prior State-level administrative decision involving the student's 2013-14 school year was pending with a federal district court (IHO Decision at p. 63). The IHO opined that, if the Court's final decision required the district to fund the parent's unilateral placement of the student at Cooke for the 2013-14 school year, Cooke would retroactively become the student's pendency placement as of the "onset of the dispute," which the IHO identified as the parent's June 17, 2014 letter to the district (id. at pp. 63-64).

As relief, the IHO directed the district to fund the independent evaluations described above and reconvene the CSE to develop an IEP for the student (IHO Decision at pp. 64-65). In addition, the IHO ordered the district to pay for the costs of the student's tuition at Cooke for the 2014-15 school year (id. at p. 65). Finally, the IHO directed that the district "continue to be responsible for [the costs of] the student's continuing placement [at Cooke] until such time as it is modified or changed by agreement of the parties here or a final determination of a subsequent placement dispute between the parties" (id.).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that it failed to offer the student a FAPE for the 2014-15 school year. More specifically, the district alleges that the June 2014 CSE relied upon evaluative material that supported the recommendation to classify the

student as a student with an intellectual disability and, further, that the parent did not assert that the student's needs were inadequately described in the IEP or that the intellectual disability classification drove the student's program recommendation. Next, the district contends that the recommendation for a 12:1+1 special class placement in a specialized school was appropriate for the student and would have enabled her to receive educational benefits by providing a modified academic curriculum in an environment with an additional adult to assist in addressing her management needs. The district also asserts that it offered the student a public school assignment in a timely manner and that any allegations pertaining to the implementation of the June 2014 IEP in the assigned school are speculative in nature.

Next, in a footnote of the petition, the district states that it does not appeal from the IHO's determinations that Cooke was an appropriate unilateral placement or that equitable considerations supported the parent's request for relief. However, the district also argues in the body of the petition that the parent did not establish that Cooke was appropriate to meet the student's needs because it did provide specially designed instruction. Lastly, with respect to the relief ordered by the IHO, the district contends that the IHO erred in directing it to fund the costs of the student's attendance at Cooke as a continuing placement, fund additional evaluations, and reconvene the CSE.

In an answer, the parent responds to the district's petition, admitting and denying the district's allegations, and asserts that the IHO properly determined that the district failed to offer the student a FAPE for the 2014-15 school year and awarded various relief. As a cross-appeal, the parent asserts that the IHO erred in concluding that, despite the district's failure to notify her by a particular date about the particular public school site to which the student was assigned, this failure did not rise to the level of a denial of a FAPE for the 2014-15 school year.

In an answer to the cross-appeal, the district generally denies the parent's allegations. Initially, the district argues that the parent's cross-appeal should be dismissed on the basis that she raises a number of objections in her memorandum of law to the IHO's determination that the district's failure to timely notify her of the assigned public school site did not rise to the level of a denial of a FAPE that were not raised in her answer. The district further maintains that it complied with State regulation and the IDEA in notifying the parent of the assigned public school site and that any purported delay did not impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.

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]). 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).

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]). 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 (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).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic,

developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

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

VI. Discussion

A. June 2014 IEP

1. Classification

The district claims that the June 2014 CSE properly classified the student as a student with an intellectual disability and that, regardless of the disability category, it developed an IEP that was based on the student's identified needs, not her classification.

As noted in Appeal No. 14-027, in which the parent disputed a February 12, 2013 CSE's determination to classify the student as a student with autism, the IDEA provides that a student's special education programming, services, and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in [the IDEA] requires that children be classified by their disability so long as each child who has a disability . . . and who, by reason of that disability, needs special education and related services is regarded as a child with a disability"]; 34 CFR 300.111[d]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [finding that once a student's eligibility for special education is established, "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]).

In other words, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). In this case, the IHO expressed concern about the shift in the CSE's disability category recommendation over the years from speech or language impairment, to autism, to intellectual disability (see IHO Decision at p. 2). However, despite the parent's concerns about the student's disability classification, the evidence in the hearing record shows that she did not dispute at the June 2014 CSE meeting or in her due process complaint the sufficiency of the evaluative information before the CSE, the IEP's description of the student in the present levels of performance, or the management needs, annual goals, or related services included in the IEP (see Parent Exs. A at pp. 2-3; M at p. 5).[5] Further, the parent did not argue that the recommendations in the June 2014 IEP were driven by the disability classification (see generally Parent Ex. A). Accordingly, and even if classification as a student with a speech or language impairment was more appropriate for the student, as the parent suggests, the hearing record does not support a finding in this instance that the student was denied a FAPE as a result of the disability classification alone (see R.C. v. Keller Indep. Sch. Dist., 958 F. Supp. 2d 718, 730-32 [N.D. Tex. 2013]; M.R., 2011 WL 6307563, at *9). However, the change in the recommended disability classification may be further evidence of the district's failure to address the student's relatively constant needs in a uniform manner relative to prior school years, as noted below.[6]

2. 12:1+1 Special Class Placement in a Specialized School

The district next alleges that the June 2014 CSE's recommendation to place the student in a 12:1+1 special class placement in a specialized school was appropriate, given her management needs, her need for increased opportunity to communicate with her peers and for a modified curriculum, and the benefit of a 12-month program in preventing regression. Conversely, the parent alleges that the IHO properly concluded that the student had a previous unsuccessful experience in a 12:1+1 special class within a community school and there was no evidence to

[5] The parent expressed concern at the June 2014 CSE meeting regarding the "type of . . . children" who would be in the student's class in light of the intellectual disability classification (Dist. Ex. 1 at p. 13). Notes of the June 2014 CSE meeting, recorded by the Cooke representative, further reflected that the parent was "concerned that the classification would place [the student] in a class that [was] not to her level" (Parent Ex. M at pp. 4-5). Thus, as in Appeal No. 14-027, the parent's concern about the similarity of the student's functioning relative to other students in the proposed classroom appears to underlie the dispute over the appropriateness of the disability category recommended by the June 2014 CSE (Dist. Ex. 1 at p. 13; Parent Ex. M at pp. 4-5). However, the meeting notes also reflected that the district school psychologist indicated that the district would "place students [based] on where they are academically" (Parent Ex. M at p. 4). As discussed below, a claim regarding the appropriateness of the functional grouping of the students in a particular classroom that the student did not attend is speculative under the facts of this case.

[6] The fact that the shifts in the recommended disability categories occurred contemporaneous with the shifts in the recommended special class placements could potentially, under other circumstances, be considered as evidence in support of a claim that the CSEs' placement recommendations were driven by disability categories rather than the student's needs; however, given that the parent did not allege this correlation, it is not determinative in this instance.

support the June 2014 CSE's recommendation. In this instance, the hearing record supports the parent's position.

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]). In this instance, given information about the student's educational history and the CSE's prior placement recommendation for the student's 2013-14 school year, the district failed to establish that a 12:1+1 special class in a specialized school was appropriate for the student for the 2014-15 school year.

The hearing record shows that the June 2014 CSE considered various evaluative information about the student including: the student's previous IEP; a November 2013 psychoeducational evaluation report; a November 2013 classroom observation of the student; a February 2014 private evaluation update report;[7] a June 2014 progress report from Cooke, and a December 2012 Adaptive Behavior Assessment System-Second Edition, Interpretive Report (ABAS-II) (Tr. pp. 48-51, 55-57, 210-11; Dist. Ex. 2 at p. 1; see Dist. Ex. 8; Parent Exs. D; E; G; K; IHO Ex. I).[8] In turn, the June 2014 IEP's description of the student's needs was consistent with such evaluative documents as well as with information provided by the student's teacher from Cooke at the CSE meeting, which was documented in notes taken by both the district and the Cooke representative (compare Dist. Ex. 1, with Dist. Ex. 2, and Parent Exs. D, E, G, K, M).

Specifically, the present levels of performance contained on the June 2014 IEP identified the student's academic functioning levels to be at the late third grade to early fourth grade level in English and at the fourth grade level in mathematics (Dist. Ex. 1 at p. 1). The IEP further indicated the student's instructional levels were at the third grade level in reading and the fourth grade level in mathematics (id. at p. 12). In the area of social development, the June 2014 IEP described the student as an attentive, cooperative student who served as a role model for the other students and who was uncomfortable when peers did not follow directions (id. at p. 2). According to the June 2014 IEP, although the student responded when others initiated interactions, she did not tend to initiate them herself, and needed prompting to initiate and maintain interactions, including during small group classroom discussion (id.). The June 2014 IEP also indicated that the student had scored within the extremely low range on an adaptive report of her social skills, which suggested that she required assistance with joining a conversation, planning activities with her friends, and identifying the kind acts of others (id.). The June 2014 IEP also included reports from the student's teacher and parent that the student did not exhibit any physical concerns related to her ability to function in the classroom setting (id.).

As supports for the student's management needs, the June 2014 CSE recommended the use of graphic organizers, a vocabulary wall, visual supports, support to use figurative language,

[7] While the private evaluation update is referenced in the meeting minutes as a September 2013 evaluation (Dist. Ex. 2 at p. 1), the update contains both dates (Parent Ex. G at p. 1).

[8] The February 2014 private evaluation update report, entitled Adolescent Unit Disposition Note, revealed that the parent had referred the student for updated evaluations upon the student's transfer from the School-Age Unit to the Adolescent Unit of the evaluating agency (Parent Ex. G at p. 1).

multimodal instruction, support to initiate conversations with others, teacher check-ins, small group instruction, and highlighting directions (Dist. Ex. 1 at p. 3). In addition, within the short-term objectives of an annual goal related to increasing her math skills, the June 2014 IEP also recommended the use of "rubrics for checking and rechecking" and "teacher guidance" to support the student's achievement of the goal (id. at p. 5). The IEP further noted that "[m]odification to the depth, breadth and pacing of the general education curriculum [wa]s warranted given the[] extent of [the student's] delays" (id. at p. 3).

After determining the student's present levels of performance, identifying strategies to address the student's management needs, and developing annual goals and recommending related services to address the student's needs, the June 2014 CSE recommended a 12-month special program for the student in a 12:1+1 special class placement in a specialized school (Dist. Ex. 1 at p. 9).

While, for purposes of a tuition reimbursement claim, each school year must be treated separately (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]), this is not to say that each school year exists in a vacuum. Here, the district representative testified that, among other things, the June 2014 CSE reviewed the student's February 2013 IEP when formulating the student's IEP for the 2014-15 school year (see Tr. pp. 48-49, 50-51). A comparison of the February 2013 and June 2014 IEPs shows that, while the student's academic and social/emotional needs remained largely the same, the June 2014 CSE recommended a less supportive setting for the student than the previous CSE (compare Dist. Ex. 1 at pp. 1-3, 9, 12 with IHO Ex. I at pp 1-3, 8, 12).[9] Yet the evidence in the hearing record does not resolve the different placement recommendations (compare Dist. Ex. 1 at p. 9, with IHO Ex. I at p. 8), and the June 2014 IEP did not include any additional services for the student to accommodate for the less supportive special class placement recommendation (see generally Dist. Ex. 1). The district's explanations for the June 2014 CSE's 12:1+1 special class recommendation do not overcome this discrepancy.

The June 2014 IEP reveals that the June 2014 CSE considered and rejected 6:1+1 and 8:1+1 special class placements because the student needed more opportunities to communicate with peers (Dist. Ex. 1 at p. 13). Likewise, the school psychologist noted that the June 2014 CSE recommended a 12:1+1 special class, in light of the description of the student as a "very social," and "very outgoing" girl, and noted that placement in a class of 12 students would provide the student with more opportunities to communicate and interact with peers, while also providing sufficient academic support (Tr. p. 65; Dist. Ex. 1 at p. 13). On the other hand, the present levels of performance indicated that the student was functioning several grades below grade level and needed "a lot of support" when problem solving in mathematics, as well as support in writing to "mak[e] sure she is able to answer the question" (Dist. Ex. 1 at p. 1). In addition, the present levels indicated that the student required prompting to initiate interactions and that her social skills were

[9] And the district successfully defended the placement recommendation for the 2013-14 school year at the State administrative review level (IHO Ex. I at p. 8; see Application of the Dep't. of Educ., Appeal No. 14-027).

measured to be in the "extremely low range" (id.). Thus, the June 2014 IEP reflects that, while social, the student needed significant support both academically and socially.

Next, as the hearing record suggests, the parent expressed concern with the 12:1+1 special class placement based on the student's prior experiences in a 12:1+1 classroom setting within a community school, which the CSE acknowledged in the student's IEP for the 2013-14 school year (see Tr. pp. 64-65, 141-49; Parent Exs. A at p. 3; M at p. 5; IHO Ex. I at p. 2). A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parent expresses concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]). Here, in response to the IHO's determination that neither party disputed the student's lack of progress in the 12:1+1 special class placement within a community school and that the hearing record did not support the June 2014 CSE's recommendation absent a description of how the specialized school could meet the student's needs (IHO Decision at pp. 55-58), the district argues only that the passage of time makes the student's previous lack of progress less relevant and fails to cite to any convincing evidence in the hearing record to indicate how either the student's needs or the recommended program would result in a different outcome for the 2014-15 school year at issue.[10]

The district asserts that, while the student struggled in a community school, the June 2014 CSE recommended a specialized school. The school psychologist testified that both the parent and Cooke personnel reported that the student was unable to keep up with the academic work in a community school (Tr. pp. 64-65). In view of that, the school psychologist testified that the type of academic work required in a specialized school versus a community school was "much more modified" (Tr. pp. 64, 105). However, the school psychologist's testimony about this purported district-wide difference between community schools and specialized schools is insufficient to overcome the lack of information in the hearing record explaining why the student failed to receive academic benefits in a 12:1+1 special class in a community school but would receive such benefits in a 12:1+1 special class in a specialized school. Moreover, even if the student required modified academic work, this alone would not be an appropriate basis for a specialized school recommendation if such a setting was not the student's least restrictive environment (see 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 also Newington, 546 F.3d at 111).

[10] The hearing record is unclear as to when the student last attended a district 12:1+1 special class within a community school. According to the parent, although the student's classification changed to autism and her placement recommendation changed from a 12:1+1 to a 6:1+1 special class for the 2011-12 school year—which recommendation is reflected in the hearing record in an October 2011 IEP—the district did not offer the student a public school site to attend and the student ultimately remained at the district's community school, presumably, in the 12:1+1 special class placement (see Tr. pp. 148-49; IHO Ex. III at pp. 5, 9). Consistent with this, a prior IHO decision, dated January 8, 2014, stated that the student's "reclassification had taken place in the fall of 2011, but no change of placement was recommended at that time; the move to a 6:1+1 recommendation took place effective the 2012-13 school year" (Parent Ex. Q at p. 3).

Next, to the extent the district cites the 12-month school year aspect of the June 2014 CSE's recommendation as evidence of the appropriateness of the recommended 12:1+1 special class placement in a specialized school, this argument is also without merit. The school psychologist testified that a "[c]ommunity school is only a 10-month program" and that the student's need for a 12-month program was "one of the reasons" the July 2014 CSE recommended a specialized school (Tr. pp. 64, 103, 105). While the school psychologist testified that, due to the student's "working memory" deficits, the student required a 12-month program, there is no evidence in the hearing record that the student ever experienced substantial regression (Tr. pp. 64, 103; see 8 NYCRR 200.1[aaa], [eee]; see also 8 NYCRR 200.6[k][1][i], [v]). Moreover, as with the modification of academic work, even if the student required a 12-month school year, this alone would not be appropriate basis for a specialized school recommendation because the IDEA's least restrictive environment requirement applies in the same way to the summer portion of the school year (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014]).

Based on the foregoing, the evidence in the hearing record reveals insufficient reason to overturn the IHO's determination that a placement in a 12:1+1 special class in a specialized school was not appropriate for the student and, therefore, that the district failed to offer the student a FAPE for the 2014-15 school year.

B. Challenges to the Assigned Public School Site

1. Timeliness of Public School Assignment

Turning next to the parent's allegation that the district's failure to timely notify her of the public school to which it assigned the student to attend for the 2014-15 school year, significantly impeding her opportunity to participate in the decision-making process concerning the provision of a FAPE, a review of the evidence in the hearing record fails to support her claims.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]).[11] Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an the IEP, the district must notify parents of the location where the special education program and related services in a student's IEP will be implemented. Moreover, parents generally do not have a procedural right related to the selection of a specific locational placement for their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d

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

Cir Dec. 23, 2013]; J.L. v. City Sch. Dist., 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]).

In this case, by school location letter dated June 17, 2014, prior to the commencement of the 2014-15 school year, the district notified the parent of the particular public school site to which it designated the student to attend for the 2014-15 school year (Dist. Ex. 7). In this particular instance, assuming without deciding that the district failed to timely notify the parent of the assigned public school site designated to implement the student's IEP, a review of the evidence in the hearing record does not support a finding that the timing of the school location letter significantly impeded her opportunity to participate in the decision-making process regarding the provision of a FAPE (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA does not give parents a "veto" over school choice]). On the contrary, the parent testified that, by June 17, 2014, she had already decided to unilaterally place the student in Cooke (Tr. pp. 189-90). Furthermore, in a letter dated June 17, 2014, in addition to noting that she had yet to receive notice of an assigned public school site, the parent rejected the June 2014 IEP, and advised the district that the student would attend Cooke for the 2014-15 school year (see Parent Ex. B). The parent testified that she received the school location letter at "the end of June" 2014 (Tr. p. 158). Accordingly, while she may not have been able to "tour" the school site before the beginning of the 2014-15 school year, the district provided a school assignment prior to the time it became obligated to implement the June 2014 IEP (see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [finding that parents "have no right to visit a proposed school or classroom before the recommendation is finalized or prior to the school year"]; M.P.G., 2010 WL 3398256, at *9 [finding that a delay in the notice of the public school assignment does not violate the IDEA when the parent receives the notice prior to the beginning of the school year]).

Thus, despite the IHO's finding that the district failed to comply with his prior order to provide notice of a particular public school site assignment no later than June 15, 2014 (IHO Decision at pp. 59-61; see Parent Ex. Q at p. 5), even assuming that the timing of the school location letter constituted a procedural violation in this instance, I concur with the IHO's ultimate conclusion that any violation did not (a) impede the student's right to a FAPE, (b) significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) cause 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]).[12]

[12] Furthermore, to the extent the parent's asserts that the district's violation of the IHO's order in the prior matter involving this student constituted a denial of a FAPE, IHOs and SROs have no authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; Application of a Student with a Disability, Appeal No. 11-060; Application of a Child with a Disability, Appeal No. 06-130; Application of a Child with a Disability, Appeal No. 04-007; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]).

2. IEP Implementation

Lastly, the parent contends that the IHO correctly held that the district failed to meet its burden of showing that the assigned public school site could implement the June 2014 IEP. The district argues that it was not obligated to prove that the assigned public school site was capable of implementing the student's IEP, given the speculative nature of such claims.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[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 E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; T.Y., 584 F.3d at 419). The Second Circuit has explained that, when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at *3).

However, the Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79; see also Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that "school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement"]). In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 246; see Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015] [noting that the "the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *6-*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at *12-*13 [S.D.N.Y. July 6, 2015] [noting the preference of the courts for "'hard evidence' that demonstrates the assigned [public school]

placement was 'factually incapable' of implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*13 [S.D.N.Y. June 16, 2014]).

In view of the foregoing, the parent cannot prevail on her claims regarding the implementation of the June 2014 IEP and/or the assigned public school site. It is undisputed that the parent rejected the district recommended program and instead chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the June 2014 IEP (see Parent Ex. B).

To the extent that the parent continues to advance arguments that the student would not have been appropriately functionally grouped within the proposed 12:1+1 special classroom, due to concerns that the student would have been placed in a classroom with students "more impaired than she," the June 2014 IEP noted that the student "is a bit uncomfortable when other peers are not following directions" (Tr. pp. 179-80; Dist. Ex. 1 at p. 2; Parent Ex. A at p. 5). The June 2014 IEP also indicated the parent's concerns regarding the other students in the proposed program (Dist. Ex. 1 at p. 13). Notwithstanding the parent's testimony that she observed students during a tour of the assigned public school site who exhibited behavioral needs, the parent conceded that she did not obtain any information regarding any specific classroom into which the student may have been placed had she attended the assigned school, or the functional abilities of the students in any such class (Tr. pp. 167-68, 191-92). The evidence contained in the hearing record provides support only for what the parent believed might occur at the assigned school, rather than evidence that the assigned school was incapable of implementing the student's IEP. A number of courts have noted the speculative nature of grouping claims when a student never attends the assigned public school site, and the parent presents no argument for departing from this authority (M.C., 2015 WL 4464102, at *7; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]; see J.L., 2013 WL 625064, at *11 [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Accordingly, the parent's claims based on her observations regarding other students at the assigned public school site generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP]).

With respect to the parent's concerns that the assigned public school site could not have provided the student with services in accordance with the June 2014 IEP, the parent raised this argument in her due process complaint notice by asserting that, during the 2011-12 school year, the school did not provide counseling and speech-language therapy to all of the students who were mandated to receive those services (Parent Ex. A at p. 5; see Parent Ex. R). However, the Second Circuit has held that parent concerns regarding a school's prior inability to provide required services and "suggestion[s] that some student are underserved" are speculative (R.E., 694 F.3d at 195; Y.F., 2015 WL 4622500, at *6; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492,

502-03 [S.D.N.Y. 2011]).[13] Accordingly, as the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion that the district would have denied the student a FAPE by failing to implement the IEP at the assigned public school site based on functional grouping or ability to implement required services would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 793 F.3d at 245-46; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

C. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or develop an IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Frank G., 459 F.3d at 365).

[13] To the extent the parent asserts that the assigned public school site could not provide the student with travel training, a party may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the 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]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). Here, contrary to her assertions on appeal, the parent did not allege in her due process complaint notice that the school could not provide travel training or indicate that she was told by school staff that the assigned school could not provide the student with travel training in accordance with her IEP (see Parent Ex. A at pp. 4-5). Accordingly, this issue, raised for the first time during the parent's direct testimony (Tr. pp. 165-66), is not properly before me.

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; quoting Frank G., 459 F.3d at 364-65).

As noted above, although the district states in a footnote of the petition that it does not appeal from the IHO's determination that Cooke was an appropriate unilateral placement for the student for the 2014-15 school year, it also asserts in the body of the petition that the IHO erred in this respect. The only basis the district advances on appeal for reversing the IHO's determination is that Cooke did not offer specially designed instruction because it used the same academic goals for all of the students in the student's class. However, although the student's teacher testified that "for the most part the goals are the same," she added that "[s]ome students have different shaded goals" and that "occasionally there will be one student who needs a differentiated goal, just depending on a specific strategy that he or she is working on" (Tr. p. 304). Moreover, public school districts—and not nonpublic or private schools—are called upon to follow the procedures of the IDEA in developing an IEP that includes annual goals for each student with a disability (see Carter, 510 U.S. at p. 13).

Furthermore, the evidence in the hearing record, as a whole, reflects that Cooke provided the student with specially designed instruction. The student's English language arts and social studies teacher at Cooke testified that she provided small guided reading groups in her class, where the student would participate in a group with two or three other students, wherein all of the students would be reading the same book at their instructional level and working on "targeted reading skills, that they specifically need to work on" (Tr. p. 299). She also testified that the student required significant small group instruction in order to make academic progress, because she took a long time to process information and was unable to internalize new information and utilize new strategies presented in class without multiple exposures to such information or strategies (Tr. pp. 295, 300-01; see Parent Ex. L at p. 21). The teacher added that this required a lot of guided practice before the student would be able to perform independently (Tr. p. 301).

In addition, the November 2014 progress report described multiple strategies and accommodations specific to different subjects from which the student benefited (Parent Ex. L at

pp. 3, 5, 7, 9, 14, 19). These included the following: English language arts (repetition of new ideas and strategies taught in class, provision of clear and explicit examples before attempting work independently, sentence starters within a graphic organizer, and nonfiction text features, such as table of contents, pictures with captions, subheadings, etc.); mathematics (manipulatives, multi-model presentations, 1:1 direct modeling from teachers, small group instruction to demonstrate and reinforce key concepts, visual cues, graphic organizers, and checklists); social studies (supports to understand and utilize content information, such as guided conversations, teacher prompting, sentence starters to talk and write about content information, as well as graphic organizers and visual aids); science (visuals, direct modeling, repetition, and prompting for retention and also in order to make abstract concepts concrete, as well as small group work and 1:1 support to apply the scientific method); and "life skills" class (picture schedules and a pictorial representation of classes on color coded folders to help with school routine and organization, a graphic organizer relating to community outings, and varying levels of assistance with home management tasks (id. at pp. 3, 5, 7, 9, 19).

The student also received related services at Cooke. Specifically, the student received individual counseling services once per week for "44 minutes" (see Tr. p. 297; Parent Ex. L at p. 11). In addition, the student participated in a counseling group led by two counselors that included a social skills group, wherein students worked on developing the skills needed to initiate and maintain contact and interaction with peers outside of school, which were areas consistent with the social and pragmatic skills goals and short-term objectives included on the student's June 2014 IEP (see Dist. Ex. 1 at p. 8; Parent Ex. L at p. 11). With regard to speech-language services, the hearing record reflects that the student participated in a language skills class, which included small group speech-language therapy sessions twice per week for 45-minutes in a group of five, which focused on improving pragmatic skills, sequencing skills, and written language skills in order to assist students in making personal decisions related to everyday life (Parent Ex. L at p. 20). The small group sessions provided direct instruction on language concepts such as identifying and producing facts and opinions, comparing and contrasting, sequencing, problems solving and inferencing, which are areas consistent with annual goals and short-term objectives on the student's IEP (compare Dist. Ex. 1 at pp. 4-5, 8 with Parent Ex. L at p. 20). Testimony by the student's teacher indicated that related service providers sometimes pushed-in to the class in order to work with students, sit close to them, and check in with them (Tr. p. 296). She added that, at times, she discussed with the related service providers specific issues that she wanted the provider to observe or help the student with (Tr. pp. 296-97). The student's teacher also indicated that related service providers also pulled students out either individually or in small groups to work on a specific skills (Tr. p. 297). In addition, the student's November 2014 progress report reflects that the student was provided with "repetitive consistent exposures to concepts," that she "utilized a color-coded graphic organizer to increase comprehension of text," and was provided with "clarification of directions and additional wait time . . . to allow for processing time" (Parent Ex. L at p. 21).

Finally, the district does not dispute that the student exhibited progress at Cooke during the 2014-15 school year but argues only that evidence of such progress was insufficient, without more, to establish the appropriateness of the unilateral placement. However, as set forth above, in addition to evidence of progress, the hearing record reflects that Cooke provided the student with instruction specially designed to meet her unique needs. Accordingly, the hearing record supports the IHO's determination that Cooke was an appropriate unilateral placement for the student for the 2014-15 school year.

D. Other Matters

1. Pendency

Next, the district asserts that, to the extent that the IHO's order could be construed as ordering it to continue to fund the costs of the student's placement at Cooke, such an order is not supported by legal authority, and must be annulled. Conversely, the parent alleges that the IHO only held that Cooke was the student's pendency placement.

In this case, to the extent the IHO's decision could be interpreted as directing the district to be responsible for the student's continued placement at Cooke, such a determination would be in error. There is no authority for an order that imposes a perpetual obligation on the district to annually fund the same educational placement without change without regard to whether a due process proceeding is requested or pending (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455-56 [2d Cir. 2015]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011]; Child's Status During Proceedings, 47 Fed. Reg. 46710 [Aug. 14, 2006]).

Thus, once the proceedings and any appeals are concluded, the district's obligation to maintain the student in her pendency placement terminates (see Mackey v. Bd. of Educ., 386 F.3d 158, 161 [2d Cir. 2004]; Marcus I. v. Dep't of Educ., 2011 WL 1979502, at *1 [9th Cir. May 23, 2011] [explaining that pendency does not guarantee a student the right to remain in any particular institution because the right to a stay put placement that stems from a given adjudicatory proceeding lapses once the proceeding has concluded]). At that point any further right to remain in the unilateral placement stems from the equitable relief, if any, granted by the IHO on the merits. The pendency provisions do not confer upon an IHO the power to extend indefinitely an interim pendency determination beyond the conclusion of the proceedings which gave rise to the stay put right. Based upon the foregoing, the IHO's order directing the district to continue to be responsible for the student's placement at Cooke must be annulled.[14]

2. Independent Educational Evaluations

Lastly, although the district correctly argues that the parent did not request in her due process complaint notice funding for independent neuropsychological and speech-language assessments, an IHO is vested under federal and State law with the discretionary authority to order an independent educational evaluation of the student at district expense (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]). Here, the district argues that it had sufficient evaluative information to develop the student's IEP. I agree, but the district has asserted no reason to find that the IHO's order was an abuse of his discretion and I decline to disturb the IHO's order directing the district to fund the costs of independent neuropsychological and speech-language assessments of the student. Similarly, the hearing record provides no reason to disturb the IHO's order that, at the next CSE meeting following the completion of the evaluations, the CSE consider the results of

[14] As neither party appeals the remainder of the IHO's determinations with respect to the student's pendency placement, I find it unnecessary to discuss the merits of this portion of the IHO's decision (see IHO Decision at pp. 63-64).

the evaluations. However, the IHO provided no basis for his direction to the district to convene a CSE by April 1, 2016, and his decision is reversed to that extent. The district was required to convene a CSE within one year of the June 2014 CSE meeting to review the student's program and revise it as necessary in light of, among other things, the student's progress toward her annual goals and the results of any new evaluative information (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; Educ. Law § 4402[1][b][2]; 8 NYCRR 200.4[f]). The hearing record contains no evidence regarding when a CSE convened to develop the student's program for the 2015-16 school year, and provides no basis to interfere in the district's procedures for scheduling CSE meetings for individual students. If, upon receiving the results of the ordered independent evaluations, the district determines that it is necessary to reconvene the CSE prior to the time required by law to develop the student's IEP for the 2016-17 school year, it must do so. Similarly, if the parent requests that the CSE convene to address the information contained in the independent evaluations, it must do so within a reasonable time or provide written notice to the parent explaining its decision not to (20 U.S.C. § 1415[b][3]; 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo]; 200.5[a]).

VII. Conclusion

In summary, there is no reason to disturb the IHO's determinations that the district failed to offer the student a FAPE for the 2014-15 school year and that Cooke was an appropriate unilateral placement. Further, the district has not appealed the IHO's determination that equitable considerations supported an award of tuition reimbursement. I have considered the parties' remaining contentions and find them to be without merit or that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated June 2, 2015, is modified by vacating that portion which ordered the district to continue to be responsible for the student's placement, as described in the body of this decision; and

IT IS FURTHER ORDERED that the IHO's decision, dated June 2, 2015, is modified by reversing that portion which ordered the district to convene a CSE by April 1, 2016; however, the district shall still be required to reconvene a CSE upon receipt of the ordered independent evaluations or as otherwise required by the IDEA or federal or State regulation.

Dated: Albany, New York
September 17, 2015

SARAH L. HARRINGTON
STATE REVIEW OFFICER